IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LIONEL GUSTAFSON, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO. 1:05-cv-00352-CG-L**
	)	
ADRIAN JOHNS, etc., et al.	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

INITIAL BENCH TRIAL BRIEF OF THE STATE ELECTION OFFICIALS

Nancy Worley, in her official capacity as Secretary of State of Alabama, a defendant in this action, for herself and on behalf of the 67 Probate Judges who are also named as official-capacity defendants, (collectively, "the State Election Officials"), submits this Initial Bench Trial Brief for this Court's consideration in connection with the issues of claim and issue preclusion and other related questions. For the reasons stated below, this Court should enter judgment in favor of the State Election Officials and against the Gustafson Plaintiffs.

INTRODUCTION

The issue presently before this Court is the preclusive effect of judgments in previous redistricting cases on the claims of the Gustafson Plaintiffs. The judgments that have potentially preclusive effects are those rendered in:

(1) *Barnett v. State,* Case No. 1:01-CV-00433-BH-S, in the United States District Court for the Southern District of Alabama;

(2) *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002) (three-judge court); and

(3) *Rice v. English*, 835 So. 2d 157 (Ala. 2002).

This Court has taken judicial notice of its own records and the *Rice v. English* record is before this Court in Doc. 201.

A judgment action against one set of plaintiffs will have preclusive effect on an action brought by a second set of plaintiffs where, among other things, there is "privity or some other special relationship between the two sets of plaintiffs." *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167-68, 119 S. Ct. 1180, 1185 (1999). That special relationship arises in cases in which, among others, the doctrine of virtual representation applies, an implied class action is present, or other indicia support the invocation of res judicata. In such cases, the prior proceeding is, explicitly or implicitly, "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Hansberry v. Lee*, 311 U.S. 32, 43, 61 S. Ct. 115, 119 (1940).

In the judgment of the State Election Officials, giving preclusive effect to the previous judgments does not offend the due process component of the Fourteenth Amendment. The plaintiffs in the earlier cases and this case are Republicans pursuing relief that would benefit Republican interests. For the most part, the earlier plaintiffs and these plaintiffs were recruited by others, and others have financed their litigation. The legal analysis of the plaintiffs in *Montiel v. Davis* is also employed by the Gustafson Plaintiffs. For these reasons, and others, the plaintiffs are all of the same class, and the litigation addresses a common issue. Accordingly, res indicate can be applied without offending due process.

In the Statement of Facts that follows, the State Election Officials will first address the proceedings and background of the *Barnett, Montiel v. Davis*, and *Rice v. English* cases. Then, they will discuss the background of the instant case, showing commonalities of interest and practice between action brought by the Gustafson Plaintiffs and the earlier actions. Finally, the State Election

Officials will show that binding the Gustafson Plaintiffs with the results in the earlier cases, does not offend due process.

STATEMENT OF FACTS

The Previous Lawsuits

In 2001, the State of Alabama received the results of the 2000 Census. Those results showed that the existing Legislative districting plans were unconstitutionally malapportioned and would have to be redrawn. With the next legislative elections set for 2002, the task of redrawing the districting plans for the Alabama State Senate and State House of Representatives fell to the Legislature. In its 2001 Regular Session and a Special Session embedded in that Regular Session, however, the Legislature did not pass new redistricting plans.

The Legislature's inability to enact new redistricting plans during its Regular Session prompted the filing of two lawsuits in the United States District Court for the Southern District. The first, *Barnett v. State*, was filed on June 15, 2001. The second, *Montiel v. Davis*, was filed on June 21, 2001. On June 19, 2001, then-Governor Don Siegelman issued a call for a Special Session of the Legislature to consider State legislative redistricting beginning on June 25, 2001. Such a special session was widely expected when the Barnett Plaintiffs filed their lawsuit on June 15, 2001. For his part, Gonzalo Montiel, who filed his lawsuit two days after the special session was called, said that, on "information and belief," the Governor had called a special session, but that the next regular session would not begin "until . . . too late to create constitutionally apportioned districts" in time for use in the 2002 election cycle. *See Montiel v. Davis*, No. 1 at 15-16, ¶ 49.

A. The Barnett Lawsuit

In *Barnett*, three plaintiffs, Les Barnett, Terry Lathan, and Percy Johnson, sought declaratory and injunctive relief that would remedy the unconstitutional malapportionment of Alabama's

legislative districts. They asserted that there was "a very real possibility" that new plans would not be in place in time to support the 2002 election cycle. In the Complaint, the Barnett Plaintiffs were represented by Paul Wesch with the Washington, D.C. law firm of Patton Boggs shown as "Of Counsel." *Barnett* No. 1.

Barnett was a Republican Party vehicle. The lawyers were Republicans, the plaintiffs were Republicans, the strategy was that of Republicans, the purpose was to protect Republican interests, and the Alabama Republican Party paid counsel for the Barnett. More specifically,

(a) As noted above, the Barnett Plaintiffs were first represented by Paul Wesch with Patton Boggs "Of Counsel." Wesch testified that he had been active in Republican Party activities and knew plaintiffs Les Barnett and Terry Lathan "through Republican affairs." Joint Bench Trial Exhibit 33, page 10, line 12 through page 11, line 16; page 22, lines 5-20. Moreover, while the Patton Boggs lawyers who were "of counsel" in this case do not appear to have been identified of record, this *Barnett* legislative case was filed in conjunction with a Congressional redistricting case filed by the same three plaintiffs. In that Congressional redistricting lawsuit, also styled *Barnett v. State*, the plaintiffs' lawyers included Ben Ginsberg and Matthew Stowe from the Washington, D.C. law firm of Patton, Boggs.[1] Chris Pringle testified that, at the conferences of the National Conference of State Legislatures which he attended, Ginsberg "was presented as the Republican expert on reapportionment." Joint Bench Trial Exhibit 31, at 90, lines 5-8. Furthermore, although Ginsberg and Stowe left the Mobile venue when the Congressional case was transferred, they were soon replaced by other Republican lawyers. On September 20, 2001, Albert L. Jordan, Algert S. Agricola, and Michael L. Jackson appeared as additional counsel for the Barnett legislative plaintiffs.

[1] In his deposition, Chris Pringle testified that, with respect to the Congressional Barnett case, he was told that Congressman Sonny Callahan employed Ginsberg and Stowe. Joint Bench Trial Exhibit 31, at 50, lines 15-23.

Barnett No. 16. In his deposition, Stephen French agreed that Jordan, Agricola, and Montiel were "really the best lawyers in Alabama who dealt with redistricting issues on the Republican side." Joint Bench Trial Exhibit 30, page 22, lines 2-7; *see also* Joint Bench Trial Exhibit 28, page 8, lines 1-24.

(b) The Barnett Plaintiffs were Republicans. Les Barnett testified that he was a member of the Party's Steering Committee and its Executive Committee. Joint Bench Trial Exhibit 23 at page 18, line 12 through page 20, line 3. Terry Lathan testified, "I am active in the Republican Party . . . ." Joint Bench Trial Exhibit 24, page 36, lines 16-17. She explained that she had worked on the campaigns of a number of Republican candidates, hosted fundraisers, and was the co-chair of the dinner at the Republican Party's Winter 2006 State Executive Committee meeting. *Id.* page 10, line 15 through page 14, line 17; page 37, lines 7-23. For his part, Percy Johnson explained that, when *Barnett* was filed, he "probably was at the time one of the known African American Republicans in Mobile." Joint Bench Trial Exhibit 25, page 9, lines 18-20; *see also id.*, page 9, lines 17-18 ("I have always been a Republican.") Johnson testified that he was recruited as a *Barnett* plaintiff by Les Barnett, with follow-up by a Montgomery lawyer. *Id*., page 8, lines 13-21; page 11, lines 7-21; page 14, line 21 through page 15, line 23. For his part, Chris Pringle testified that he recruited Percy Johnson and said, "I want to say I did it for Paul Wesch." Joint Bench Trial Exhibit 31, page 47, line 15 through page 48, line 9; page 137, line 18.

(c) The strategy behind the filing of the Barnett congressional and legislative redistricting lawsuits was, originally, that of Congressman Callahan. Chris Pringle testified that he was calling the *Barnett* lawsuit "the Sonny Callahan styled lawsuit" and explained that Congressman Callahan "filed a preemptive lawsuit to ensure that he got treated fairly" in the redistricting process in 1992. Joint Bench Trial Exhibit 31, page 48, lines 10-14; page 61, lines 3-7. Pringle said that his

understanding of the *Barnett* lawsuit's purpose "was to have a federal court available to draw a plan if the legislature failed to pass a plan." *Id.*, page 65, line 14 through page 66, line 1.[2]

(d) The goal was to protect the interests of Republicans. Chris Pringle testified that Congressman Callahan wanted "to ensure that he got treated fairly," Joint Bench Trial Exhibit 31, page 61, lines 5-7, and acknowledged that the redistricting process had partisan implications. *Id*. page 131, line 9 through page 134, line 4. For his part, Marty Connors stated that the Republican Party wanted an equal "[p]laying field," explaining, "We felt that if a judge as opposed to a partisan legislature were to draw the lines, we would accept that. We thought that would be more fair" than the Legislature's Democratic majority. Joint Bench Trial Exhibit 27, page 34, line 17 through page 35, line 16.

(e) With respect to funding, Marty Connors and Bert Jordan each testified that Connors paid some $75,000 to Jordan's firm for its representation in Barnett. Joint Bench Trial Exhibit 27, page 94 line 19 through page 95, line 2; Joint Bench Trial Exhibit 28, page 27, line 22 through page 29, line 14. At that time, Connors was the chairman of the Alabama Republican Party State Executive Committee. Joint Bench Trial Exhibit 27, page 9, line 7 through page 10, line 13. For his part, Jordan testified that his law firm was paid by the Party or a fund of the Party. Joint Bench Trial Exhibit 28, page 27, line 22 through page 29, line 14. Furthermore, as discussed below, the lawsuit came to an end after Marty Connors declined to expend more resources.

In the Special Session that began on June 25, 2001, the Legislature enacted redistricting plans for the State Senate (Ala. Act No. 2001-727) and State House of Representatives (Ala. Act No.

[2] In characterizing this strategy as Republican, the State Election Officials do not mean to suggest that the filing of preemptive or place holder lawsuits is exclusively a Republican activity. Rather, in this instance, Republicans employed a strategy available to any interested party.

2001-729). Those plans reduced the overall population deviation among the districts to less than 10%. The Governor signed both bills on July 3, 2001.

On August 3, 2001, the Barnett Plaintiffs filed a First Amended Complaint. In addition to naming a number of probate judges as official capacity defendants, the Barnett Plaintiffs purported to address the effect of the enactment of new districting plans for the State Senate and State House of Representatives. The Barnett Plaintiffs noted that the new districting legislation had not yet been submitted for preclearance and invoked the jurisdiction of the state courts. They asserted that the new plans had to be approved by either Circuit Court of Montgomery County or the Alabama Supreme Court because the Circuit Court had allegedly retained "jurisdiction over future redistricting plans for the Alabama Legislature" and the propriety of that retention of jurisdiction was before the Alabama Supreme Court. *Barnett* No. 8, at 3- 4, ¶ 2; at 8, ¶ 10, 13; at 8-9, ¶ 14. They contended that the Legislative Districts violated, among other things, Article IX, § 200 of the Constitution of Alabama (1901), which requires, among other things, that the "districts . . . be as nearly equal to each other in the number of inhabitants as may be . . . . " *Id.* at 12, ¶ 19.[3]

The State submitted Acts Nos. 2001-727 and 2001-729 to the United States Department of Justice for preclearance in accordance with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Act No. 2001-727, the Senate plan, was precleared on October 15, 2001, and Act No. 2001-729, the House plan, was precleared on November 5, 2001.

After the State filed evidence that the Senate plan had been precleared, the court directed the Barnett Plaintiffs and the Montiel Plaintiffs to address, among other things, the effect of that preclearance. *Barnett* No. 24. In their Response to that Order, the Barnett Plaintiffs again pointed to

[3] While he did not represent the Barnett Plaintiffs, Mark Montiel picked this contention up and ran with it in *Rice v. English*. *See Gustafson* No. 201 at 85-102.

the "conflicted" state of proceedings in the Alabama state courts. *See Barnett* No. 26 at 10-12 and n.6. The Barnett Plaintiffs suggested that the court issue three certified questions to the Alabama Supreme Court. *Id*. at 14-15. With respect to preclearance, the Barnett Plaintiffs said that preclearance "may warrant some amendment or supplementation of the pleadings." *Id*. at 16. They noted that preclearance does not bar subsequent litigation, pointing again to § 200 of the Alabama Constitution. *Id*. at 17.

Subsequently, in their Reply to the Responses filed by the opposing parties, the Barnett Plaintiffs pointed to the words "as currently drawn" in paragraph 19 of their Amended Complaint, stating, "such phrasing reaches both the past practice and the new statutes. In either event, the core violation of law remains, and state policy is implicated directly." *Barnett* No. 36 at 6-7; *see also id.* at 7 (attacking "both past practice and the new statute"). The Barnett Plaintiffs further challenged the State Defendants' suggestion that preclearance mooted their claims. They concluded, "In any event, the plaintiffs should receive a period of time to amend to allow for any additional claims they may wish to assert . . . ." *Barnett* No. 36 at 14-15.

On November 7, 2001, the court dismissed the Barnett lawsuit as moot. In essence, the court disagreed with the Barnett Plaintiffs' contentions that they had said enough or were entitled to additional time to amend. The court explained that, in their Amended Complaint, the Barnett Plaintiffs

> purported to challenge the new districting statutes but [their allegations] were predicated solely upon references to the malapportionment of the 1993 plans under the 2000 census. The redistricting statutes have now been precleared. The redistricting statutes have now been precleared. Plaintiffs have presented no specific challenge to the validity of the se statutes.

Barnett No. 40 at 1-2. The court also rejected the Barnett Plaintiffs' suggestion that the Alabama state courts had to review the plans as "irrelevant . . . in the absence of a specific challenge to Acts

2001-727 and 2001-729." *Id.* at 1-2 n.1. The possibility that the Alabama courts might "negate[]" the new plans was "speculation at its best." *Id.*

The court's dismissal of the Barnett Plaintiffs' claims left them with several options, but they did nothing. The Barnett Plaintiffs could have asked the court to reconsider by pointing to language in their Amended Complaint as amplified in their briefs that stated a challenge to the new plans. The Barnett Plaintiffs might have sought leave to amend their Complaint to state a challenge more directly. Alternatively, they could have appealed from the judgment of the three-judge district court. In his deposition, the Barnett Plaintiffs' lawyer, Bert Jordan, invoked the attorney-client privilege when asked why he did not take any of these steps. See Joint Bench Trial Exhibit 28, page 59, lines 13-21; page 68, line 12 through page 70, line 11; page 129, lines 8-20.

As noted above, the Barnett Plaintiffs did nothing. Marty Connors explained that he did not consider amending the complaint to state a challenge to the newly enacted plans. He explained:

> I cannot stress to you how focused I was on operational politics and not litigation. That stuff is expensive. And so I was terribly vindicated when what happened in Georgia occurred because they paid for all of the research and development, not us.

Connors' decision not to proceed further was a "[f]iscal decision." Joint Bench Trial Exhibit 27, page 64, line 5 through page 65, line 4. The Party paid Bert Jordan's law firm some $60-70,000 for its work on *Barnett*; that payment was on top of some $60-70,000 paid to consultants to draw redistricting plans. *Id*. page 94, line 19 through page 95, line 19.

For his part, Steve French was "disappointed" that *Barnett* stopped when it did. Joint Bench Trial Exhibit 30, page 18 lines 3-20. He thought that the Party did not get "a whole lot of bang out of our buck." Joint Bench Trial Exhibit 29, page 91, lines 14-22. French thought that Connors "pulled the plug" and said that Connors "basically threw that little bit of money at a fairly significant legal challenge and then washed his hands of it . . . ." *Id*. page 93, lines 13-19. French thought the Party

had "enough money to be more aggressive." Joint Bench Trial Exhibit 30, page 84, lines 2-3. He also thought that Mark Montiel was traveling down "the wrong path" in pursuing racial gerrymandering claims instead of one-person, one-vote claims. *Id*., page 39, line 23 through page 40, line 14. He was not sure whether Montiel did pursue one-person, one-vote claims. *Id*., page 40, lines 15-18.

B. *Montiel v. Davis*

In *Montiel v. Davis,* Gonzalo Montiel, now deceased, represented by Mark Montiel, complained that the districting plans for Alabama's Congressional delegation, the State Board of Education, the State Senate, and State House of Representatives were unconstitutionally malapportioned. With respect to the Legislative plans, Gonzalo Montiel said that he was under represented in that the population of the State Senate and State House of Representatives districts in which he lived was greater than the ideal population of such a district by more than 5%. He brought his lawsuit "on behalf of himself and all other citizens of the State of Alabama similarly situated" and, while naming six probate judges, the Secretary of State, and the Lieutenant Governor as official-capacity defendants, stated that the probate judges were named in their "representative" capacities "on behalf of a class of probate judges across Alabama . . . ." Gonzalo Montiel sought, among other things, declaratory relief holding the Legislative redistricting plans unconstitutionally malapportioned, and injunctive relief prohibiting the use of those plans in the next election cycle. *See generally*, *Montiel v. Davis* No. 1.

As noted above, the Legislature enacted new redistricting plans for the State Senate and State House of Representatives in a Special Session that began on June 25, 2001. The Governor signed both bills on July 3, 2001. On August 3, 2001, Gonzalo Montiel filed a First Amended Complaint in which he challenged the constitutionality of the new plans. *Montiel v. Davis*, No. 18. At that point,

neither plan had been precleared. The Senate Plan was precleared on October 15, 2001, and the House Plan was precleared on November 5, 2001.

In a Second Amended Complaint filed on November 26, 2001, Gonzalo Montiel was joined by five more plaintiffs, Sheldon Day, John Lang, John Rice, Camilla Rice, and Bobby Humphryes. That Second Amended Complaint was superseded by a Third Amended Complaint filed on December 21, 2006.[4]

In the Third Amended Complaint, the Montiel Plaintiffs stated that they brought their action on behalf of themselves and others. John Lang and Camilla Rice stated that they were suing on behalf of themselves "and all other citizens of the State of Alabama similarly situated who reside in these districts," that is, SD 24 and HD 70 for Lang, and SD 28 and HD 83 for Camilla Rice. *Montiel v. Davis* No. 63 at 6, ¶¶ 7, 8. Gonzalo Montiel, who claimed that he lived in districts that were not "apportioned on the basis of one-person, one-vote," stated that he was proceeding on his own behalf and on behalf of "all other citizens of the State of Alabama similarly situated." *Id*. at 6, ¶ 5. Sheldon Day, Bobby Humphryes, and John Rice stated that they were proceeding on behalf of themselves, the residents of the districts that were the subject of their complaint (HD 22 and HD 68, SD 5 and HD 15, and HD 79, respectively), and other citizens assigned the Senate districts, House districts, or both "that violate the constitutional requirements of one-person, one vote." *Id*., at 68, ¶¶ 6, 9, 10.

The Montiel Plaintiffs further sought certification of a defendant class of probate judges and a plaintiff class and subclasses. With respect to the plaintiff classes, the Montiel Plaintiffs sought the certification of the following classes and subclasses

[4] The court struck the Montiel Plaintiffs' Second Amended Complaint because it included allegations and claims relating to Congressional and State Board of Education redistricting after those claims had been severed, transferred or both. *See Montiel v. Davis* Nos. 59, 60, 61. The court directed the Montiel Plaintiffs to remove those allegations and claims, which they did in a Third Amended Complaint. *See Montiel v. Davis* Nos. 61, 63.

Gonzalo Montiel	all citizens of the State of Alabama similarly situated;
Montiel, Day, and Humphryes	all citizens of Alabama similarly situated and assigned to State Senate districts "with populations that violate the Fourteenth Amendment requirements of one-person, one-vote";
Montiel, Humphryes, and John Rice	all citizens of Alabama similarly situated and assigned to State House of Representatives districts "with populations that violate the Fourteenth Amendment requirement of one-person, one-vote";
Day	all citizens assigned to HD 68, a "district that is racially gerrymandered in violation of the Fourteenth Amendment";
Lang	all citizens assigned to HD 70, a racially-gerrymandered district
Camilla Rice	all citizens assigned to SD 28 and HD 83, districts that are racially-gerrymandered

Montiel v. Davis, No. 63, at 16-27, ¶¶ 37-39.

With respect to the new plans, several of the Montiel Plaintiffs asserted that those plans did not comply with one-person, one-vote standards and violated Section 2 of the Voting Rights Act. They contended that the deviations in population among the districts "were not based on legitimate considerations incident to the effectuation of a rational state policy, nor for any purpose or policy recognized by the Supreme Court to allow states minor deviations among districts." *Montiel v. Davis*, No. 63 at 38 ¶ 77, 40 ¶ 79. They alleged that the new plans "unnecessarily split[] counties, cities, towns, and voting precincts throughout the state and in the malapportioned districts." *Id.* They asserted that their votes were "systematically diluted by the discriminatory malapportionment [of the Senate and House districts] for an unconstitutional and irrational policy or purpose . . . ." *Id.* In their Section 2 claim, the same plaintiffs claimed that the new plans were drawn "in order to achieve a goal of maximization of black majority districts and achieve proportional representation for black citizens in state legislative districts that equal the overall black population in the State of

Alabama." *Id*. at 44 ¶ 84.

Sheldon Day and other Montiel Plaintiffs (John Lang and Camilla Rice) also made racial gerrymandering claims. Day attacked HD 68 and stated that the district lines split the cities of Grove Hill, Jackson, Evergreen, and Monroeville on racial lines. *Montiel v. Davis* No. 63 at 45-47 ¶¶ 85-91. John Lang attacked SD 24 and HD 70, and Camilla Rice attached SD 28 and HD 83. *Id*. at 48-55.

(1) The Montiel Plaintiffs

The deposition testimony shows that, like the Barnett Plaintiffs, the Montiel Plaintiffs can all be identified as Republicans. Likewise, to the extent that *Montiel v. Davis* was filed before the Legislature adopted new redistricting plans, it was a preemptive lawsuit just like *Barnett*. While the Republican Party or Republican interests did not support this litigation or *Rice v. English*, it was not because Mark Montiel did not ask Marty Connors for support or because John Rice did not seek support from Republican interests. Finally, the Montiel Plaintiffs appear to have had little involvement in the case after it was filed.

In his deposition, John Rice testified that, while a member of the Alabama Senate in 1988, he switched to the Republican Party. He had qualified to run for a seat in the Public Service Commission as a Republican in 2006, Joint Bench Trial Exhibit 18, page 6, line 23 through page 7, line 4; page 9, line 18 through page 10, line 5. He considers himself to be a Republican. *Id*., page 10 lines 17-23.

In 2001, Rice testified that he "probably fussed" to Gonzalo Montiel about the legislative districts telling Gonzalo Montiel that "if anything's going to be fixed, I wanted my counties in east Alabama to be part of it." Joint Bench Trial Exhibit 18, page 34, line 20 through page 35, line 6. Rice asked Mark Montiel if he could join the lawsuit to see if Lee County could be fixed. *Id*. page

36, line 23 through page 37, line 13. Lee County had been split among a number of districts in 1993; Rice, represented by Mark Montiel, challenged the 1993 plan without success and wanted another shot. Rice testified that he thought his legal efforts would be supported by Republican interests, but got little support when he asked. He explained that thought his lawsuits would be a "rallying point," but "nobody paid any attention to it." *Id.,* page 45 lines 20-23; *see also id.* page 45, line 3. Rice did not know that the Republican Party had its own vehicle in *Barnett* "until much later." *Id*., page 49, lines 4-7.

Rice testified that he did not think he asked Mark Montiel to appeal from the judgment against the Montiel Plaintiffs because he "was tired." Joint Bench Trial Exhibit 18, page 45, lines 9-23. He organized a "Rice Redistricting Litigation Fund" and solicited contributions, but not much money came in. He thought that he paid Mark Montiel more than $2,000, but "not significantly [more]. Thousands more, but not tens of thousands." *Id*., page 16, line 18 through page 77, line 22.

When he was deposed in 2006, Sheldon Day testified that he joined the *Montiel v. Davis* lawsuit after someone contacted him. He did not recall whether his first contact came from Mark Montiel, but Montiel did contact him.[5] Joint Bench Trial Exhibit 22, line 15 through page 21, line 22. Day signed on because he "felt like we ought to at least challenge the districts in a manner so that we could divide and dilute our peoples' voting power in small communities." *Id.*, page 21, lines

[5] Day has been the Mayor of Thomasville for ten years. Joint Bench Trial Exhibit 20, page 8, line 21 through page 9, line 2. In *Kelley v. Bennett*, 96 F. Supp. 2d 1301 (M.D. Ala. 2000) (three-judge court), a three-judge federal district court held that a number of the legislative districts created in 1993 were the product of unconstitutional racial gerrymandering. The Kelley Plaintiffs were represented by Mark Montiel, and, in its opinion, the three-judge court stated that "south Alabama towns such as Evergreen, Grove Hill, Monroeville, Thomasville, and Linden" were split on racial lines. 96 F. Supp. 2d at 1313. Montiel was, thus, in a position to contact Sheldon Day to ask him to join the lawsuit.

In *Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446 (2000), the United States Supreme Court reversed the judgment of the three-judge court holding that the Kelley Plaintiffs lacked standing to pursue racial gerrymandering claims.

11-14. "[A] lot of times", the district lines split population by race, but:

> This is not about Republican or Democrat. It's not necessarily about race one way or the other. This is about . . . the people of an area being represented fairly and not carving out portions of our community which, in my opinion, puts us at a disadvantage in being able to compete in the legislative process . . . .

Id., page 24, line 15 through page 25, line 3, page 45, lines 11-18.

Day testified that he ran for SD 22 as a Republican in 2002. Joint Bench Trial Exhibit 22, page 10, lines 3-21. Day may have met Bobby Humphryes once, but had no more contact with him and had never met any of the other Montiel Plaintiffs. *Id*., page 25, line 17 through page 27, line 5. He has known Mark Montiel since the early to mid 1990's. *Id.,* page 69, line 14 through page 70, line 17. Day never read the decision of the three-judge court against him and did not recall getting a copy. Likewise, he did not recall any talk of an appeal. *Id*., page 53, lines 13-15, page 54, line 6 through page 55, line 12.

When he was deposed in 2006, John Lang, a rancher and businessman living in Tuscaloosa County, testified that he had considered himself to be a Republican for the "last ten years." Joint Bench Trial Exhibit 20, page 9, lines 22-23. While Lang did not live in Gerald Allen's house district, he complained to Allen that he thought the district lines were unfair. Later, Mark Montiel called him and asked if he wanted to participate in the lawsuit. *Id.*, page 14, line 17 through page 19, line 19. Lang's representative lived in Cuba, in Sumter County. *Id*., page 18, lines 5-11. While he made a racial gerrymandering claim in *Montiel v. Davis*, his complaint of unfairness did not have a racial discrimination component to it. *Id.,* page 21, lines 21-23; *see also id.*, page 21, lines 8-10 ("My complaint is not a black/white issue. It's not a Democratic/Republican issue. It's a fair issue.") The same held true with his racial gerrymandering claim against HD 70. *Id*., page 24, lines 4-9.

Lang did not know any of the other Montiel Plaintiffs and had never met them. *Id*., page 12, line 12 through page 13, line 20. He knew that his lawsuit was "dismissed" but did not remember how he learned that. He did not recall any discussion about an appeal. *Id*., page 26, line 4 through page 27, line 9. Lang did not pay any fees to Mark Montiel. *Id*., page 27, lines 10-15. While he did not select the lawyer or manage the lawsuit, he was informed about the claims that were brought. *Id*. page 33, line 20 through page 34, line 8.

In her deposition, Camilla Rice testified that she was a Republican, was recruited as a plaintiff and had limited participation in the case. She stated that she has "always" belonged to the Republican Party. Joint Bench Trial Exhibit 19 at page 8, line 21 through page 9, line 11. She had little memory of *Montiel v. Davis*, but had nothing to do with managing the case or deciding what claims to make. *Id*., page 13, line 20 through page 14, line 5. She did not recall how she came to be a plaintiff, but said that John Rice "would have been the only logical one to have asked me." *Id*., page 14, lines 12-13.

In his deposition, Bobby Humphryes testified that he was a Republican legislator whose district was changed in the new House plan. Because population had to be added to a neighboring black-majority district held by a Democrat, he and Johnny Curry, another Republican incumbent, had their districts combined. Joint Bench Trial Exhibit 21, page 12, lines 15-17, page 13, lines 1-14, page 22, line 10 through page 25, line 17. In Jefferson County, party generally correlated with race, with "Democrats . . . mostly black and Republicans mostly white." *Id*. page 61, lines 16-17. Humphryes explained that the claims he made in *Montiel v. Davis* were based on race rather than politics because of that correlation in Jefferson County. *Id*., page 60, line 21 through page 61, line 23.

Humphryes testified that he thought he was challenging "the whole plan" in *Montiel v. Davis*.

Joint Bench Trial Exhibit 21, page 42, line 21 through page 43, line 23. In his judgment, the new plans split voters on the basis of race rather than politics. *Id*., page 53, lines 5-10.

Humphryes testified that he had no reason to believe that Mark Montiel did not adequately represent his interests. He had no complaint about Montiel's representation either in 2002 or in 2006. Joint Bench Trial Exhibit 21 page 33, line 23 through page 35, line 9. Humphryes did not pay Montiel's fee in *Montiel v. Davis* and did not know who did. *Id*. page 38, lines 6-12.

(2) The Proceedings

On August 2, 2001, Gonzalo Montiel filed a First Amendment to his Complaint alleging that, while neither Act No. 2001-727 nor Act No. 2001-729 had been precleared, if they were precleared, they were still unconstitutionally malapportioned. Gonzalo Montiel alleged that the plans created districts "with deviations from equal population that are not based on legitimate considerations incidents to the effectuation of a rational state policy but, instead, are based on a policy of racial maximization . . . ." Montiel No. 18 at 3, ¶ 6.

Subsequently, as noted above, the plans were precleared, and Gonzalo Montiel was joined by five other plaintiffs in a Second and Third Amended Complaint. In the course of the proceedings, then-Governor Don Siegelman and Ken Guin, and Andrew Hayden, two Democratic members of the Alabama House of Representatives, intervened as defendants in support of the new plans.

The case was resolved on cross-motions for summary judgment. With their Motion, the Montiel Plaintiffs included Affidavits from Steve French and Chris Pringle. In his Affidavit, Pringle stated that, among other things, the drafters of the plans had the "overriding objective and purpose . . . to over populate white-majority House and Senate districts and to under populate black-majority House and Senate districts." Joint Bench Trial Exhibit 43 at Exhibit 6, page 4; *see also* Joint Bench Trial Exhibit 42 at 8 of 9 (French makes same assertion with respect to State Senate districts in

Jefferson County). Pringle testified that he signed the Affidavit at Mark Montiel's request and that Montiel drafted it with input from Pringle. Joint Bench Trial Exhibit 31, page 110, line 16 through page 114, line 11. For their part, the Legislative Intervenors offered evidence that the drafters of the plans used evidence of actual voter behavior to draw districts that would help to preserve their respective Democratic majorities. *See Montiel v. Davis*, 215 F. Supp. 2d at 1283 and fn.5. In putting political motivations over race, those Legislative Intervenors drew support from the Supreme Court's decision in *Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452 (2001).

On July 8, 2002, the court held that the new plans did not violate one-person one-vote standards and that the new plans were not the product of racial gerrymandering. *Montiel v. Davis*. More particularly, the court said that there was no evidence, "either direct or circumstantial, which establishes to any degree that the Alabama Legislature subordinated traditional race-neutral districting principles . . . to racial considerations . . . ." 215 F. Supp. 2d at 1283. The court further held that the plaintiffs had failed to prove their allegations of "the systematic overpopulation of white-majority districts and under population of black-majority districts." *Id*. at 1286-88.

The Montiel Plaintiffs might have tried to attack the Legislators' reliance on political considerations, but they did not. Likewise, the Montiel Plaintiffs could have appealed from the judgment against them. John Rice testified that he was "tired" of leading where nobody would follow. Joint Bench Trial Exhibit 18, page 45, lines 9-23. Neither Sheldon Day nor John Lang remembered any talk about an appeal. In the end, the judgment became final.

C. Rice v. English

(1) The Parties

In *Rice v. English*, Mark Montiel represented John Rice, Bill Harris, and Patricia Christine N. Wood. As noted above Rice, who was the only one of those people deposed, has been and hopes to

be a Republican officeholder. Harris was, for a time, the Executive Director of the Alabama Republican Party, and press reports identified Wood as the mother of Harris. John Rice said that he brought the lawsuit because "I wanted to pursue avenues and I'm sure that Mr. Montiel, Mark Montiel, my attorney, gave me options and I picked options." Joint Bench Trial Exhibit 18, page 58, lines 3-10. He testified that he contributed to Montiel's fees and expenses but was "sure it wasn't too much." *Id*. page 59, lines 12-13.

(2) The Proceedings

On August 9, 2001, after new legislative redistricting plans had been adopted but before they had been submitted for preclearance, and while *Barnett* and *Montiel v. Davis* were pending, John rice, William McCall Harris, and Patricia Christine N. Wood filed suit in the Circuit Court of Montgomery County challenging the newly adopted State Senate districting plan. The Rice Plaintiffs, represented by Mark Montiel, contended that the new State Senate districting plan violated Article IX, § 200 of the Constitution of Alabama (1901), which states that the Senate districts are to "be as nearly equal to each other in the number of inhabitants as may be." They sought a declaration that the State Senate districting plan violates state law and related injunctive relief. *Gustafson* Doc. No. 201 at 85-102.

The Rice Plaintiffs asserted that § 200 of the Alabama Constitution required the population of each Senate district to be equal to the ideal population; in other words, zero deviation was required. The Rice Plaintiffs alleged that they were underrepresented and brought their action on behalf of themselves "and all other citizens of the State of Alabama similarly situated." They sought certification of a plaintiff class of all citizens of the State of Alabama underrepresented in the Alabama Senate . . . ," as well as a defendant class of probate judges. *Id.*

On January 28, 2002, the Circuit Court of Montgomery County granted the Motion for

Summary Judgment filed by the State Election Officials which had been joined by Governor Siegelman, who had intervened as a defendant. *Gustafson* No. 201, pages 141-175. In a separate Order of the same date, the Circuit Court held that the redistricting claims before it were justiciable. *Gustafson* No. 201 at 139-40.

The Rice Plaintiffs appealed from the judgment against them to the Supreme Court of Alabama. On May 24, 2002, the Alabama Supreme Court affirmed the judgment of the Circuit Court. *Rice v. English*, 835 So. 2d 157 (Ala. 2002).

3. The Gustafson Lawsuit

(A) Organizing the Lawsuit

The impetus for another challenge to Alabama's legislative districting plans came from the United States Supreme Court's decision in *Cox v. Larios* on June 30, 2004. *See Cox v. Larios,* 524 U.S. 947, 124 S. Ct. 2806 (2004). There, the Court summarily affirmed (albeit with a concurring opinion by Justice Stevens, joined by Justice Breyer, and a dissent by Justice Scalia) the decision of a three-judge court invalidating Georgia's legislative redistricting plans. *See Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court). In its decision of February 2004, the three-judge court held that those plans, which had an overall population deviation of 9.98%, were unconstitutional because the population deviations were created for excessively partisan political reasons.

After the Supreme Court's decision in *Cox v. Larios* came down, Steve French and Jerry Lathan each started making contacts, albeit independently. French called Mark Montiel and asked him to look at the decision and its effect on Alabama. He explained that, of the three Republican redistricting lawyers in Alabama, he was most comfortable with Montiel. French did not know Al Agricola as well as he knew Montiel, and he thought that Bert Jordan had done a "poor job" in the

Barnett case in Mobile in that the Republican Party had not "gotten a lot of bang out of our buck." Joint Bench Trial Exhibit 30, page 90, line 1 through page 91, line 22; Joint Bench Trial Exhibit 31, page 62, line 13 through page 67, line 22. French would have preferred to have been more aggressive in 2002. *Id*., page 93, lines 1-12. Lathan called the Georgia lawyers who had been on the winning side and asked them to do an "initial review" of the facts in Alabama in relation to those in Georgia. Lathan paid $5,000 of his own money for that initial review. Joint Bench Trial Exhibit 32, page 20, line 18 through page 22, line 15. Lathan met with the Georgia lawyers in Huntsville in November or December 2004, and also consulted with Ben Ginsberg in the fall of 2004. *Id*., page 107, lines 4-11; page 47, line 21 through 49, line 5.

Chris Pringle testified that French told him about the *Larios* decision telling him "It's very similar to what happened in Alabama. Joint Bench Trial Exhibit 31, page 120, line 8 through page 121, line 12. Pringle also testified that he talked with Jerry Lathan shortly after the Supreme Court's decision in *Cox v. Larios*. Lathan "is spearheading or trying to put together . . . . an effort to increase Republican representation in the Alabama legislature." Lathan told Pringle about his plans to put together an organization to train, recruit, and fund the campaigns of Republican candidates. Pringle told Lathan that "he was going to have a problem winning seats, given the way the Legislature was drawn in reapportionment." Joint Bench Trial Exhibit 31, page 143, line 6 through page 144, line 22; *see also* Joint Bench Trial Exhibit 32, page 79, line 9 through page 81, line 10.

The trail soon led to the door of Mark Montiel. Lathan testified that, when he talked to Steve French, French told him that Montiel "probably had more of that evidence and documents than anybody else, and that if I wanted to get into it I should probably contact him." Joint Bench Trial Exhibit 32, page 79, lines 1-5. Lathan then contacted Montiel. *Id*., page 79, lines 6-8. Marty Connors testified that the Georgia lawyers wanted to know who had the documents, and that "Pringle

and all of those guys had given their information to Mark Montiel. He was the warehouse of information that had occurred – the data, the transcripts, you know, all the hardware of this case. And so that's how [Mark Montiel] got on board." Joint Bench Trial Exhibit 27, page 71, line 21 through page 72, line 9.

By the late fall of 2004, or the early winter of 2005, French, Connors and Lathan had decided that the lawyers for a *Larios*-based challenge to the Alabama legislative districting plans would be the Georgia lawyers and Mark Montiel. Joint Bench Trial Exhibit 30, page 8, line 21 through page 10, line 20. Then, the attention turned to the recruitment of plaintiffs. At the Republican Party's winter meeting in February 2005, Lathan announced that a lawsuit was planned and solicited interested plaintiffs. Lathan testified that he "explained a broad strategy" and presented a plan that "involved possibly filing – hopefully filing a lawsuit to challenge the districts." Joint Bench Trial Exhibit 32, page 115, line 8 through page 116, line 10; *see also Gustafson* No. 150 at Exhibit 59. He announced that the lawsuit would address the fact "that district lines are drawn to concentrate voters in suburban areas and growing areas versus rural areas and non-growth areas that tend to favor Republicans in the overpopulated and tend to strengthen or exaggerate Democrat strength by the nature of the districts they have drawn." Joint Bench Trial Exhibit 32, page 117, lines 1-14.

Lathan's announcement produced at least one Gustafson Plaintiff, Rick Renshaw. *See* Joint Bench Trial Exhibit 13, page 28, line 14 through page 29, line 16. Lathan also called one or more plaintiffs including Lionel Gustafson. *See* Joint Bench Trial Exhibit 1, page 16 line 12 through page 18, line 3. For his part, Steve French "basically hired" Leland Walley to recruit plaintiffs, and several Gustafson Plaintiffs were contacted by Walley. *See* Joint Bench Trial Exhibit 30, page 42, line 15 through page 43, line 2. French gave Walley a list of districts, each of which was overpopulated by more than 4%, in which to try to locate plaintiffs. *Id.,* page 43, lines 3-10.

When the plaintiffs had been recruited, French, Lathan, and Connors became a Litigation Management Committee. They have interacted with the lawyers, guiding the litigation. The Gustafson Plaintiffs have made few decisions in the case, and those are the ones clients are ethically in charge of: The Gustafson Plaintiffs agreed to participate in a lawsuit and with counsel who were presented to them. They have not been called on to make decisions regarding the claims to be brought or nearly all of the other litigation management decisions.

(b) The Gustafson Plaintiffs

With respect to the Gustafson Plaintiffs; the depositions generally follow the same track and produce similar responses. By way of example, the State Election Officials note:

(a) Lionel Gustafson testified that she has been active in the Republican Party since 1989. She is on the Party's State Executive Committee and was Vice-Chair of the Party for two years. Joint Bench Trial Exhibit 1, page 15, line 21 through page 16, line 11. She became a plaintiff after Jerry Lathan called her. *Id*., page 16, line 12 through page 18, line 3. She did not select the lawyers. *Id*., page 19, lines 3-10. She has not paid any attorneys fees and is not responsible for any. *Id*., page 20, lines 6-11.

(b) Martha Hosey testified that she has been a member of the Republican Party's State Executive Committee in 1989, and was active in other Party related organizations. Joint Bench Trial Exhibit 2, page 11, line 22 through page 12, line 13. She became a plaintiff after Jerry Lathan called her. *Id*., page 13, line 11 through page 14, line 11. The Litigation Management Committee decided which layers to employ to represent the plaintiffs. *Id*., page 18, line 23 through page 19, line 9. She has not paid the attorneys, has no obligation to do so, and does not know who is paying them *Id*.,

page 33, lines 6-8. She did not see the complaint before it was filed. *Id*., page 19, line 10-20. She first met Mark Montiel on the day of her deposition (January 7, 2006), and never met the Georgia lawyers. *Id*., page 33, lines 9-23.

(c) Thomas Brown testified that he has been on the Republican Party's Madison County Executive Committee and belongs to several Republican clubs. Joint Bench Trial Exhibit 13, page 7, line 23 through page 9, line 21. He became a plaintiff after talking with Gustafson Plaintiff William Meiers and with Linwood Bragan, who had ran Governor Riley's campaign office in Madison County. *Id*., page 14, line 14 through page 15, line 3. Bragan suggested that Brown call Marty Connors. *Id*., page 15, lines 4-16. Brown received a copy of the Complaint "recently, in the last ten days" before his deposition. *Id*., page 57, lines 5-15; *see also id.*, page 58, lines 17-23 (Amended Complaint). He is not paying the lawyers. *Id*., page 59, lines 10-19. Before the Georgia lawyers advised the plaintiffs of their need to withdraw as counsel on December 30, 2005, the Litigation Management Committee was handling the decisions about managing the lawsuit. *Id*., page 63, line 15 through page 64, line 4.

(d) Gustafson Plaintiff David Hammonds has been active in the Republican Party since running against the Democratic incumbent Lowell Barron in 2002. Joint Bench Trial Exhibit 6, page 8, line 17 through page 10, line 5. Hammonds thinks that Marty Connors called him and asked him to join the lawsuit. *Id*., page 49, lines 10-14. He met Mark Montiel in March 2005 at a meeting of Gustafson plaintiffs, attorneys, and litigation management committee members and next talked to him again in January 2006, before his deposition. *Id*., page 48, lines 3-23. The result that Hammonds seeks would benefit the Republican Party. *Id*., page 122, lines 12-17.

The other Gustafson Plaintiffs testified to similar effect. In addition, as a general matter, the

Gustafson Plaintiffs testified that they knew little or nothing about the previous lawsuits. One or two of them paid attention to the redistricting process, but none moved to file a lawsuit until a vehicle was presented to them. They agreed to participate as plaintiffs, agreed to employee the attorneys presented to them, and agreed to the participation of the Litigation Management Committee. Otherwise, they have played little role in the case.

The Gustafson Plaintiffs do not include Steve French, Jerry Lathan, or Terry Lathan. French testified that he was interested in participating as a plaintiff but his district was not overpopulated by more than 4%. Joint Bench Trial Exhibit 29, page 96, line 3 through page 97, line 8. Jerry Lathan testified that he and the Georgia lawyers "discussed whether I would be a plaintiff or whether my wife would be a plaintiff . . . ." Joint Bench Trial Exhibit 32, page 24, lines 14-16. An attorney decided that Lathan would not be a plaintiff, *Id.* page 25, line 18 through page 27, line 16. There are no plaintiffs from Lathan's Senate or House districts. *Id.* page 27, lines 17-23.

The Gustafson Plaintiffs are not responsible for the funding of their lawsuit. Rather, the Alabama 21st Century Foundation is paying the attorneys fees and expenses. Jerry Lathan created the Foundation, which is a 501(c)(4) tax entity, in the spring of 2005. Joint Bench Trial Exhibit 32, page 15, line 9 through page 16, line 5. The Foundation has three directors, Lathan, Connors, and Harold D. Callaway, Jr., of Gulf Shores, and no employees. *Id*. page 105, lines 2-19; page 112, lines 2-23. Lathan testified that the Foundation was formed "to support the creation or drawing or formation of fair representative districts that fair representation in the legislature for the citizens of Alabama." *Id*., page 46, lines 1-18; *see also* Joint Bench Trial Exhibit 31, page 143, lines 9-13 ("Jerry Lathan is spearheading or trying to put together . . . an effort to increase Republican representation in the Alabama Legislature."). The Foundation has paid Ben Ginsberg for the advice

that he and his firm have provided. Joint Bench Trial Exhibit 32, page 53, lines 8-14.

ARGUMENT

The facts set forth above show that the driving force behind all of these cases is a small group of Republicans. The State Election Officials do not criticize them for their party leanings and recognize the frustration driving their case. That core group of Republicans, though, had its day in court in *Barnett v. State, Montiel v. Davis*, and *Rice v. English*; it had multiple chances to attack these plans but was unsuccessful. This Court should not permit that core group of Republicans to recruit new plaintiffs for another challenge.

In this case, the application of claim and issue preclusion to the claims of the Gustafson Plaintiffs presents, at its core, an issue of due process: Is it fundamentally unfair to the Gustafson Plaintiffs to bind them with the previous judgments in favor of the State legislative districting plans? In the judgment of the State Election Officials, the answer is, "No." Binding the Gustafson Plaintiffs with the results in *Barnett, Montiel*, and *Rice* is not fundamentally unfair for all of these cases.

Ordinarily, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks,* 490 U.S. 755, 762, 109 S. Ct. 2180, 2184 (1989). As the Court explained in *Richards v. Jefferson County*, however, there are exceptions to that general rule. *Id*., 517 U.S. 793 at 799, 116 S. Ct. 1761 at 1766, such that a judgment in a previous case might be binding on a nonparty. The '[m]ost notabl[e]" exception is for privity, but, as the Court observed,

> [A]lthough there are clearly constitutional limits on the "privity" exception, the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.

Id. In essence, the test is whether an absent party's interests are "adequately represented by someone with the same interests who is a party." *Martin v. Wilks,* 490 U.S. at 762, n.2, 109 S. Ct. at 2184, n.2. Put differently,

> A prior proceeding, to have binding effect on absent parties, would at least have to be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."

Richards, 517 U.S. at 801, 116 S. Ct. at 1767 (quoting *Hansberry v. Lee,* 311 U.S. 32, 43, 61 S. Ct. 115, 119 (1940)).

In *Richards*, the Court recognized that, "governmental and private entities have substantial interests in the prompt and determinative resolution of challenges to important legislation." *Id.*, 517 U.S. at 804-05, 116 S. Ct. at 1769. The case before the Court involved a challenge to the application of an Alabama county's occupational tax, and the Court "assume[d]" that some classes of taxpayer actions might have preclusive effect on future actions by other taxpayers.[6] In particular, preclusion principles may bar "cases in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds" . . . or about other public action that has only an indirect impact on his interests." Id. 517 U.S. at 803, 116 S. Ct. at 1768. As the Court put it, as to certain cases, "we may assume that the States have wide latitude to establish procedures to limit the number of judicial proceedings that may be entertained . . . ." *Id.* The claim presented in *Richards* was not one of those claims.

Subsequently, in *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160, 119 S. Ct.

[6] The preclusive effect referred to here is that of claim or issue preclusion. Preclusion through precedent is qualitatively different from claim or issue preclusion. *See Richards*, 517 U.S. at 805, 116 S. Ct. at 1769.

1180 (1999), the Court returned to this theme in the course of rejecting another attempt to invoke res judicata to bar a challenge to the application of Alabama's franchise tax to foreign corporations. The Court explained that, in the absence of a "special representational relationship" between two groups of plaintiffs, a

> second set of plaintiffs could not have been led to be precluded, as a matter of res judicata, by the earlier judgment itself, even though they may well have expected that the rule of law announced in [the earlier case] would bind them in the same way that a decided case binds every citizen.

526 U.S. at 168, 119 S. Ct. at 1185. As in *Richards*, the taxpayers' challenge, which came from different taxpayers and involved different tax years, were not the kind of claims that could be precluded.

In addition to certain classes of taxpayer actions unlike those presented in *Richards* and *South Central Bell*, preclusion principles have been applied in the context of redistricting cases. More significantly, in each of the cases, a prior judgment in favor of a plan has been given preclusive effect, to a greater or lesser degree, over a subsequent lawsuit by new plaintiffs with similar interests. In *Robertson v. Bartels*, 148 F. Supp. 2d 443 (D.N.J. 2001) (three-judge court), *aff'd*, 534 U.S. 1110, 122 S. Ct. 914 (2002), the court concluded that, even though different claims were involved, the claims of the second parties to attack New Jersey's legislative districting plan were precluded. The court noted that the claims in both actions involved the same basic facts, sought the same basic relief, and were brought by parties sufficiently related to the first set of plaintiffs to be bound. 148 F. Supp. 2d at 448. In *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), the Eight Circuit Court of Appeals affirmed the dismissal of a second lawsuit challenging a city's aldermanic districting plan on claim preclusion grounds where the plaintiffs overlapped and the same claims were presented. The court noted that the African-American plaintiffs "shared the same concern: the dilution of the African-

American vote in St. Louis. This organizational commonality suggests a special commonality of interests." 93 F.3d at 457. Similarly, in *Thompson v. Smith*, 52 F. Supp. 2d 1364 (M.D. Ala. 1999) (three-judge court), the court dismissed one-person one-vote and vote dilution claims as well as the racial-gerrymandering claim of one plaintiff. *See also Dillard v. Chilton County*, 640 F. Supp. 1347 (M.D. Ala. 1986).

Furthermore, as the State Election Officials have previously shown, the Supreme Court's summary affirmance of the decision in *Robertson v. Bartels* includes an affirmance of that court's ruling on claim preclusion. More to the point, the Supreme Court's action represents a rejection of the following question presented by the appellants in *Robertson v. Bartels:*

> 5. Does a redistricting challenge based on minority voter dilution claims brought the day following enactment and which are tried and decided within 20 days after enactment preclude the hearing of Equal Protection claims brought by other plaintiffs 16 days after enactment?

See Gustafson No. 107 at 8-10 and Exhibit 9. That summary affirmance "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240 (1977) (*per ciriam).*

In *Tyus v. Schoemehl* and *Robertson v. Bartels*, the courts looked at, among other things, whether the cases before them presented public or private law issues. Those courts concluded that the redistricting claims before them raised public, not private, law issues. Unlike the taxpayers refund cases presented in *Richards* and *South Central Bell*, who seek specific, definite monetary relief, these redistricting cases affect citizens broadly. While the Gustafson Plaintiffs are Republicans, not every resident of their district shares their concern. Furthermore, "[c]oncerns of judicial economy and cost to defendants, while present in every suit, are particularly important in this

context." *Tyus*, 93 F. 3d at 456. Those concerns are threatened by the potentially limitless number of plaintiffs in public law cases. *Robertson*, 148 F. Supp. 2d at 450.

Measured against these standards, res judicata bars some or all of the claims of the Gustafson Plaintiffs. Their one-person, one-vote claims parallel those of the Montiel Plaintiffs. Aside from offering a different bad motivation, the claims in *Montiel v. Davis* and this case require a showing that:

(1) the apportionment process had "a taint of arbitrariness or discrimination";

(2) the "minor deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy";

(3) "the asserted unconstitutional or irrational state policy is the actual reason for the deviation," and

(4) "the minor population deviation is not caused by promotion of legitimate state policies."

See Montiel v. Davis, 279 F. Supp. 2d at 1286 (internal quotations and citations omitted). The Montiel Plaintiffs, who stated that they lived in overpopulated districts and sought to represent all residents of overpopulated districts, failed to carry their burden. This Court should not give the Gustafson Plaintiffs another chance to prove those elements asserting as the only distinguishing factor that the unconstitutional or irrational motive was excessive partisanship, not race.

Indeed, the depositions show that, in some instances, relabeling is taking place. Montiel

Plaintiff Bobby Humphryes claimed that the changes to his Jefferson County district were based on race. Gustafson Plaintiff Pat Moore, who lives in the same district, says it's party, but testified that those moved were black Democrats and white Republicans. *See* Joint Bench Trial Exhibit 10, page 58, line 12 through page 59, line 5; Joint Bench Trial Exhibit 21, page 60, line 21 through page 61, line 23. Gustafson Plaintiff Gilbert Douglas also "regrettably" acknowledged that "political orientation correlate[s] . . . in Jefferson County pretty well." Joint Bench Trial Exhibit 5, page 92, lines 12-22. This Court should not permit the Gustafson Plaintiffs to relabel the persons at issue in *Montiel v. Davis*.

In *Hansberry v. Lee,* the Court said that a proceeding "so devised and applied as to insure that those present of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." 311 U.S. at 43, 61 S. Ct. at 119. Those criteria are met in this case. The Gustafson Plaintiffs, like the Barnett Plaintiffs, the Montiel Plaintiffs, and the Rice Plaintiffs, are Republicans who claim to live in overpopulated districts. All sought or seek the same goal, new redistricting plans.

The earlier cases also offered the opportunity for full and fair consideration of the issues. The Barnett Plaintiffs and the Montiel Plaintiffs each had a shot at these plans, but passed it up to one degree or another. The Barnett Plaintiffs, Republicans with funding from the Party, chose not to ask the court that dismissed their claims to reconsider, allow them to amend, or both, or to appeal. Marty Connors, who chose not to put more resources into the Barnett fight, now serves on the Gustafson Plaintiffs' Litigation Management Committee and recruits plaintiffs in support of a second shot. The Montiel Plaintiffs were squarely presented with the invocation of partisan political considerations, but chose not to pick that fight. Even so, they carried their racial gerrymandering claim to

conclusion. Now, Mark Montiel represents a second set of challengers backed by a Foundation, who seek to pursue a claim that his earlier clients could have.

Those opportunities foregone tie into the concerns expressed by the three-judge court in *Robertson v. Bartels*. There, the court noted that, given the large number of plaintiffs with standing, public law claims have the potential to "assume immortality." 148 F. Supp. 2d at 450 (quoting *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F. 2d 731, 741 (9th Cir. 1984)). Moreover, a measure of preclusion is justified to deter "interested individuals from 'fence-sitting,' namely waiting for the outcome of the prior action." *Id*. (citing *Tyus*, 83 f. 3d at 4561. Allowing the small group of Republicans to recruit new plaintiffs to pursue claims that they could previously have pursued through other plaintiffs leaves the State Election Officials wondering whether these challenges will end if they prevail or whether new plaintiffs will be recruited to pursue new claims.

CONCLUSION

For the reasons stated above, this Court should enter judgment in favor of this State Election Officials and against the Gustafson Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of March, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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