

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, et al.,	)	(Three-judge court)
	)	
Defendants,	)	
	)	
SETH HAMMETT, LOWELL BARRON and	)	
HANK SANDERS,	)	
	)	
Defendants-Intervenors.	)	

**DEFENDANT-INTERVENOR HAMMETT'S TRIAL BRIEF  
ON THE ISSUE OF RES JUDICATA**

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Defendant-intervenor Seth Hammett, through undersigned counsel, pursuant to this Court’s order of January 18, 2006, Doc. 214, submits herein his brief supporting ground number 1. of his motion to dismiss, filed September 30, 2005, Doc. 121, namely: “The claims asserted in the amended complaint in this action have already been adjudicated in at least two prior cases, *Montiel v. Davis*, 215 F.Supp.2d 1279 (S.D. Ala. 2002) (3-judge court), and *Rice v. English*, 835 So.2d 157 (Ala. 2002), and are barred by *res judicata* and collateral estoppel.” This is the sole issue set for hearing and discovery in this Court’s order of November 22, 2005, Doc. 144, and Hammett has proceeded on the understanding that grounds 2. and 3. of his motion to dismiss, laches and failure to state a claim, are not the subject of the instant bench trial on the merits. Hammett reincorporates herein his prior briefs on this subject. Docs. 122, 133, 142.

## STATEMENT OF FACTS

All of the lawsuits challenging Alabama's House and Senate districts over the past decade have been prosecuted by three Republican lawyers in Alabama: Mark G. Montiel, Albert Jordan and Algert Agricola. These lawyers have worked with the same cadre of Republican activists planning and managing these lawsuits: former State Senator John Rice, State Senator Steve French, State Representative Chris Pringle, Alabama Republican Chairman Marty Connors and Alabama Republican Vice Chairman Jerry Lathan.

### **I. Redistricting Litigation In the 1990s**

On August 13, 1993, the Circuit Court of Montgomery County approved a consent decree adopting the post-1990 census Alabama Legislative redistricting plan. *Sinkfield v. Bennett*, civil action no. 93-689-PR (Aug. 13, 1993) (*cited in Rice v. Smith*, 988 F.Supp. 1437, 1438 n.3 (M.D. Ala. 1997) (3-judge court)). This state court consent decree was entered in an action brought by African-American voters when the Alabama Legislature failed to enact a redistricting statute. *Rice v. Smith*, 988 F.Supp. at 1438. Two legislative redistricting actions also had been filed in federal court, one by African Americans and the other by a group of Republicans. *Id.* n.2 (*citing Brooks v. Camp*, CA no. 92-T-364-N (M.D. Ala.), and *Peters v. Folsom*, CA no. 93-T- 124-N (M.D. Ala.)). These federal lawsuits were dismissed after the Alabama Supreme Court held that the consent decree had been a legitimate exercise of the state court's jurisdiction. *Rice v. Smith*, 988 F.Supp. at 1438 n. 3 (*citing Brooks v. Hobbie*, 631 So.2d 883 (Ala.1993)).

At the time the 1993 redistricting consent decree was entered, Mark Montiel was the only

Republican on the five-judge Alabama Court of Criminal Appeals. He had been appointed to that judgeship in 1991 by Governor Guy Hunt, the first Republican Governor of Alabama since Reconstruction.<sup>1</sup> On February 8, 1994, Judge Montiel moved to intervene as a party with two other Republican activists in an action brought by African Americans challenging under the Voting Rights Act the at-large method of electing judges on the Alabama Supreme Court, the Alabama Court of Civil Appeals and the Alabama Court of Criminal Appeals. *White v. Alabama*, 74 F.3d 1058, 1062 and n.11 (11<sup>th</sup> Cir. 1996). Judge Montiel was represented in the *White* action by Albert Jordan. *Id.* at 1059. Al Agricola represented Ralph Bradshaw, an African American opposed to the plaintiffs' position and aligned with the Republican intervenors, who also was allowed to intervene in the *White* case. *Id.* The district court certified Judge Montiel and his co-intervenors to represent a class "of all Alabama electors who are Republican and a subclass consisting of all Alabama electors who are Republican and are not African-American. . . ." *White v. Alabama*, 867 F.Supp. 1519, 1529 (M.D. Ala. 1994), *vacated and remanded*, 74 F.3d 1058 (11<sup>th</sup> Cir. 1996). Judge Montiel opposed the settlement proposed by the black plaintiffs and the state defendants and approved by the district court, because it retained at-large voting, which Montiel contended diluted the voting strength of Republicans. He asked the court to require all Alabama appellate judges to be elected from single-member districts. *White v. Alabama*, 74 F.3d at 1065. In a separate opinion, the district court dismissed Montiel's partisan vote dilution claim on grounds that it failed to satisfy the equal protection standards set out in *Davis v. Bandemer*,

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<sup>1</sup> Judge Montiel had been Governor Hunt's legal advisor before his appointment to the bench, and he recused himself from the Hunt ethics case. These facts are not in evidence, but the Court can take judicial notice of these basic biographical facts about Mr. Montiel, whose deposition, at his request, was not taken in the instant action. See also Doc. 231 Exh. 18 at 15.

478 U.S. 109 (1986). *White v. Alabama*, 867 F.Supp. 571 (M.D. Ala. 1994).

On appeal, Judge Montiel and his lawyer, Bert Jordan, did not pursue their partisan vote dilution claim. 74 F.3d at 1068 n.34. In the November 1994 general election, Montiel had run as a Republican for Place 3 on the Alabama Supreme Court against the Democratic incumbent, Ralph Cook,<sup>2</sup> and Montiel lost by a narrow margin, 551,042 to 539,947.<sup>3</sup> But the Republican candidate defeated the Democratic incumbent for Chief Justice of the Alabama Supreme Court, and two Republican judges were elected in at-large voting, one to the Court of Criminal Appeals and the other to the Court of Civil Appeals. Judge Montiel left office in January 1995 and entered private practice.<sup>4</sup>

In 1997 Mark Montiel filed in federal court his first lawsuit attacking Alabama's House and Senate districts. *Rice v. Smith*, 988 F.Supp. 1437 (M.D. Ala. 1997) (3-judge court). His clients were John Rice and his mother, Camilla Rice. John Rice had been elected to the Alabama Senate in 1986 as a Democrat, but in October 1988 he switched parties and became a

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<sup>2</sup> Justice Cook then was the sole African-American member of the Alabama Supreme Court. He had been appointed to replace Justice Oscar Adams, who retired in 1993. Justice Adams' elections in 1982 and 1988 and Justice Cook's election in 1994 are the only three occasions in Alabama history when an African American has been elected to a statewide office. Justice Cook was defeated by a white Republican when he and another African-American appointee, John England, stood for re-election in 2000.

<sup>3</sup> The election returns can be downloaded from the web site of the Alabama Secretary of State:  
<http://www.sos.state.al.us/downloads/dl3.cfm?trgturl=election/1994/94g-prec.exe&trgtfile=94g-prec.exe>.

<sup>4</sup> The district court noted, however, that "Judge Montiel, who was first appointed to the trial bench and then appointed to the appellate bench, is now eligible for retirement benefits for his years on the appellate bench without ever having won election to a judicial seat." *White v. Alabama*, 867 F.Supp. at 1536 (footnote omitted).

Republican. Doc. 231 Exh. 18 at 6-7. When Congressman Nichols died in December 1988, Rice won the special Republican primary to replace Nichols, but he lost to Democrat Glen Browder in the special general election. *Id.* at 7-8. John Rice was a good friend of Mark Montiel and had “stood behind” Judge Montiel in *White v. Alabama*. Doc. 231 Exh. 18 at 14. In their 1997 federal court action, Montiel and Rice asserted a statewide one-person, one-vote claim against the minor deviations in the House and Senate plans, a statewide vote dilution claim on behalf of white voters, and district-specific racial gerrymander claims under the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases. *Rice v. Smith*, 988 F.Supp. at 1438. Although Montiel and Rice were representing the interests of Republicans, perhaps because of the short shrift Montiel’s partisan discrimination claims had received in *White v. Alabama*, their legal theories were based on racial discrimination. Even the statewide one-person, one-vote claim alleged that “the defendants intentionally underpopulated the majority-black districts and overpopulated the majority-white districts in the current redistricting plan for the purpose of diluting white voting strength in violation of the equal protection clause of the fourteenth amendment.” *Thompson v. Smith*, 52 F.Supp.2d 1364, 1371 (M.D. Ala. 1999) (3-judge court).

Because the challenged plans were the product of the consent decree over which the state court had retained jurisdiction, the federal district court directed Rice to move to intervene in the state court action, *Sinkfield v. Bennett*. *Thompson v. Smith*, 52 F.Supp.2d 1364, 1366 (M.D. Ala. 1999) (3-judge court). Rice did intervene in the state court case, but before the state court could act, Mr. Montiel added several of his friends and relatives, including his brother, Ricardo Montiel, as additional plaintiffs (the Thompson plaintiffs) in the federal court action. *Thompson v. Smith*, 52 F.Supp.2d at 1366-67. Even though both the federal and state courts invited the

Thompson plaintiffs to join John and Camilla Rice as intervenors in the state court action, Mr. Montiel refused, leaving the Thompson plaintiffs under a stay order in federal court. *Id.* at 1367.

After a trial on the merits, the state court rejected all of Rice's claims against the House and Senate plans. Mr. Montiel simultaneously filed an appeal to the Alabama Supreme Court on behalf of Rice and returned to ask the federal court to hear the merits of the claims of both the Rice plaintiffs and the added Thompson plaintiffs. *Thompson v. Smith*, 52 F.Supp.2d at 1367. The three-judge federal court held that the Rices' claims all were barred by *res judicata*, *Rice v. Smith*, 988 F.Supp. at 1440, but it stayed further proceedings on the Thompson plaintiffs' claims pending review of the state court decision by the Alabama Supreme Court. *Id.* On December 18, 1998, the Alabama Supreme Court dismissed the Rices' appeal as moot. *Rice v. Sinkfield*, 732 So.2d 993 (Ala.1998) (per curiam). The federal court then held that the Thompson plaintiffs' statewide one-person, one-vote claims were barred by virtual representation *res judicata* principles, citing cases we have relied on in the instant action. *Thompson v. Smith*, 52 F.Supp.2d at 1369-71. But it allowed the Thompson plaintiffs' district-specific *Shaw* claims to go forward, on grounds that John and Camilla Rice did not reside in those districts and thus lacked standing to assert them. *Id.* at 1371-72.

After a trial on the merits, the three-judge federal court, in a split decision, held that several of the House and Senate districts challenged by the Thompson plaintiffs violated the Fourteenth Amendment racial gerrymander principles of *Shaw v. Reno*. *Kelley v. Bennett*, 96 F.Supp.2d 1301 (M.D. Ala. 2000) (3-judge court). The Sinkfield defendants and the State appealed, and it was at this point that Bert Jordan and Al Agricola (who now were members of the same law firm) entered the litigation as co-counsel with Mr. Montiel. See Appellees' motion

to dismiss or to affirm, 2000 WL 33976607. However, on November 27, 2000, in a 9-0 decision, the Supreme Court summarily reversed on standing grounds. *Sinkfield v. Kelley*, 531 U.S. 28 (2000). The appellate mandate was filed in the district court on January 3, 2001, and on January 4 a final order of dismissal was entered. 97-715 Doc. 381 (M.D. Ala.).

## **II. The 2001 Redistricting Lawsuits**

Messrs. Montiel, Jordan and Agricola, while still battling over the taxation of costs against their clients in federal court, wasted little time turning their attention to the upcoming post-2000 census redistricting situation. On January 24, 2001, Jordan and Agricola joined Montiel as additional counsel for John Rice in the state court case, *Sinkfield v. Bennett*, which had retained jurisdiction over the 1993 consent decree. They petitioned the state court to vacate the consent decree, in light of the impending need to redistrict the Legislature with 2000 census data, and to relinquish the jurisdiction it had retained to oversee future efforts by the Legislature to redraw the House and Senate districts. Doc. 229 Exh. 39, Exh. 3. However, Montgomery County Circuit Judge Price denied Rice's motion, and Montiel, Jordan and Agricola filed an appeal to the Alabama Supreme Court. Doc. 229, Exh. 39, Exh. 3 at 6.

In March 2001 the 2000 census data for Alabama was released. Doc. 150 Exh. 1. With elections for all House and Senate seats coming up in 2002, the Legislature needed to enact redistricting statutes in 2001. But the 2001 Regular Session, which began on February 6, ended on May 21<sup>5</sup> without passage of any redistricting bills. However, there was no doubt that the Governor would call one or more special sessions to address redrawing the districts, not only for

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<sup>5</sup> See <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp?SESSION=1016>.

the Legislature but for Congress and the State Board of Education. Doc. 150 Exh. 2.

Nevertheless, on June 15, 2001, after State Republican Chairman, Marty Connors, Senator Steve French and Representative Chris Pringle consulted each other, Republicans filed *Barnett v. Alabama*, CA No. 1:01-cv-433-BH-S (S.D. Ala.). Doc. 225 Exh. 31 at 48-49. The plaintiffs were Les Barnett, a member of the State Republican Executive Committee, Doc. 223 Exh. 23 at 18-19, Terry Lathan, a member of the Mobile County Republican Executive Committee, Doc. 223 Exh. 24 at 10 (and wife of Jerry Lathan, Vice Chairman for the First and Second Congressional Districts in the State Republican Committee, Doc. 225 Exh. 32 at 12-13), and Percy Johnson, an African American who testified he was asked to be a plaintiff because he is one of “the leading African American Republicans in Mobile.” Doc. 223 Exh. 25 at 19. Johnson was recruited to be a plaintiff by Representative Chris Pringle. Doc. 225 Exh. 31 at 46. The plaintiffs’ lawyers on the original *Barnett* complaint were Benjamin Ginsburg and Matthew Stowe of the Patton Boggs firm in Washington, DC, and Paul Wesch of Mobile. O1-433 Doc. 1. Ginsburg was a “well-known nationally respected Republican lawyer” who specialized in redistricting cases. Doc. 224 Exh. 27 at 22-23. He and Stowe had been retained by Republican Congressman Sonny Callahan. Doc. 225 Exh. 31 at 50. Wesch was a former Chairman of the Mobile County Republican Executive Committee and had been the lead plaintiff in the post-1990 census Congressional redistricting lawsuit.<sup>6</sup> Doc. 225 Exh. 33 at 9-10. The *Barnett* complaint alleged that the Legislature was unlikely to redraw its own districts in time for the 2002 elections and asked this Court to assume jurisdiction of the redistricting process and to re-draw the

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<sup>6</sup> *Wesch v. Hunt*, 785 F.Supp. 1491 (S.D. Ala.) (3-judge court), *aff’d summarily, sub nom. Camp v. Wesch*, 502 U.S. 902 (1992).

districts itself, if necessary. 01-433 Doc. 1 at 2.

The *Barnett* lawsuit was financed by the State Republican Executive Committee and perhaps others. Doc. 224 Exh. 27 at 22-25; Doc. 225 Exh. 31 at 90. Marty Connors, who became State Republican Chairman in January 2001, testified that Republicans assumed the Legislature would be unable to agree on redistricting plans and that a court would have to draw them. Doc. 224 Exh. 27 at 20-21.<sup>7</sup> When Connors took office, he discovered that the State Executive Committee had already paid Republican consultants in Washington, Randy Henneman and David Winston, \$60,000 to \$70,000. Doc. 224 Exh. 27 at 27-28. The consultants had been working with Republican leaders on the Legislature's Joint Reapportionment Committee, Senator Steve French of Birmingham, who was co-chair of the committee, and Representative Chris Pringle of Mobile. Doc. 225 Exh. 31 at 38. Connors left Republican redistricting strategy decisions in the Legislature to French and Pringle and did not get actively involved in the legislative process himself. Doc. 224 Exh. 27 at 15-18; Doc. 225 Exh. 31 at 41. At the request of "the legislators [who] were really sort of driving this," Connors paid Bert Jordan and Al Agricola \$75,000 for work in the *Barnett* case.<sup>8</sup> Doc. 224 Exh. 27 at 24-25; Doc. 224 Exh. 28 at 28-29; Doc. 227 Exh. 35 at Exh. 6.

Four days later, on June 19, 2001, the Governor called a special session to address

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<sup>7</sup> Connors told the press: "Judging from the history of the Alabama legislature, both its inability to make decisions on this and/or its political proclivity, it tells us the smart thing is to make sure we have some federal supervision of this whole process." Doc. 224 Exh. 27 at 34 (quoting Doc. 150 Exh. 7).

<sup>8</sup> Jordan and Agricola did not file an appearance in *Barnett* until September 20, 2001. 01-433 Doc. 16. But they signed an engagement letter with Marty Connors on July 27, 2001. Doc. 224 Exh. 26 at 1.

redistricting of the Legislature to begin on Monday, June 25. Doc. 150 Exh. 5. Two days after that, on June 21, 2001, Mark Montiel filed his own federal lawsuit alleging failure of the Legislature to redraw the districts not only for the Legislature but for Congress and the State Board of Education. *Montiel v. Davis*, CA No. 1:01-cv-447-BH-S (S.D. Ala.). His father, Gonzalo Fitch Montiel, was the sole plaintiff in the original complaint. 01-447 Doc. 1. Mark Montiel asked Connors several times for support, but Connors refused based on financial considerations: “I mean it’s the old -- it’s the old guns or butter argument,” said Connors. “Do you buy lawyers, or do you buy direct mail? I chose direct mail. You know, it’s just that simple.” Doc. 224 Exh. 27 at 32-33. Some time later, after Montiel had phoned “every month or so,” Connors wrote him a check for \$1,500, because Montiel was “a guy who spent months and months working on our behalf for various things. . . .” Doc. 224 Exh. 27 at 47, 96, 106.

Before the special session began on June 25, 2001, it became apparent that the Democratic majorities in the House and Senate intended to pass redistricting plans. Doc. 150 Exh. 8. The Republicans in the Legislature responded, on the advice of their consultant, David Winston, and an African-American lawyer and banker, Donald Watkins, with a strategy that they hoped would get the statutory plans struck down in court. Doc. 224 Exh. 29 at 40-41, 45; Doc. 225 Exh. 31 at 10, 37. “This train is on the fast track for another lawsuit,” Representative Pringle told the press. Doc. 225 Exh. 31 at 36 (quoting Doc. 150 Exh. 4). The Republican strategy involved (1) attacking the minor population deviations under plus or minus five percent as a systematic design to overpopulate suburban Republican districts and to underpopulate urban and rural majority-black and Democratic districts and (2) attacking as unlawful retrogression the reduction of the size of black majorities to shore up the districts of white Democrats, while

demonstrating that even more majority-black districts could be created with zero-deviation plans. Doc. 224 Exh. 29 at 30, 38-39; Doc. 150 Exhs. 2, 8, 10, 11; Doc. 225 Exh. 31 at 40, 70-76; Doc. 224 Exh. 27 at 37-41 (“What's good for blacks in Alabama with regards to reapportionment is also good for Republicans.”).

New legislators believe the Democratic majority in both chambers will try to lessen black populations in majority black districts to shore up white Democrats elsewhere. Republicans say the tactic would violate civil rights laws and are nearly guaranteed to challenge it in court.

Doc. 224 Exh. 29 at 45 (*quoting* Doc. 150 Exh. 11). Senator French and Representative Pringle had met with Marty Connors, the State Republican Chairman, to “talk[] about how we could hold the Republicans together to try and force a one man, one vote, zero deviation plan, or as close to a zero deviation plan as we could through legislature.” Doc. 225 Exh. 31 at 40. They also were getting “feedback” from Mark Montiel, who attended most of the public meetings of the Joint Reapportionment Committee. Doc. 224 Exh. 29 at 48-49; Doc. 225 Exh. 31 at 55. Winston drew zero-deviation plans for the House and Senate that were introduced by Representative Pringle and Senator French. Doc. 225 Exh. 31 at 80-81; Doc. 224 Exh. 29 at 52-56; Doc. 150 Exhs. 14, 16. The French and Pringle plans avoided reducing the black percentage in any of the majority-black districts, and the Senate plan created a ninth majority-black district. Doc. 225 Exh. 31 at 80-84; Doc. 224 Exh. 29 at 51-52.

Acts 2001-727 (the Senate plan) and 2001-729 (the House plan) passed the Legislature on July 2 and were signed by the Governor on July 3, 2001.<sup>9</sup> The Alabama Attorney General, Bill Pryor, representing the defendant election officials in both *Barnett v. Alabama* and *Montiel v.*

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<sup>9</sup> See <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp?SESSION=1019> and <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp?SESSION=1019>.

*Davis*, on July 12, 2001, promptly moved to dismiss the complaints in both cases on grounds that the Legislature had successfully enacted redistricting statutes, which were being submitted for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. 01-433 Doc. 5; 01-447 Doc. 13. This Court, acting through Judge Hand as a single judge, issued an order on July 18 in both cases requiring the *Barnett* and *Montiel* plaintiffs to respond by August 3 to the Attorney General's motions to dismiss. 01-433 Doc. 7; 01-447 Doc. 16. These developments in federal court presented the legal team of Montiel, Jordan and Agricola with a problem, because apparently they had decided that their best chance for striking down the 2001 House and Senate plans was somehow to get the Alabama Supreme Court to accept original jurisdiction to review them first.<sup>10</sup> Their appeal from the state court's refusal to relinquish jurisdiction over the redistricting process was still pending in the Alabama Supreme Court. Meanwhile, on July 2, 2001, the same day the House and Senate redistricting statutes passed the Legislature, another lawsuit was filed in the Circuit Court of Montgomery County, this time by lawyers representing Democratic Party interests. *Webb v. Alabama*, assigned to Judge Hardwick, sought a declaratory judgment that the new House and Senate plans were constitutional. Doc. 229 Exh. 39 at Exh. 4.

On August 3, 2001, in response to Judge Hand's July 18 order, Mark Montiel filed a first amendment to his complaint in *Montiel v. Davis* that squarely challenged the constitutionality of the new, statutory House and Senate plans.<sup>11</sup> 01-447 Doc. 18. On the same day, the *Barnett*

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<sup>10</sup> By 2001 eight of the nine justices on the Supreme Court of Alabama had been elected as Republicans.

<sup>11</sup> Paragraph 6 of the first amendment to the *Montiel v. Davis* complaint alleged that Acts 2001-727 and 2001-729, if precleared under Section 5 of the Voting Rights Act, violate the United States Constitution and Section 2 of the Voting

plaintiffs, still represented by the D.C. lawyers, Ginsberg and Stowe (even though Jordan and Agricola had been retained on July 27), filed a response to Judge Hand's order and an amended complaint which declined directly to attack Acts 2001-727 and 2001-729, on the ground that the statutes were not yet enforceable under § 5 of the Voting Rights Act and on the additional ground that the Alabama Supreme Court was now exercising jurisdiction over the redistricting process in the appeal from Judge Price's refusal to vacate the 1993 consent decree in *Sinkfield*. 01-433 Docs. 8 and 10. The Barnett plaintiffs asked Judge Hand to request a three-judge court to create court-ordered redistricting plans if no enforceable state law plan was in place in time for the 2002 election cycle. *Id.*

To further complicate matters, on August 14, 2001, Mark Montiel filed yet another state court lawsuit. *Rice v. English*, CA No. 2001-2311 (Cir. Ct. of Montgomery County), challenged only the Senate plan, alleging that its districts were malapportioned in violation of the Alabama Constitution. Doc. 201 Exh. 69A. John Rice, undertaking his third redistricting lawsuit, was one of the plaintiffs. The other two plaintiffs were William McCall Harris, a former State Republican Executive Director and his mother, Patricia Wood. Doc. 225 Exh. 31 at 117; Doc. 224 Exh. 30 at 49-50. Bert Jordan and Al Agricola did not join Mark Montiel as counsel. In his deposition, Mr. Jordan refused to say why he did not appear in *Rice v. English*, citing attorney-client privilege. Doc. 224 Exh. 28 at 82.

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Rights Act of 1965, 42 U.S.C. § 1973 (c) by creating malapportioned State Senate and House districts with deviations from equal population that are not based on legitimate considerations incident to the effectuation of a rational state policy but, instead, are based on a policy of racial maximization in the creation of the State Senate and House districts.

01-447 Doc. 18 at ¶ 6.

However, on September 20, 2001, Jordan and Agricola did file an appearance in this Court as additional counsel for the *Barnett* plaintiffs.<sup>12</sup> 01-433 Doc. 16. On September 25, Judge Hand, still acting as a single judge, held a joint hearing in *Barnett v. Alabama* and *Montiel v. Davis*. Doc. 232 Exh. 71. Mr. Jordan told Judge Hand about the appeal pending in the Alabama Supreme Court and argued that action by a three-judge federal court would not be necessary until the statutory plans had been precleared and the Alabama Supreme had resolved questions about whether the new plans complied with the state constitution. *Id.* at 9-10. Then Mr. Jordan went one step further and suggested that Judge Hand certify these state law questions to the Alabama Supreme Court as “one way to help the process along. . . .” *Id.* at 15.

[T]he Alabama Supreme Court is sitting there right now with the questions of State legislative districting. The Alabama Supreme Court has also been notified and I don't think the record in this case yet shows it but the Alabama Supreme Court has also been notified of the effort to obtain preclearance of the new legislative plans and there has been a little bit of debate in the Alabama Supreme Court on the question of whether Section 200 of the Alabama Constitution is violated. So a way to expeditiously involve the State Court in the process of resolving questions and seeing if you need to do anything else, in other words, to see if this case is moot, is to issue a certified question to them.

*Id.* at 16. When his turn came, Mr. Montiel endorsed Jordan's suggestion that the federal court certify the redistricting issues to the Alabama Supreme Court. *Id.* at 48.

A few weeks later, on October 9, 2001, Montiel, Jordan and Agricola, acting together as co-counsel for John Rice, filed a petition for prohibition, mandamus or other extraordinary writ in the Alabama Supreme Court, asking that court to take charge of the redistricting process pending in three state court cases, *Sinkfield*, *Webb* and *Rice v. English*. *Ex parte Rice*, No.

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<sup>12</sup> Mr. Jordan testified in his deposition that he had been engaged to represent the *Barnett* plaintiffs “substantially before July 27<sup>th</sup>.” Doc. 224 Exh. 28 at 151.

1010125 (Ala. S.Ct.), Doc. 229 Exh. 39 at Exh. 3. *The Ex parte Rice* petition referred to the *Barnett* case (but not to *Montiel v. Davis*) pending in this Court:

This question also is part of a proceeding in the United States District Court for the Southern District of Alabama in the case of *Barnett v. Alabama*, No. 01-CV-433-WBH (3-judge court). The federal court has been urged to issue certified questions to this Court, about both this Court's retained jurisdiction and the validity of the Senate districts under § 200 of the Alabama Constitution. As of this writing, no trial has been set in the federal court. The multiplicity of proceedings about the 2001 state legislative districts makes an assertion of this Court's supervisory power exceptionally warranted, especially given the role of the pending *Rice* appeal in determining the proper forum for redistricting disputes.

*Id.* at 10-11.

On October 1, 2001, the same three-judge court was designated to sit in *Barnett v. Alabama* and *Montiel v. Davis*. 01-433 Doc. 19; 01-447 Doc. 30. This Court did not grant the request of Jordan and Montiel to certify questions to the Alabama Supreme Court. Instead, on October 12, this Court simultaneously ordered the parties in both cases to file briefs by October 29 addressing several specific questions set out in the orders, including a question about the federal court's obligation to defer to the state courts. 01-433 Doc. 22; 01-447 Doc. 32. However, before the briefs came due, on October 18 and 22, the Alabama Attorney General filed notice in both cases that the Senate plan, Act 2001-727, had been precleared by the Department of Justice. 01-433 Doc. 23; 01-447 Doc. 35. Accordingly, on October 23, the parties were further ordered to advise this Court in their October 29 briefs what effect preclearance of the Senate plan and "possible preclearance" of the House plan would have on the pleadings in both cases. 01-433 Doc. 24; 01-447 Doc. 33.

Jordan and Montiel filed their responses to this Court's questions on October 29, 2001. 01-433 Doc. 26; 01-447 Doc. 39. In *Barnett*, Jordan and Agricola argued that DOJ preclearance

of the plans changed nothing, so far as what procedure this Court should follow, and they renewed their request for certified questions to the Alabama Supreme Court. They urged this Court to ignore *Webb v. Alabama* and *Rice v. English*, the two cases pending in a state trial court, suggesting that *Webb* was a non-adversarial proceeding “that seeks ‘validation’ of the new districts,” 01-433 Doc. 26 at 11, and that *Rice v. English* had not been set for trial. *Id.* at 11 n.5. They informed this Court that on October 19 the Alabama Supreme Court had rejected the appeal of John Rice from Judge Price’s refusal to relinquish jurisdiction over the redistricting process. *Id.* This is the appeal in which Montiel, Jordan and Agricola were co-counsel, and they advised this Court that they had filed an application for rehearing<sup>13</sup> that essentially asked the Alabama Supreme Court to accept original jurisdiction over their constitutional claims against both the House and Senate plans. *Id.*

Rice does not now question the retained jurisdiction, but instead, because of the passage of time during the pendency of appeal, urges the Alabama Supreme Court to conduct proceedings using that retained jurisdiction. Rice asks the Supreme Court to bar conflicting proceedings such as the *Webb* validation “trial,” and to determine if the 2001 redistricting acts violate the Alabama Constitution.

*Id.* at 12. Nevertheless, Jordan and Agricola wanted this Court to retain jurisdiction of the *Barnett* action and to stay further proceedings pending answers to certified questions:

As a procedure for honoring the federalist principles of the *Grove* case that Article III expects this Court to honor, in a setting where Congress lacks trust in state government, as evidenced by § 5 of the Voting Rights Act, we suggest certified questions be issued to the Alabama Supreme Court. It leaves this Court very much a part of the redistricting process, as its basic jurisdictional authorization requires. Also, it provides assurance that the plaintiffs will receive timely consideration of their claims here in light of the meaning of state law, as well as a coercive order if they are entitled to it, without necessarily having the

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<sup>13</sup> It appears from the report of *Rice v. Bennett*, 839 So.2d 685 (Ala. 2001), that rehearing had been denied by October 19, 2001.

obstacle of USAG approval.

Plaintiffs therefore suggest the following three certified questions:

1) Does Act No. 2001-727 violate the provision of § 200 of the Alabama Constitution which requires that Senate districts "shall be as nearly equal to other in the number of inhabitants as may be"?

2) Do §§ 199 and 200 of the Alabama Constitution, considered together in light of their traditional reliance on county boundaries to be district boundaries, require that House districts be wholly contained within the boundaries of a Senate district?

3) Has the last date passed by which an Alabama state court can order into place, using the full protections of judicial process, any needed remedy for defects in new redistricting statutes, and not disrupt the candidate qualifying deadline in early April 2002? If not, please advise what that date is.

We suggest a request for a response within forty days. The Court also should request to receive notice, within ten days, if the Alabama Supreme Court declines to provide a response. Pending a response, the parties should prepare for appropriate proceedings in this Court.

*Id.* at 14-15 (citation omitted). Jordan and Agricola concluded their brief by pointing to some federal claims they would make against the House and Senate plans once the Alabama Supreme Court (or this Court) had resolved the state constitutional questions they wanted certified:

There is no bar to subsequent litigation related to the change approved or bar to a federal court from providing relief for some other conditions found to be illegal. This subsequent litigation obviously could include state law. In Plaintiffs' view, a proper construction of § 200 could result in a redistricting plan that creates no fewer majority-minority districts, divides fewer counties, and provides for districts more "nearly equal to each other in the number of inhabitants . . . ."

In addition, subsequent litigation can review for violations of the Voting Rights Act. As an example, the failure to create an election district where minority voters act in a politically cohesive fashion in an area that is bounded in reasonably compact fashion, yet encounters racial block voting by non-minority voters, identifies conditions that may violate § 2 of the Voting Rights Act, 42 U.S.C. § 1973. Such challenges are permitted, even though the USAG has given his approval under § 5.

*Id.* at 17.

Mark Montiel's brief filed on October 29, 2001, in *Montiel v. Davis*, 01-447 Doc. 39, took positions similar to those of Jordan and Agricola in *Barnett*. It described the "muddled and

confusing” proceedings in the state courts, but said Mr. Montiel’s father, “Plaintiff Gonzalo Fitch Montiel, is not a party to any of these state court proceedings and the state court lawsuits will not resolve his federal claims.” *Id.* at 8. Mr. Montiel did not disclose that he was co-counsel with the *Barnett* lawyers in the mandamus proceeding still pending in the Alabama Supreme Court. He reiterated his support of Jordan’s request for certification of state law questions to the Alabama Supreme Court:

Regarding the Plaintiff’s claims involving his State Legislative districts, this Court should:

- (1) deny the State Defendants’ Motion to Dismiss and requests to abstain;
- (2) certify questions to the Alabama Supreme Court regarding novel and unsettled questions of state law involving Acts 2001-727 and 2001-729. That certification procedure will resolve specific questions of state law to avoid “premature adjudication of constitutional questions” involved in this redistricting litigation;
- (3) issue a scheduling order, with consideration of the time requirements for response to the certified questions. The Court’s scheduling order should allow the plaintiff an opportunity to resolve his federal claims and remedies in time for the 2002 elections to proceed as scheduled.

*Id.* at 11 (citation omitted). Like Jordan and Agricola, Montiel urged this Court to retain jurisdiction, anticipating that the Alabama Supreme Court would rule that the House and Senate plans violate the state constitution, but would leave insufficient time for either the legislative or judicial branches of state government to draft and get § 5 preclearance of a new plan. In the end, they expected this Court to order new House and Senate districts to be used in the 2002 elections. *Id.* at 16.

On November 7, 2001, reply briefs were filed by Mark Montiel in *Montiel v. Davis* and by Bert Jordan and Al Agricola in *Barnett v. Alabama*. 01-433 Doc. 36; 01-447 Doc. 49. They maintained their position that this Court should certify questions to the Alabama Supreme Court,

while retaining jurisdiction to draw new districts in time for the 2002 elections. However, unlike the *Montiel* briefs, which supported the allegations in the *Montiel v. Davis* amended complaint squarely challenging Acts 2001-727 and 2001-729 on both state and federal grounds, the reply brief in *Barnett* continued to insist that, until the Alabama Supreme Court had decided the state law issues, it would be premature to amend the *Barnett* complaint to assert claims against the new statutory House and Senate districts. In the section of their reply brief discussing standing, Jordan and Agricola waffled somewhat, arguing that language in their first amended complaint “reaches both the past practice and the new statutes.” 01-433 Doc. 36 at 6-7. They went on for several more pages pointing out how the minor population deviations in the new statutory plans arguably violated the U.S. Constitution, citing cases like *Gray v. Sanders*, 372 U.S. 368 (1963), *White v. Register*, 412 U.S. 755 (1973), and *Marylanders for Fair Representation v. Schaefer*, 849 U.S. 1022 (D. Md. 1994) (3-judge court). *Id.* at 7-10. They even referred to a plan drawn by a demographer named Domnanovich, which Jordan and Agricola had filed the day before, contending it demonstrated that smaller deviations which still protected majority-black districts were possible. *Id.* at 11. Jordan and Agricola concluded their reply brief by arguing that “plaintiffs should receive a period of time to amend to allow for any additional claims they may wish to assert, up to November 21, as proposed in the Report of the Parties’ Planning Meeting.” *Id.* at 14-15.

However, this Court apparently had run out of patience with the *Barnett* plaintiffs. On the same day the *Barnett* reply brief was filed, November 7, 2001, the Alabama Attorney General filed notice that the House plan had been precleared by the Justice Department, 01-433 Doc. 33, and the *Barnett* case was dismissed. “Plaintiffs have presented no specific challenge to the

validity of [the 2001] statutes. It is therefore ORDERED that this action be and is hereby DISMISSED as MOOT.” 01-433 Doc. 40 at 2. The *Barnett* plaintiffs did not file a motion to reconsider and for leave to file an amended complaint challenging Acts 2001-727 and 2001-729, nor did they appeal the dismissal. When Mr. Jordan was asked at his deposition why he did not amend the *Barnett* complaint he invoked privilege and refused to answer. Here is his answer:

A. . . . The reply that was filed on the 7th that focuses on the language in the first-amended complaint where it is currently drawn, the phrasing of the reply says, “The phrasing of the first-amended complaint reaches both the past practice and the new statutes. In either event, the core violation of law remains, and state policy is implicated directly.” And I think the court didn’t accept that view and said that there was not a specific challenge to the new statutes.

Q. If the court said that, if the court did not accept your view, why did you not, after having represented to the court that you intended to challenge the new statutes, why did you not at that point amend to make perfectly clear, “Court, I’m sorry if that language doesn’t satisfy you. How about this language?” Why didn’t you do that after the court, you say, rejected your representation that you had challenged under equal protection grounds --

A. Well, I think it would be privileged as to why I did not.

Q. Okay. So you decline to answer that question, then?

A. I think so.

Doc. 224 Exh. 28 at 69-70. However, Marty Connors, the State Republican Chairman who paid Jordan and Agricola and who talked to them during the lawsuit “every once in a while,” Doc. 224 Exh. 27 at 43-44, while cautioned by his lawyer not to reveal the contents of attorney-client conversations, testified that he was unwilling to pay further legal fees:

Q. Did you ever consider amending the *Barnett* lawsuit to challenge the House and Senate districts that did pass?

MR. ALLEN: I don’t think that’s objectionable. You can answer that question. . . .

A. You know, I --

MR. ALLEN: Don't go blurting out conversations when you answer. Just answer the question.

A. No. No.

BY MR. BLACKSHER:

Q. You did not? Well, why not?

A. I cannot stress to you how focused I was on operational politics and not litigation. This 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.

Q. Okay. So it was a fiscal decision, a financial --

A. Yeah. Fiscal decision. Yes.

Doc. 224 Exh. 27 at 64-65. Senator French, explaining why he later turned to Mark Montiel to handle the *Gustafson* lawsuit, was very upset with both the *Barnett* lawyers and Marty Connors:

A. There are three -- basically there are three lawyers on the Republican side that do redistricting cases. One is Mark Montiel, one is Al Agricola, one is Bert Jordan. Bert had represented us in the case down in Mobile, and I frankly thought he had done a poor job. And I don't know Al as well as I know Mark.

Q. You thought he did a -- Bert Jordan did a poor job representing us in which lawsuit? The Barnett case?

A. I guess the federal case, I guess, down in Mobile.

Q. What was poor about the job that Jordan did?

A. I just didn't think that we'd gotten a whole lot of bang out of our buck.

Q. Well, you're talking about the money that was paid to Jordan and Agricola?

A. Uh-huh (in the affirmative).

Q. Do you know anyone who paid them besides the state Republican party?

A. No, sir.

Q. So you're talking about you didn't get a bang out of the buck that the Republican party paid them?

A. Correct.

Q. And what was the bang that you were hoping to get that you didn't get?

A. Well, if I recall that case correctly, we basically got dismissed before even getting to first base. And I certainly thought that we could have and should have gotten farther in that case than we did.

Q. Did you want Jordan and Agricola and the other lawyers in that Barnett case to continue with the lawsuit by challenging the plans that passed the legislature?

A. I would have liked that. I had a disagreement with Marty Connors because in my opinion Marty pulled the plug as well. I wasn't real happy with the way Marty handled the deal. So I would have preferred that we be more aggressive. I frankly think that there is a lot of similarities between Alabama and Georgia, and Georgia ended up being with the Larios Decision the law of the land

as the Courts are going to hear it, I guess. And I still believe that we could have -- that could have happened in Alabama if we had been more aggressive and had more resources put to the case.

Q. How did Marty Connors pull the plug?

A. He basically threw that little bit of money at a fairly significant legal challenge and then washed his hands of it and that was all he was going to do and that's all he did.

Q. Did the lawyers want more money to continue? Jordan, Agricola?

A. I'm sure if lawyers are going to continue they are going to want more money. So I would have thought that they would have continued the case and been a little bit more aggressive perhaps with their strategy if they had an indication that they could have sustained the fight.

Doc. 224 Exh. 29 at 91-94. Representative Pringle was under the impression that the Barnett plaintiffs actually were challenging the plans that passed the Legislature in 2001. Doc. 225 Exh. 31 at 109-10. As noted above, Bert Jordan thought his *Barnett* complaint was worded broadly enough to “reach[] both the past practice and the new statutes’ [quoting his brief], . . . [a]nd I think the court didn’t accept that view and said that there was not a specific challenge to the new statutes.” Doc. 224 Exh. 28 at 69. In other words, by refusing to amend his complaint, Jordan consciously abandoned claims against the 2001 House and Senate plans he thought he had already made.

The withdrawal of the State Chairman’s financial support for *Barnett* and the Alabama Supreme Court’s order on November 8 denying the *Ex parte Rice* mandamus petition, Doc. 232 Exh. 72, left Mark Montiel to soldier on alone with his claims against Acts 2001-727 and 2001-729 in *Montiel v. Davis* and *Rice v. English*. This Court promptly, on November 8, 2001, denied the State Attorney General’s motion to dismiss the *Montiel* complaint on standing grounds, based on Mr. Montiel’s clarification of the nature of his claims against the House and Senate districts. 01-447 Doc. 53. Instead of making district-specific racial gerrymandering claims, as he had done

in the *Sinkfield* case, Montiel attacked the new plans solely on statewide one-person, one-vote grounds, alleging that the minor populations had been manipulated to maximize black voting strength. *Id.* at 2. This Court gave Montiel until November 26 further to amend his complaint. *Id.* at 3.

Montiel's motion to file a second amended complaint, filed on November 26, 2001, 01-447 Doc. 59, was denied on December 17, because it still contained allegations relating to the Congressional districts, which this Court had severed and transferred to the Middle District, and to the State Board of Education districts, which had been severed and assigned to Judge Hand as a single judge. 01-447 Doc. 61. Thereafter, on December 21, Montiel filed his third amended complaint. 01-447 Doc. 63. Now Mr. Montiel's father, Gonzalo Montiel, had been joined by five other plaintiffs, including Mark Montiel's old pal, John Rice and his mother, Camilla Rice. John Rice was still one of Montiel's plaintiffs in the pending state court case, *Rice v. English*. The other plaintiffs were all active Republicans: Sheldon Day, the Mayor of Thomasville, John Lang, a Tuscaloosa rancher and business man, and Bobby G. Humphryes, a Republican member of the House representing a Jefferson County district. Doc. 231 Exh. 22 at 8; Doc. 231 Exh. 20 at 9; Doc. 231 Exh. 21 at 11-12.

John Rice tried to rally support from the Republican establishment for his two lawsuits, but he was unsuccessful. He talked to twenty or thirty different Republican legislators, but they were more concerned about their incumbency interests and declined either to contribute to Rice's litigation fund from their campaign funds or to ask their financial supporters to contribute. Doc. 231 Exh. 18 at 52-56. Many Republican and Democratic legislators had formed coalitions, and "it would be real bad if you and I were suitemates, if you were a Democrat and I a Republican

and you find out I was donating out of my campaign fund to get you beat.” Doc. 231 Exh. 18 at 54-55. Rice thought the State Republican Party officials cared about capturing a Republican majority in the Legislature but they “neither had the money nor the organization nor the perceptual skill to do it.” Doc. 231 Exh. 18 at 51-52. Mr. Rice emphasized that “Republicans and the party are two different things.”<sup>14</sup> Doc. 231 Exh. 18 at 52. Mr. Montiel never told John Rice that he was constantly lobbying Marty Connors, the Republican Chairman, for financial support. Doc. 231 Exh. 18 at 59-60.

Senator French and Representative Pringle, through their consultant, David Winston, wrote letters to the Department of Justice objecting to preclearance of Acts 2001-727 and 2001-729. Doc. 225 Exh. 31 at 9, 96-98 and Doc. 230 Exh. 43 at Exh. 2. They also cooperated with Mark Montiel by providing affidavits describing the circumstances in the Legislature leading to passage of Acts 2001-727 and 2001-729, which were filed in both *Montiel v. Davis* and *Rice v. English*. Doc. 224 Exh. 30 at 28, 61, 76-77; Doc. 225 Exh. 31 at 110-14; 01-447 Docs. 96 and 97; Doc. 201 Exh. 69B at 62. Senator French and Representative Mark Gaines, who at the time was House Minority Leader, also filed amicus briefs in the *Rice v. English* appeal in support of the plaintiffs. Doc. 224 Exh. 30 at 61, 76-77. Neither Senator French nor John Rice were much

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<sup>14</sup> Marty Connors made the same point when he explained what he meant by the “generic” Republican Party: “That big blob out there which may or may not represent the Republican Party.” Doc. 224 Exh. 27 at 52-53. Connors’ successor, Twinkle Andress Cavanaugh, testified that in her role as State Chair she cannot speak for other Republicans, only for her employees. Doc. 224 Exh. 26 at 54. Plaintiff Elaine Little explained that “RINO” means a “Republican in name only,” a term that religious conservatives in the party use to characterize Republicans who do not endorse their agenda. Doc. 226 Exh. 7 at 58. She agreed that “[t]he Republican Party in Alabama is a big tent and has a lot of diverse people and groups in it . . . .” *Id.* at 59. But she also agreed that “even if there are conflicting interests among Republicans about important issues, . . . the interests of Republicans are pretty much the same when it comes to redistricting.” *Id.* at 60.

impressed with Mr. Montiel's choice of legal theories. French thought Mark Montiel was "traveling down the wrong path" in *Montiel v. Davis*, because he thought Montiel was claiming only that the 2001 plans were racially gerrymandered, and French thought they should have been challenged as violating "one man, one vote." Doc. 224 Exh. 30 at 40. Senator French is still unaware that Montiel actually made both claims in *Montiel v. Davis*. Doc. 224 Exh. 30 at 73.<sup>15</sup> John Rice's main complaint about the Act 2001-727 and 729 redistricting plans was that, within the plus or minus 5% range, he thought they systematically overpopulated Republican districts and underpopulated Democratic districts. Doc. 231 Exh. 18 at 23, 34, 39-40. He "probably fussed about it" to Mark Montiel. Doc. 231 Exh. 18 at 34-35.

Mark Montiel was the driving force behind both *Montiel v. Davis* and *Rice v. English*. For the most part, although the plaintiffs in *Montiel v. Davis* and the *Rice v. English* plaintiffs knew each other, they never met to plan or to discuss the cases. Doc. 231 Exh. 18 at 38, 58. Rice deferred to Montiel's judgment about what legal strategies to pursue, and Rice believed Montiel adequately represented his interests in all three lawsuits. Doc. 231 Exh. 18 at 64-65. Mr. Rice thinks that he was an adequate representative of all Alabama voters residing in overpopulated districts. Doc. 231 Exh. 18 at 69.

The state trial court granted summary judgment against the plaintiffs in *Rice v. English* on January 28, 2002, and the Alabama Supreme Court affirmed on May 24, 2002. *Rice v. English*, 835 So.2d 157 (Ala. 2002). After a period for discovery, cross-motions for summary judgment were filed, and on July 8, 2002, this Court granted summary judgment in favor of the defendants

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<sup>15</sup> French did not consider becoming a plaintiff in one of the 2001 cases, because he was too busy with his family and political affairs. Doc. 224 Exh. 30 at 70-71.

and defendants-intervenors dismissing *Montiel v. Davis*. 01-447 Docs. 118 and 119; *Montiel v. Davis*, 215 F.Supp.2d 1279 (S.D. Ala. 2002) (3-judge court). John Rice did not consider asking Montiel to appeal this Court's decision rejecting their claims in *Montiel v. Davis*, because he was frustrated that neither the Republican Party nor business groups had supported his efforts in court. Doc. 231 Exh. 18 at 45, 48-49.

These adverse judgments seemed for a while to take the steam out of the Republican litigation project against the 2001 House and Senate plans. Mark Montiel did file another state court action on May 29, 2002, this time alleging that the Senate plan (but not the House plan) violated the Alabama Constitution by unnecessarily fragmenting too many counties. *Owens v. Jordan*, CA No. 02-1512-CP (Cir. Ct. Montgomery County), Doc. 201 Exh 70. Lori Owens, the sole plaintiff, has been Chairwoman of the Cherokee County Republican Committee. Doc. 231 Exh. 18 at 70 (Rice had known Owens for a number of years, ever since he went to Cherokee County to help organize that county's Republican Party). But Mr. Montiel has to this day failed to prosecute the *Owens* action.

### **III. The Gustafson Lawsuit**

Then came news of the three-judge district court's February 10, 2004, decision in *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004) (3-judge court), *aff'd*, 542 U.S. 947 (2004).

Senator French happened to be in Atlanta when news of the *Larios* decision broke. "And so I got excited because it was what I had contended during the '01 cycle, or at least I felt it was. And I called Mark up and said, you know, I need you to validate if I'm right. Does *Larios* mean the Court has now spoken and given definition on the point that we were trying to -- that I was trying

to offer up during the '01 cycle.” Doc. 224 Exh. 30 at 63. French asked Montiel to review the *Larios* decision and to advise him “whether it applied to Alabama.” Doc. 224 Exh. 30 at 64. When Montiel reported back, French “got energized” and started organizing what became the *Gustafson* litigation. Doc. 224 Exh. 30 at 67.

At this point, almost all the other major players in the 2001 redistricting lawsuits came back together to organize a new litigation challenge to the House and Senate districts using *Larios* as a model. Senator French and Jerry Lathan, now Vice Chairman of the State Republican Party and the husband of Terry Lathan, one of the *Barnett* plaintiffs, got together. Doc. 225 Exh. 32 at 23, 76-79. Jerry Lathan contacted Frank Strickland and Anne Lewis, the Georgia lawyers who represented the *Larios* plaintiffs, and paid them \$5,000 out of his personal funds to research and compare the facts in Alabama with the redistricting situation in Georgia. Doc. 225 Exh. 32 at 19-23. Senator French also phoned Chris Pringle, who had not sought re-election to his House seat in order to make an unsuccessful run for Congress in 2002, to tell him about the district court’s decision in *Larios*. French “said, Chris, it’s very similar to what happened in Alabama.” Doc. 225 Exh. 31 at 121. Jerry Lathan began “spearheading” the project. Doc. 225 Exh. 31 at 143. He phoned Chris Pringle, and they met in Mobile to plan and organize the project. Doc. 225 Exh. 31 at 143-45.

John Rice decided not to get involved in what became the *Gustafson* litigation, because the cost of his three previous unsuccessful lawsuits attacking the House and Senate districts “wore me out,”<sup>16</sup> Doc. 231 Exh. 18 at 13, and because Rice now has a lobbying practice in the

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<sup>16</sup> Rice estimated that over a five or six-year period he personally had invested a little less than \$20,000 in Montiel’s redistricting cases. Doc. 231 Exh. 18 at 20.

Alabama Legislature. “I couldn't let my Democrat friends get mad at me and take it out on my lobbying clients by thinking that I was involved.” Doc. 231 Exh. 18 at 17.

Marty Connors, the cost-conscious Chairman of the Alabama Republican Party, found out about the *Larios* decision at a Republican National Committee meeting in February 2004, where he talked with Ralph Reed, the Georgia Republican Chairman. Doc. 224 Exh. 27 at 58-59. He felt “vindicated” when Reed told him about the millions of dollars they had spent on the *Larios* case. Connors thought, “Well, thank goodness Georgia paid for the research and development and we didn't.” Doc. 224 Exh. 27 at 59. Connors testified, “at that point I started getting interested in this case.” Doc. 224 Exh. 27 at 60. That's what he told the press when they phoned him for reaction to Mark Montiel's statement in February 2004 that he would file a new lawsuit “within a couple of weeks.” Doc. 224 Exh. 27 at 58; Doc. 150 Exh. 56. But Connors still had to be prodded by the more enthusiastic Republicans to start raising money for a new Alabama lawsuit. His Vice Chairman, Jerry Lathan, whom Connors called “a believer,” Doc. 224 Exh. 27 at 73, began lobbying Connors.

So Jerry Lathan and I had talked about this idea -- again, being very, very stubborn and cautious to bankrupting parties and so on with litigation costs. That's when Jerry Lathan then went and found the Georgia attorneys, Frank Lewis and Anne Strickland [sic], which he did.

Doc. 224 Exh. 27 at 61. Marty Connors then began “talking with some business groups about helping the party fund a seminal legal challenge to Alabama's legislative districts.” Doc. 224 Exh. 27 at 68, referring to a news article in which he was quoted, Doc. 150 Exh. 57.

I remember this article well. This was sort of a trial balloon to the business community. See, what was frustrating to me is the business community in Georgia jumped on this. Business community here has been very pensive about this. And so that's what I was doing here. We still didn't get involved in

anything proactively, in any efforts to raise funds or anything. I don't believe until like really the first of '05. Maybe the very end of '04. This was a message to the Montgomery business establishment. And I just wanted to see how they would react.

Doc. 224 Exh. 27 at 68-69. Jerry Lathan agreed to be the head fund-raiser and bookkeeper for the new litigation project. Lathan set up a 501(c) foundation that he named the Alabama 21<sup>st</sup> Century Foundation. Doc. 225 Exh. 32 at 15-16. Eventually, according to press reports, Lathan was able to raise about \$450 thousand. Doc. 224 Exh. 27 at 72-73; Doc. 150 Exh. 57. At his deposition, Jerry Lathan refused to produce his fund-raising documents or to reveal how much money the foundation had received from which donors. Lathan's attorney claimed a First Amendment privilege. Doc. 225 Exh. 32 at 10-11, 18-19.

This is when Connors reached out to Mark Montiel. The Georgia lawyers would need local counsel. Senator French had written off Bert Jordan, and he had already been in touch with Montiel. Connors finally came around to supporting Montiel as well:

When we had contacted the Georgia attorneys, they wanted to know who in Alabama had all of the data – the transcripts, you know, all of the information from the hearings that had long passed once the legislature, you know, had passed the original plan. Pringle and all 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 he got on board. And I don't remember the exact date.

Doc. 224 Exh. 27 at 71-72 (emphasis added).

Senator French took on the lead role in recruiting plaintiffs. French “basically hired” Leland Whaley (misspelled “Wayley” in the transcript) to do the recruiting. Doc. 224 Exh. 30 at 42. The only criteria Whaley was given were that the plaintiffs should be registered voters who resided in a House or Senate district whose population was at least 4% over the ideal population.

*Id.* at 43. The nineteen plaintiffs whose names eventually appeared on the *Gustafson* complaint are effectively figureheads. They are all active in the Republican Party,<sup>17</sup> but they played no role in organizing the lawsuit or selecting the lawyers, and they have not participated in making any litigation decisions. *E.g.*, Doc. 226 Ex. 10 at 43-44, 57 (Pat Moore); Doc. 226 Ex. 2 at 8-9, 18-19, 33 (Hosey); Doc. 226 Ex. 1 at 19 (Gustafson); Doc. 223 Ex. 24 at 24-27, 37, 39-40 (Jerry Lathan); Doc. 224 Ex. 29 at 15-16 (French vol. 1); Doc. 226 Ex. 4 at 22 (Clemens); Doc. 226 Ex. 7 at 14-15 (Little); Doc. 226 Ex. 11 at 40-41 (Oldroyd)

The litigation is managed by a committee consisting of Jerry Lathan, Steve French and Marty Connors. Doc. 225 Exh. 32 at 37. Lathan is the acknowledged leader. *Id.* The named plaintiffs, or at least some of them, have met with their lawyers only twice, once on March 11, 2005, at Republican Party headquarters in Birmingham and on December 30, 2005, at a hotel in Birmingham, when they agreed to let Strickland and Lewis withdraw. Doc. 224 Exh. 27 at 82-83, Exh. 30 at 15-16; Doc. 226; Doc. 226 Exh. 5 at 16-18, 42, 44-46; Doc. 226 Exh. 10 at 17, 19, 22-23; Doc. 226 Exh. 2 at 34-35. The litigation management committee has participated with the lawyers in making all the important decisions. Doc. 224 Exh. 29 at 15-16; Doc. 225 Exh. 32 at 39-40. The three members of the litigation management committee picked the lawyers before the case was filed. Doc. 224 Exh. 30 at 9-10. Senator French testified that he has talked to the *Gustafson* lawyers a “hundred plus” times. Doc. 224 Exh. 30 at 30.

## ARGUMENT

### ALL OF PLAINTIFFS’ CLAIMS ARE BARRED BY RES JUDICATA AND

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<sup>17</sup> *E.g.*, Docs. 159 and 173 and attached exhibits; Doc 226 Exh. 2 at 12, Exh. 5 at 12-13, 49-52, Exh. 10 at 8-11.

**ISSUE PRECLUSION.**

The facts summarized above show that the claims asserted in the amended complaint in this action have already been adjudicated in at least two prior cases, *Montiel v. Davis*, 215 F.Supp.2d 1279 (S.D. Ala. 2002) (3-judge court), and *Rice v. English*, 835 So.2d 157 (Ala. 2002), and are barred by *res judicata* and collateral estoppel. The doctrines of claim preclusion, or *res judicata*, and issue preclusion, or collateral estoppel, have been defined as follows:

Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.

*New Hampshire v. Maine* 532 U.S. 742, 748-749 (2001).<sup>18</sup> One of the prior judgments was in federal court, and the other judgment was in state court, so *res judicata* principles of both federal and state law apply here. *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1285 (11<sup>th</sup> Cir.2004), *cert. denied*, 126 S.Ct. 42 (2005) (“federal preclusion principles apply to prior federal decisions, whether previously decided in diversity or federal question jurisdiction” (*quoting CSX Transp., Inc. v. Brotherhood of Maint. of Way Employees*, 327 F.3d 1309, 1316 (11<sup>th</sup> Cir.2003)); *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11<sup>th</sup> Cir. 1990) (“Federal courts apply the law of the state in

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<sup>18</sup> Another formulation is as follows:

Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *San Remo Hotel v. City and County of San Francisco*, 125 S.Ct. 2491, 2500 n.16 (2005) (*quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citations omitted)).

which they sit with respect to the doctrine of *res judicata*.”); accord, *San Remo Hotel v. City and County of San Francisco*, 125 S.Ct. 2491, 2500 n.14 (2005) (applying state preclusion law to determine whether prior state court judgment bars subsequent federal court proceeding); *Thompson v. Smith*, 52 F.Supp.2d 1364, 1368-69 (M.D. Ala. 1999) (3-judge court).

There is no discernible difference in federal and Alabama *res judicata* law relevant to the instant action. The Eleventh Circuit describes the federal law standards as follows:

We have held that *res judicata* can be applied only if all of *four* factors are shown: “(1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action.” [In re Piper Aircraft Corp.](#), 244 F.3d 1289, 1296 (11th Cir.2001) (citing [Israel Discount Bank Ltd. v. Entin](#), 951 F.2d 311, 314 (11th Cir.1992); [In re Justice Oaks II, Ltd.](#), 898 F.2d 1544, 1550 (11th Cir.1990)). Likewise, in this Circuit, collateral estoppel can apply *only* “when the parties are the same (or in privity) [and] if the party against whom the issue was decided had a full and fair opportunity to litigate the issue in the earlier proceeding.” [In re Southeast Banking Corp.](#), 69 F.3d 1539, 1552 (11th Cir.1995) (citing [Allen v. McCurry](#), 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); [In re St. Laurent](#), 991 F.2d 672, 675 (11th Cir.1993)).

*Pemco*, 383 F.3d at 1285. These are the same principles governing the defense of *res judicata* in Alabama law.

Under Alabama law, the essential elements of *res judicata* are: “(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits.” If all of these elements are met, *any claim that was or could have been adjudicated in the previous action is precluded*. If even one element of the four is not met, however, *res judicata* is not applicable.

52 F.Supp.2d at 1368-69 (*quoting N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir.1990) (citations omitted) (emphasis added)). Claims that could have been adjudicated in the previous proceeding are also barred under federal *res judicata* law:

[C]laims are part of the same cause of action for res judicata purposes when they arise out of the same transaction or series of transactions. See [Justice Oaks, 898 F.2d at 1551](#) (citing [Restatement \(Second\) Judgments § 24 \(1982\)](#)). “In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form. It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same ‘claim’ or ‘cause of action’ for purposes of res judicata.” [Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1239 \(11th Cir.1999\)](#) (internal citation and quotation marks omitted).

[In re Piper Aircraft Corp., 244 F.3d 1289, 1296-97 \(11th Cir.2001\)](#).

There is a difference, however, between the federal and Alabama law of collateral estoppel:

Although the federal courts have held that mutuality – the requirement that the parties in both actions are the same – is no longer a prerequisite, [Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 \(1979\)](#), Alabama continues to require that a party may be barred from relitigating an issue, such as duty or breach, only if that issue has previously been found adversely to that same party. [Smith v. Union Bank & Trust Co., 653 So.2d 933, 934 \(Ala.1995\)](#). See also [Unum Life Ins. Co. of America v. Wright, 897 So.2d 1059, 1077 \(Ala.2004\)](#).

[Ex parte Flexible Products Co. 915 So.2d 34, 45 \(Ala.,2005\)](#). Consequently, because none of the [Gustafson](#) plaintiffs was a party to [Rice v. English](#), issue preclusion can apply only with respect to the judgment in [Montiel v. Davis](#).

#### **I. There Are Prior Judgments On the Merits By Courts of Competent Jurisdiction.**

There can be no dispute that [Montiel v. Davis, 215 F.Supp.2d 1279 \(S.D. Ala. 2002\)](#) (3-judge court), and [Rice v. English, 835 So.2d 157 \(Ala. 2002\)](#), are final judgments by courts of competent jurisdiction on the merits of the claims against Acts 2001-727 and 2001-729. The complaint in [Rice v. English](#) asserted a state constitutional challenge only against the Senate plan, Act 2001-727, but the plaintiffs could have asserted federal claims against both plans in the state

court proceedings. *Brooks v. Hobbie*, 631 So.2d 883 (Ala.1993) (Alabama courts have power and duty to provide relief for federal claims). Indeed, Mark Montiel, Bert Jordan and Al Agricola were co-counsel for John Rice in other proceedings asking the Alabama Supreme Court to assume original jurisdiction to review the constitutionality of both the House and Senate plans.

*Barnett v. Alabama* did not produce a judgment on the merits, because it was dismissed as moot. *Wisznia v. City of Albuquerque*, 135 Fed.Appx. 181, 187 (10<sup>th</sup> Cir. 2005) (*citing Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1086 (11th Cir.2004)). However, the mootness was created by the conscious decision of the lawyers and financial backers of the *Barnett* plaintiffs to abandon claims against the 2001 statutory House and Senate plans, claims they refused to make more specifically when this Court invited them to do so. Under the circumstances, the *Barnett* parties and their privies are bound by the final judgments in *Montiel v. Davis*, the companion case with *Barnett*, and *Rice v. English*.

## **II. The Gustafson Plaintiffs Are in Privity With the Montiel and Rice Plaintiffs.**

Privity is a relationship between parties and non-parties. This Court did not certify the class the *Montiel* plaintiffs sought to represent, and none of the *Gustafson* plaintiffs was a party in *Montiel v. Davis*. In this circumstance, federal courts have recognized three general categories of relationships that will establish privity between parties in the first and succeeding actions:

- (1) where the non-party shares or legally succeeds to the interest of a party, particularly an interest in property;
- (2) where the non-party effectively controlled the prior litigation; and
- (3) where the non-party's interests were adequately represented by the party to

the prior action (i.e., virtual representation).

*Pemco*, 383 F.3d at 1286-87; accord, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 798-99 (1996); *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997); *Robertson v. Bartels*, 149 F.Supp.2d 443, 449 (D. N.J. 2001), *aff'd summarily*, 534 U.S. 1110 (2002) (citing *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir.1990)); *American Forest Research Council v. Shea*, 172 F.Supp.2d 24, 31 (D. D.C. 2001).

The facts in evidence establish privity between the *Gustafson* plaintiffs and the *Montiel* and *Rice* plaintiffs under theories (2) and (3), effective control and virtual representation. We will discuss virtual representation first.

#### A. *Virtual Representation*

*Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975), “is generally credited with breathing new life into virtual representation doctrine.” Robert G. Bone, *Rethinking the Day in Court Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 218 (1992). Virtual representation is now well established in federal jurisprudence, even though its doctrinal contours cannot be defined with precision.<sup>19</sup>

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[W]ith the exception of the Sixth Circuit in *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877 (6th Cir.1997), no circuit has entirely rejected the notion that a nonparty can be “virtually represented” by another party in a prior case, and thus, barred from re-litigating those claims. Although some courts have criticized the doctrine for lacking a consistent scope or a common definition, the majority of courts recognize the need, under certain limited circumstances, to bar individuals from litigating claims raised and decided in cases to which they were not formally parties. Moreover, although the decisions cited by plaintiffs ultimately concluded that the litigants then before them as first-time parties should not be bound by prior judgments, those decisions were based on the particular facts of each case and did not reflect outright repudiations of the doctrine of virtual representation.

“Virtual representation” is a term of art that we have defined as applying “when the respective interests are closely aligned *and* the party to the prior litigation adequately represented those interests.” *Delta Air Lines, Inc. v. McCoy Rests., Inc.*, 708 F.2d 582, 587 (11th Cir.1983) (citing *Southwest Airlines Co. v. Texas Int’l Airlines, Inc.*, 546 F.2d 84, 100 (5th Cir.1977)) (emphasis added). The doctrine of virtual representation provides in essence that “a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.” *Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 717 (5th Cir.1975). Whether a party is a virtual representative of another is a question of fact.

*Pemco*, 383 F.3d at 1287 (footnotes omitted) (some citations omitted). As this passage indicates, there are only two essential conditions for finding privity with non-parties under the theory of virtual representation: (1) closely aligned interests between the parties and non-parties and (2) adequate representation of those interests by the original parties.

*Pemco* proceeds to identify “four factors” that were “employed” in one of the virtual representation precedents: “participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties.” *Pemco*, 383 F.3d at 1287 (quoting *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir.1988) (quoting 18 Wright & Miller, *Federal Practice & Procedure* § 4457, at 494-99)). But *Pemco* emphasizes that these four factors are neither necessary nor exclusive; they are the kinds of evidence that can demonstrate the requisite closely aligned *interests*. *Pemco*, 383 F.3d at 1287.

This Court asked the parties in its September 30, 2005, order, Doc. 119, to address a longer list of factors that can be relevant to determining whether the interests of parties and non-parties are closely aligned and whether they those interests were adequately represented.

Although all of those factors are present in the present circumstances, none of them, standing

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*American Forest Resource Council v. Shea*, 172 F.Supp.2d 24, 32 (D. D.C. 2001).

alone or in combination with other evidentiary factors, is either necessary or sufficient to establish virtual representation. Indeed, many of the factors listed by this Court are more relevant to the control theory of privity than they are to the virtual representation theory of privity. In this section of the brief we will focus on the factors that are more relevant to the virtual representation theory of privity.

**1. The identity of interests in the 2001 and 2005 redistricting lawsuits.**

Virtual representation occurs where the interests of parties and non-parties are sufficiently the same to satisfy the due process requirements for binding non-parties with earlier judgments. “[I]t is important to keep in mind that ‘[i]t is the identity of *interests* that determines the due process question, not ... the identity of *issues*.’” *Robertson v. Bartels*, 149 F.Supp.2d 443, 450 (D. N.J. 2001) (3-judge court), *aff’d summarily*, 534 U.S. 1110 (2002) (*quoting Moldovan v. Great Atlantic & Pacific Tea Co.*, 790 F.2d 894, 899 (3d Cir.1986)) (emphasis in original). It is much more difficult to satisfy due process when the prior judgment acted on private interests, particularly property interests, than when it impacted public interests. See Doc. 133 at 5-8 and Doc. 142 at 4-6.

Redistricting actions are the quintessential type of public law litigation. They do not involve the denial of the right to vote to a particular individual or to a particular group of voters. Rather, they involve, in one form or another, the alleged unequal weight or effectiveness of individual votes when they are aggregated in the districting process. They necessarily implicate the rights of all voters in the state or local jurisdiction that is being subdivided for purposes of electing representatives. Any remedy for an adjudicated violation of one voter’s right to an

equally weighted or effective vote necessarily impacts the rights of all other voters with whom he or she is aggregated or disaggregated. The plaintiffs in all the 2001 redistricting cases and the 2005 *Gustafson* plaintiffs share the following public interests:

(1) Whether the House and Senate plans are legally and constitutionally valid.

E.g., *Robertson v. Bartels*, 149 F.Supp.2d at 451 (“there is a clear commonality of interests among all of the parties: their challenge to the validity of the New Jersey redistricting plan”).

(2) Whether the residents of overpopulated districts have the weights of their

votes systematically diminished by the minor population deviations within plus or minus 5%.

All the plaintiffs in the 2001 and 2005 lawsuits were complaining about this same thing, and all of them based their claims first and foremost on alleged arithmetic disparities that appeared on the face of the plans. The differences in their complaints pertained only to alleged impermissible motives for the minor deviations. Some said it was discrimination against fast-growing suburban residents (*Montiel v. Davis*, *Barnett v. Alabama*). Others said it was discrimination against white voters (*Montiel v. Davis*). Now the *Gustafson* plaintiffs say it was discrimination against suburban Republican voters. Had any of these one-person, one-vote claims been upheld, the remedy would have benefitted all these plaintiffs. They still may have been unhappy about alleged racial or partisan effects of the plans, but they no longer could have blamed those alleged wrongs on population deviations.<sup>20</sup>

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<sup>20</sup> This is what distinguishes all the 2001 and 2005 legislative redistricting cases from the *Sinkfield* lawsuits attacking the 1993 plans. Mr. Montiel’s clients were given only one bite at their statewide one-person, one-vote claims in the 1990s. Their attempts to relitigate them with different plaintiffs were barred on grounds of virtual representation, just as the *Gustafson* plaintiffs should now be precluded. But some of Mr. Montiel’s clients also brought district-specific *Shaw* claims against the shapes of district boundaries, and they were allowed to proceed to the merits. No such district-specific claims have been made in any of the post-2000

(3) Whether the minor population deviations disadvantage Republicans. Only the *Gustafson* plaintiffs explicitly identify themselves with Republican interests, but the facts show conclusively that the plaintiffs in *Barnett v. Alabama*, *Montiel v. Davis*, *Rice v. English*, *Ex parte Rice*, and *Owens v. Jordan* were all actively pursuing the interests of Republicans as well.

**2. The *Gustafson* plaintiffs' interests were adequately represented in *Montiel v. Davis* and *Rice v. English*.**

The fact that the *Montiel v. Davis* plaintiffs sought to represent a plaintiff class of all citizens of Alabama residing in overpopulated districts against a defendant class of all state election officials has been held to satisfy the requirement of adequate representation. *Thompson v. Smith*, 52 F.Supp.2d at 1369-70 (“The Rice plaintiffs . . . expressly sought to represent a class that clearly includes the Thompson plaintiffs, and there is every reason to conclude that the state court took care to protect the interests of *non-party* class members.”) (emphasis added); *accord, e.g., Jaffree v. Wallace*, 837 F.2d 1461, 1468 and n.17 (11<sup>th</sup> Cir. 1988) (Jaffree’s unsuccessful motion to certify a plaintiff class in the prior action was one important factor for concluding that he adequately represented the non-parties in the second action and thus was their virtual representative). None of Mark Montiel’s 2001 clients thought he had failed adequately to represent their interests, and neither the *Gustafson* plaintiffs nor their handlers would have hired Mr. Montiel if they had any dissatisfaction with his representation in the 2001 redistricting cases. Even had they expressed dissatisfaction with Mr. Montiel’s performance, it would not have mattered:

Adequate representation is better viewed not in terms of actually adequate

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redistricting cases, probably because none of the plaintiffs reside in a majority-black district.

representation, but “in terms of incentive to litigate.” Incentive should be the test, not actual adequacy, because considerations of trial strategy and trial error are “external” to the inquiry whether the parties’ interests are aligned. In addition, the sins of the lawyer are routinely visited on the client in civil litigation; there is no reason to treat differently a nonparty who is virtually represented by a party. To deny preclusion because of inadequate representation would encourage nonparties to hold aloof from the first action.

WRIGHT AND MILLER, 18A FED. PRAC. & PROC. JURIS.2d § 4457 (*quoting Tyus v. Schoemehl*, 93 F.3d 449 at 458).

Holding aloof or “fence-sitting,” *Tyus v. Schoemehl*, 93 F.3d 449 at 456, is precisely what Marty Connors, the State Republican Chair, did when he pulled the plug on *Barnett*. He and the *Barnett* plaintiffs acquiesced in the adequacy of representation that thereafter proceeded in the companion *Montiel v. Davis* case. Connors actually boasted that his fence-sitting was vindicated by the Georgia Republicans’ victory in *Larios*. He and the other members of the *Gustafson* litigation management committee, Steve French and Jerry Lathan, as well as all the Republican backers who contributed to their Alabama 21<sup>st</sup> Century Foundation, are estopped from complaining that the *Montiel v. Davis* and *Rice v. English* plaintiffs did not adequately represent their interests and justify their deliberate decision to wait until 2005 to begin raising money to prosecute another lawsuit. They had the incentive to litigate in 2001, and they declined to follow through. So did each and every one of the fence-sitting *Gustafson* named plaintiffs. Their decisions not to get involved in the 2001 redistricting lawsuits they knew about, or did not inform themselves about by paying attention to the widespread publicity during 2001 about Republican litigation strategies both in the Legislature and later in court, are conclusive evidence of their acquiescence in the adequacy of representation of their interests by Mr. Montiel’s 2001 clients.

**3. Other evidence of closely aligned interests that were adequately represented in the 2001 redistricting cases.**

The evidence also displays most of the other factors this Court asked about, which are relevant to whether there is a close relationship between the parties in the present case and the parties in *Montiel*, including, inter alia: any parties in common, any attorneys in common, any supporters in common (financial or otherwise); publicity attending the *Montiel* litigation, or other evidence of awareness thereof or acquiescence therein by present parties; and tactical maneuvering or efforts to avoid the preclusive effect of *Montiel*. The only one of these factors (which are discussed in more detail in Hammett's prior briefs, Docs. 133 and 142) not present here is common parties. None of the *Gustafson* plaintiffs was a party to the 2001 lawsuits. But, as the litany of questions plaintiffs' counsel asked each *Gustafson* plaintiff in his or her deposition shows, that is by design and is part of the tactical maneuvering by the common attorney, Mark Montiel, and his common supporters, Steve French, Jerry Lathan and Marty Connors, to avoid the preclusive effect of *Montiel*.

Actually, Mark Montiel is not the only attorney in common with the 2001 and 2005 lawsuits. There is a web of interlocking relationships among Montiel, Jordan and Agricola. Montiel collaborated with the *Barnett* lawyers, Bert Jordan and Al Agricola, and was co-counsel with them in unsuccessful attempts to maneuver original review of the 2001 House and Senate plans into the Alabama Supreme Court. Marty Connors, who bankrolled the *Barnett* litigation, also paid a small fee to Montiel. Mr. Agricola now appears in the *Gustafson* action as counsel for Governor Riley, who has sided with Mr. Montiel's position. And, even though Bert Jordan fell out of favor with *Gustafson* organizer Senator French, he consulted with Montiel and Chris

Pringle about the possibility of replacing the Georgia lawyers after they withdrew. Doc. 224 Exh. 28 at 94-95. Regardless of their different formal statuses with respect to representing the *Gustafson* plaintiffs, Montiel, Jordan and Agricola are still members of the same lawyer team that been pursuing the Republican redistricting litigation project for nearly a decade.

The same is true with respect to the supporters of all these lawsuits. Mr. Montiel may argue that the State Republican Chair did not support him financially in his 2001 state and federal court cases – dismissing the \$1,500 fee. But, as Marty Connors admitted, there is no dispute about the fact that they were all pursuing the same Republican redistricting interests, consulted with the same Republican legislators, Senator French and Representative Pringle in particular, and relied on the same zero-deviation plans drawn by the Republican consultant, David Winston. John Rice and his friends, Gonzalo Montiel, Mark Montiel, Bill Harris, Lori Owens and others who contributed to their efforts may not have had the official sanction of the State Republican Executive Committee, but, as the witnesses made plain, there are many diverse activists in the Republican Party, and they were all working toward the same goal when it came to redistricting. At several points in 2000-01, Bert Jordan and Al Agricola were representing John Rice at or near the same time they were representing the *Barnett* plaintiffs and being paid by Marty Connors.

Tactical maneuvering characterized nearly every litigation decision made by Montiel, Ginsberg, Jordan, Agricola and their activist backers over the two-year period from the U.S. Supreme Court's adverse ruling in *Sinkfield v. Kelley* on November 27, 2000, to this Court's dismissal of *Montiel v. Davis* on July 8, 2002. They tried to force the *Sinkfield* state court to relinquish jurisdiction over post-2000 redistricting, then preemptively filed first *Barnett v.*

*Alabama* then *Montiel v. Davis* in this Court before the Legislature could enact new House and Senate plans. Then, when Acts 2000-727 and 2000-729 passed, they tried a number of maneuvers aimed at giving the Alabama Supreme Court the first shot at reviewing the new plans, including filing equivocating motions and responses in the companion cases before this Court, commencing *Rice v. English* in state court, and finally submitting a mandamus petition to the Alabama Supreme Court.

But the biggest tactical maneuver was made by Republican State Chairman Marty Connors, who is the party official who finally authorized the organization and fundraising effort for *Gustafson*. Faced with this Court's ultimatum in *Barnett* to specify what claims the (figurehead) plaintiffs were going to assert against the statutory plans, Marty Connors told Jordan and Agricola to pull the plug and leave the task of challenging those plans to someone else. Connors remains proud of his reason for doing this: he believed the party funds he controlled would better be spent on campaign funding for Republicans rather than on risky litigation, and he felt vindicated when the Georgia Republicans invested millions of dollars and did the "research and development" for him. The fact that Connors was pursuing a misguided strategy does not obviate the deliberate maneuvering behind his fateful decision in 2001 to abandon the *Barnett* action and withhold substantial financial support from *Montiel v. Davis*.

In short, every one of the redistricting lawsuits filed from 2001 to the present have been organized, directed and paid for by Alabama Republican activists. The Republican redistricting marching band may be a ragtag group whose members tend to march in different directions and want to play different tunes, but it has always been trying to cross the same goal line and score a

Republican touchdown.<sup>21</sup>

***B. Mark Montiel and the Same Group of Republicans Effectively Controlled the 2001 and 2005 Redistricting Lawsuits.***

The effective control theory of privity is “analytically separate from a finding of virtual representation. . . .” *Pemco*, 383 F.3d at 1290. Virtual representation establishes privity between parties and non-parties even when they are acting independently of each other or are even in some respects opposed to each other. All that is required to show virtual representation is that the two sets of litigants have interests that are aligned with each other and that the original parties adequately represented those shared interests. Aligned interests may be adequately represented even where there is no evidence of collaboration or even awareness of the earlier litigation by the later litigants. Indeed, most of the evidentiary factors discussed in the preceding section, such as common attorneys and supporters and tactical maneuvering, are less relevant to a virtual representation inquiry than they are to proof of effective control.

Mark Montiel effectively controlled *Montiel v. Davis* and *Rice v. English*, and he effectively controls *Gustafson v. Johns*. All of Mr. Montiel’s clients have and still do defer entirely to his case management decisions. Montiel coordinated his 2001 lawsuits with lawyers Bert Jordan and Al Agricola, and among non-lawyers he worked most closely with John Rice, Steve French and Chris Pringle in the 2001 lawsuits, and with Steve French, Jerry Lathan and Marty Connors as the litigation management team in the instant action. But all of the above named non-lawyers testified that they have deferred to Montiel’s litigation decisions.

To the extent that persons and organizations who provide funding thereby exercise

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<sup>21</sup> Apologies for the overused and mixed football metaphor, but this Alabama, after all.

control over litigation, for aught that appears, the Alabama 21<sup>st</sup> Century Foundation, which is paying the *Gustafson* plaintiffs' fees and expenses, has received donations from some of the same Republican sources who funded *Montiel v. Davis*, *Rice v. English* and *Barnett v. Alabama*. Jerry Lathan, the person in charge of the Alabama 21<sup>st</sup> Century Foundation, refused to reveal who its contributors are.

To the extent that Mark Montiel has shared control of the 2001 and 2005 redistricting lawsuits, it has been with the same interlocking group of Republican activists and lawyers. One way or another, they have all been involved in the entire litigation project. The named plaintiffs themselves, those in 2001 as well as those in 2005, have been nothing but volunteers to fill the formal role of parties, while effective control has been exercised by Mr. Montiel and his colleagues.

**III. The Gustafson Amended Complaint Alleges Claims That Were Raised or Could Have Been Raised in *Montiel v. Davis* and *Rice v. English*.**

Thus far the *Gustafson* plaintiffs have not seriously disputed that this element of *res judicata* can be established. They conceded that non-parties in privity with the first parties are precluded from reasserting not only those claims actually litigated in the prior lawsuit, but claims which could have been raised as well, such as the Gustafson First Amendment claim. Doc. 136 at 25. We have cited both federal and Alabama law showing that all three of the *Gustafson* causes of action were raised or could have been raised in the 2001 cases. Doc. 122 at 11-19; Doc. 142 at 3-4. *See also Kelly v. Merrill Lynch*, 985 F.2d 1067, 1070 (11<sup>th</sup> Cir.), *cert. denied*, 510 1011 (1993) ("Res judicata bars parties from relitigating issues that were or could have been raised in the first action. Plaintiffs could have asserted the state claims before the district court,

which would have had pendent or diversity jurisdiction over the claims.”) (citing *Federated Dep’t Stores v. Moitie*, 452 U.S. 394, 398 (1981)); accord, *In re Justice Oaks II, Ltd*, 898 F.2d 1544, 1552 (11<sup>th</sup> Cir.), cert. denied, 498 U.S. 959 (1990). The claim of discrimination against Republicans and the First Amendment allegations are merely different theories for the same alleged one-person, one-vote violation.

### CONCLUSION

Preclusion issues always depend on the particular facts of each case. The facts leading up to the instant action are complex and often difficult to follow. (For the Court’s convenience, a graphic time line of the major events is attached to this brief.) But when one takes the time to follow the interlocking trails left by the 2001 plaintiffs and their Republican supporters and the reappearance of the same actors in 2005, the conclusion is overpowering. All the *Gustafson* claims are barred by *res judicata*, under both the virtual representation and effective control theories of privity.

Respectfully submitted this 27<sup>th</sup> day of February, 2006,

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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, et al.,	)	
	)	
Defendants,	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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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