

ORIGINAL

FEDERAL DISTRICT COURT  
U.S.D.C. Atlanta

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

APR 17 2003

LUTHER D. TAYLOR, Clerk  
By: *J. Drigop*  
Deputy Clerk

SARA LARIOS, et al., )  
)  
Plaintiffs, )  
)  
v. )  
)  
GEORGE E. "SONNY" PERDUE, )  
et al., )  
)  
Defendants. )

CIVIL ACTION  
NO. 1:03-CV-0693

**CAP**

**DEFENDANTS PERDUE, COLEMAN, AND COX'S MOTION TO  
DISMISS COMPLAINT AGAINST THE REDISTRICTING PLAN FOR  
THE GEORGIA STATE SENATE OR, IN THE ALTERNATIVE, TO JOIN  
A PARTY PURSUANT TO FED. R. CIV. P. 12(b)(7)**

COME NOW Defendants George E. "Sonny" Perdue, Terry Coleman, and  
Cathy Cox, and hereby move in accordance with Federal Rule of Civil Procedure  
12(b)(7) that the Court dismiss Plaintiffs' action challenging the Georgia State  
Senate redistricting plan or, in the alternative, join a party pursuant to Rule 19.  
Plaintiffs have failed to join Lieutenant Governor Mark Taylor in this action as the  
representative Defendant of the Georgia State Senate and instead have named that  
body's President Pro Tempore, Senator Eric Johnson, as the representative  
Defendant. As Lieutenant Governor Taylor, and not Senator Johnson, is the  
proper, constitutionally authorized representative Defendant for the State Senate,

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the Complaint should be dismissed or Lieutenant Governor Taylor should be joined as a Defendant in his official capacity as Lieutenant Governor of Georgia and President of the Georgia State Senate.


A brief in further support of this Motion is being filed concurrently herewith for this Court's consideration.

This 17 day of April, 2003.

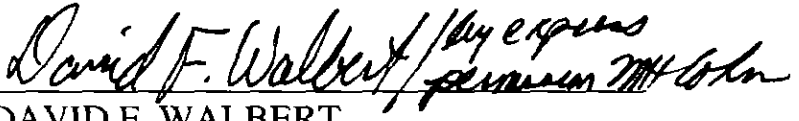
Respectfully submitted,

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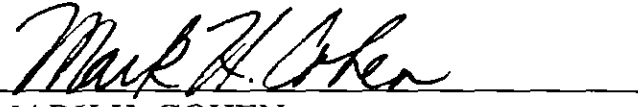
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**Local Rule 7.1D Certification**

By signature below, counsel certifies that the foregoing Motion was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.



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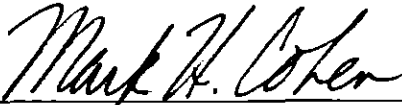
MARK H. COHEN  
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**CERTIFICATE OF SERVICE**

This is to certify that I have this day served or caused to be served a copy of the within and foregoing **DEFENDANTS PERDUE, COLEMAN, AND COX'S MOTION TO DISMISS THE COMPLAINT AGAINST THE REDISTRICTING PLAN FOR THE GEORGIA STATE SENATE OR, IN THE ALTERNATIVE, TO JOIN A PARTY PURSUANT TO FED. R. CIV. P. 12(b)(7)**, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Frank B. Strickland, Esq.  
Anne W. Lewis, Esq.  
Strickland Brockington Lewis LLP  
Midtown Proscenium, Suite 2000  
1170 Peachtree Street, N.E.  
Atlanta, GA 30309-3400

This 17 day of April, 2003.

  
\_\_\_\_\_  
Mark H. Cohen

**ORIGINAL**

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U.S.D.C. ATLANTA

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**BRIEF IN SUPPORT OF DEFENDANT PERDUE, COLEMAN, AND  
COX'S MOTION TO DISMISS COMPLAINT AGAINST THE  
REDISTRICTING PLAN FOR THE GEORGIA STATE SENATE  
OR, IN THE ALTERNATIVE, TO JOIN A PARTY  
PURSUANT TO FED. R. CIV. P. 12(b)(7)**

I. INTRODUCTION

Plaintiffs' Complaint challenges the constitutionality of Georgia's current Congressional, State Senate, and State House of Representatives redistricting plans. With respect to their challenge to the redistricting plan of the State House of Representatives, Plaintiffs correctly named Terry Coleman, Speaker of the House, who is the presiding officer of that chamber as provided in the Georgia Constitution. However, with respect to their challenge to the redistricting plan of the Georgia State Senate, Plaintiffs incorrectly named as the responsible party Eric

Johnson, who serves as President Pro Tempore of that chamber. In fact, the Georgia Constitution provides that the Lieutenant Governor of the State of Georgia, Mark Taylor, serves as the presiding officer of the Georgia State Senate, and is the proper party defendant for any challenge to the State Senate's redistricting plan.

## II. ARGUMENT AND CITATION OF AUTHORITY

For cases in which one is sued in a representative capacity, the proper party defendant is determined by the law of the state in which the district court is held. See Fed. R. Civ. P. 17(b) (“In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . .”). Based on Georgia law, the proper representative Defendant for the Georgia State Senate is the Lieutenant Governor. The legislative power of the State of Georgia is vested in a bicameral General Assembly, which consists of a Senate and a House of Representatives. Ga. Const. art. III, § 1, ¶ 1. The presiding officer of the Senate is styled the “President of the Senate.” Id. art. III, § 3, ¶ 1(a). The Georgia Constitution expressly provides that “[t]he Lieutenant Governor shall be the President of the Senate.” Id. art. V, § 1, ¶3. Accordingly, the Lieutenant Governor, not the President Pro Tempore, is the presiding officer of the Georgia State Senate. The President Pro Tempore becomes the President of the Senate only

upon the “death, resignation, or permanent disability of the President or in the event of the succession of the President to the executive power.” Id. art. III, § 3, ¶ 1(b).

The need to sue the lieutenant governor of a state, and not the senate president pro tempore, where legislative action is being challenged is shown by past redistricting cases — involving both the State of Georgia and other states — brought pursuant to the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., as amended. In such cases, the claims were asserted against the governor, as chief executive of the state; the lieutenant governor, as presiding officer of the state senate; the speaker of the house of representatives, as presiding officer of that body; and the Secretary of State, as the constitutional officer in charge of elections. See, e.g., Shaw v. Reno, 509 U.S. 630, 637 (1993) (“Appellants sued the Governor of North Carolina, the Lieutenant Governor, the Secretary of State, the Speaker of the North Carolina House of Representatives, and members of the North Carolina State Board of Elections (state appellees), together with two federal officials, the Attorney General and the Assistant Attorney General for the Civil Rights Division (federal appellees).”); VanderLinden v. Hodges, 193 F.2d 263, 263 (4th Cir. 1999) (listing lieutenant governor as defendant “in his official capacity as Lieutenant Governor and presiding officer of the South Carolina Senate”); Cannon v. Durham

County Bd. of Elections, No. 97-1459, 1997 U.S. App. LEXIS 31794 (4th Cir. 1997) (suing lieutenant governor and speaker of house in their official capacities as presiding officers); Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 534 n.2 (M.D. Pa. 2002) (three-judge court) (noting that defendants lieutenant governor and speaker of the house preside over senate and house of representatives respectively); Smith v. Beasley, 946 F. Supp. 1174, 1174 (D.S.C. 1996) (three-judge court) (naming lieutenant governor and speaker of the house as defendants in their official capacities as presiding officers); DeJulio v. Georgia, 127 F. Supp. 2d 1274, 1294 (N.D. Ga. 2001) (suing lieutenant governor, speaker of the house, and local delegation chairpersons in challenge to method by which legislature enacts local legislation); Johnson v. Miller, 864 F. Supp. 1354, 1358 (S.D. Ga. 1994) (three-judge court) (listing as defendants the governor, lieutenant governor, speaker of the house, and secretary of state).

Despite the fact that the Lieutenant Governor is the Senate's presiding officer, Plaintiffs have chosen to name President Pro Tempore Eric Johnson as the representative Defendant of the Georgia State Senate:

Defendant Eric B. Johnson is a resident of Georgia and is sued in his representative capacity as the President Pro Tem of the Georgia Senate and the highest officer elected by that body. The state Senate is one of the bodies of the General Assembly charged with redistricting Georgia's state legislative and Congressional Representative Districts in a manner consistent with federal

constitutional and statutory requirements. The Georgia Senate passed the current redistricting plans.

Complaint for Declaratory, Injunctive and Other Relief ¶ 39. Plaintiffs apparently have chosen to name Senator Johnson as the representative Defendant of the State Senate instead of Lieutenant Governor Taylor because Senator Johnson is a Republican and Lieutenant Governor Taylor is a Democrat. Many, if not all, Plaintiffs in this suit are Republicans, according to the Complaint itself. See id. ¶¶ 7, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 28, 29, 30, 31, 32, 33, 34.

The apparent partisan motive for naming Senator Johnson instead of Lieutenant Governor Taylor is underscored by the fact that, for the House of Representatives, Plaintiffs have failed to name as a Defendant the Speaker Pro Tempore, a Democrat. The powers of the Speaker Pro Tempore are in substance identical to those of the Senate President Pro Tempore:

A President Pro Tempore shall be elected by the Senate from among its members. The President Pro Tempore shall act as President in case of the temporary disability of the President. *In case of the death, resignation, or permanent disability of the President or in the event of the succession of the President to the executive power, the President Pro Tempore shall become President* and shall receive the same compensation and allowances as the Speaker of the House of Representatives. The General Assembly shall provide by law for the method of determining disability as provided in this Paragraph.

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A Speaker Pro Tempore shall be elected by the House of Representatives from among its members. *The Speaker Pro Tempore shall become Speaker in case of the death, resignation, or permanent disability of the Speaker* and shall serve until a Speaker is elected. Such election shall be held as provided in the rules of the House. The General Assembly shall provide by law for the method of determining disability as provided in this Paragraph.

Ga. Const. art. III, § 3, ¶ 1(b), 2(b) (emphasis added). In short, Plaintiffs have named as a Defendant the presiding officer of the House (the Speaker) but have failed to name the presiding officer of the Senate (the Lieutenant Governor). The recognition by Plaintiffs that the Democratic Speaker Pro Tempore is not the proper representative Defendant for the House while at the same time asserting that the Republican President Pro Tempore is the proper representative for the Senate is both revealing and procedurally defective.

Because Plaintiffs have not sued the Senate's presiding officer, the Complaint against the State Senate plan either should be dismissed without prejudice pursuant to Fed. R. Civ. P. 12(b)(7) or Lieutenant Governor Taylor should be joined as the official representative of the State Senate. If the Complaint is dismissed without prejudice, Plaintiffs should be instructed to file an amended complaint that replaces Senator Johnson with the proper constitutionally authorized representative of the State Senate, Lieutenant Governor Taylor.

The Court may dismiss Plaintiffs' suit against the State Senate plan simply because they have failed to comply with Rule 19(c). That rule requires that "[a] pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as prescribed in subdivisions (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined." Fed. R. Civ. P. 19(c). Plaintiffs' failure to name Lieutenant Governor Taylor, whom they know is the presiding officer of the Senate but chose to ignore naming in the suit because they prefer for strategic purposes to name Senator Johnson, supports dismissal of the action. See, e.g., Stevens v. Loomis, 334 F.2d 775, 776 n.1 (1st Cir. 1964) (affirming dismissal by noting in regards to failure to fulfill Rule 19(c) obligation, "We are engaged in a lawsuit, not in a poker game . . . ."); Polling v. K. Hovnanian Enters., 99 F. Supp. 2d 502, 517 n.16 (D.N.J. 2000) (stating requirement and inference of damaging facts where not met); William Chris Trucks & Equip. Brokers v. First Canadian Bank, 98 F.R.D. 584, 586 (E.D. Ill. 1983) ("Failure to comply with Rule 19(c) has been found to be sufficient grounds for a determination that an individual 'cannot be made a party' within the meaning of Rule 19(b)[, thus supporting dismissal of the case.]"); Hinsdale v. Farmers Nat'l Bank, 93 F.R.D. 662, 665 (E.D. Ohio 1982) ("Rule 19(c) requires the plaintiff to state the names, if known, of persons described in 19(a)(1)-(2) who are not joined, and the reasons why they

are not joined. The plaintiff has not done so.”); Process Control Corp. v. Tullahoma Hot Mix Paving Co., 79 F.R.D. 223, 225 (E.D. Tenn. 1977) (“Such pleading deficiency is a ground for the dismissal of this action.”).

Independently, the Court may consider whether dismissal or joinder is required based on whether Lieutenant Governor Taylor is a “necessary” or “indispensable” party to this action pursuant to Rule 19(a)-(b). In determining whether to dismiss the suit entirely or to join Lieutenant Governor Taylor in this action, the Court must consider three issues: first, the Court must consider whether the absentee, in this case Lieutenant Governor Taylor, is needed for just adjudication; second, if the answer to the first question is in the affirmative, the Court should determine whether joinder is feasible; third, if joinder is not feasible, the Court must determine whether to allow the litigation to proceed or to dismiss the pending case. See Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 850 (11th Cir. 1999) (explaining three-step analysis).

As to the first issue of whether an absentee is needed for just adjudication, the court must inquire into (1) whether complete relief can be granted with the present parties and (2) whether the absent party, Lieutenant Governor Taylor, has an interest in the disposition of the proceedings. See id. at 847. If either applies, Lieutenant Governor Taylor is “necessary” to the suit. In this case, Lieutenant

Governor Taylor has an interest in the disposition of the current proceedings, as he is the proper legal representative of the Georgia State Senate. As explained above, he is the constitutionally authorized presiding officer of the State Senate, one of the two bodies whose assent is required to enact redistricting legislation and a body whose districts are being challenged in this action. In addition, because Lieutenant Governor Taylor is the presiding officer of the Senate, and Senator Johnson is not, a strong question exists whether declaratory and injunctive relief against the Senate as a whole can be made without naming its presiding officer as a Defendant.

Accordingly, for complete relief to be granted in this case, Lieutenant Governor Taylor should be named as a Defendant in his official capacity as presiding officer of the State Senate.

As to the second issue of whether Lieutenant Governor Taylor can be joined in this action, Lieutenant Governor Taylor likely can be joined in this action.<sup>1</sup> The naming of the Lieutenant Governor as the representative Defendant of the State

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<sup>1</sup> The fact that the Court likely can join the Lieutenant Governor in this action does not make Defendants' Rule 12(b)(7) motion inappropriate. See generally 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1359 (2d ed. 1990) (noting that 1966 amendment to Rule 12(b)(7) eliminated reference to "indispensable party" and rule now allows challenge to any Rule 19 joinder defect). Regardless, Defendants' motion to dismiss still would be permitted because Plaintiffs failed to comply with the independent requirement of Rule 19(c), and the Complaint could be dismissed on this basis alone, if the Court so chose.

Senate will not destroy the Court's subject matter jurisdiction. This is a federal question case, and, even if it were not, there is no diversity of citizenship in any event. The Court also has personal jurisdiction over Lieutenant Governor Taylor, as Georgia law requires that he must be a resident of Georgia, see Ga. Const. art. V, § 1, ¶ 4, and it is unlikely that he could object to venue. See Fed. R. Civ. P. 19(a). Given that joinder appears feasible, the third step of the Rule 19 analysis does not apply.

Accordingly, as Lieutenant Governor Taylor is the proper, constitutionally authorized representative Defendant for the State Senate and is a "necessary" party to this action, the Complaint should be dismissed or Lieutenant Governor Taylor should be added as a Defendant in his official capacity.

### III. CONCLUSION

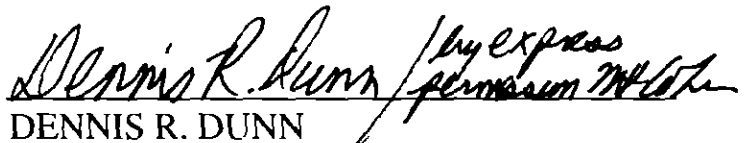
For the reasons set forth above, Plaintiffs' Complaint for Declaratory, Injunctive and Other Relief against the Georgia State Senate redistricting plan should be dismissed without prejudice pursuant to Rule 12(b)(7) or, alternatively, Lieutenant Governor Mark Taylor should be joined pursuant to Rule 19 as a Defendant in his official capacity as Lieutenant Governor of Georgia and President of the Georgia State Senate.

This 17 day of April, 2003.


Respectfully submitted,

THURBERT E. BAKER  
Attorney General of the State of Georgia  
Georgia Bar No. 033887

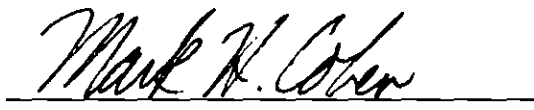
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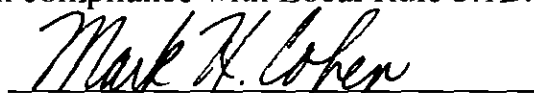
  
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**Local Rule 7.1D Certification**

By signature below, counsel certifies that the foregoing Brief was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

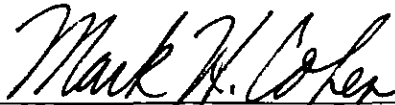
  
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