

**ORIGINAL**

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

SARA LARIOS, et al., )  
)  
Plaintiffs, ) CIVIL ACTION  
) NO. 1:03-CV-0693-CAP  
v. )  
)  
GEORGE E. "SONNY" PERDUE, )  
et al., )  
)  
Defendants. )

**REPLY BRIEF IN SUPPORT OF 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)**

**I. Introduction**

Defendants Perdue, Coleman, and Cox have filed a Motion to Dismiss, or in the Alternative, to Join a Party Pursuant to Fed. R. Civ. P. 12(b)(7) on grounds that Plaintiffs have failed to name Georgia's Lieutenant Governor Mark Taylor as the proper Representative Defendant of the Georgia State Senate and chose to name instead the Senate's President Pro Tempore, Senator Eric Johnson. See Complaint for Declaratory, Injunctive and Other Relief ¶ 38 ("Defendant Eric B. Johnson is a resident of Georgia and its sued in his representative capacity as the President Pro

Tem of the Georgia Senate . . .”). Georgia law expressly states that the Lieutenant Governor of Georgia is the presiding officer of the Georgia State Senate. Accordingly, Lieutenant Governor Taylor is the proper party defendant for any legal challenge affecting the Georgia State Senate as a body.

Rule 19(a) of the Federal Rules of Civil Procedure provides the test for determining whether a party is “necessary” and consequently should be joined in an action. A party is necessary if

(1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). A party is necessary if either subpart (1) or (2) is met. See Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 850 (11th Cir. 1999) (“A party is considered ‘necessary’ to the action if the court determines either that complete relief cannot be granted with the present parties or the absent party has an interest in the disposition of the current proceedings.”). Status as a necessary party is determined by the law of the state in which the district court sits. See Fed. R. Civ. P. 17(b) (“In all other cases capacity to be sued shall be determined by the law of the state in which the district courts is held.”).

Agreeing that state law governs this issue, Plaintiffs and Senator Johnson respond that Senator Johnson is the Representative Defendant of the Georgia State Senate because (1) the 2003 Georgia State Senate Rules prescribe that Senator Johnson is the “head of the Senate” and (2) Senator Johnson, as a practical matter, “controls the Senate” and “can unquestionably effectuate any Senate action that the Court might order.” (Def. Sen. Eric B. Johnson’s Resp. to Defs. Perdue, Coleman, and Cox’s Mot. to Dismiss Compl. 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) [hereinafter “Sen. Johnson’s Resp.”] at 4-5; see also Pls.’ Br. in Opp’n to Defs. Perdue, Coleman, and Cox’s Mot. to Dismiss Compl. 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) [hereinafter “Pls.’ Resp.”] at 6.) Neither of these arguments, however, is legally correct, and they consequently do not justify naming Senator Johnson as the Georgia State Senate’s Representative Defendant in this action in the place of Lieutenant Governor Taylor.

**II. The 2003 Georgia State Senate Rules Do Not Permit Naming Senator Johnson as the Representative Defendant of That Legislative Body.**

Contrary to Plaintiffs’ and Senator Johnson’s contention, the Senate Rules cannot and do not supplant Senator Johnson for Lieutenant Governor Taylor as the legal representative of the Georgia State Senate. The Senate Rules *cannot* supplant

Senator Johnson for Lieutenant Governor Taylor as the Senate's legal representative, because the Georgia Constitution itself expressly provides that only "[t]he Lieutenant Governor shall be the President of the Senate" and its presiding officer. Ga. Const. art. III, § 3, ¶ 1(a); *id.* art. V, § 1, ¶ 3.

The Senate Rules also *do not* supplant Senator Johnson for Lieutenant Governor Taylor as the Senate's legal representative. The Senate Rules, in language identical to that in the Georgia Constitution, provide that "[t]he Lieutenant Governor shall be the President of the Senate" and its presiding officer. Ga. State Sen. R. 3-4(a) (2003) (attached as Ex. "A" to Sen. Johnson's Resp.). This language exists in the current Senate Rules and also existed the 1994 and 2001 Senate Rules attached by Senator Johnson as exhibits to his brief. The language has not changed. Compare *id.*, with Ga. State Sen. R. 3-4(a) (2001), and Ga. State. Sen. R. 3-4(a) (1994) (attached as Exs. "B" & "C" to Sen. Johnson's Resp.). The Georgia State Senate could not and did not enact new rules in 2003 that make Senator Johnson the Senate's legal representative.

In addition, the Senate Rules provisions to which Plaintiffs and Senator Johnson refer do not show that Senator Johnson "actually controls" the Senate, as he and Plaintiffs contend. (See Pls.' Resp. at 6.) For example, contrary to the impression Plaintiffs and Senator Johnson seek to create, "all questions of priority

of business shall be *decided by the President of the Senate*, with the concurrence of the President Pro Tempore . . .” Ga. State Sen. R. 19 (2003) (emphasis added).

All bills are assigned to a committee by “*the President of the Senate* [ ], with the concurrence of the President Pro Tempore.” Ga. State Sen. R. 115 (2003)

(emphasis added). If a Committee of the Whole is formed, its chairperson *shall be appointed by the President of the Senate* with concurrence of the President Pro

Tempore.” Ga. State Sen. R. 122 (2003) (emphasis added). Even in regards to the

Committee on Assignments, the Senate Rules do not grant Senator Johnson sole power, or even power greater than granted to the Lieutenant Governor. The

Committee is comprised of three individuals: the President Pro Tempore, *the*

*President of the Senate*, and *the Majority Leader*. Ga. State Sen. R. 25(b) (2003)

(emphasis added).

**III. No Single Senator Controls a Legislative Body, Which Is Why a Suit Is Brought Against the Body as a Whole by Naming Its Presiding Officer as the Representative Defendant.**

Plaintiffs and Senator Johnson ignore the fact that this suit is against the Georgia State Senate as a body and that the named officer is merely the legal representative for that body as a whole:

The real party in interest in an official-capacity suit is the entity represented, not the individual officeholder. Official-capacity suits generally represent only a way of pleading an action against an entity

of which the officer is an agent. The official-capacity suit is, in all respects other than name, treated as a suit against the entity.

6 James Wm. Moore et al., *Moore's Federal Practice* § 25.41[2] (3d ed. 2003).

The allegation that Senator Johnson is the leader of the majority party does not make him the legal “presiding officer” of the Georgia State Senate. See Karcher v. May, 484 U.S. 72, 78 (1987) (“The fact that [the Speaker of the House] and [President of the Senate] participated in this litigation *in their official capacities as presiding officers on behalf of the legislature* does not mean that they became parties in all of their personal and professional capacities.” (Emphasis added.)).

Furthermore, even looking at the issue from the “practical considerations” that Plaintiffs and Senator Johnson encourage, one cannot conclude that Senator Johnson “controls the Senate in practice” and “can unquestionably effectuate any Senate action that the Court might order.” (Sen. Johnson’s Resp. at 3-5; see also Pls.’ Resp. at 6.) In addition to Senator Johnson, fifty-five other independent-minded individuals are elected from throughout Georgia to serve their constituents in the Georgia State Senate. See Ga. Const. art. III, § 2, ¶ 1(a) (stating that Georgia State Senate shall not have more than fifty-six members). A majority comprising at least twenty-nine of these senators is required for passage of any bill. See Ga. Const. art. III, § 5, ¶ 5. Majority support is never assured on any legislation, including redistricting legislation, as recent Georgia history has demonstrated. See

Johnson v. Miller, 922 F. Supp. 2d 1556, 1559 (S.D. Ga. 1995) (noting that, despite both houses being controlled by the same political party, “the legislature notified the Court on September 13, 1995, that it was unable to redraw the map and had adjourned, effectively leaving the task to us”). The unpredictability of the legislative process casts doubt on any member’s assertion that he “controls the Senate in practice” and “can unquestionably effectuate any Senate action that the Court might order.” (Sen. Johnson’s Resp. at 4-5; see also Pls.’ Resp. at 6.)

As no one individual in Georgia “controls” our state’s legislative bodies, this is why their presiding officers, the Lieutenant Governor and the Speaker of the House, are properly named as the representative defendants in court cases challenging their actions. See 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). The cases from other states that Plaintiffs and Senator Johnson cite are immaterial. As Plaintiffs concede, only the law of a state in which a district court is held determines the capacity to be sued. (See Pls.’ Resp. at 5 (citing Fed. R. Civ. P. 17).)

Without this accepted practice of suing the presiding officer, parties and the courts in determining proper representative defendants in cases against legislative bodies would be required to analyze the internal power struggles among the officeholders — power struggles in which the outcome might vary depending on each issue. Perhaps one legislator (or five or ten together) would command a majority of the legislative body's respect and support on one issue, while other legislators would predominate on a different issue. Would a plaintiff need to know this in determining which member (or group of members) to name as the representative defendant(s)? In the context of the Georgia State Senate, even assuming the Committee on Assignments controlled the Senate on all issues, what if a Majority Leader were elected, who although of the same political party as Senator Johnson, did not agree with him on issues and instead aligned himself with Lieutenant Governor Taylor on matters before the Committee? According to Plaintiffs and Senator Johnson's analysis, the President Pro Tempore not longer would be the proper representative of the Georgia State Senate for purposes of a suit.

Litigants and the federal courts cannot be expected to delve into these myriad political issues just to determine who is the proper representative defendant for a legislative body. A federal court action is not a poker game in which litigants

and the judge are required to determine internal political issues of who's up , who's down, who's in, and who's out at a particular moment in time. See Stevens v. Loomis, 334 F.2d 775, 776 n.1 (1st Cir. 1964) (“We are engaged in a lawsuit, not in a poker game . . .”).

No federal case law supports Plaintiffs and Senator Johnson's position that such investigation is required. As support for his and Plaintiffs' position, Senator Johnson cites Ceballos v. Shaughnessy, 352 U.S. 599, 603 (1957), and Estrada v. Ahrens, 296 F.2d 690, 699 (5th Cir. 1961).<sup>1</sup> These cases, however — notably, both involving immigration — apply at most only to actions against executive agencies in which an official “under the supervision” of the agency head possesses decisionmaking authority that is “final.” See Shaughnessy v. Pedreiro, 349 U.S. 48, 53 (1955), cited in Ceballos, 352 U.S. at 603-04. Nothing in these two cases supports applying them to the legislative branch, where no one is “under the supervision” of another and final decisionmaking authority rests in the body as a whole.

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<sup>1</sup> In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

**IV. Lieutenant Governor Taylor Is Not Required to Have Intervened at this Preliminary Stage of the Litigation in Order to Profess an Interest in the Case.**

Finally, Plaintiffs and Senator Johnson claim that Lieutenant Governor Taylor does not profess any interest in this case because he has not attempted to be made a party. The Lieutenant Governor is fact is represented by the Attorney General of Georgia in this proceeding, and the prior motion was filed with the Lieutenant Governor's knowledge and consent. Moreover, Lieutenant Governor Taylor certainly is not barred at this early stage of the proceedings from taking his proper position as a Defendant in the case. The case that Senator Johnson cites on this issue, Smith v. State Farm Fire & Casualty Company, 633 F.2d 401 (5th Cir. 1980), supports this view. That case emphasizes that the nonjoinder issue was not even raised until after trial and a verdict had been rendered (and even then was raised by the judge himself):

The pretrial order specifically stated there we no questions concerning nonjoinder. State Farm never brought the matter on for a pretrial hearing or otherwise offered evidence of the bankruptcy's existence until midway through the trial. Its introduction at that point appears to have been for the purpose of supporting State Farm's contention that Gladys Smith had no insurable interest in the property, and not to support the argument that the trustee was an indispensable party. . . . From State Farm's argument in its motion for a new trial . . ., the district court itself became aware of and raised for the first time the specific issue of the trustee's indispensability.

Smith, 633 F.2d at 404-05; see also Hawkins v. Fulton County, 95 F.R.D. 88, 91 (N.D. Ga. 1982) (holding that joinder during initial stages of discovery would not unduly prejudice or delay litigation). In this case, unlike in Smith, the nonjoinder issue clearly has been raised. This Rule 12(b)(7) motion is before the Court, and the Initial Joint Preliminary Report and Discovery Plan explicitly delineates the current joinder dispute. (Initial Joint Prelim. Report & Disc. Plan at 8.)

Because Plaintiffs have not sued the Senate's presiding officer, the Complaint either should be dismissed without prejudice pursuant to Fed. R. Civ. P. 12(b)(7) or Lieutenant Governor Taylor should be joined as the Representative Defendant of the Georgia State Senate.<sup>2</sup> 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 legal representative of the Georgia State Senate, Lieutenant Governor Taylor.

## **V. Conclusion**

For the reasons set forth above, Plaintiffs' Complaint for Declaratory, Injunctive and Other Relief should be dismissed without prejudice pursuant to Rule

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<sup>2</sup> Defendants Perdue, Coleman, and Cox have also filed this date a motion to realign Senator Johnson as a party plaintiff in this litigation, since his interests as expressed in his Answer and responses are closely aligned with Plaintiffs and in conflict with the other Defendants. In the event that motion is granted, Lieutenant Governor Taylor would also need to be added as the proper representative of the Georgia State Senate.


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<sup>th</sup> day of June, 2003.

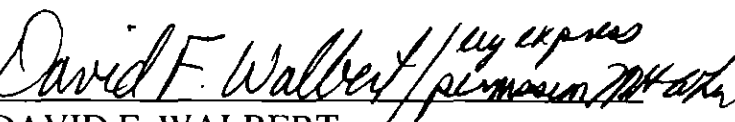
Respectfully submitted,

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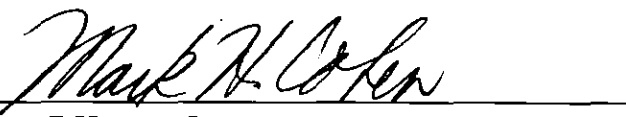
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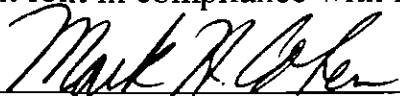
  
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**Local Rule 7.1D Certification**

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

  
\_\_\_\_\_  
Mark H. Cohen  
Georgia Bar No. 174567

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a copy of the within and foregoing REPLY BRIEF IN SUPPORT OF 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), prior to filing the same, by causing to be hand delivered a copy thereof properly addressed upon:

Frank B. Strickland, Esq.  
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and by first class mail, with adequate postage thereon, properly addressed to:

E. Mark Braden, Esq.  
Amy M. Henson, Esq.  
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This 17<sup>th</sup> day of June, 2003.

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