

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

LIONEL GUSTAFSON, et al.)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 1:05-cv-00352-CG-L
)	
ADRIAN JOHNS, etc., et al.)	THREE-JUDGE COURT
)	
Defendants,)	
)	
and)	
)	
SETH HAMMETT, LOWELL BARRON,)	
and HANK SANDERS)	
)	
Defendant-Intervenors.)	

**REPLY OF STATE ELECTION OFFICIALS TO TRIAL BRIEF OF THE
GUSTAFSON PLAINTIFFS ON THE ISSUE OF *RES JUDICATA***

Nancy Worley, in her official capacity as Secretary of State of Alabama, a named defendant in this action, on her own behalf and on behalf of the 67 Probate Judges who are also named as official-capacity defendants (the “State Election Officials”), submits this Reply in response to the Gustafson Plaintiffs’ Trial Brief (No. 238). For the reasons stated in their Initial Bench Trial Brief (No. 236), as well as the Trial Briefs of Defendants-Intervenors Hammett (No. 234) and Barron and Sanders (No. 233) and their Reply Briefs, this Court should enter judgment in favor of the State Election Officials and against the Gustafson Plaintiffs.

In this Reply Brief, the State Election Officials will show that they are entitled to judgment in their favor because the Gustafson Plaintiffs err in their treatment of key issues. Those issues include the relationship between the Gustafson Plaintiffs’ claims and the claims made by the previous sets of

plaintiffs and the legal standards that govern the application of claim and issue preclusion in public-law cases. In addition, the Gustafson Plaintiffs overstate the significance of *Larios*. Contrary to the Gustafson Plaintiffs' contention, that decision does not represent an intervening change in the law that might, standing alone, preclude the application of res judicata. When these and other issues are properly considered, it will be clear that the State Election Officials are entitled to judgment in their favor.

The Facts Revisited

A primary point of disagreement between the parties is where this Court should focus its attention. The Gustafson Plaintiffs want the attention to be focused on them, while the State Election Officials and Legislative Defendants-Intervenors believe that this Court should focus on the group of Republicans that was behind both the earlier cases and this one.

In brief, the Gustafson Plaintiffs ask this Court to focus on them, pointing out the absence of any connection between them and the earlier cases. They argue that none of the factual prerequisites for a conclusion of virtual representation or control is present. With respect to the Litigation Management Committee, the Gustafson Plaintiffs point out that they have retained the "sole authority" to make "all major decisions in the case." *Gustafson* No. 238 at 32-33.

In contrast, the State Election Officials note that a small group of Republicans is behind these cases. Mark Montiel represented the Montiel Plaintiffs and the Rice Plaintiffs and passed up the opportunity to make a political gerrymandering claim in *Montiel v. Davis*. He returns as one of the attorneys for the Gustafson Plaintiffs. Marty Connors, a member of the Litigation Management Committee, financed the *Barnett v. State* lawsuit and chose not to challenge the dismissal of that case. Steve French, another member of the Litigation Management Committee, represented Republican interests in the State Senate in 2001, opposed the preclearance of the new plans in a letter

to the United States Department of Justice written by David Winston, filed an amicus brief in the Alabama Supreme Court, made an affidavit attacking the plans in *Montiel v. Davis*, and helped to recruit plaintiffs for this case.¹ Jerry Lathan, the third member of the Litigation Management Committee, is “spearheading or trying to put together . . . an effort to increase Republican representation in the Legislature,” Joint Bench Trial Exhibit 31, page 143, lines 9-13, and this lawsuit is part of that effort. Joint Bench Trial Exhibit 32, page 116, lines 1-10. Lathan is in charge of raising the funds to support this case. In sum, this case is the product of an animus against the 2001 redistricting plans that has been around since 2001.

That animus may have gotten new wind with *Larios v. Cox*, but, as discussed below, the Gustafson Plaintiffs overplay the novelty of that decision. After *Larios* was decided, Connors, Lathan, and French signed up lawyers and recruited plaintiffs. All of those plaintiffs have been active in the Republican Party and live in overpopulated districts. A handful of them did not like the plans when they were adopted in 2001, but did nothing to challenge them until 2005. After being recruited, the plaintiffs played little part in the case. They have no responsibility for attorneys fees, most or all did not review the complaint before or after it was filed, and all have had little contact with either their attorneys or the Litigation Management Committee.

A. The Gustafson Plaintiffs understate the similarity between their claims and the claims in the previous cases.

At several points in their Brief, the Gustafson Plaintiffs note that they do not make any racial gerrymandering claims. *See, e.g.*, No. 238 at 4, 42-44. They explain that they allege that the

¹ Chris Pringle, who does not appear to be involved in this case, represented Republican interests in the State House of Representatives in 2001, opposed preclearance of the plans, and made an affidavit that was used by Mark Montiel in *Montiel v. Davis* and in *Rice v. English*. (*See Gustafson* No. 201-60-B at pages 94-97 of 169).

legislative redistricting plans violate the Fourteenth Amendment because they fail to satisfy one-person, one-vote standard and are the product of unconstitutional political gerrymandering. No. 238 at 4. They also make claims that the plans violate their First Amendment rights to freedom of expression and association. *Id.* This argument is to no avail.

At one level, the fact that the Montiel Plaintiffs made racial gerrymandering claims and the Gustafson Plaintiffs make political gerrymandering claims is entirely beside the point. The test for claim preclusion purposes is not whether a claim was made, rather, the test is whether a claim arising out of the same nucleus of operative fact could have been made. *See, e.g., Davila v. Delta Air Lines*, 326 F.3d 1183, 1187 (11th Cir. 2003); *NAACP V. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990) (Res Judicata applies “not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact.”); *see also Robertson v. Bartels*, 148 F. Supp. 2d 443, 452 (D.N.J. 2001) (three-judge court) (Counsel’s pursuit of different claims “amount[s] to nothing more than differences in strategy.”). The claims of both the Gustafson Plaintiffs and the Montiel Plaintiffs arise out of the same nucleus of operative fact, the Alabama Legislature’s redrawing of the legislative districts in 2001. Furthermore, a political gerrymandering claim could have been brought in 2001; such a claim would have been reviewed under the standard in *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2729 (1986), instead of the standard prevails today, but it would have been reviewed. Indeed, a claim of unconstitutional political gerrymandering would have been a natural response to the invocation of political considerations by the Legislative Intervenor-Defendants in *Montiel v. Davis*. The Montiel Plaintiffs chose, however, not to pick that fight.

The Gustafson Plaintiffs’ packaging of their claims is unsound for another reason: The claims of both the Montiel Plaintiffs and the Gustafson Plaintiffs include claims of global scope. In

the Montiel Plaintiffs' Third Amended Complaint, Gonzalo Montiel sought to represent all residents of all malapportioned districts, and Sheldon Day, Bobby Humphries, and John Rice sought to represent the citizens assigned to Senate districts, House districts, or both "that violate the constitutional requirements of one-person, one-vote." *Montiel v. Davis*, No. 63 at 6-8, ¶¶ 6-10; see also *id.* at 16-27, ¶¶ 37-39. The Montiel Plaintiffs' claims included the allegations that the population deviations between districts did not result from the pursuit of a rational state policy, the plans unnecessarily split "counties, cities, towns, and voting districts throughout the state . . .," and their votes were "systematically diluted . . . for an unconstitutional or irrational policy or purpose." *Id.* at 38, ¶ 77; 40-41, ¶ 79. The relief they sought included declaring the plans unconstitutional. *Id.* at 56.

For their part, the Gustafson Plaintiffs contend that their votes have been diluted, the plans, "which intentionally and invidiously discriminate against voters in overpopulated districts, are tainted with arbitrariness or discrimination," and the plans should be declared unconstitutional. *Gustafson* No. 9 at 42, ¶¶ 131, 132. The global focus of the Gustafson Plaintiffs' claims is also evident in Counts Two and Three of their First Amended Complaint. Count Two repeatedly attacks "[t]he state legislative redistricting plans and the individual districts contained therein," and Count Three complains about the "plans." *Id.* at 43-46, ¶ 133-38, 142, 144. *Cf. Vieth v. Jubelirer*, 188 F. Supp. 2d 532, 540 (M.D. Pa. 2002) (three-judge court) ("[U]nlike a claim for race-based gerrymandering, a plaintiff in a partisan gerrymandering claim need not allege that he lives in a particular district that has been gerrymandered on the basis of political affiliation.").

Given the statewide focus of *Montiel v. Davis* and the Gustafson Plaintiffs' claims, the only analytical difference between the two cases is the unconstitutional or irrational purpose that allegedly motivated the Legislature. That analytical difference is legally insignificant not only because the

Montiel Plaintiffs’ (and the Barnett Plaintiffs, for that matter) could have made a political gerrymandering claim. It is also legally irrelevant because the same legal analysis controls both claims. The four-part analysis employed by the court in *Montiel v. Davis*, 279 F. Supp. 2d 1279, 1286 (S.D. Ala. 2002), was also employed by the three-judge in *Larios v. Cox*, 300 F. Supp. 2d 1320, 1339-42 (N.D. Ga. 2004). More specifically, the *Larios* court concluded that the minor deviations in the Georgia plans were unconstitutional because:

- (a) “[T]he policies the population window was used to promote . . . were not ‘free from an taint of arbitrariness or discrimination.’” *Id.* at 1341 (quoting *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 1458 (1964));
- (b) “[T]he population deviations . . . were not driven by any traditional redistricting criteria” *Id.* at 1342; and
- (c) The explanations offered to support the Georgia plans did not adequately explain either the population deviations between regions of the state or the treatment of incumbents. *Id.*

If the Gustafson Plaintiffs are to prevail, they will have to travel down the same road.

The Gustafson Plaintiffs similarly understate the significance of *Barnett v. State* and *Rice v. English*. While the dismissal in *Barnett* was based on mootness, the court’s conclusion conflicted with the Barnett Plaintiffs’ view of their claims and might have been challenged. As the State Election Officials noted in their Initial Bench Trial Brief, No. 236 at 7-8, the Barnett Plaintiffs said that preclearance of the plans “may warrant some amendment or supplementation of the pleadings,” and that the words “as currently drawn” in the Amended Complaint “reach[ed] both the past practice and the new statutes.” *See Barnett* No. 26 at 16-17; No. 36 at 6-7, 14-15. The court disagreed with those arguments. The Barnett Plaintiffs could have asked to amend, asked the court to reconsider, or appealed, but did nothing. This Court should not permit the Gustafson Plaintiffs to pick up a baton that the Barnett Plaintiffs dropped.

Rice v. English also had a statewide focus. The Rice Plaintiffs contended that the State Senate plan was malapportioned because the districts are not of equal population. *Gustafson* No. 201 at 85-102. The contention that the State Senate districts are required to be of equal population by the Constitution of Alabama (1901) is matched by allegations in the Gustafson Plaintiffs' First Amended Complaint. There, the Gustafson Plaintiffs allege that the State's Congressional districting plan, which has a population deviation of zero, shows that such plans can be drawn and that, "[i]n and of itself, the use of a $\pm 5\%$ population deviation, whether a starting point or goal, makes the plans unconstitutional." *Gustafson* No. 9 at ¶¶ 106, 107; *see also id.* at 39, ¶ 120 (referring to the need to establish "state legislative districts of equal population").

B. The Gustafson Plaintiffs' legal analysis is flawed.

The Gustafson Plaintiffs' legal argument rests on private-law cases and overlooks the latitude allowed to the State in defending repetitious public law cases.

As the State Election Officials pointed out in their Initial Bench Trial Brief, the underlying issue is one of due process: Whether it is fundamentally unfair to the Gustafson Plaintiffs to bind them with the results in *Montiel v. Davis*, *Barnett v. State*, and *Rice v. English*. The doctrines of virtual representation and implied class action are subsets of the due process analysis, and not the only ones. Rather, as the United States Supreme Court has allowed, and the redistricting decisions uniformly show, in some public law cases, "the States have wide latitude to establish procedures to limit the number of judicial proceedings that may be entertained" *Richards v. Jefferson County*, 517 U.S. 793, 803, 116 S. Ct. 1761, 1768 (1996). In such cases, due process is satisfied when the prior proceeding is, explicitly or implicitly, "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Hansberry v. Lee*, 311 U.S. 32, 43, 61 S. Ct. 115, 119 (1940).

In this case, these elements have been met. The Gustafson Plaintiffs are plainly of the same class as the Montiel, Rice, and Barnett Plaintiffs. They are all Republicans who allege that they are residents of overpopulated districts and seek new redistricting plans. If the Montiel Plaintiffs or the Rice Plaintiffs had prevailed, or the Barnett Plaintiffs had not bailed out, the Gustafson Plaintiffs would have had no need to file suit. The second element has been met too. The Montiel Plaintiffs and the Rice Plaintiffs have already complained that the new districting plans are malapportioned. The Montiel Plaintiffs and the Barnett Plaintiffs had the opportunity to raise political gerrymandering claims, but passed it up. The people who were behind *Montiel v. Davis* (Mark Montiel) and *Barnett v. State* (Marty Connors) should not be given another chance to attack these plans.

EEOC v. PEMCO Aeroplex, Inc., 383 F.3d 1280 (11th Cir. 2004), is not to the contrary. There, the Eleventh Circuit rejected the contention that a lawsuit by private plaintiffs' barred a subsequent action by the EEOC. In its decision, the court explained that it would be "unusual to find privity between a governmental agency and private plaintiffs because governmental agencies have statutory duties, responsibilities, and interests that are far broader than the discrete interests of a private party." 383 F.3d at 1291; *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002) (Company's arbitration agreement with employee does not bar EEOC from seeking victim-specific judicial relief on behalf of that employee). This factor alone distinguishes PEMCO Aeroplex.

Moreover, in *PEMCO Aeroplex*, the court rejected the employer's reliance on *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990). There, the Eleventh Circuit held that a legislator's unsuccessful challenge to the State's flying of the Confederate flag on top of the capitol barred a later challenge by other state legislators who were NAACP members like the original plaintiff. In *PEMCO Aeroplex*, the court pointed out that *Hunt* "involved a general public law issue that affected

the plaintiffs' private interests only indirectly, unlike the alleged racial harassment at *PEMCO*." 383 F.3d at 1289. Citing *Richards v. Jefferson County*, the court noted the distinction between "such generalized public law challenges and more individualized cases," with "less preclusion protection" for the former class of claims. *Id.*

PEMCO Aeroplex, thus, recognizes that the public law distinction on which the State Election Officials and Legislative Defendants-Intervenors rely exists. And, as the State Election Officials have previously observed, challenges to redistricting plans are viewed as public law cases. Furthermore, in each of those cases claims were precluded to a greater or lesser degree. Accordingly, application of res judicata to some or all of the public law claims in this case would not run afoul of *PEMCO Aeroplex*.

More specifically, in *Robertson v. Bartels*, there may have been a finding of tactical maneuvering, but the two sets of plaintiffs pursued opposite claims. No matter which set of plaintiffs prevailed, though, the result would be the same. Viewed in that light, the "different claims amount to nothing more than differences in strategy, clearly an inappropriate basis on which to allow a second lawsuit." 148 F. Supp. 2d at 452. In addition, the court based its finding of identity of parties on the fact that the plaintiffs in the first case included Republican members of the State Senate and General Assembly and the plaintiffs in the second case included a different Republican member of the State Senate. The court found participation "by association" and pointed to the "clear commonality of interests among all the parties: their challenge to the New Jersey redistricting plan." *Id.* at 451.

Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996), also supports the application of res judicata. There, the court noted that there was some overlap in the plaintiffs, but it also pointed to an "organizational commonality" on the part of those concerned about the dilution of the African-

American vote in St. Louis, 93 F.3d at 457. In addition, there, as here, a lawyer linked the two sets of plaintiffs. The court's finding of tactical maneuvering also rests on an understanding of the way in which the two lawsuits worked together: a win by the first plaintiffs would benefit all while a loss would not harm the second set of plaintiffs. Holding preclusion inapplicable would "allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group." *Id.* As noted above, there would be no need for the Gustafson Plaintiffs' lawsuit if any of the earlier plaintiffs had won. Finally, the court rejected the contention that, because the first set of plaintiffs did not file a formal response to a summary judgment motion, there was no adequacy of representation. It held that "[n]o more" than "incentive and opportunity to fully litigate" was required. *Id.* at 458.

Third, *Thompson v. Smith*, 52 F. Supp. 2d 1364 (M.D. Ala. 1999) (three-judge court), supports the dismissal of the Gustafson Plaintiffs' claims. The court held that statewide one-person, one-vote and vote dilution claims were barred while district-specific racial gerrymandering claims were not for anyone but a repeat plaintiff. 52 F. Supp. 2d at 1370-72. The Gustafson Plaintiffs err because, as stated in their First Amended Complaint, their political gerrymandering claims are all statewide in scope, not district-specific. Furthermore, three of the Gustafson Plaintiffs (Keith Ward, Patricia Moore, and Billy Ray Dukes), live in the same district as a Montiel Plaintiff, (John Rice, Bobby Humphries, and Sheldon Day), and other Gustafson Plaintiffs equate race with partisan political leaning. *See, e.g.*, Joint Bench Trial Exhibit 5, page 92, lines 12-22; Joint Bench Trial Exhibit 10, page 58, line 21 through page 59, line 5; Joint Bench Trial Exhibit 16, page 61, lines 10-13 (House district lines in Lee County split voters along racial lines).² The Gustafson Plaintiffs deny

² These points do not appear in the Gustafson Plaintiffs' summaries of their testimony. *Gustafson* No. 238.

that their interests were adequately represented before, but there is no evidence that any previous plaintiff did not try to prevail.

Finally, the Gustafson Plaintiffs' reliance on the passage of time between the lawsuits fails because of *NAACP v. Hunt*, 891 F.2d 1555, 1558-59 (11th Cir. 1990). There, the lawsuit that had a preclusive effect was filed thirteen years before the precluded lawsuit. If the rest of the equitable, fact-intensive inquiry favors the application of *res judicata*, the passage of time between the judgments will make no difference.

C. Additional Considerations

The Gustafson Plaintiffs' characterization of *Larios* as new (No. 238 at 24, 26, 34), is incorrect. The only thing that is novel about *Larios* is that political gerrymandering plaintiffs won. The district court's decision in *Larios* follows other decisions in its analysis of the way in which a redistricting plan with a minor overall deviation of less than 10% can be attacked. The Gustafson Plaintiffs will have to make the same showing that the Montiel Plaintiffs failed to make; only the allegedly unconstitutional or irrational purpose will be different. Moreover, as noted above, such a claim could have been made in 2001. Such political gerrymandering claims were justiciable, and the court would have relied on the plurality opinion in *Davis v. Bandemer*.

At various points in their Trial Brief, the Gustafson Plaintiffs assert that there is no evidence to support a contention made or an inference drawn by the State Election Officials, the Legislator Defendants-Intervenors, or both. *See, e.g., Gustafson* No. 238 at 3, 18, 19, 22. These assertions need to be viewed with great care because, in many instances, the Gustafson Plaintiffs' invocation of the attorney-client privilege blocked pertinent questioning. In particular, the deposition of Mark

Montiel, who was deeply involved in *Montiel v. Davis* and *Rice v. English*, was not taken, and Bert Jordan declined to explain why the Barnett Plaintiffs did not seek to amend their complaint, ask for reconsideration, or appeal. *See* Joint Bench Trial Exhibit 28, page 59, lines 13-21; page 68, line 12 through page 70, line 11; page 129, lines 8-20. Even if an adverse inference cannot be drawn against the Gustafson Plaintiffs, for invoking the privilege, the State Election Officials and Legislative Defendants-Intervenors should not suffer as a result. To do otherwise would allow the Gustafson Plaintiffs to use the attorney-client privilege as both a sword and a shield.

The Gustafson Plaintiffs' invocation of the sword and shield metaphor with respect to the disposition of the class action allegations in *Montiel v. Davis* is unconvincing. As they have done previously, the Gustafson Plaintiffs suggest that the State Election Officials should not have contested class certification in *Montiel v. Davis*. *See Gustafson* No. 238 at 36-37. Private sector defendants facing class action allegations may act rationally in doing that, but, when they do, they are engaged in tactical maneuvers. Those private sector defendants do not face racial gerrymandering claims where only those plaintiffs who live in an allegedly racially gerrymandering district have standing to pursue such a claim. *See United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431 (1995). Moreover, given the Republican leanings of the Montiel Plaintiffs, they would not have been adequate representatives of Democratic, Libertarian, or independent voters. There would not have been one plaintiff class, there would have been several sub-classes, each pulling in a different direction. In short, requiring that the legal standards for certifying a plaintiff class be met is not tactical maneuvering.

Indeed, if anyone is engaged in structural maneuvering, it is the small group of Republicans that is behind this case just like it was behind other efforts to derail the 2001 legislative redistricting plans. A political gerrymandering claim by any of the Montiel or Rice Plaintiffs would clearly be

barred, so new plaintiffs were recruited. Likewise, the participation of Steve French or Jerry Lathan as plaintiffs, which was contemplated, would have provoked questions. In the end, the Gustafson Plaintiffs' claim to be "wholly innocent citizens who . . . have not engaged in . . . legal chicanery," *Gustafson* No. 238 at 55, reflects the criteria for their recruitment. The claim has the nature of a self-fulfilling prophecy.

CONCLUSION

In summary, the application of res judicata to the Gustafson Plaintiffs' claims would not offend due process. These Republicans make a global attack on the redistricting plans just like earlier sets of Republican plaintiffs did. Earlier Republican plaintiffs could have raised this claim, but chose not to because they were tired or did not want to spend the money. Now, with new Republican plaintiffs and a source of funds, Republicans who passed up the first opportunity want another shot. These new Republican plaintiffs should not be permitted to make claims that could have been made in 2002 by their predecessors when the same result, new redistricting plans, is sought.

For the reasons stated in the State Election Officials Initial Bench Trial Brief and this Reply, as well as the Trial Briefs and Reply Briefs of Seth Hammett and of Lowell Barron and Hank Sanders, this Court should enter judgment in favor of the State Election Officials and against the Gustafson Plaintiffs.

Respectfully submitted,

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

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