

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

JIM ZEIGLER, et al.

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Plaintiffs,

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vs.

*** Case No.: 03-CV-2017-900338.00**

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**HON. ROBERT BENTLEY,
GOVERNOR OF ALABAMA**

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Defendant.

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ANSWER OF GOVERNOR OF ALABAMA

The Governor says the following as his Answer to Auditor Zeigler and Chairman Chapman’s Complaint:

INTRODUCTION

Zeigler and Chapman are not entitled to the relief they seek in their introductory paragraph, and their claims are due to be rejected. Within one week after Senator Sessions resigned from the Senate, the Governor complied with §36-9-8 of the Alabama Code by issuing writs of election setting various dates relating to the special election to fill Senator Sessions’ seat at the soonest practicable time. It is telling that Zeigler and Chapman do not request that the special primary, special runoff, and special general elections be held on particular dates, for Zeigler and Chapman presumably have not been able to determine particular dates when those elections should be held.

Zeigler and Chapman’s inability to specify such dates is reason, by itself, for the Court to reject their lawsuit, for the Court cannot conclude that the Governor has violated any ministerial duty or abused the discretion given to him by §36-9-8 of the Alabama Code.

In any event, three considerations—two of which Zeigler and Chapman fail to mention in their Complaint—make the dates the Governor has set for the special primary, runoff, and general elections the soonest practicable dates.

First, as the Governor has explained in correspondence attached as Exhibit 1 to this Answer, the federal-court order issued by Judge Thompson in *Hall v. Merrill*, 2016 W.L. 5796871 (M.D. Ala. 2016) (attached as Exhibit 2 to this Answer), precludes the State from holding the elections on dates substantially earlier than those announced by the Governor. In that case Judge Thompson addressed the constitutionality, in special elections, of Alabama’s statute requiring independent candidates who wish to appear on the ballot to file a petition with signatures of at least “three percent of the qualified electors who cast ballots for the office of Governor in the last general election for the state, county, district, or other political subdivision in which the candidate seeks to qualify.” Ala. Code § 17-9-3.

Judge Thompson held that in light of this requirement, the special election to fill former U.S. Representative Jo Bonner’s seat occurred on a

timeframe that was too short to comply with the Constitution. To comply with the statutory 3% requirement, the independent candidate for Representative Bonner's seat needed to obtain 5,938 signatures over the course of 106 days. Judge Thompson issued a declaratory judgment against Secretary Merrill that the 3% requirement "cannot be enforced in the context of an off-season special election occurring on a similarly limited timeframe." 2016 W.L. 5796871, at *17. The Court held that this problem "should be addressed legislatively" by either eliminating the 3% requirement for special elections or by allowing for a special election to "be held with much more lead time" than the 106-day period used in the election at issue in that case. *Id.* Regardless, Judge Thompson stated that he had "confidence that the Secretary [of State] will act accordingly. *Id.*

The Legislature has not amended Alabama law in a way that would cure the problem Judge Thompson identified, and the Governor has a responsibility to apply Alabama law in a way that comports with the federal Constitution and Judge Thompson's binding order. Accordingly, because the 3% requirement is still in place under Alabama law, the Governor must call for an election to "be held with much more lead time" than the 106-day period used in the election at issue in the case involving Representative Bonner's seat. *See id.* The amount of lead time necessary here is even greater than the amount that would have been required in the election at issue in *Hall*. An

independent candidate for Senator Sessions' seat would need about 35,000 signatures, almost six times the amount the independent candidate needed for Representative Bonner's seat. Judge Thompson found that 106 days was not enough lead time to comply with the Constitution in the election for Representative Bonner's seat, so much more time would be needed to comply with the Constitution in the election to fill Senator Sessions' seat. Given the amount of lead time Judge Thompson's opinion would require, the only practicable solution that is consistent with Alabama law and the Constitution is to hold the special elections at the times the Governor has proclaimed in 2018.

Second, the Legislature has not allocated budget funds to cover standalone special primaries, special runoffs, and a special general election for the Senate seat at issue. According to the Governor's estimates, the total cost of standalone elections to fill the Senate seat would be approximately \$14 million. Unless the Legislature makes an appropriation for standalone elections, the soonest practicable date for the special elections would be contemporaneous with the other elections scheduled for 2018.

Third, the federal Uniform and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20302, has the practical effect of requiring the Secretary of State to have 54 days before each of the special primary, special runoff, and special general elections to mail absentee ballots to Alabamians overseas.

Zeigler and Chapman's failure to account for these considerations requires their claims to be denied.

The Governor says the following in response to the numbered paragraphs of Zeigler and Chapman's Complaint:

I. PARTIES

1. The Governor lacks sufficient information to admit or deny the allegations about Zeigler's citizenship and residence, and whether he pays taxes. The Governor admits that Zeigler is State Auditor. Alabama law concerning appointment of registrars speaks for itself, but Zeigler and Chapman have mischaracterized it. *See* Ala. Code § 17-3-2 ("Registration shall be conducted in each county by a board of three reputable and suitable persons to be appointed, unless otherwise provided by law, by the Governor, Auditor, and Commissioner of Agriculture and Industries, or by a majority of them acting as a state board of appointment.").

2. The Governor lacks sufficient information to admit or deny the allegations of this paragraph of the Complaint about Chapman.

3. The allegations of this paragraph pertaining to the fact that Robert Bentley is Governor, and a voter and resident of Alabama, are admitted.

II. BACKGROUND

4. In light of Zeigler and Chapman's misunderstanding about when Alabama law requires the Governor to take action regarding the Senate seat formerly held by Senator Sessions, it is fitting that Zeigler and Chapman have misrepresented the relevant dates in this paragraph about when Senator Sessions left office. Jeff Sessions was not confirmed as Attorney General, and he did not resign from the U.S. Senate, on "February 14, 2017," as Zeigler and Chapman have alleged. Instead, the Senate confirmed Sessions as Attorney General six days before then, on February 8, 2017, and Senator Sessions tendered his resignation from the Senate on February 8, 2017. The Governor otherwise denies the material allegations of this paragraph.

5. Zeigler and Chapman again have once again alleged erroneous dates in this paragraph. The Governor did not appoint Senator Strange on February 14, 2017, and he did not even appoint Senator Strange "[o]n the same day" the Senate confirmed the President's nomination of Attorney General Sessions, as Zeigler and Chapman have alleged. The Governor instead appointed Senator Strange on February 9, 2017, the day after the Senate confirmed the President's nomination of Attorney General Sessions. The Governor's appointment of Senator Strange was temporary, and it will

expire once a successor to the seat formerly held by Senator Sessions is elected during a special election and is qualified.

This paragraph of Zeigler and Chapman's Complaint also makes legal assertions to which no response is required. But to the extent that a response is required, the Governor denies any assertions material to the claims Zeigler and Chapman are making. The Governor otherwise denies the material allegations of this paragraph of the Complaint.

6. The Governor admits that on February 14, 2017, he issued a proclamation setting the following schedule for a special election for the Senate seat at issue:

- February 9, 2018: deadline for qualification for candidates from major political parties
- March 15, 2018: deadline for certification of qualified candidates to Secretary of State by major political parties
- June 5, 2018: deadline for independent candidates and minor party candidates seeking ballot access to file ballot access petitions and paperwork with Secretary of State
- June 5, 2018: Special Primary Election
- June 5, 2018: deadline for major parties to submit names of respective nominees to Secretary of State
- July 17, 2018: Special Primary Runoff Election

- November 6, 2018: Special General Election

The Governor otherwise denies the material allegations of this paragraph of the Complaint.

III. RELEVANT LAW

7. Section 36-9-8 of the Alabama Code speaks for itself. This paragraph of Zeigler and Chapman’s Complaint makes legal assertions about the statute to which no response is required in this Answer. In any event, Zeigler and Chapman fail to quote the statute in this paragraph of their Complaint, and that failure has led them to mischaracterize the statute in this paragraph of their Complaint. The statute does not say that “[i]f the vacancy occurs more than four months from the next regular election, the special election shall be set *forthwith*,” as Zeigler and Chapman allege. The statute instead says that “[w]henever a vacancy occurs in the office of senator of and from the State of Alabama in the Senate of the United States more than four months before a general election, the Governor of Alabama *shall forthwith order* an election to be held by the qualified electors of the state to elect a senator of and from the State of Alabama to the United States Senate for the unexpired term.” Ala. Code §36-9-8 (emphasis added). Under the plain language of the statute, the word “forthwith” modifies the word “order,” not the word “held,” as Zeigler and Chapman allege. So the statute’s plain language requires the Governor to issue his “order” about the election

forthwith, which the Governor did by issuing his order on February 14, 2017, six days after Senator Sessions resigned. The statute's plain language does not require the election to be "held" forthwith, as Zeigler and Chapman allege.

The Governor otherwise denies the material allegations and legal assertions of this paragraph of Zeigler and Chapman's Complaint.

8. This paragraph of Zeigler and Chapman's Complaint makes legal assertions to which no response is required in this Answer. The Governor denies the material allegations of this paragraph of the Complaint. In any event, Zeigler and Chapman are wrong to allege that the Governor is acting "in defiance" of the statute. The Governor already has complied with the statute by issuing his order, on February 14, 2017, setting a detailed schedule for the primary, runoff, and general elections associated with the Special Election. The Governor also has set the schedule so that the various required phases of the special election at the earliest practicable time in light of (1) federal requirements set by Uniform and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20302, (2) the order issued by the U.S. District Court for the Middle District of Alabama in *Hall v. Merrill*, and (3) the lack of current funding in the State budget for a standalone special election cycle, which is estimated to cost approximately \$14 million. Zeigler and Thompson, by filing this lawsuit, are seeking to defy the federal-court order in *Hall v. Merrill*.

The Governor otherwise denies the material allegations and legal assertions of this paragraph of the Complaint.

9. The Governor lacks sufficient information to admit or deny Zeigler and Chapman's allegations concerning the Legislative Research Service, the extent to which it researched this issue, and the extent to which the Legislative Research Service reached the same conclusion as Zeigler and Chapman.

The memo attached as Appendix B to the Complaint speaks for itself. It makes legal assertions to which no response is required in this Answer.

Regardless, the memo attached as Appendix B to the Complaint makes three noteworthy omissions. First, it does not mention that the word "forthwith" in the statute modifies the word "order," not "held," and thus does not consider that the plain language of the statute requires the Governor to issue his order "forthwith," rather than hold the election "forthwith." Second, and just as critically, the memo attached as Appendix B does not mention the federal court's decision in *Hall v. Merrill*, which Zeigler and Chapman are seeking to defy, and which requires that the special election to fill Senator Sessions' former seat be held on the dates set forth in the Governor's proclamation. Third, like the Complaint itself, the memo attached to the Complaint as Appendix B does not specify dates on which Zeigler, Chapman, and the Legislative Research Service believe that Alabama and federal law

require the special primary, special runoff, and special general elections to be held. This is presumably because Zeigler, Chapman, and the Legislative Research Service have been unable to come to a conclusion about the dates on which they believe that these phases of the special election must be held. Moreover, the memo attached to the Complaint as Appendix B shows that the statute does not set a date certain for the special election, which in turn shows that the statute grants the Governor substantial discretion to set the special election at an appropriate time.

The Governor otherwise denies the material allegations and legal assertions of this paragraph of the Complaint.

CAUSE OF ACTION

10. This paragraph of Zeigler and Chapman's Complaint makes legal assertions to which no response is required in this Answer. The Governor denies that Zeigler and Chapman have standing to assert the claims in the Complaint. The Governor denies that the allegations set forth in Zeigler and Chapman's complaint would be sufficient to afford them standing to assert these claims. The Governor denies that Zeigler and Chapman have a cause of action under Alabama law. The Governor denies that Zeigler and Chapman are entitled to the relief requested. A declaratory judgment is not the proper vehicle for judicial review under state law of an already-implemented official

act. An injunction cannot issue under Alabama law to compel the executive branch to engage in non-ministerial acts with respect to which the Legislature has granted the executive branch discretion.

Zeigler and Chapman's complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. The Governor otherwise denies the material allegations and legal assertions of this paragraph of the Complaint.

RELIEF REQUESTED

The last four paragraphs of Zeigler and Chapman's Complaint, in requesting relief, make legal assertions to which no response is required in this Answer. Zeigler and Chapman's Complaint misrepresents the text of §36-9-8 when they state that it requires an "election to take place, forthwith." Instead, the text states that the Governor will "forthwith order" the election, which he already has done. The Governor denies that Zeigler and Chapman are entitled to the relief requested. Zeigler and Chapman's complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. The Governor otherwise denies the material allegations and legal assertions of this paragraph of the Complaint.

AFFIRMATIVE DEFENSES

1. The Governor pleads the general issue.
2. Zeigler and Chapman have pointed to no law that establishes a ministerial duty for the Governor.
3. The Governor reasonably exercised his discretion when he issued a proclamation regarding the schedule for the special election in good faith.
4. The Governor acted within the discretion conferred to him by state and federal law in setting the schedule for the special elections.
5. Zeigler and Chapman have no standing to bring these claims.
6. Zeigler and Chapman's claims are moot.
7. Zeigler and Chapman have not been injured or harmed by any alleged act or omission by the Governor.
8. The Governor is immune from Zeigler and Chapman's claims.
9. The Governor's actions were justified.
10. Zeigler and Chapman's claims are barred because they seek to regulate the discretion entrusted to a constitutional officer of the State of Alabama.
11. Federal law, including UOCAVA, the First and Seventeenth Amendments, and other portions of the U.S. Constitution and the U.S. Code preempt Zeigler and Chapman's claims and supersede various laws relied on by Zeigler and Chapman.

12. The Legislature has implicitly repealed relevant portions of Section 36-9-8 of the Alabama Code on which Zeigler and Chapman rely.

13. The federal court order in *Hall v. Merrill* requires rejection of Zeigler and Chapman's claims and requires this Court to decline to exercise jurisdiction.

14. Zeigler and Chapman's claims are barred by the doctrines of comity and federalism.

15. Zeigler and Chapman's claims, if upheld, would violate the state and federal constitutions.

16. Zeigler and Chapman's claims are barred by the separation of powers.

17. Zeigler and Chapman have waived their claims.

18. Zeigler and Chapman's claims are barred by laches.

19. Zeigler and Chapman's claims are barred because they involve nonjusticiable political questions.

20. The complaint fails to allege the requisite elements for preliminary or permanent injunctive relief.

21. The Governor reserves the right to amend this answer to add other additional defenses.

Respectfully submitted,

s/ John C. Neiman, Jr.

*One of the Attorneys for the Governor of
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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2016, I filed a copy of the foregoing via Alafile, which will serve Zeigler and Chapman's lawyers.

s/ John C. Neiman, Jr.

OF COUNSEL