

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

<b>LAKEISHA CHESTNUT, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	<b>CASE NO. 2:18-CV-00907-KOB</b>
	)	
<b>JOHN H. MERRILL,</b>	)	
	)	
<b>Defendant,</b>	)	

**SECRETARY OF STATE JOHN MERRILL’S REPLY  
IN SUPPORT OF HIS MOTION TO STAY (DOC. 28)**

Defendant John Merrill, Alabama Secretary of State, respectfully submits this reply brief in support of his motion to stay the litigation while his Motion for Judgment on the Pleadings is pending (doc. 28). Plaintiffs argue that Secretary Merrill’s motion should be denied for essentially three reasons, none of which is persuasive.

I

First, Plaintiffs argue that the cases Secretary Merrill relies upon deal with motions to dismiss, not motions for judgment on the pleadings. But the Eleventh Circuit has affirmed stays of discovery granted during the pendency of a motion for judgment on the pleadings. *Horsley v. Feldt*, 304 F.3d 1125, 1131 n.2 (11th Cir. 2002) (stay of discovery was not an abuse of discretion “because the defendants’ motions for judgment on the pleadings are challenges to the legal sufficiency of [plaintiff’s] complaint that ‘present a purely legal question [and][f]or that reason, there was no need for discovery before the district court ruled on those motions.’”); *Keller v. Straus*, 480 F. App’x 552, 554 n.2 (11th

Cir. 2012) (approving stay of discovery after District Court converted a motion to dismiss to a motion for judgment on the pleadings). All the policy reasons for staying litigation apply with equal force here, and courts routinely stay discovery when considering a motion for judgment on the pleadings. *See Plumbers and Steamfitters Local 150 Pension Fund v. Muns Welding and Mech., Inc.*, 2015 WL 12843218 (S.D. Ga. May 5, 2015); *Smith v. Univ. Cmty. Hospital, Inc.*, 2018 WL 4907910 at \*2 (M.D. Fla. Oct. 10, 2018); *DYC Fishing, Ltd. v. Beaver Street Fisheries, Inc.*, 2006 WL 8439171 (M.D. Fla. Feb. 1, 2006).

## II

Plaintiffs' second argument is that the motion to stay should be denied because Secretary Merrill's motion for judgment on the pleadings contains "recycled" arguments that are not well founded. But the Secretary is not presenting any arguments that have already been considered by the Court (the proposed intervenor's motion to intervene was denied and he never presented his proposed motion to dismiss).

In any event, Defendant's motion for judgment on the pleadings is far from weak, containing three meritorious grounds for dismissal that will be further developed in Secretary Merrill's upcoming reply brief:

(1) The three-judge court question has been set for hearing, doc. 35, and the Louisiana Secretary of State, who has a pending motion concerning this issue in a similar case, agrees with Secretary Merrill's position that jurisdiction lies with a three-judge court.

(2) Plaintiffs' complaint is insufficient without a map or other specific allegations about the location and shape of a second majority-minority district.

Plaintiffs allege not that there is a reasonably compact population of Black voters that could populate such a district, but that there is a group of African-American voters in Mobile County and a group of African-American voters in Lee County, some 200 miles away, who can be cobbled together with others into a district. Plaintiffs have not sufficiently alleged facts that make it plausible that a *reasonably compact* majority-minority district is possible, and § 2 does not require a district that is not reasonably compact.<sup>1</sup> The existing allegations suggest that a second majority-black district would be a racial gerrymander that disregards communities of interest to put voters in a district solely on the basis of race.

(3) And Secretary Merrill presents serious arguments that Plaintiffs filed this action too late to receive the relief they request, when they waited seven years after enactment, when a new census is imminent, and when any districting would necessarily use stale data.

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<sup>1</sup> See *Bush v. Vera*, 517 U.S. 932, 979 (1996) (“If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district.”); *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (“[Section] 2 does not require a State to create, on predominantly racial lines, a district that is not ‘reasonably compact.’”) (citations omitted); *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (“When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply.”); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433-434 (2006) (“[A] State may not assum[e] from a group of voters’ race that they think alike, share the same political interests, and will prefer the same candidates at the polls. In the absence of this prohibited assumption, there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates.”).

### III

Third, Plaintiffs suggest that the motion to stay should be denied because Defendant is allegedly seeking to delay the litigation when Plaintiffs are in a rush to judgment. But case law permits Secretary Merrill's motion, and the only reason for a rush is because Plaintiffs delayed filing suit. Plaintiffs should not get to limit Secretary Merrill's defenses by waiting so late to file their claim.

The purpose of the motion to stay is not unwarranted delay but, as Circuit law permits, to avoid potentially unnecessary discovery while the Court considers a dispositive motion. Plaintiffs have recently served discovery requests that are quite extensive. For example, Plaintiffs ask Secretary Merrill to produce the voting records for each registered voter in Alabama (more than 3 million of them) for each of the past four election cycles; precinct level returns for each election since 2010; and identification of all records of complaints "relating to voting or election administration and involving allegations of discrimination or the failure to address the needs or concerns of minority citizens in Alabama, from January 1, 2007 to the present." *See* Plaintiffs' Requests for Production and Interrogatories, attached as Exs. 1 and 2. Putting aside the objectionable scope of these requests, responding will be onerous, and this is just the sort of work the Eleventh Circuit says should be stayed until the Court considers Secretary Merrill's dispositive motion.

For all these reasons, Secretary Merrill's motion to stay should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on December 18, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a copy to all counsel of record.

s/ James W. Davis

Of Counsel