FILED
2018 Dec-21 PM 03:41
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

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

SECRETARY OF STATE JOHN MERRILL'S REPLY IN SUPPORT OF HIS MOTION FOR JUDGMENT ON THE PLEADINGS (DOC. 27)

Defendant John Merrill, Alabama Secretary of State, respectfully submits this reply brief in support of his motion for judgment on the pleadings (doc. 27).

I. Jurisdiction lies with a three-judge court.

Plaintiffs' response fully discusses their belief that one judge may preside over this case, but it says not a word about why this issue is important or the costs of wrongly deciding it. To be clear: Secretary Merrill has no preference between a single-judge court or a three-judge court. He raises the issue because if this case is tried before a court later determined to have lacked subject-matter jurisdiction, then the proceeding would be a nullity, and the considerable time and resources put into it will have been a waste.

This is not a theoretical concern. "Federal court challenges to redistricting plans" are "expensive and very time consuming…." *Harris v. Ariz. Ind. Redistricting*

Comm'n, 993 F.Supp.2d 1042, 1086 (D. Az. 2014) (three-judge court).[1] Records from other voting rights cases bear this out. For example, in *Bethune-Hill v. Virginia State Board of Elections*, a case that challenged Virginia's legislative districts, Perkins Coie – who represents Plaintiffs in this case – sought $3,302,915.25 in fees and $558,389.96 in expenses. *Id*., No. 3:14-cv-00852-REP-GBL-BMK (E.D. Va. Sept. 19, 2018), docs. 241 and 241-3.

The issue thus is an important one and turns on the proper interpretation of 28 U.S.C. § 2284. Plaintiffs argue that the "plain language" of the statute applies only to "constitutional challenges," and that their Voting Rights Act claim is merely statutory. *E.g., Plaintiffs' Br. in Opp'n To Defendant's Mot. for Judgment on the Pleadings,* doc. 31 at 4. But plain language is not always the end of the analysis. Statutes should be interpreted to give effect to the language, and "the plain meaning of the statute controls *unless the language is ambiguous or leads to absurd results*." *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995) (emphasis added).

A fair reading of the statute is one that makes it effective. "This cannon follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always

[1] The NAACP's Legal Defense Fund observes that "A huge amount of resources is needed to bring a Section 2 complaint. … Section 2 challenges are also expensive to defend. … Section 2 litigation can run taxpayers in locales defending claims a considerable amount of money." *See* The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation, Legal Defense Fund (available at https://www.naacpldf.org/wp-content/uploads/Section-2-costs-08.13.18_1.pdf) (last visited December 6, 2018) (footnotes omitted).

includes effectiveness." Antonin Scalia & Bryan A. Garner, Reading Law 63 (2012). To give effect to §2284(a)'s purpose – ensuring that reapportionment cases that raise profound federalism concerns are decided by a three-judge court – the statute should be interpreted to include § 2 challenges as well as constitutional challenges.

The only distinction between the two sorts of claims is a distinction in the burden of proof – intent or results[2] – that did not exist in 1976 when Congress amended §2284(a) to eliminate the use of three-judge courts for many other types of cases. That distinction did not arise until 1982 at the earliest, when Congress legislatively overruled *City of Mobile v. Bolden*'s holding that intent was required to prove a Section 2 case, *id.*, 446 U.S. 55. 58 (1980); *see also Thornburg v. Gingles*, 478 U.S. 30, 36 (1986) (observing that the 1982 amendment to the Voting Rights Act "was largely in response to this Court's plurality opinion in *Mobile v. Bolden*");

[2] Plaintiffs are wrong to suggest that constitutional challenges and § 2 claims differ wildly because the former require proof of intentional discrimination and the latter merely a sterile results test. A § 2 plaintiff is required to prove that any vote dilution is "on account of race or color." As the Fifth Circuit has noted, Plaintiffs must prove that racial bias is at work:

> The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates. Rather, § 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats.

League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 854 (5th Cir. 1993). The Eleventh Circuit has similarly held that voter motivations are relevant to the question of vote dilution: "[W]hat appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates. '[T]o be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause.'" *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000), citing *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc) (Tjoflat, C.J., plurality opinion).

or perhaps until 1986, when the Supreme Court recognized the legal framework for vote dilution cases. *Gingles*, 478 U.S. at 48-51. When Congress last amended § 2284(a), it had no reason to address a distinction between constitutional and statutory challenges to congressional apportionment, or between intent and results standards of proof.

The Senate Report on the 1976 amendments bears this out. The Report assured members of Congress that even though some types of cases would cease to be heard by three-judge courts, "three-judge courts would be retained … in any case involving congressional reapportionment …." S. Rep. No. 94-204, *1 (1975). The Report explained this choice:

> The bill preserves three-judge courts for cases involving congressional reapportionment ... because **it is the judgment of the committee that these issues are of such importance that they ought to be heard by a three-judge court** and, in any event, they have never constituted a large number of cases."

Id. at *9 (emphasis added).

Plaintiffs point to the burden that three-judge courts impose on the federal court system, doc. 31 at 5, and the Senate Report notes that three-judge courts cause "a considerable strain on the workload of Federal judges." S. Rep. 94-204 at *3. However, when Congress sought to reduce the burden of three-judge courts, it nonetheless decided to keep them for "those [cases] involving reapportionment."

It makes sense that Congress would continue to give three-judge courts jurisdiction over reapportionment cases, because such cases involve serious federalism concerns. Redistricting is primarily a function of state governments, and for a federal court to take over this core state function threatens concepts of federalism and comity. *Abbott v. Perez*, __ U.S. __, 138 S.Ct. 2305, 2324 (2018) ("Redistricting 'is primarily the duty and responsibility of the State,' and '[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions'") (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). [3]

Requiring three-judge courts to preside over congressional apportionment suits while eliminating them for other types of cases was Congresses' attempt to balance the competing interests attendant to exercising federal court jurisdiction over this core state function. Three-judge courts were "designed to encourage greater

[3] *See also Cooper v. Harris*, __ U.S. __, 137 S.Ct. 1455, 1487 (2018) (quoting *Miller*, adding "the good faith of a State legislature must be presumed"); *Harris*, 993 F.Supp.2d at 1086; *Growe v. Emison*, 507 U.S. 25, 34 (1993) (recognizing "that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts,' and requiring federal court deferral to timely state efforts to redistrict); *Baldus v. Brennan*, 2011 WL 5040666, *2 (E.D. Wis. 2011) (three-judge court); *Kidd v. Cox*, 2006 WL 1341302, *7 (N.D. Ga. 2006) (three-judge court) ("Districting is 'the most vital of local functions' and 'primarily the duty and responsibility of the state … which federal courts should make every effort not to pre-empt,'" quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1973)); *Larios v. Cox*, 300 F.Supp.2d 1320, 1338 (2004) (three-judge court) ("The Supreme Court has recognized that the goal of fair and effective representation is not furthered 'by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurring removed from legislative hands and performed by federal courts.'") (citation omitted); *Cano v. Davis*, 191 F.Supp.2d 1140, 1142-3 (C.D. Cal. 2002) (three-judge court) ("Redistricting is undoubtedly a sensitive area of state policy.") (citing *Miller, supra*); *Winters v. Ill. State Bd. of Elections*, 197 F. Supp.2d 1110, 1114 (N.D. Ill. 2001) ("The Supreme Court has repeatedly emphasized the primary responsibility for legislative and congressional reapportionment lies with the States.") (three-judge court).

deliberation among three minds before a grant of injunctive relief, to lend greater dignity to the proceedings, and to provide expedited Supreme Court correction, if necessary." Michael E. Solimine, *The Three-Judge Court in Voting Rights Litigation*, 30 U. MICH J.L. REFORM 79, *84 (1996). Thus, requiring three judges to preside over suits challenging congressional apportionment signifies Congressional recognition that "'[f]ederal court review of districting legislation represents a serious intrusion on the most vital of local functions.'" *Diaz v. Silver*, 932 F. Supp. 462, 469 (E.D. N.Y. 1996) (three-judge court). The fact that such federal action is intrusive on a core state function does not depend on the nature of the challenge. Whether brought under the constitution or the Voting Rights Act, cases attacking a state's redistricting choices threaten state independence and agitate notions of federalism, and Plaintiffs have suggested no reason why Congress would not have given the same respect to states in statutory cases that it did in constitutional ones.[4]

To apply Justice Scalia's canon of statutory construction to this statute:

> (1) interpretation always depends on context, and when Congress last amended § 2284(a) it had no idea that in the future there would be a statutory claim for vote dilution and that was the context in which Congress acted;

[4] Plaintiffs' argue that if Congress wanted statutory congressional redistricting challenges to be heard by three-judge courts, it has had "more than *three decades*" to amend § 2284(a) for that purpose since the advent of a statutory vote dilution claim. *Plaintiffs' Brief* at 12-13/35. Congresses' failure to act, Plaintiff implies, should be read as acquiesce to statutory apportionment claims being heard by a single judge. This argument has multiple flaws, not the least of which is that it's entirely speculative. Plaintiffs' have offered no evidence that any member of Congress is aware of the issue before the Court, and the absence of Congressional action may just as well be understood as Congresses' ignorance of the issue rather than its acquiesce to changed circumstances.

> (2) context always includes evident purpose, which was to balance the need for federal jurisdiction against the intrusive consequences of exercising it; and
>
> (3) evident purpose always includes effectiveness, and the effectiveness of Congresses' solution – requiring three judges to preside over congressional apportionment cases instead of just one – is fulfilled only if both constitutional and statutory apportionment cases are heard by three-judge courts.

It necessarily follows that Plaintiff's claims must be heard by a three-judge court.

This case is not unlike a case decided by the Mississippi Supreme Court in 1994. In *Allred v. Webb*, the issue was whether a district attorney could fire an assistant district attorney. *Id*., 641 So. 2d 1218, 1219 (Miss. 1994). The controlling statute, Miss. Code Ann. §25-31-6, said that an assistant district attorney "may be removed at the discretion of the duly elected and acting district attorney." *Allred*, 641 So. 2d at 1221. The rub was that the district attorney in question was not *elected*: he was *appointed* by the Governor to fill a vacancy. *Id.*, 641 So. 2d at 1219. The trial court ruled that on the plain language, the *appointed* DA could not remove his assistant DA. The Mississippi Supreme Court noted that this reading of the statute led to an absurd result: "An unwise purpose will not be imputed to the legislature when a reasonable construction is possible." *Id.*, 641 So. 2d at 1222. The court concluded that the appointed DA could remove the assistant DA, stating:

> When construing a statute, all possible repercussions and consequences should be considered. When no valid reason exists for one of two possible constructions of a statute, the interpretation with no valid reason ought not be adopted.

Id.

Plaintiffs have provided no reason why Congress in 1976 would have said that constitutional challenges must be heard by a three-judge court and statutory challenges by a one-judge court. As we have shown, such a distinction did not even exist at the time, and could not have been intended by Congress. The only reading of § 2284(a) that gives effect to Congress' intent and avoids an absurd result is one that requires all challenges to state reapportionment plans to be heard by a three-judge court, and this Court should so hold. *See Page v. Bartels*, 248 F.2d 175, 189 (3d Cir. 2001) ("We do not believe that Congress made a deliberate choice to distinguish between constitutional apportionment challenges and apportionment challenges brought under § 2 of the Voting Rights Act.").[5]

[5] It matters not that the parties in the pending Georgia congressional redistricting lawsuit stipulated to jurisdiction before a single District Court judge. *See* doc. 31 at 3. Their agreement is not a judicial determination of jurisdiction. The docket sheet shows that the district court merely accepted the parties' agreement without making its own determination, even though it is the duty of a court, not the parties, to determine its jurisdiction. *Green v. Graham*, 906 F.3d 955, 961 (11th Cir. 2018 ("'Longstanding principles of federal law oblige us to inquire sua sponte whenever a doubt arises as to the existence of federal jurisdiction….'") (citations omitted). And if the court lacks jurisdiction, it cannot be conferred by agreement of the parties, Georgia notwithstanding. *Brawley v. Nw. Mutual Life Ins. Co.*, 288 F. Supp. 3d 1277, 1284 (N.D. Ala. 2017) ("'[t]he jurisdiction of a court over the subject matter of a claim involves the court's competency to consider a given type of case, and cannot be waived or otherwise conferred upon the court by the parties'") (citations omitted).

II. Plaintiffs' claims should be dismissed for failure to plead sufficient facts to make it plausible that they meet the first *Gingles* requirement.

In order to prevail in their Section 2 claim that Alabama must draw a second majority-black Congressional district, Plaintiffs must show (among other factors) that the population of African-Americans is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). At this stage, they must plead sufficient facts that, if true, make it plausible, not merely speculative, that this factor is met. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Plaintiffs do not meet this standard. They do not allege that there is a geographically-compact black population that can form the core of a new majority-black district. Rather, they allege that there are four separate, isolated, heavily-black areas in Mobile, Macon and Bullock, Montgomery, and Lee Counties. Lee County is over 200 miles from Mobile, and it is not at all clear that a constitutional district can link all these areas together without a single-minded focus on race and a disregard of standard districting principles of compactness, preserving communities of interest, *etc.* It also is not clear on the alleged facts what drawing such a district would do to District 7 (would it in fact remain majority black?)[6] or whether the

[6] Plaintiffs must show that drawing a second constitutional district would not eliminate the existing district. "If the inclusion of the plaintiffs would necessitate the exclusion of others, then the State cannot be faulted for its choice." *LULAC v. Perry*, 548 U.S. 399, 429-430 (2006).

population left along the Florida border is sufficiently large to draw a district that complies with one-person, one-vote.

Secretary Merrill does not claim that every Section 2 claimant must include a map with his complaint. On these allegations, though, the absence of such a map (or other factual allegations showing the location and demographics of the proposed district) is fatal, because Plaintiffs appear to be asking the Court to require Alabama to engage in unconstitutional racial gerrymandering.

Section 2 does not require Alabama to draw any conceivable majority-minority district,[7] not if it would violate the Equal Protection Clause. That clause "prohibits a State, without sufficient justification, from separat[ing] its citizens into different voting districts on the basis of race." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S.Ct. 788, 797 (2017). Racial sorting harms voters, including by "being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Id.* (internal citations and quotation marks omitted).[8]

[7] It has long been established that §2 does not require maximization of majority-minority districts: "[R]eading the first *Gingles* condition in effect to define dilution as a failure to maximize in the face of bloc voting (plus some other incidents of societal bias to be expected where bloc voting occurs) causes its own dangers, and they are not to be courted. … One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. … Failure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994).

[8] *See also Miller v. Johnson*, 515 U.S. 900, 911-912 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls. Race-based assignments embody stereotypes that treat individuals

Simply put, if a second majority-minority district cannot be drawn in Alabama without racial gerrymandering, and without sacrificing compactness, § 2 does not require it and Plaintiffs' claim fails. *Bush v. Vera*, 517 U.S. 952, 979 (1996).[9] A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.* Nor does Section 2 require Alabama to ignore communities of interest (and Plaintiffs have alleged no facts to show that voters on the Georgia border and in downtown Mobile form a community of interest). "The recognition of nonracial communities of interest reflects the principle that 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

as the product of their race.") (internal citations and quotations marks omitted); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.").

[9] *See also Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997) ("[Section] 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.' And the § 2 compactness inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.") (citations omitted); *Cooper*, 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."); *Miller*, 515 U.S. at 920-927 (finding that a plan that failed to create an additional majority-minority district was not intentionally discriminatory when creating that district would violate standards of compactness and contiguity).

the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *LULAC v. Perry*, 548 U.S. 399, 433-434 (2006).[10]

Without a plan or specific allegations about the shape and location of the proposed district, it is not plausible that Plaintiffs meet the first *Gingles* requirement or that Section 2 requires Alabama to draw a second majority-minority district. Interestingly, Plaintiffs never say that they do not yet have a plan; they just want to wait to submit it with expert reports, which would give us all far less time to assess it. But when the facts as alleged show only that it may be possible to engage in an impermissible racial gerrymander, they should present it now to show that their claim is more than speculative.

III. Plaintiffs' claim is barred by laches.

A. Laches is applicable to Plaintiffs' claim.

Plaintiffs argue that laches does not apply to their claim because they seek prospective relief. But as clearly demonstrated by the cases cited in the Secretary's motion and principal brief, the prospective relief involved in suits challenging electoral districts *is* subject to a defense of laches. *See Fouts v. Harris*, 88 F. Supp. 2d 1351, 1353 (S.D. Fla. 1999) ("Laches has been applied to bar actions challenging

[10] *See also LULAC*, 548 U.S. at 434 ("Legitimate yet differing communities of interest should not be disregarded in the interest of race. The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals. Compactness is, therefore, about more than 'style points;' it is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal opportunity to participate in the political process and to elect representatives of their choice.")

redistricting plans."); *Sanders v. Dooly County*, 245 F.3d 1289, 1291 (11th Cir. 2001) (upholding the district court's application of laches to bar claim for injunctive relief from alleged gerrymandered districts). This is because of the unique nature of redistricting where the boundaries of electoral districts have a ten-year expiration date. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964) (holding that "if reapportionment occurred with less frequency [than decennially], it would assuredly be constitutionally suspect"). Other election laws, such as polling place hours, remain in place until repealed or superseded. But because of a district boundary's expiration date, there is a time when it is too late for a court to address a challenge, and as discussed below, courts have found prejudice when States are required to redistrict in quick succession.

B. Plaintiffs Inexcusably Delayed in Bringing Their Claim.

Plaintiffs next argue that their delay in filing the claim was excusable because plaintiffs are entitled to take the time necessary to "fully investigate" their claims, and because Chestnut herself "did not become a resident of Alabama until 2016." Doc. 31 at 19-21. Neither argument is valid.

Plaintiffs argue that "a plaintiff's reasonable need to fully investigate its claims" may excuse a delay in filing suit, noting a specific need to develop evidence of racial bloc voting in Section 2 cases. Doc. 31 at 21 (quoting *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1285 (11th Cir.

2015). Yet Plaintiffs stop short of saying that investigation and evidence-gathering is the actual reason for their delay in filing suit; indeed, they say nothing about steps they have taken to investigate or evidence they have worked to gather, or why either would take seven years. And indeed, the discovery requests served on the Secretary indicate that Plaintiffs, far from using the last seven years to investigate their Section 2 claim, have waited until now to seek out the relevant data from the Secretary in the midst of actually litigating their claims. *See* docs. 36-1 (Pls. First Req. for Production) and 36-2 (Pls. First Interrogatories).

Plaintiffs also argue that Chestnut's 2016 move to Alabama (a fact not alleged in the complaint, which states only that Chestnut moved to CD 1 in 2016, *see* doc. 14 at 4 ¶ 13) justifies the delay because she, too, "was entitled to investigate and prepare her claims," doc. 31 at 21, implying that investigative work done for this case could not have commenced until 2016. Yet Ms. Chestnut is but one of 10 named plaintiffs in this action, and no mention is made of the reason any of the other nine could not have brought this challenge sooner.

The census data were released in February 2011, and the redistricting was passed by the legislature in June 2011. Since that time, no changes in the law or the underlying data have occurred, and nothing stood in the way of bringing this claim. Plaintiffs' delay until 2018 is inexcusable.

C. Plaintiffs' Delay is Prejudicial to Secretary Merrill.

As the Secretary explained in his principal brief, *see* doc. 27 at 20-22, courts have consistently held that back-to-back redistrictings are prejudicial because frequently-changing districts cause confusion for voters and candidates alike. *See Sanders v. Dooly County*, 245 F.3d 1289, 1290-91 (11th Cir. 2001), *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990), *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354-55 (S.D. Fla. 1999). Moreover, late-cycle reapportionment is necessarily based on stale data, and "old census figures have been recognized as unduly prejudicial because they fail to provide a basis for 'fair and accurate representation for the citizens.'" *Fouts*, 88 F. Supp. 2d at 1355 (quoting *White*, 909 F.2d at 104).

Plaintiffs argue that the Secretary is "describ[ing] as prejudice [what] are simply consequences of an adverse ruling on the merits, which are plainly insufficient to demonstrate laches." Doc. 31 at 23. But laches is a defense grounded in the equities of a case as a whole, and the viability and effectiveness of the remedy sought is a consideration. The point of laches is to protect a defendant's ability to litigate the case to a fair and just resolution, and its purpose is thus served by applying it against Plaintiffs to preclude expensive, time-consuming litigation in pursuit of a remedy that imposes great added costs on Secretary Merrill and the State of Alabama immediately before they must undertake the same redistricting process *again* in 2021.

Plaintiffs finally argue that even if an injunction would be prejudicial, their claim for *declaratory* relief should be allowed to proceed, citing *Sanders v. Dooly County*. *See* 245 F.3d 1289, 1291 (11th Cir. 2001). In *Sanders*, the Eleventh Circuit held that the plaintiffs' claims for declaratory relief as to a redistricting scheme could proceed, even though their claims for injunctive relief were barred by laches, because the declaratory judgment would be of real value to the plaintiffs and would "prevent the Attorney General from using the [challenged] plan as a baseline for retrogression analysis in the post-2000 census round of preclearance proceedings under § 5 of the Voting Rights Act." *Id.*, 245 F.3d at 1291. But Alabama is not presently subject to preclearance obligations, so Plaintiffs here derive no benefit from a declaratory judgment that re-sets the benchmark for preclearance review. Nor does a declaratory judgment ensure anything about Alabama's 2021 congressional districting map because Alabama's congressional delegation will likely shrink from seven to six following the 2020 census. The loss of a congressional seat will re-set the baseline for drawing the boundaries of the districts themselves, increasing the number of voters residing in each of them, and changing the calculations for the possibility of drawing two majority-minority districts.

By contrast, the Secretary (and the State) will be prejudiced by having to continue litigating the claim for declaratory relief because of the time and expense associated with doing so in the absence of any real benefit to Plaintiffs.

Plaintiffs inexcusably waited eight years and four election cycles to bring the sole claim in this case. If they were to prevail, new districts would be drawn on stale data, would be in place for at most a single election, and then Alabama would have to turn around nearly immediately and start the process again after the upcoming census. Other courts have applied laches to dismiss claims in these circumstances, and Plaintiffs' claims are likewise barred.

* * * * *

For all these reasons, Secretary Merrill's motion for judgment on the pleadings should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 21, 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