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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

LAKEISHA CHESTNUT, an individual; MARLENE MARTIN, an individual; BOBBY DUBOSE, an individual; RODNEY LOVE, an individual; JANICE WILLIAMS, an individual; KAREN JONES, an individual; RODERICK CLARK, an individual; JOHN HARRIS, an individual, Plaintiffs, v. JOHN H. MERRILL, in his official capacity as Alabama Secretary of State, Defendant.	Case No. 2:18-cv-907-KOB

JOINT STATUS REPORT

Pursuant to the Court's February 12, 2019 Order (ECF No. 49), the parties submit the following joint status report.

1. Nature of the Case

A. Plaintiffs' Statement of the Case

This case is a voting rights action challenging Alabama Act No. 2011-518 ("S.B. 484"), now codified at Ala. Code § 17-14-70. Plaintiffs assert that S.B. 484 violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. They allege that S.B. 484 "packs" African American voters into the Seventh Congressional District and "cracks" other African-American voters among Congressional Districts 1, 2,

and 3, despite the fact that the African-American population in these areas could have been united to form an additional, geographically compact majority-minority congressional district in which African-American voters would have the opportunity to elect their candidates of choice. Plaintiffs also allege that African-American voters in Alabama are politically cohesive, that voting in the state is highly racially polarized such that the white majority often votes as a bloc to defeat African-American voters' preferred candidates, and that the totality of the circumstances reveals that African Americans in Alabama have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.[1]

B. Defendant's Statement of the Case

The issue in this case is whether Section 2 requires Alabama to draw a second majority-black congressional district. While Plaintiffs allege that District 7 is "packed," they have expressly disavowed a racial gerrymandering challenge to District 7, and a single District Court judge lacks jurisdiction to consider such a challenge.

Defendant contends that it is not enough for Plaintiffs to show that it is possible to draw two majority-black districts. Rather, Plaintiffs must show that it is

[1] Plaintiffs also note that the Court instructed that this Status Report "should not be used to argue the party's case, or to present all possible legal theories," ECF No. 49 at 2, let alone argue legal theories that have already been rejected by the Court. *See supra* at 2.

possible to draw two *constitutional* majority-black districts that observe communities of interest and other traditional districting criteria, and that such districts would be part of a state plan that is legal as a whole. Defendant expects to show that while Plaintiffs' demonstrative plans include two districts that barely contain a voting-age black majority, those districts are unconstitutional racial gerrymanders that split communities of interest. In fact, had Alabama drawn any of the plans that Plaintiffs will propose, a federal court would likely have struck the plan. For these and other reasons, Plaintiffs cannot show that Section 2 requires Alabama to draw a second majority-black district.

Plaintiffs' claims are also barred by laches, which is the subject of a pending motion. Even if this case proceeds on the current schedule, it will not be possible to reach a final judgment (that will almost certainly be appealed by one party or the other), draw new plans, and have hearings for the Court to consider remedial plans, all in time for the 2020 elections. If Alabama is ordered to conduct a special session of the Legislature to draw a remedial plan and hold a special congressional election outside the regular election schedule, such proceedings are exceedingly costly, would be based on out-of-date numbers, produce low voter turnout and high voter confusion, and any new plan would be in place for only part of one Congressional session before a new census requires new redistricting efforts. These

issues are caused by Plaintiffs' inexcusable delay in challenging the 2011 plan and are prejudicial to the State and to voters.

The mere pendency of this lawsuit at this late stage of the census cycle is already causing prejudice. Plaintiffs' proposed plans will dismantle Districts 1 and 2, currently represented by Rep. Bradley Byrne and Rep. Martha Robey, respectively. Rep. Byrne has announced that he is running for United States Senate in 2020, and there will therefore be a vacancy in District 1 that is currently a compact district encompassing the Gulf Coast region of the state, a strong community of interest. Any candidate considering a run for that open seat now faces a dilemma. She does not know if the district will include her residence, she does not know whether to campaign in Washington County or Houston County, and any fundraising efforts are likely futile as long as there is so much uncertainty regarding the district lines. The uncertainty at this late stage, which uncertainty is unlikely to be resolved before the qualifying deadline, may serve to dissuade qualified persons from running for office. For all these reasons, this case should be dismissed on laches grounds, and such dismissal should come before the parties continue to engage in expensive discovery.

2. Current Case Status

The parties have served their initial disclosures. Plaintiffs served Defendant with Plaintiffs' First Requests for Production on November 30, 2018. Plaintiffs

also served a First Set of Interrogatories on December 6, 2018. Defendant initially refused to engage in discovery. Indeed, Plaintiffs did not begin to receive responsive documents from Defendant until February 15, 2019, less than one month before their expert reports were due. Pursuant to the Court's scheduling order, Plaintiffs served Defendant with Plaintiffs' expert reports on March 8, 2019. The parties are currently in the process of scheduling depositions of Plaintiffs and Plaintiffs' experts. Depositions of Plaintiffs will likely occur during the first two weeks of April 2019, and depositions of Plaintiffs' experts will likely occur mid-May 2019.

Defendant notes further as follows:

Secretary Merrill has produced all documents in his custody and control that are responsive to Plaintiffs' discovery request.

Defendant has retained M.V. ("Trey") Hood, III, Ph.D., as an expert witness. Dr. Hood is a political scientist from the University of Georgia. Dr. Hood's contract is executed and in place. Defendant is in the process of retaining Douglas Johnson, Ph.D., a demographer. His contract is expected to be effective Friday, March 15, 2019.

Dr. Hood and Dr. Johnson are each providing testimony this week in a political gerrymandering case that is in trial in the Southern District of Ohio, *Ohio A. Philip Randolph Institute v. Kasich*, No. 1:18-cv-00357. They have thus been

unable to turn to Plaintiff's expert reports this week. Next week, once defense counsel has been able to consult with Defendant's experts about Plaintiffs' three reports, Defendant will have a better idea if it will be possible to meet the current April 8, 2019 deadline for Defendant's report.

3. Pending Motions

On November 2, 2018, Defendant moved for judgment on the pleadings. (ECF No. 27). The Court denied a portion of that motion on January 28, 2019. (ECF Nos. 40, 41). The issues raised in Defendant's motion for judgment on the pleadings but not resolved by the Court's January 28, 2019 ruling remain pending.

4. Current or Anticipated Problems in Preparing Case for Trial

Plaintiffs see no current or anticipated problems regarding preparing this case for trial.

Defendant remains concerned that the current April 8, 2019 expert disclosure deadline is unrealistic, in light of the breadth of issues covered by Plaintiffs' expert reports and the fact that Defendant's experts were, as discussed above, unavoidably unable to begin work this week due to their role as expert witnesses in a federal lawsuit in Ohio. Defendant expects to have a fuller understanding next week of whether he will need to request an extension.

Plaintiffs contend that there is sufficient time for Defendant to meet his expert disclosure deadline. Dr. Johnson and Dr. Hood have previously submitted

responsive expert reports in redistricting litigation under similar timelines. *See, e.g.*, Notice of Legislative Defendants' Expert Report, *Covington v. North Carolina*, No. 1:15-cv-399-TDS-JEP (M.D.N.C. Dec. 27, 2017), ECF No. 234-1 (report by Dr. Johnson responding to a special master recommendation filed within 26 days); Expert Report of M.V. Hood III, *One Wis. Inst. v. Nichol*, No. 3:15-cv-324-JDP (W.D. Wis. Jan. 11, 2016), ECF No. 86 (report by Dr. Hood responding to plaintiffs' expert reports within 32 days); Initial Pretrial, Scheduling and Discovery Order, *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14-cv-852-REP-AWA-BMK (E.D. Va. Mar. 3, 2015), ECF No. 35 (ordering defendants to serve Dr. Hood's report within 30 days).

5. Settlement Prospects and Mediation

Pursuant to the Court's scheduling order, the parties have considered the prospect of settlement. The parties agree that settlement is not a possibility, and that participation in mediation would not bring the parties closer to a resolution of this dispute. The parties therefore do not wish to submit this case to mediation.

Dated: March 15, 2019

Respectfully Submitted,

By */s/ James W. Davis*
James W. Davis (ASB-4063-I58J)
Deputy Attorney General
Winfield J. Sinclair (ASB-1750-S81W)
Misty S. Fairbanks Messick (ASB-1813-T71F)
Laura E. Howell (ASB-0551-A41H)
Brad A. Chynoweth (ASB-0030-S63K)
Assistant Attorneys General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8440
jimdavis@ago.state.al.us
wsinclair@ago.state.al.us
mmessick@ago.state.al.us
lhowell@ago.state.al.us
bchynoweth@ago.state.al.us

Dorman Walker (ASB-9154-R81J)
BALCH & BINGHAM LLP
Post Office Box 78
Montgomery, AL 36101-0078
Telephone: (334) 834-6500
Facsimile: (334) 269-3115
dwalker@balch.com

Counsel for the Defendant

Respectfully submitted,

By /s/ *Aria Branch*
Marc Erik Elias (*admitted pro hac vice*)
Bruce V. Spiva (*admitted pro hac vice*)
Aria C. Branch (*admitted pro hac vice*)
Perkins Coie, LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
Email: MElias@perkinscoie.com
Email: ABranch@perkinscoie.com

Abha Khanna (*admitted pro hac vice*)
Perkins Coie, LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: AKhanna@perkinscoie.com

By: *Richard P. Rouco* (AL Bar. No. 6182-R76R)
Quinn, Connor, Weaver, Davies & Rouco LLP
Two North Twentieth
2-20th Street North, Suite 930
Birmingham, AL 35203
Phone: (205) 870-9989
Fax: (205) 803-4143
Email: rrouco@qcwdr.com

Attorneys for Plaintiffs