

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, et al.

Plaintiffs,

v.

KYLE ARDOIN, in his official capacity as the
Acting Secretary of State of Louisiana,

Defendant

Case No. 18-625-SDD-EWD

JOINT STATUS REPORT

A. JURISDICTION

Plaintiffs' Position: This Court has jurisdiction over this action pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), and 1357. This Court has jurisdiction to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. Venue is proper under 28 U.S.C. § 1391(b).

Defendant's Position: Defendant contends that 28 U.S.C. § 2284 applies to this case and no further proceedings should occur until that issue is resolved by this Court and through the completion of the applicable appellate process. This court is without jurisdiction to decide the merits of the case.

B. BRIEF EXPLANATION OF THE CASE

1. Plaintiffs' claim: African-American voters in Congressional Districts 2, 5, and 6 challenge Louisiana's 2011 Congressional Map under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Louisiana has diluted the voting strength and political influence of African Americans in the state by adopting a congressional map that "packs" African-American voters into one majority-minority district (Congressional District 2) and "cracks" African-American voters among other districts, including the districts in which Plaintiffs reside.

African-American voters in Louisiana are sufficiently numerous and geographically

compact to form a majority of eligible voters in a second congressional district. Moreover, given the existence of racially polarized voting in Louisiana, along with, *inter alia*, Louisiana's long history of discrimination against African Americans, the ongoing socioeconomic effects of that history, underrepresentation of African-American elected officials, and perpetuation of racial appeals in campaigns in the state, a second majority-minority district is required under Section 2. Louisiana's failure to create a second majority-minority district in its 2011 Congressional Plan has resulted in the dilution of African-American voting strength in violation of Section 2 of the Voting Rights Act.

The Complaint seeks an injunction of the 2011 Congressional Plan and the ordering and/or adoption of a new congressional plan that includes two majority-minority districts.

2. Defendant's claims:

Defendant asserts that this Court does not have jurisdiction and that a panel of three-judges is required to hear this claim under 28 U.S.C. § 2284.

Defendant asserts that Plaintiffs' claim is made too late in the congressional districting cycle and is barred by laches. The Louisiana Legislature re-apportioned its congressional districts in 2011 based upon the 2010 U.S. census. The reapportionment plan was precleared on review by the U.S. Department of Justice under Section 5 of the Voting Rights Act in August 2011. Congressional elections proceeded under the plan in 2012, 2014, and 2016. Congressional elections are scheduled to be held under the plan in 2018, and Plaintiffs have not requested any relief in advance of this coming election. In 2013, a group of plaintiffs made the same claims as the plaintiffs make here in *Buckley v. Schedler, CA 13-763 (MD La. 2013)*. Plaintiffs in *Buckley* dismissed the suit voluntarily. Seven years have elapsed since the Justice Department precleared the plan; three election cycles have gone forward since pre-clearance was granted; five years elapsed without any action since the *Buckley* case was dismissed. Attempting to re-draw congressional districts for 2020 based upon the 2010 census would unjustifiably disrupt Louisiana's congressional elections. The Plaintiffs' arguments should be made to the Legislature for the 2020 decennial redistricting process.

Additionally, Defendant has raised a number of other objections in the currently pending motion to dismiss, which are incorporated by reference.

Defendant also asserts that the Plaintiffs cannot meet the *Gingles* factors, which are essential to the Cause of Action Plaintiffs allege. *See Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Specifically, Defendant believes that it is not possible to draw a second majority-minority Congressional district in Louisiana that complies with the requirements of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the U.S. Constitution. Louisiana attempted exactly this three times in the 1990s, and this Court rejected three times Louisiana's districting plans.

C. PENDING MOTIONS

List any pending motion(s), the date filed, and the basis of the motion(s):

By Secretary of State:

Motion to Dismiss under 12(b)(1) and 12(b)(6) for lack of jurisdiction (Doc 16) based upon (1) the requirement for the appointment of a three-judge panel to hear the case pursuant to 28 USC § 2284; and (2) Plaintiffs lack of standing to bring the claim by reason of their failure to sufficiently allege that a second compact congressional district with an African-American majority can be created and for lack of injury; (3) any injury claimed by the Plaintiffs is not traceable to the Secretary of State and the Secretary lacks the power to implement any remedy the Court may order; and (4) to dismiss this action under the doctrine of laches for waiting too long to make the claim to the prejudice of the Defendant and Louisiana's citizens and voters.

This motion is currently pending and opposition to the motion is due on August 21, 2018. Defendant intends to seek leave of Court to file a reply brief.

D. ISSUES

List the principal legal issues involved and indicate whether or not any of those issues are in dispute:

Plaintiffs' Response: The principal legal issue in this case is whether Louisiana's 2011 Congressional Redistricting Plan violates Section 2 of the Voting Rights Act, 52 U.S.C. § 1301(a). In resolving this question, the Court must determine whether three necessary preconditions for vote dilution under Section 2 are met: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

Once all three preconditions are established, the statute directs the Court to consider whether, under the totality of the circumstances, members of a racial group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The Court considers several non-exclusive factors commonly called the "Senate Factors" in making this determination. These factors are outlined in Plaintiffs' response to Section G(4) below.

Defendant's Issues:

1. Whether the invocation of Section 2 without expressly citing to the Fourteenth or Fifteenth Amendments requires a three-judge panel to hear and determine this case pursuant to 28 U.S.C. § 2284.
2. Whether allegations of purposeful racial gerrymandering or intentional

discrimination by the Louisiana Legislature in the 2011 apportionment of congressional districts constitute constitutional claims, even if not so labeled, requiring a three-judge panel to hear and determine the case pursuant to 28 U.S.C. § 2284.

3. Whether the Plaintiffs can meet their burden of proof to establish a violation of Section 2 of the Voting Rights Act as outlined by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30. Plaintiffs cannot meet all of the *Gingles* preconditions.
4. Whether Plaintiffs have standing to bring the challenge.
5. Whether any Congressional districting plan could be proposed that would contain a second majority-minority district that complies with Section 2 of the Voting Rights Act and the requirements of the Fourteenth and Fifteenth Amendments.
6. Whether Plaintiffs' complaint is deficient for failure to provide a remedy map.
7. Whether Plaintiffs' claim is barred by laches.

E. DAMAGES

Plaintiffs' Statement: Plaintiffs seek declaratory and injunctive relief in this case, not monetary damages. If Plaintiffs prevail, they will seek attorneys' fees under applicable law.

Defendant's Statement:

Plaintiffs seek declaratory and injunctive relief in this case, not monetary damages. To the extent Plaintiffs claim damages, such claims are barred by the 11th Amendment.

If Defendant prevails, the Secretary of State may seek attorneys' fees under applicable law and in accordance with the Lodestar formula. The Secretary of State seeks all just and equitable relief required and allowed by law.

F. SERVICE

Identify any unresolved issues as to waiver or service of process, personal jurisdiction, or venue:

There are no unresolved issues as to waiver or service of process, personal jurisdiction, or venue.

G. DISCOVERY

1. Initial Disclosures:

- A. **Have the initial disclosures required under FRCP 26(a)(1) been completed?**

YES NO

In accordance with Local Rule 26(b), the parties shall provide their initial disclosures to the opposing party no later than 7 days before the date of the scheduling conference, unless a party objects to initial disclosures during the FRCP 26(f) conference and states the objection below.

- B. **Do any parties object to initial disclosures?**

YES NO

For any party who answered yes, please explain your reasons for objecting.

Plaintiffs' Response: Plaintiffs do not object to the service of initial disclosures and are ready to serve their disclosures in accordance with Local Rule 26(b).

Defendant's Response: Until this Court's jurisdiction is determined under 28 U.S.C. § 2284, disclosures and discovery are premature and should not proceed.

2. **Briefly describe any discovery that has been completed or is in progress:**

By plaintiff(s): No discovery requests have been served to date.

By defendant(s): No discovery requests have been made.

3. **Please describe any protective orders or other limitations on discovery that may be required/sought during the course of discovery. (For example: are there any confidential business records or medical records that will be sought? Will information that is otherwise privileged be at issue?)**

Plaintiffs' Response: At this time it is not anticipated that any protective orders or other limitations on discovery will be requested. If such orders and limitations are requested, Plaintiffs will work with Defendant to promptly draft the necessary documents and requests to submit to the Court.

Defendant's Response:

- a. Confidentiality and privilege issues may arise in connection with the production of litigation materials, correspondence, memoranda, notes, and other documents in the possession of the defendants from past litigation dealing with voting rights issues.

- b. Legislative privilege issues may arise with documents that may be in the possession of the Louisiana Legislature, legislative staff, consultants, and legislative attorneys.
- c. To the extent Plaintiffs may seek access to voter registration records that contain non-public information, a protective order may be sought
- d. No other confidentiality issues or protective orders are anticipated at this time.

4. Discovery from experts:

Identify the subject matter(s) as to which expert testimony will be offered:

By Plaintiff(s): Plaintiffs anticipate that expert testimony will be offered to demonstrate that (1) the African-American population in Louisiana is “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) African-American voters in Louisiana are “politically cohesive”; and (3) white voters in Louisiana vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

Additionally, it is anticipated that expert testimony will be offered regarding Louisiana’s history of official discrimination against African Americans, as well as the other Senate Factors set out in the Senate Report on the 1982 amendments to the Voting Rights Act, including, but not limited to: (1) the use of voting practices or procedures that tend to enhance the opportunity for discrimination against African Americans; (2) the exclusion of African Americans from candidate slating processes; (3) the extent to which African Americans bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (4) the use of overt or subtle racial appeals in political campaigns; and (5) the extent to which African Americans have been elected to public office in the jurisdiction.

By Defendant(s): The Secretary of State expects to call one or more experts in demographics, mapping, population distribution, voter registration data, voting patterns, and assessment and evaluation of election districts and sub-districts as well as accepted methods and techniques for analyzing voting patterns and election practices.

The Secretary of State may call an expert concerning historical, social, political, racial, and cultural conditions, particularly as those condition impact voting and the ability to elect candidates of the voters choosing.

H. PROPOSED SCHEDULING ORDER

1. If the parties propose an alternative timeframe for exchanging initial disclosures, please provide that proposed deadline:

Defendant proposes that initial disclosures be withheld until the Court’s jurisdiction is

determined.

2. Recommended deadlines to join other parties or to amend the pleadings:

Plaintiff(s): September 13, 2018.

Defendant: Defendant proposes that the deadline for joining parties and amending pleadings is 60 days after jurisdiction of this Court is resolved. Jurisdiction must be determined before amendments or joinder of parties can be filed.

3. Filing all discovery motions and completing all discovery except experts:

Plaintiff(s): Plaintiffs propose that fact and expert discovery in this case proceed on parallel tracks and that all discovery (fact and expert) be completed by January 21, 2019.

Defendant: Fact discovery should await a final determination of the Court's jurisdiction and would take six months from that date. The conclusion of fact discovery is necessary before expert discovery can proceed.

4. Disclosure of identities and resumés of expert witnesses (if appropriate, you may suggest different dates for disclosure of experts in different subject matters):

Plaintiff(s): October 8, 2018.

Defendant: Two months from completion of fact discovery after jurisdiction is finally determined

5. Exchange of expert reports:

Plaintiff(s): October 29, 2018.

Defendant: Three months from completion of fact discovery after jurisdiction is finally determined

Plaintiffs' Expert Rebuttal: December 10, 2018.

6. Completion of discovery from experts:

Plaintiffs: January 21, 2019 (Completion of Expert and Fact Discovery).

Defendant: Five months from completion of fact discovery after jurisdiction is finally determined

7. Filing dispositive motions and Daubert motions:

Plaintiffs: February 25, 2019.

Defendant: Six months from completion of fact discovery after jurisdiction is finally determined

8. All remaining deadlines and the pre-trial conference and trial date will be included in the initial scheduling order. The deadlines will be determined based on the presiding judge's schedule, within the following general parameters. The parties should not provide any proposed dates for these remaining deadlines.

a. Deadline to file pre-trial order (approximately 16 weeks after dispositive motion deadline).

b. Deadline to file motions in limine (approximately 20-22 weeks after dispositive motion deadline).

c. Deadline to file responses to motions in limine (approximately 22-24 weeks after dispositive motion deadline).

d. Deadline to file an affidavit of settlement efforts (approximately 22-24 weeks after dispositive motion deadline).

e. Deadline to submit joint jury instructions, voir dire, verdict forms, and trial briefs to the presiding judge (approximately 25-27 weeks after dispositive motion deadline).

f. Pre-trial conference date (approximately 18-20 weeks after dispositive motion deadline).

g. Trial date (approximately 27-29 weeks after dispositive motion deadline).

9. If the general outline of proposed deadlines does not fit the circumstances of your particular case, please provide a proposed joint schedule of deadlines which is more appropriate for your case.

Plaintiffs' Position: Plaintiffs seek a resolution of this case (including a remedy) prior to the 2020 congressional elections. Accordingly, they request a trial date set for early July 2019, if possible under the Court's current calendar. This schedule is approximately 8 to 10 weeks shorter than the general outline of proposed deadlines. As such, Plaintiffs propose the following deadlines for the dates listed above:

- Deadline to File Pre-trial Order: Week of April 29, 2019
- Deadline to File Motions in Limine: Week of May 27, 2019
- Deadline to File Responses to Motions in Limine: Week of June 10, 2019
- Pre-trial Conference Date: Weeks of either May 20 or May 27, 2019
- Deadline to File Pre-trial Briefs: Weeks of either June 24 or July 1, 2019
- Proposed Trial Date: Week of July 8, 2019

Defendant's Position: Defendant is entitled to reasonable deadlines. Plaintiffs waited 7 years from preclearance to file this suit and are not now entitled to an accelerated schedule caused

by their dilatory filing that will work injustice on the Defendant and interfere with the Court's already crowded docket. Defendant cannot begin to suggest a pre-trial order and motions schedule until the jurisdictional issue is finally resolved by this Court and gets through the appellate process.

I. TRIAL

1. Has a demand for trial by jury been made?

YES NO

2. Estimate the number of days that trial will require.

Plaintiffs submit that trial will require between 5 and 8 days.

Defendant submits that trial will require between 8 and 10 days.

J. OTHER MATTERS

Are there any specific problems the parties wish to address at the scheduling conference?

YES NO

i. If the answer is yes, please explain:

Plaintiffs' Response: As indicated above, Plaintiffs and Defendant have opposing views on the schedule in this case, including the initial disclosures deadline and the timeline for discovery.

Defendant's Response: This resolution of the jurisdiction issue is the first priority, including whether oral argument is desirable and if so, when argument can be scheduled. Otherwise, the Defendant disagrees with the unreasonably expedited discovery and motion schedule proposed by the Plaintiffs, particularly in light of the laches issues raised by the Defendant, and the resulting prejudice to the Defendant (including—subject to a number of possible privilege objections—locating fact witnesses to events that occurred 7-8 years ago and searching for documents from that time period).

ii. If the answer is no, do the parties want the court to cancel the scheduling conference and to enter a scheduling order based on the deadlines set out in this report?

CHECK "NO" IF YOU HAVE NOT SUBMITTED JOINT PROPOSED DEADLINES.

YES NO

K. SETTLEMENT

1. Please set forth what efforts, if any, the parties have made to settle this case to date.

The parties have not made any efforts to settle this case.

2. Do the parties wish to have a settlement conference:

YES NO

If your answer is yes, at what stage of litigation would a settlement conference be most beneficial?

L. CONSENT TO JURISDICTION BY A MAGISTRATE JUDGE

You have the right to waive your right to proceed before a United States District Judge and may instead consent to proceed before a United States Magistrate Judge.

Indicate whether, at this time, all parties will agree, pursuant to 28 U.S.C. § 636(c), to have a Magistrate Judge handle all the remaining pretrial aspects of this case and preside over a jury or bench trial, with appeal lying to the United States Court of Appeals for the Fifth Circuit.

All parties agree to jurisdiction by a Magistrate Judge of this court:

YES NO

If your response was “yes” to the preceding question, all attorneys and unrepresented parties should sign the attached form to indicate your consent.

Report dated: August 9, 2018

Attorneys for Plaintiffs

Respectfully submitted,

s/Darrel J. Papillion

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Counsel for Defendant Louisiana Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2018, the Joint Status Report was filed electronically with the Clerk of Court using the CM/ECF system.

s/Darrel J. Papillion _____
Darrel J. Papillion