

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES THOMAS, et al.,

Plaintiffs,

vs.

JOHN H. MERRILL, et al.,

Defendants.

Case No.: 2:21-cv-1531-AMM

PLAINTIFFS' MOTION FOR STATUS CONFERENCE

Plaintiffs respectfully request that the Court set a status conference for the purpose of discussing the Stay Order entered by this Court on March 21, 2022 (ECF No. 61). Specifically, Plaintiffs wish to be heard concerning modification or reconsideration of the Stay Order to allow them to, at a minimum, proceed with their constitutional claims, which are not implicated by the Supreme Court's consideration of the proper standard for vote-dilution claims in *Merrill v. Milligan*, No. 21-1086. Defendants take no position on the request for a status conference but oppose any request to lift or modify the stay.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this action on November 16, 2021, promptly after the Alabama legislature passed its new state legislative districting maps following the 2020

census. ECF No. 1. The sole claims asserted in the original complaint were racial gerrymandering claims under the Fourteenth Amendment, challenging eleven State Senate districts and twenty-one state House districts. *Id.* On February 11, 2022, Plaintiffs filed an amended complaint which maintained their racial gerrymandering claims and made no substantive changes to them, but added one claim under Section 2 of the Voting Rights Act (“VRA”) seeking an additional State Senate seat in Montgomery where Black voters could elect candidates of choice. ECF No. 54 ¶¶ 6–8, 143–221, 232–38. Plaintiffs filed a Second Amended Complaint on February 25 that corrected errors in the previous complaint but made no substantive changes. ECF No. 57.

On the same day these Plaintiffs filed *Thomas*, an overlapping group of Plaintiffs filed a lawsuit challenging Alabama’s congressional districts under both Section 2 of the VRA and two Fourteenth Amendment theories: intentional discrimination and racial gerrymandering. *See Milligan v. Merrill*, No 2:21-cv-01530-AMM, ECF No. 1 (N.D. Ala. Jan. 24, 2022) (three-judge court). In *Milligan*, the Plaintiffs sought a preliminary injunction based on both their VRA and racial gerrymandering claims. The court granted the motion on the basis of the VRA claim alone, finding it unnecessary to rule on the racial gerrymandering claim. *See Prelim. Injunction Mem. Op. & Order, Milligan*, ECF No. 107 at 5–7. Defendants sought a stay of the order in *Milligan* before the three-judge court, which it denied. Order

Denying Defs.’ Emergency Mot. for Stay Pending Appeal, *Milligan*, ECF No. 120.

The *Milligan* Defendants then sought a stay in the U.S. Supreme Court, which the Court granted on February 7 and the Court noted probable jurisdiction. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022). In his concurrence (the only opinion explaining the rationale for the Court’s stay), Justice Kavanaugh wrote that “the underlying question here is whether a second majority-minority congressional district (out of seven total districts in Alabama) is required by the Voting Rights Act and not prohibited by the Equal Protection Clause.” *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Similarly, in his dissent, Chief Justice Roberts supported the grant of probable jurisdiction “to resolve the wide range of uncertainties arising under *Gingles*,” because, in his view, “*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim.” *Id.* at 882–83 (Roberts, C.J., dissenting).

On March 21, 2022, the Supreme Court set the following as the sole question presented in the case: “Whether the State of Alabama’s 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U. S. C. §10301.”¹

¹ <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1086.html>.

ARGUMENT

Racial gerrymandering claims have long been recognized as “analytically distinct” from vote-dilution claims. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). This remains true whether vote-dilution claims are brought under an intentional discrimination theory or based on the results test of Section 2 of the VRA. The core of Plaintiffs’ case here concerns whether thirty-two state legislative districts are racial gerrymanders under the Fourteenth Amendment. Their other claim is an “analytically distinct” VRA claim that seeks the creation of an additional State Senate district in the Montgomery area where Black voters could elect candidates of choice. The Supreme Court’s decisions to: take jurisdiction over the preliminary-injunction ruling in *Milligan*; consider whether Alabama’s congressional districts violate Section 2 of the VRA; and indicate (for some Justices) that greater clarity is needed as to the standards for assessing Section 2 vote-denial claims, *Merrill*, 142 S. Ct. at 881–83, do not implicate Plaintiffs’ racial gerrymandering claims.

While at least Justices Kavanaugh and Alito may be interested in the question of when seeking an additional majority-minority district under the VRA implicates the Equal Protection Clause, *id.* at 881, no Justice or party to these cases contends that the *Merrill* case implicates the racial gerrymandering standard itself. The three-judge court in *Milligan* explicitly declined to rule on the racial gerrymandering claims there in their detailed ruling finding that Plaintiffs had met all requirements

for injunctive relief under the VRA, and racial gerrymandering issues explicitly lie outside of the question presented as framed by the Supreme Court in *Merrill*.

Likely for this very reason, in the parties' Report of their Planning Meeting (ECF No. 60), Defendants did not seek to stay discovery on Plaintiffs' racial gerrymandering claims and proposed a trial date of summer 2023. ECF No. 60 at 4, 6. The Court's stay order goes beyond what Defendants requested, which was that discovery "should commence only on Plaintiffs' Equal Protection claims." *Id.* at 4. Likewise, while arguing that the Supreme Court's ultimate decision in *Merrill* "is likely to have a substantial or controlling effect on the Section 2 claim," *id.*, they make no such assertion of effect upon Plaintiffs' racial gerrymandering claims. This is for good reason.

Nothing in the Supreme Court's decision to consider the Section 2 vote-dilution standard in *Milligan* will change either the facts or law under which Plaintiffs' racial gerrymandering claims will be adjudicated. The Supreme Court has issued several decisions over the last decade providing clarity as to racial gerrymandering standards. *See North Carolina v. Covington*, 138 S. Ct. 2548 (2018); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015). There is no indication that the Court has either a desire or intention to reconsider those standards in the *Merrill* case, or otherwise. Just last week, the

Supreme Court issued a *per curiam* order vacating and remanding the Wisconsin Supreme Court's decision to adopt a set of maps based on its understanding of what the VRA required, and in doing so, it reaffirmed existing racial gerrymandering standards. *See Wisc. Legislature v. Wisc. Elections Comm'n*, No. 21A471, 2022 WL 851720, at *2 (U.S. Mar. 23, 2022).

Because the Supreme Court's consideration of *Milligan* does not implicate Plaintiffs' racial gerrymandering claims, Plaintiffs ask the Court—and would make a formal motion if appropriate—to set a schedule under which they may continue to actively pursue their racial gerrymandering claims.

CONCLUSION

Plaintiffs respectfully request a status conference to discuss the Court's Stay Order and modification of that order to allow Plaintiffs' racial gerrymandering claims to proceed.

DATED this 28th day of March 2022.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which provides electronic notice of filing to all counsel of record.

This the 28th day of March, 2022.

/s/ Davin Rosborough