

**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

REPORT OF THE PARTIES' PLANNING MEETING

1. **Synopsis of the case:**

- (a) Plaintiffs: This action challenges 11 Alabama State Senate Districts (Districts 7, 11, 12, 18, 19, 20, 21, 24, 25, 26, and 33) and 21 State House of Representatives Districts (Districts 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 70, 71, 72, 75, 76, 78, 98, 99, 101, and 103) as racial gerrymanders under the Fourteenth Amendment to the Constitution. Plaintiffs intend to prove that the lines of each district reflect race as the predominant factor in their construction, and that the use of race was not narrowly tailored to comply with the Voting Rights Act or any other compelling governmental interest. Rather, Defendants have adopted lines for many of these districts that artificially separate Black and white voters into different districts in ways not reflective of communities of interest or other traditional redistricting principles. Instead, these lines limit the opportunities of Black voters by placing them in districts in much higher proportions than necessary to elect candidates of choice while creating adjacent districts with large majorities of white voters where Black voters have little to no influence. In a few other areas, the districts improperly fragment Black voters across districts in manner that artificially dilutes their influence in any one district.

Additionally, Plaintiffs challenge under Section 2 of the Voting

Rights Act the failure of Defendants to create an additional Senate district in the Montgomery area where Black voters can participate equally in the political process and elect a candidate of choice.

- (b) Defendants: Defendants contend that the 32 challenged House and Senate districts are constitutional and that the House and Senate plans comply with Section 2 of the Voting Rights Act. For each challenged district, either race did not predominate in the drawing of the district or strict scrutiny was satisfied.

Plaintiffs' Section 2 claim fails because they have no private right of action under that statute and because the challenged Senate districting plan does not result in a denial or abridgement of the right of any black Alabamian to vote on account of race or color.

2. **The following persons participated in a Federal Rule of Civil Procedure 26(f) conference on March 4, 2022 by telephone:**

- Davin Rosborough, Tish Gotell Faulks, David Dunn, and Liza Weisberg, representing the Plaintiffs.
- Jim Davis and Edmund LaCour, representing Defendant Merrill, and Dorman Walker, representing Defendants McClendon and Pringle.

3. **Initial Disclosures**. The parties will complete by March 21, 2022, the initial disclosures required by Rule 26(a)(1). Defendants contend that those disclosures are limited to those relevant to Plaintiffs' equal protection claim.

4. **Discovery Plan**. The parties propose this discovery plan:

- (a) **Discovery will be needed on these subjects:**

Plaintiffs' position:

- The factors considered in drawing the challenged districts as well as in the previous redistricting cycles (to the extent Defendants maintain these districts seek to preserve existing district cores), and the relative weight of those factors;
- The process for drawing the challenged districts in this cycle and the previous three redistricting cycles;
- Input from legislators and other interested parties considered

in creating the challenged districts and their predecessor districts;

- How Defendants and those involved in drawing and evaluating the maps considered compliance with the Voting Rights Act;
- Demographic and geographical data concerning the current and previous districts in the Alabama State House and Senate;
- Factors bearing on whether Black voters in Alabama have an equal opportunity to participate in the political process and elect candidates of choice under the current districts.

Defendants' position:

- The evidentiary basis for Plaintiffs' claims;
- The factors considered in the drafting and adoption of the House and Senate plans;
- Plaintiffs' proposed remedies;
- Plaintiffs' standing;
- The opinions of Plaintiffs' expert witnesses;
- Testimony from legislators representing the challenged districts and surrounding districts concerning the map-drawing process and the application of traditional districting principles to those districts (assuming those legislators do not invoke their legislative privilege);
- Testimony from Plaintiffs.

(b) **Proposed Discovery Schedules:**

Plaintiffs' position¹:

- Commencement of discovery: March 22, 2022
- Discovery Deadline: August 26, 2022

Defendants' position:

- Because of the parties' disagreements about how this case

¹ Plaintiffs' position on all deadlines depends on a trial beginning on November 7, 2022, so any adjustment to that date would result in Plaintiffs proposing modified deadlines.

should proceed, Defendants request a scheduling conference before entry of a scheduling order.

- Commencement of discovery: Defendants contend that if discovery is going to proceed in this case, it should commence only on Plaintiffs' Equal Protection claims. The Section 2 claim should not proceed until the Supreme Court resolves *Merrill v. Milligan*, No. 21-1086 and *Merrill v. Caster*, No. 21-1087, which is likely to have a substantial or controlling effect on the Section 2 claim, or at least until this Court decides whether Plaintiffs have a private right of action to enforce Section 2.
- Discovery Deadline: Defendants contend that the schedule should aim for a trial of the equal protection claim in the summer of 2023, that time should be allowed for dispositive motions, and that discovery on the equal protection claims should end January 31, 2023.

(c) **Interrogatories**: Plaintiffs contend that Plaintiffs and Defendants shall each be allowed 25 interrogatories to each party, with answers and objections due 30 days after service. Defendants contend that Plaintiffs and Defendants shall each be allowed 50 interrogatories to each party, with answers and objections due 30 days after service.

(d) **Requests for Admission**: Plaintiffs and Defendants shall each be allowed 25 RFAs to each party, with answers and objections due 30 days after service.

(e) **Depositions**: Plaintiffs propose that Plaintiffs and Defendants shall each be allowed 15 depositions, excluding experts and parties. Defendants propose that Plaintiffs and Defendants shall each be allowed 50 depositions. Both parties contend that no deposition shall run for more than seven hours absent leave from the Court.

(f) **Dates for exchanging reports of expert witnesses:**

Plaintiffs' proposal:

- Plaintiffs' initial reports: July 1, 2022
- Defendants' reports: July 29, 2022
- Plaintiffs' Rebuttal reports: August 12, 2022

Defendants' proposal:

- Plaintiffs' initial reports: July 1, 2022
- Defendants' reports: September 1, 2022
- Plaintiffs' rebuttal reports: September 30, 2022

(g) **Dates for supplementations under Rule 26(e):**

Plaintiffs' proposal: October 10, 2022

Defendants' proposal: January 6, 2023

5. **Other Items:**

(a) **Plaintiffs shall amend pleadings or join parties by June 6, 2022.**

(b) **Final dates to file dispositive motions:**

- Plaintiffs' proposal: Plaintiffs do not believe the fact-intensive nature of this case is conducive to resolution on summary judgment or similar dispositive motion. To the extent Defendants and/or the Court disagree, Plaintiffs' propose a deadline of September 9, 2022.
- Defendants' proposal: Defendants contend that summary judgment can be appropriate in intentional discrimination and Section 2 claims and that the deadline for dispositive motions should be March 31, 2023.

(c) **Prospects for settlement:** Both parties believe settlement is unlikely due to the nature of the claims and the need for the legislature to approve any changes to redistricting plans.

(d) **Suggested trial date and estimate of trial length:**

Plaintiffs' proposal: Because Plaintiffs will seek special elections in 2023 for any districts modified based on relief they obtain, and because Defendants will likely raise arguments about interference with election processes and timing under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and its progeny, Plaintiffs believe trial should commence on or before November 7, 2022. Plaintiffs are willing to try this case as early as late-August 2022 and believe they will face unfair prejudice for any trial beginning after November 7, 2022. This timeline provides ample time for discovery even though Plaintiffs will

have more discovery to conduct given that this action targets Defendants' and their agents' processes and considerations in adopting the challenged district lines in their current and previous incarnations, as well as their effects on Black voters. Plaintiffs estimate 10 days for trial.

Defendants' proposal: Defendants propose a trial date in the summer of 2023. Plaintiffs are not likely to show they are entitled to the extraordinary relief of a special election (if they prevail), and the mere fact that they intend to ask for such relief is not a reason to impose a rushed schedule that would prejudice the Defendants. A court considering whether to order special elections should consider "the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty." *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017). Should Plaintiffs prevail, they will have a steep hill to climb to show an entitlement to a special election in 2023, and the parties should have ample time to build a record on the 32 challenged districts.

DATED this 15 day of March 2022.

/s/ LaTisha Gotell Faulks

LaTisha Gotell Faulks (ASB-1279-I63J)
Kaitlin Welborn*
AMERICAN CIVIL LIBERTIES UNION OF
ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
tgfaulks@aclualabama.org
kwelborn@aclualabama.org

/s/ Deuel Ross

Deuel Ross*
NAACP LEGAL DEFENSE & EDUCATIONAL
FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
dross@naacpldf.org

Leah Aden*
Stuart Naifeh*
Kathryn Sadasivan (ASB-517-E48T)
NAACP LEGAL DEFENSE & EDUCATIONAL
FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
laden@naacpldf.org snaifeh@naacpldf.org
ksadasivan@naacpldf.org

David Dunn*
HOGAN LOVELLS LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000
david.dunn@hoganlovells.com
Blayne R. Thompson*

Respectfully submitted,

/s/ Davin M. Rosborough

Davin M. Rosborough*
Julie A. Ebenstein*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
drosborough@aclu.org
jebenstein@aclu.org

/s/ Sidney Jackson

Sidney Jackson (ASB-1462-K40W)
Nicki Lawsen (ASB-2602-C00K)
WIGGINS, CHILDS, PANTAZIS, FISHER,
& GOLDFARB
301 19th Street
North Birmingham, AL 35203
(205) 314-0500
sjackson@wigginschilds.com
nlawsen@wigginschilds.com

/s/ Caren E. Short

Caren E. Short (ASB-0646-P48N)
Jack Genberg*
Liza Weisberg*
SOUTHERN POVERTY LAW CENTER
PO Box 1287
Decatur, GA 30031
(404) 521-6700
caren.short@splcenter.org
jack.genberg@splcenter.org
liza.weisberg@splcenter.org

Jessica L. Ellsworth*
Shelita M. Stewart*
HOGAN LOVELLS LLP

HOGAN LOVELLS US LLP
609 Main St., Suite 4200
Houston, TX 77002
(713) 632-1400
blayne.thompson@hoganlovells.com

555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com
shelita.stewart@hoganlovells.com

Michael Turrill*
Harmony R. Gbe*
HOGAN LOVELLS US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067
(310) 785-4600
michael.turrill@hoganlovells.com
harmony.gbe@hoganlovells.com

Attorneys for Plaintiffs

Anthony Ashton*
Anna-Kathryn Barnes*
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
(NAACP)
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5777
aashton@naacpnet.org
abarnes@naacpnet.org

***Attorneys for Plaintiff Alabama State
Conference of the NAACP***

*Admitted *pro hac vice*

s/ James W. Davis

Steve Marshall
Attorney General

Edmund G. LaCour Jr. (ASB-9182-U81L)
Solicitor General

James W. Davis (ASB-4063-I58J)

Deputy Attorney General

A. Barrett Bowdre (ASB-2087-K29V)
Thomas A. Wilson (ASB-1494-D25C)

Deputy Solicitors General

Misty S. Fairbanks Messick (ASB-1813-T71F)
A. Reid Harris (ASB-1624-D29X)
Brenton M. Smith (ASB-1656-X27Q)
Benjamin M. Seiss (ASB-2110-O00W)

Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Barrett.Bowdre@AlabamaAG.gov
Thomas.Wilson@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Misty.Messick@AlabamaAG.gov
Reid.Harris@AlabamaAG.gov
Brenton.Smith@AlabamaAG.gov
Ben.Seiss@AlabamaAG.gov

Counsel for Secretary of State Merrill

s/ Dorman Walker

Dorman Walker (ASB-9154-R81J)
BALCH & BINGHAM LLP
Post Office Box 78 (36101)
105 Tallapoosa Street, Suite 200
Montgomery, AL 36104
Telephone: (334) 269-3138
Email: dwalker@balch.com

*Counsel for Sen. McClendon and Rep.
Pringle*