FILED
2024 Jan-12 PM 03:16
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

BOBBY SINGLETON, *et al.*,

Plaintiffs,

v.

HON. WES ALLEN, in his official capacity as Alabama Secretary of State, *et al.*,

Defendants.

Case No. 2:21-cv-01291-AMM
THREE-JUDGE COURT

DEFENDANTS' RESPONSE TO *SINGLETON* PLAINTIFFS' MOTION FOR AN ORDER REGARDING PREVAILING PARTY STATUS

The *Singleton* Plaintiffs are not "prevailing parties" under 42 U.S.C. § 1988 because they have not prevailed on any of their claims. They brought and then dropped a claim that Alabama's congressional redistricting plan was malapportioned. They then sought preliminary injunctive relief on claims that the State's 2021 and 2023 plans contained racially gerrymandered districts that violated the Equal Protection Clause. This Court never ruled on those claims. Doc. 88 at 7; Doc. 191 at 8. "[R]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Farrar v. Hobby*, 506 U.S. 103, 110 (1992). Because the *Singleton* Plaintiffs have received

no relief on the merits of their claims, they are not prevailing parties. Their arguments to the contrary are frivolous.

Though this Court gave them no relief on the merits of their claims, the *Singleton* Plaintiffs appear to claim that they can be deemed prevailing parties because the preliminary relief *other* litigants obtained on *other* claims resembles the relief the *Singleton* Plaintiffs hoped to obtain *if* they had won. That contravenes both precedent and logic. Otherwise, any *amicus* who supported the VRA Plaintiffs or a plan that loosely approximates the one adopted by this Court would be a "prevailing party" despite never having been a party. The fact that the *Singleton* Plaintiffs had a claim pending should not make a difference, because that claim could be completely meritless. Under their approach, even if only their obviously moot malapportionment claim remained pending, their desire for a new map would make them prevailing parties when a different party prevailed on a different claim. That is not the law.

Finally, even under their legally baseless "we got what we want" standard, the *Singleton* Plaintiffs fail. They have consistently argued that congressional plans dividing Jefferson County between Districts 6 and 7 are unconstitutional racial gerrymanders, and that the congressional plan should minimize county splits and avoid splitting counties in ways that produce racial disparities on either side of the split. Yet, in the plan the Court adopted, the split of Jefferson County remains, along

with a new split of Mobile County. Thus, the *Singleton* Plaintiffs' arguments are factually baseless too.

BACKGROUND

A. The *Singleton* Plaintiffs Bring Constitutional Claims That This Court Does Not Decide.

On September 27, 2021—before the Legislature convened to draw a new map based on the 2020 Census data—the *Singleton* Plaintiffs challenged the 2011 Map as being malapportioned and racially gerrymandered. *See generally* Doc. 1. Their specific complaints as to the racial gerrymander claim pertained to the 2011 Plan's splits of Jefferson, Tuscaloosa, Clarke, and Montgomery counties, which they alleged were along racial lines. *E.g.*, *id.* ¶ 49. They thus sought a map that remedied these issues by "restoring Alabama's traditional redistricting principle of drawing its Congressional district with whole counties." *Id.* ¶ 1. The 2021 Plan was adopted on November 4, 2021, which remedied the alleged malapportionment. Doc. 15 ¶ 2.

The *Singleton* Plaintiffs then filed an amended complaint to challenge use of the 2021 Plan. Doc. 15. They argued that the plan was racially gerrymandered because it purportedly contained "splits that capture black voters in Jefferson, Tuscaloosa, and Montgomery Counties" and place them disproportionally within District 7. *Id.* ¶ 2. They "assert[ed] that new congressional districts must be drawn without splitting counties, which was the 'race-neutral' way that Alabama drew Congressional maps from 1822 until 1964." *Singleton v. Merrill*, 582 F. Supp. 3d

924, 952 (N.D. Ala. 2022) (quoting Doc. 15 ¶¶ 6, 20, 35). The Amended Complaint included a proposed "Whole County Plan," which the *Singleton* Plaintiffs claimed created two opportunity districts for black voters without splitting any counties. *See* Doc. 15 ¶¶ 42-43. The *Singleton* Plaintiffs maintained that "the Voting Rights Act no longer requires maintenance of a majority-black Congressional District in Alabama," and that "[t]he Legislature's refusal to adopt plans that replaced the racially gerrymandered majority-black District 7 with two reliable crossover districts drawn with race-neutral traditional districting principles violated the Fourteenth and Fifteenth Amendments, which prohibit discrimination based on race." *Id.* ¶¶ 3, 6.

Meanwhile, plaintiffs in *Milligan v. Merrill*, Case No. 2:21-cv-1530, and *Caster v. Merrill*, Case No. 2:21-cv-1536-AMM, (collectively, the "VRA Plaintiffs") brought claims under Section 2 of the Voting Rights Act, and the *Milligan* Plaintiffs also alleged that the 2021 Plan violated the Fourteenth Amendment. Unlike the *Singleton* Plaintiffs, the *Milligan* Plaintiffs asserted that under the VRA, "the only proper remedy is a plan that contains two majority-Black congressional districts," and the *Caster* Plaintiffs sought a "remedy that includes two majority-Black or Black-opportunity congressional districts." *Singleton*, 582 F. Supp. 3d at 954.

The *Singleton* Plaintiffs did not prevail on their constitutional claims against the 2021 Plan. The Court in *Milligan* and *Caster* granted the VRA Plaintiffs' motions

for preliminary injunctions against use of the 2021 Plan. The Court ruled only on statutory grounds and "**RESERVE[D] RULING** on the constitutional issues raised in the *Singleton* ... plaintiffs' motion[] for preliminary injunctive relief." Doc. 88 at 7, 216-17.

In June 2023, the Supreme Court affirmed this Court's order granting a preliminary injunction. *See Allen v. Milligan*, 599 U.S. 1 (2023). "On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map (the '2023 Plan')." *Singleton v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156, at *2 (N.D. Ala. Sept. 5, 2023). The VRA Plaintiffs and *Singleton* Plaintiffs objected and sought new preliminary injunctions: the VRA Plaintiffs on § 2 grounds and the *Singleton* Plaintiffs "argu[ing] that the 2023 Plan is an impermissible racial gerrymander—indeed, just the latest in a string of racially gerrymandered plans the State has enacted, dating back to 1992." *Id.*

The *Milligan* and *Caster* Plaintiffs moved to clarify the role of the *Singleton* Plaintiffs in proceedings evaluating the lawfulness of the 2023 Plan, including "confirmation that the *Singleton* Plaintiffs are not parties to the VRA remedial proceedings." *Milligan* Doc. 188 at 2. This Court ordered that "the *Singelton* Plaintiffs [could] not participate as a party" in those proceedings but that if the 2023 Plan did not remedy the likely § 2 violation, the *Singleton* Plaintiffs could "submit

remedial maps for the Special Master to consider and … otherwise participate in proceedings before the Special Master ….” Doc. 154 at 5.

The Court granted the VRA Plaintiffs relief “on statutory grounds, and … again **RESERVE[D] RULING** on the constitutional issues raised by the *Singleton* … Plaintiffs, including the *Singleton* Plaintiffs’ motion for a preliminary injunction.” *Singleton*, 2023 WL 5691156, at *3.

In the *Milligan* and *Caster* cases, the Secretary of State sought a stay from the District Courts of their preliminary injunctions, which the Courts denied. Doc. 200. The Secretary of State then sought stays from the Supreme Court in those two cases, which the Supreme Court denied. *E.g.*, *Allen v.* Milligan, No. 23A231, 2023 WL6218394 (U.S. Sept. 26, 2023). The *Singleton* Plaintiffs, while not having obtained a preliminary injunction, opposed the Secretary’s requests for stays of the preliminary injunction orders obtained by the VRA Plaintiffs. Doc. 223 at 9.

B. The Court Rejects The *Singleton* Plaintiffs’ Plan.

In the remedial proceeding before the Special Master, the *Singleton* Plaintiffs pushed for their own plan and advocated against the plan proposed by the VRA Plaintiffs. *See In re Redistricting 2023*, Docs. 5 & 24. The *Singleton* Plaintiffs disputed the notion “that the rulings of the District Court and the Supreme Court require the Special Master to recommend remedial plans that contain one or more majority-Black districts.” *In re Redistricting*, Doc. 5 at 1. Their plan included a

"District 6, whose BVAP is 39.61% and which includes all of Jefferson County and just enough of northern Shelby County to equalize population, and District 7, whose BVAP is 49.38% and which includes nearly all of the Black Belt." *Id.* at 7. In their view, "having one person represent both urban Birmingham and the rural Black Belt in Congress prevents that person from being a truly effective advocate for either one." *Id.* at 18.

In response to the VRA Plaintiffs' proposed plan, they argued that "The VRA Plan Does Not Comply with the Equal Protection Clause Because It Uses Racial Targets to Segregate Voters by Race Without Sufficient Justification." *In re Redistricting*, Doc. 24 at 1. In their view, "[t]he VRA Plan's focus on race manifests in the way it splits counties," because there were "stark racial borders" based on the demographics of those parts of Jefferson County included in District 6 versus those in District 7. *Id.* at 8. The *Singleton* Plaintiffs concluded that their plan was "superior to any other proposed plan under the criteria set out by the District Court." *Id.* at 26.

The Special Master disagreed. The Special Master faulted the *Singleton* Plan for "deviat[ing] more significantly than was needed" to cure the likely Section 2 violation. *In re Redistricting*, Doc. 44 at 28. And the Special Master rejected the *Singleton* Plaintiffs' assertion "that the VRA Plaintiffs Plan, which provided the starting point for the Special Master's proposed Remedial Plan 1, impermissibly used 'non-negotiable racial targets' and is a 'race-based' plan." *Id.* at 34. The Special

Master recommended three Remedial Plans, each of which continued to split Jefferson County between Districts 6 and 7 in the manner the *Singleton* Plaintiffs had alleged was unconstitutional. *See id.* at 15-25.

Only then did the *Singleton* Plaintiffs suggest a preference for the Special Master's Remedial Plan 3. In their response to the Special Master's Report, the *Singleton* Plaintiffs first stated that they "still believe that their plan is best for the reasons they have submitted to the Special Master." Doc. 205 at 2. They only supported Remedial Plan 3 "if the Court selects one of the three plans the Special Master has recommended[.]" *See id.* They "d[id] not here dispute that all three of the Special Master's remedial plans *may* satisfy all four criteria" that this Court ordered the remedial plans to comply with, and they did so "without abandoning positions they have taken in this Court and in the Supreme Court[.]" *Id.* at 3 (emphasis added). They also said that "Remedial Plan 3 is the clear winner" "if the Special Master's plans must respect traditional redistricting principles 'to the extent reasonably practicable[.]'" *Id.*

ARGUMENT

I. The *Singleton* Plaintiffs Are Not Prevailing Parties Because They Did Not Prevail On Any Of Their Claims.

Under 42 U.S.C. § 1988(b), the Court "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The text plainly communicates Congress's intent "to permit the … award of counsel fees only

when a party has prevailed on the merits." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992). "Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). And the Supreme Court "require[s] the plaintiff to prove 'the settling of some dispute which affects the behavior of the defendant towards the plaintiff.'" *Farrar*, 506 U.S. at 110 (quoting *Hewitt*, 482 U.S. at 761). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12. Thus, "[t]he plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Id.* at 111 (citation omitted).

The Supreme Court therefore has expressly rejected the notion "that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit …, has reached the 'sought-after destination' without obtaining any judicial relief." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 606 (2001). Relatedly, "no fee may be awarded for services on [an] unsuccessful claim." *Hensley*, 461 U.S. at 434; *see also Finch v. City of Vernon*, 877

F.2d 1497, 1507-08 (11th Cir. 1989) (denying fees to plaintiff who prevailed only on his state tort claim but not his § 1983 claim).

The Court can quickly dispatch with the *Singleton* Plaintiffs' request to be treated as "prevailing parties" for the simple reason that they have not prevailed on any of their claims. They cite no authority for the counter-textual notion that a party "prevails" on his claim when he approves of the results that other parties obtain when they succeed on the merits of their claims. Rather, "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Farrar*, 506 U.S. 110. This Court has not ruled on any of the *Singleton* Plaintiffs' claims; thus, they cannot have prevailed on those claims.

The *Singleton* Plaintiffs try to analogize their case to those in *Hastert v. Illinois State Board of Election Commissioners*, 28 F.3d 1430 (7th Cir. 1993), and *Dillard v. City of Greensboro*, 213 F.3d 1347 (11th Cir. 2000) (per curiam). *See* Doc. 223 at 12-15. But neither case helps them because, in each case, the "prevailing parties" prevailed on the merits of their claims.

The *Hastert* litigation centered on Illinois's failure to draw new congressional districts following the 1990 census, when the State lost two seats following apportionment. *Hastert*, 28 F.3d at 1435. Multiple groups of plaintiffs brought malapportionment claims, which the defendant State Board of Elections did not contest. The Board did not "adopt[] an adversarial role" and was merely "a necessary

nominal defendant." *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991).[1] Every plaintiff thus had an indisputable claim that the old plan could not constitutionally be used for the 1992 election. *Hastert*, 28 F.3d at 1435. One set of plaintiff-intervenors, the *Scott* Plaintiffs, intervened and negotiated a pre-trial stipulation with another plaintiff group to keep certain communities together in one congressional district. *Hastert*, 777 F. Supp. at 640. After the court declared that the existing congressional plan was unconstitutionally malapportioned, and the aspect of the plan that the *Scott* Plaintiffs had secured through their stipulation was included in the plan approved by the court, the *Scott* Plaintiffs were deemed prevailing parties. *Hastert*, 28 F.3d at 1441.

Similarly, in *Dillard*, the plaintiffs brought a § 2 claim against Greensboro, and the city "agreed to the entry of a consent decree establishing liability." 213 F.3d at 1350. Plaintiffs thus "prevailed early on when they exacted from Greensboro an admission of liability," and "they prevailed" later on when "the special master's plan effect[ed] a complete remedy for the city's acknowledged § 2 violation." *Id.* at 1354 (internal quotation marks omitted). The Court went so far as to say "We would be reluctant to hold, and we can find no precedent[] to conclude[,] that securing a

[1] That unique aspect of the *Hastert* litigation also distinguishes it from this case. *Hastert* was "not ordinary litigation." *Hastert*, 28 F.3d at 1439. With everyone agreeing on the defendant's liability, the litigation "was not between the plaintiffs and the defendant." *Id.* Rather, "[t]he real dispute was among the various plaintiffs," *id.*, all of whom agreed (with the defendant) that the existing Illinois plan could not constitutionally be used again.

'complete remedy' for an only claim does not necessarily make the plaintiff at least a partially prevailing party." *Id.* at 1354.

Unlike the prevailing parties in *Hastert* or *Dillard*, the *Singleton* Plaintiffs have not pleaded a claim that has been resolved by the Court or reached any settlement to secure relief. And because they have secured no "judgment," "consent decree or settlement," they are not prevailing parties. *Farrar*, 506 U.S. at 111.

Finally, without citing any authority, the *Singleton* Plaintiffs assert that they attained prevailing party status by opposing the Secretary of State's attempt to obtain a stay of preliminary injunctions awarded to the VRA Plaintiffs. Doc. 223 at 15. But if filing a brief in support of some other party's efforts were enough to make one a prevailing party, then *amici* across the country would be due fees. Again, precedent forecloses that result: "An organization or group that files an amicus brief on the winning side is not entitled to attorney's fees and expenses as a prevailing party, because it is not a party." *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003).

The *Singleton* Plaintiffs protest that they were not *amici* because they had their own claim pending when they opposed a stay of the preliminary injunctions secured by the VRA Plaintiffs. But that distinction can't make a difference because it would apply whether a plaintiff's non-adjudicated claim was meritorious or frivolous. For example, if the *Singleton* Plaintiffs had brought a nonjusticiable[2] partisan

[2] *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

gerrymandering claim or simply not dropped their moot malapportionment claim, they could still claim prevailing party status under their novel theory. That is why the plaintiff's burden is to show "relief on the merits of *his* claim," not someone else's. *Farrar*, 506 U.S. at 110 (emphasis added). The *Singleton* Plaintiffs received no more relief on the *merits* of their *claim* than any *amicus curiae* supporting the VRA Plaintiffs received, which is none.

II. The *Singleton* Plaintiffs Did Not Receive The Remedy They Wanted.

Even if this Court were to adopt the new (and foreclosed) standard pressed by the *Singleton* Plaintiffs, they would fail because they did not "receiv[e] the remedy they wanted." Doc. 223 at 15.

As discussed above (at 3-8), the *Singleton* Plaintiffs have consistently argued that maintaining a division of Jefferson County between Districts 6 and 7 that produces differences in the racial demographics of those Jefferson County residents included in one district versus the other is unconstitutional and not required by the Voting Rights Act. *E.g.*, Doc. 15 ¶¶ 2, 42-43. They challenged the State's 2021 and 2023 Plans on those grounds. *Id.*; Doc. 147 at 5. They challenged the VRA Plaintiffs' proposed plan on those grounds. *In re Redistricting*, Doc. 24 at 1. And they have consistently advocated for a plan that would place Jefferson County into just one congressional district, including before the Special Master. *Id.* Doc. 5. The Special Master then rejected their plan, rejected their objections to the VRA Plaintiffs' plan,

and proposed three plans that each split Jefferson County. Only then did the *Singleton* Plaintiffs provide tepid support for one of those three plans.[3] That is, only after they failed to get their plan adopted, did they express a preference among plans that ran contrary to their theory of the case. *See Hastert*, 28 F.3d at 1443 (considering whether a "party's map (or the map the party ultimately embraces) is ultimately adopted").

The *Singleton* Plaintiffs assert that "[t]hey sought a congressional map with two opportunity districts drawn without regard to race, and they received two opportunity districts drawn without regard to race." Doc. 223 at 14. But that contention both paints with too broad a brush and conflicts with their theory of racial gerrymandering. The *Singleton* Plaintiffs did not just seek a plan with two opportunity districts, they sought one that would keep Jefferson County whole. *See generally* Doc. 15. They did not receive such a remedy.

And under their theory of racial gerrymandering, any plan that divides Jefferson County in a way that leads to significantly different racial makeups in the

[3] *See, e.g.*, Doc. 211 at 34:11-15 (Mr. Quillen: "Obviously, as you know, the Singleton plaintiffs have wanted to keep counties together. Plan 3 does that better than Plan 1. And if we can't have our whole county remedy, we certainly think that it is better for building biracial coalitions across the state."); *id.* at 35:9-16 (Mr. Quillen: "I will say we certainly, in the three days we had to look at it, we were not able to do a full expert analysis of whether, you know, a computer analysis would determine that there was evidence of racial gerrymandering. We just don't have any evidence of that kind. And for that reason, we are not claiming at this time that the—any of the Special Master's plans failed to remediate the Voting Rights Act violation or failed to comply with the Constitution.").

two Jefferson County districts is a racial gerrymander. *See* Doc. 147 at 5 ("Like the last four plans before it, the new [2023] plan separates White and Black voters in Jefferson County for no compelling reason."). In their view, "the Legislature's 2023 Plan" and "the *Caster* and *Milligan* Plan" both "separate[d] voters by race despite the availability of effective crossover districts," and that racial divide purportedly violated the Constitution. *Id.* at 7-8. To claim now that the Court-ordered plan provided the *Singleton* Plaintiffs "the substance of what they sought," is revisionist history. Doc. 223 at 14 (cleaned up).

Respectfully Submitted,

Steve Marshall
Attorney General

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

James W. Davis (ASB-4063-I58J)
Deputy Attorney General

Misty S. Fairbanks Messick (ASB-1813-T71F)
Brenton M. Smith (ASB-1656-X27Q)
Benjamin M. Seiss (ASB-2110-O00W)
Charles A. McKay (ASB-7256-K18K)
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
Edmund.LaCour@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov

Misty.Messick@AlabamaAG.gov
Brenton.Smith@AlabamaAG.gov
Ben.Seiss@AlabamaAG.gov
Charles.McKay@AlabamaAG.gov

Counsel for Secretary Allen

s/ *Dorman Walker* (with permission)
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

Michael P. Taunton (ASB-6833-H00S)
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35203
Telephone: (205) 226-3451
Email: mtaunton@balch.com

Counsel for Sen. Livingston and Rep. Pringle

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2024, I filed the foregoing using the Court's CM/ECF system, which will serve all counsel of record.

/s/ Edmund G. LaCour Jr.
Counsel for Secretary Allen