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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

KHADIDAH STONE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:21-cv-1531-AMM
	)	
WES ALLEN, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS REP. PRINGLE'S AND SEN. LIVINGSTON'S
REPLY IN SUPPORT OF MOTION TO DISMISS

In addition to the reasons laid out in Defendants' Reply in Support of Motion to Dismiss, (Doc. 139), Defendants Rep. Chris Pringle and Sen. Steve Livingston in their official capacities as House and Senate Chairs of the Alabama Legislature's Permanent Legislative Committee on Reapportionment (the "Chairs" and the "Committee") are due to be dismissed because: (1) They have legislative immunity from suit; and (2) Plaintiffs lack standing to sue the Chairs.

Nothing substantial has changed since the Chairs first moved to dismiss these claims. Plaintiffs still do not contest either that the Chairs are generally entitled to legislative immunity or that such immunity would bar Plaintiffs' suit here. (*See generally* Doc. 138, 36–41.) Instead, Plaintiffs opposition exclusively argues that the Chairs have waived their right to legislative immunity. The Chairs have not waived their right to assert legislative immunity, though, because:

- This case was stayed for over 15 months, (*cf.* Docs. 059 and 075), and "the passage of time alone is insufficient to establish" waiver, *In re Crowley*, 568 B.R. 835, 837 (M.D. Ala. 2017);

- This case remains at its beginning stages. Preliminary motions have not yet been heard, discovery has not yet begun, and the Plaintiffs cannot show "undue prejudice," *U.S. v. Barfield*, 396 F. 3d 1144, 1150 (11th Cir. 2005);

- A statement of counsel concerning the waiver of legislative immunity is not, by itself, sufficient to waive such immunity; and

- The Chairs have not extensively engaged in litigation. The Chairs did not intervene, very little litigation has occurred due to the stay, and their sole litigation conduct involves engagement in two threshold procedural motions, and filing an answer to a now-inoperative Complaint that was brought against a different defendant.

As such, this case is distinguishable from *Singleton v. Merrill*, 576 F. Supp. 3d 931 (N.D. Ala. 2021), and legislative immunity applies.

Further, Plaintiffs lack standing to sue the Chairs because the Chairs cannot provide the relief sought by the Plaintiffs in their Fourth Amended Complaint.

LEGAL STANDARD

When "state legislators [are acting] in their legislative capacities, they are entitled to absolute legislative immunity." *Scott v. Taylor*, 405 F.3d 1251, 1257 (11th 2005). If a legislator may waive legislative immunity, "waiver can be found only after explicit and unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting." *United States v. Helotski*, 442 U.S. 477, 490–91 (1979).

"To have a case or controversy, a litigant must establish that he has standing, which requires proof of three elements. The litigant must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citations and quotation marks omitted).

ARGUMENT

I. It Is Undisputed That Legislative Immunity Would Normally Bar Plaintiffs' Suit Against The Chairs.

In their Motion to Dismiss, (Doc. 130), the Chairs argued that, under the doctrine of legislative immunity, they are "absolutely immune from liability for their legislative activities." (*Id.* at 8) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 48–49 (1998)). The Chairs further argued that the "challenged acts as Chair[s]" under the Fourth Amended Complaint, (Doc. 126), "were inherently legislative." (Doc. 130 at 10.) On that basis, the Chairs argued that legislative immunity applied, and that Plaintiffs' suit against the Chairs was due to be dismissed. (*Id.* at 8–11.) Plaintiffs' do not contest these premises. As such, it is undisputed that, on the face of the Complaint, legislative immunity should apply.

II. The Chairs Have Not Waived Legislative Immunity.

Plaintiffs' rely on three arguments that the Chairs have waived immunity:

(1) Legislative immunity should not apply because this case has been pending for "over two years," (Doc. 138 at 36);

(2) The Chairs have waived immunity by "actively participating in the litigation," (*id.* at 37); and

(3) The Chairs "explicitly and implicitly waived immunity in these proceedings." (*Id.*)

Each of these arguments fails. First, the mere passage of time does not waive the privilege, and Plaintiffs cannot show any harm from the delay given the early stage of this case. Second, unlike in *Singleton v. Merrill*, 576 F. Supp. 3d 931 (N.D. Ala. 2021), the Chairs have not engaged in "extensive litigation conduct," *id.* at 941. And third, counsel's statements at an early status conference concerning the Chairs' intent does not itself affect a waiver.

a. The passage of time does not waive the Chairs' legislative immunity.

Plaintiffs first raise a laches-style argument that, because this case has been pending for "over two years," the Chairs should now be barred from raising the legislative immunity. (Doc. 138 at 36.)

First, Plaintiffs' laches argument applies the wrong waiver standard because as the U.S. Supreme Court has held in *United States v. Helotski*, 442 U.S. 477, 490–91 (1979), "waiver can be found only after **explicit and unequivocal** renunciation of the protection [of legislative immunity]. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting." (Emphasis added). The passage of time, alone, is not "explicit and unequivocal renunciation of the protection." *Id. See also In re Crowley*, 568 B.R. 835, 837 (M.D. Ala. 2017).

Second, even if a delay could effect a valid waiver of legislative immunity, there would still be no waiver here. In the analogous context of laches, for instance, waiver does not apply until "(1) there was a delay in asserting a right or claim, (2) the delay was not excusable, and (3) the delay caused [the party] undue prejudice." *U.S. v. Barfield*, 396 F. 3d 1144, 1150 (11th Cir. 2005) (emphasis added). The procedural history of this case demonstrates that Plaintiffs cannot meet this test.

The original Complaint was filed on November 16, 2021. (Doc. 001.) However, the case was stayed in March 2022, (Docs. 59 and 61), and remained stayed until June 9, 2023. (Doc. 075.) Plaintiffs did not file their Third Amended Complaint until July 10, 2023, (Doc. 083) or their Fourth Amended Complaint until December 6, 2023. (Doc. 126.) The Chairs promptly responded to each with a motion to dismiss on July 24, 2023, (Doc. 093), and December 20, 2023. (Doc. 130.) As such, while the Chairs' current motion was filed roughly 25 months after the original Complaint, this case was stayed for roughly 15 of those months, and the Chairs' have had a motion to dismiss pending nearly constantly since the case was unstayed in July 2023. Any delay was excusable. *Barfield*, 396 F. 3d at 1150.

Further, this case remains in its nascent stages, and thus Plaintiffs cannot show "undue prejudice." *Id.* The stay on this case was lifted on June 9, 2023, (Doc. 075); Plaintiffs' Third Amended Complaint was filed on July 10, 2023, (Doc. 083); Plaintiffs' Fourth Amended Complaint was filed on December 6, 2023 (Doc. 126);

this Court has yet to hear or rule on any motion to dismiss; and discovery has not yet begun. As such, Plaintiffs cannot demonstrate *any* prejudice, much less "undue prejudice." *Id.* The Chairs' motion to dismiss was timely raised.

b. The Chairs have not waived legislative immunity by "extensive litigation conduct."

In an effort to analogize the current case to *Singleton v. Merrill*—where this Court held that Rep. Pringle and Sen. McClendon were not entitled to legislative *privilege* because they had waived the privilege through "extensive litigation conduct," (*id.* at 941)—Plaintiffs argue that the Chairs "active[ly] participat[ed]" in the litigation. (Doc. 138 at 37–38.) Plaintiffs note that Rep. Pringle and Sen. McClendon (acting as then-Senate Chair of the Committee): (a) joined in opposing Plaintiffs' Motion to Recuse, (Doc. 045); (b) answered Plaintiffs' original Complaint, (Doc. 053); and (b) joined in opposing Plaintiffs' Motion to Modify the stay then in place in this case, (Doc. 073). These are not examples of "extensive litigation conduct" like those considered by this Court in *Singleton*, though.

As noted above, "waiver can be found only after **explicit and unequivocal** renunciation of the protection [of legislative immunity]. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting." *United States v. Helotski*, 442 U.S. 477, 490–91 (1979) (emphasis added). Rep. Pringle's and Sen. McClendon's joinder in arguments concerning threshold procedural matters does not reach this (high) threshold.

For instance, courts routinely consider litigation participation-based waiver under the similar standard of "clear and unequivocal" in the context of removal. *See*, *e.g.*, *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1260–61 (11th Cir. 1999) (noting that "litigation-based waivers" usually require "clear and unequivocal" evidence that a party intended to waive a right); *Fain v. Biltmore Securities, Inc.*, 166 F.R.D. 39, 40 (M.D. Ala. 1996). Applying that standard, courts have held that a litigation-based waiver is only "clear and unequivocal" if a party "tak[es] some substantial offensive or defensive action in the state court action indicating a willingness to litigate in that tribunal . . . ." *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244, 1246 (11th Cir. 2004) (quoting Charles A. Wright, *et al*., 14B FEDERAL PRACTICE & PROCEDURE § 3721 (2003)). Lower courts have held that "[a]s a general rule, the right of removal is not lost [*i.e.*, no litigation-based waiver occurs] by action in the state court **short of proceeding to an adjudication on the merits**." *Hamilton v. Sterling Bank*, 2016 WL 7017409, *2 (M.D. Ala. Nov. 29, 2016) (quoting, ultimately, *Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776, 782 (5th Cir.1989)) (emphasis added). Put differently, if a party's actions "were for the purpose of preserving the status quo," *Fain*, 166 F.R.D. at 40, no litigation-based waiver has occurred. Plaintiffs cite to no contrary authority suggesting a different test.

Here, none of Rep. Pringle's and Sen. McClendon's filings amounted to a "substantial offensive or defensive action." *Yusefzadeh*, 365 F.3d at 1246. Instead,

they were each "for the purpose of preserving the status quo," *Fain*, 166 F.R.D. at 40, or "w[ere] dictated by the rules of [this] Court." *Yusefzadeh*, 365 F.3d at 1246 (citation omitted). For instance, Rep. Pringle's and Sen. McClendon's joinder in opposing Plaintiffs' Motion to Recuse, (Doc. 045), was purely in response to Plaintiff's motion, (Doc. 040); was dictated by this Court's briefing schedule, (Doc. 041); and was to preserve the *status quo* of a threshold issue—which judges were assigned to this case, and as such, which judges might rule on a motion involving the merits, such as the Chairs' Motion to Dismiss based on legislative immunity.

Similarly, Rep. Pringle's and Sen. McClendon's joinder in opposing Plaintiffs' Motion to Modify the stay then in place in this case, (Doc. 073), concerned a purely procedural matter. *Yusefzadeh*, 365 F.3d at 1246.

Nor was Rep. Pringle's and Sen. McClendon's answer to the Plaintiffs' original Complaint a "substantial offensive or defensive action" that would trigger a litigation-based waiver. *Yusefzadeh*, 365 F.3d at 1246. *See also Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1010 at n.13 (11th Cir. 1992) (holding that legislators were entitled to legislative immunity even though they first filed an answer in which they did not raise legislative immunity as a defense). The Eleventh Circuit held in *Yusefzadeh*, for instance, that "filing a motion or answer in compliance with state civil procedure does not equate to litigating on the merits." *Id.* at 1245. Answers are required by the Federal Rules of Civil Procedure, and thus parties are required to file

them in order to avoid being in default. Rep. Pringle and Sen. McClendon did so. Since that time, however, Plaintiffs have filed four amended complaints, to which the Chairs have either not responded at all or, in the case of the Third and Fourth Amended Complaint, asserted legislative immunity. That is not waiver.

Comparing this conduct to this Court's opinion in *Singleton* highlights the point. In *Singleton*, this Court noted that the Chairs: (1) voluntarily intervened in the case; (2) intervened for the express purpose of asserting factual and legal defenses; (3) did not move to dismiss either *Singleton* or *Milligan*; and (4) "answered fully in both cases." *Singleton*, 576 F. Supp. 3d at 940–41. Here, by contrast, the Chairs: (a) did not intervene, but were sued as original defendants; (b) have not made any statements about their indispensability to this case; (c) have filed the instant motion to dismiss; and (d) answered the original Complaint, but did not answer the First or Second Amended Complaints, and moved to dismiss the Third and Fourth Amended Complaint. Plaintiffs do not address this critical difference in procedural posture. *Singleton* is not on point, and there has been no litigation-based waiver.

c. Counsel's statements at a status conference do not, by themselves, constitute a waiver.

Finally, the Chairs and counsel acknowledge that at a status conference on May 20, 2022, in response to a question concerning legislative immunity from Judge Manasco, counsel for the Chairs indicated that the Rep. Pringle and Sen. McClendon "have obviously waived their immunity." (*See* Doc. 115-1 at 19:1–10.) Counsel's

statement, however, does not affect a waiver in and of itself—nor have Plaintiffs pointed to any cases suggesting the contrary.

The Chairs again note that the legislative privilege is a "*personal* defense" to each legislator, *Scott*, 405 F.3d at 1254–55 (emphasis added), *Brown v. New York*, 975 F. Supp. 2d 209, 228 (N.D.N.Y. 2013), and that Sen. Livingston was not Senate Chair of the Committee at the time the above statement was made. (*See, e.g.,* Docs. 045, 053, and 073.) As such, counsel's May 2022 statement does not concern Sen. Livingston. Plaintiffs' sole argument to the contrary substantially relies on *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1336–37 (11th Cir. 2022), which upheld a trial court's denial of a motion by a party to substitute herself into the place of her deceased sister. *Carrizosa* does not address legislative immunity; does not address official capacity lawsuits; and does not address the status of personal defenses after a substitution of parties. It thus has little-to-no application to Sen. Livingston's assertion of legislative immunity. (*See also* Doc. 118 at 7.)

Further, as discussed above, the test for waiver is whether a legislator took "substantial offensive or defensive action," *Yusefzadeh*, 365 F.3d at 1246, that manifested an "explicit and unequivocal renunciation of the protection" of legislative immunity. *Helotski*, 442 U.S. at 490–91. While counsel's statements are relevant to that inquiry, they are not dispositive. Instead, a litigation-based waiver is ultimately accomplished by litigation activity that actually implicates a privilege or

immunity, not merely by statements *about* a privilege. *See, e.g., Abtew v. United States Dep't of Homeland Sec.*, 47 F. Supp. 3d 98, 110 (D.D.C. 2014) ("But it is axiomatic that a party does not waive a privilege by **intending** to take an action in the future; privilege is waived **only when that action is actually taken**.") (emphasis added); *Lohman v. Superior Court*, 81 Cal.App.3d 90, 95 (1978) ("[T]he intent to disclose does not operate as a waiver, **waiver comes into play after a disclosure has been made**.") (emphasis added); *Butler ex rel. Com. Bank, N.A. v. HCA Health Servs. of Kansas, Inc.*, 427, 6 P.3d 871, 890 (Kan. App. 1999) ("Even if there was some implied waiver by Dr. Desjarlais to disclosing the privileged documents, **any waiver was expressly withdrawn before any disclosure was made**.") (emphasis added) (citing 81 Am.Jur.2d, Witnesses § 294, p. 281) ("[T]he waiver of a privileged communication may be withdrawn at any time before it has been acted on, where no advantage has accrued to either litigant on account thereof."); *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003) (noting that a privilege "may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition.").[1]

The litigation conduct of the Chairs had not, in fact, waived their immunity at the time of that status conference. *See supra* Sec. II.b. Counsel's statement

[1] Additionally, contrary to Plaintiffs' statement, (Doc. 138 at 37), the Chairs are not seeking to have it both ways by "simultaneously defend[ing] legislation and also claim[ing] immunity from suit attacking it." (Doc. 138 at 37.) Instead, the Chairs are seeking to be dismissed altogether.

accurately reflected that, at that time, the then-current Chairs did not intend to assert immunity if this case proceeded—but this case did not immediately proceed, (*see* Docs. 59 and 61), Sen. Livingston replaced Sen. McClendon as Senate Chair of the Committee, the stay was not lifted until over a year later, (Doc. 075), and a Third and Fourth Amended Complaint have been filed. (Docs. 085, 126.) Given the intervening time, the current Chairs (including Rep. Pringle) have since changed their minds and determined that they wish to assert legislative immunity.[2] No intervening conduct has waived the defense, and due to the nascent stages of this litigation, Plaintiffs are not prejudiced by this change. *Barfield*, 396 F. 3d at 1150.

III. The Plaintiffs Lack Standing To Sue The Chairs.

Additionally, the Plaintiffs lack standing to sue the Chairs because "[t]he Chairs cannot provide any relief sought by Plaintiffs." (Doc. 130 at 5.) *See Jacobson v. Florida Sec. of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) ("The litigant must prove (1) an injury in fact that . . . (3) is likely to be redressed by a favorable decision.") (citations omitted). Plaintiffs respond by citing the Chairs' motion to intervene in the parallel congressional district cases, (Doc. 138 at 44–46) (citing *Caster v. Allen*, 2:21-CV-1536-AMM (N.D. Ala. Dec. 20, 2021), ECF No. 60), and

[2] In particular, since May 2022, the Chairs have experienced first-hand the "distraction and . . . diver[sion of] their time, energy, and attention from their legislative tasks to defend the litigation" in other cases, *Scott*, 405 F.3d at 1256 (cleaned up), (Doc. 138 at 36–37), and have determined that the public is better served by them devoting their energies to their legislative tasks.

more generally by highlighting the importance of the Chairs and the Committee in redistricting. (*Id.* at 42–46.) While the Chairs certainly acknowledge the importance of their office, Plaintiffs' arguments miss the point: the specific relief sought by the Fourth Amended Complaint is outside the power of the Chairs to grant.

Specifically, Plaintiffs' Fourth Amended Complaint requests the following:

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Declare the State Senate districting plan adopted in SB 1 a violation of Section 2 of the Voting Rights Act of 1965;

B. Enjoin the Defendants and their agents from holding elections in the challenged districts adopted in SB 1 and any adjoining districts necessary to remedy the Voting Rights Act violations, 42 U.S.C. § 1983; 52 U.S.C. § 10302(b);

C. Set a reasonable deadline for the State of Alabama to adopt and enact a districting plan for the State Senate that remedies the Voting Rights Act violations;

D. Award Plaintiffs their costs, expenses, disbursements, and reasonable attorneys' fees incurred in bringing this action pursuant to and in accordance with 52 U.S.C. § 10310(e) and 42 U.S.C. § 1988(b);

E. Retain jurisdiction over this matter until all Defendants have complied with all orders and mandates of this Court;

F. Retain jurisdiction over this matter and require all Defendants to subject future State Senate redistricting plans for preclearance review from this court or the U.S. Attorney General under Section 3(c) of the VRA, 52 U.S.C. § 10302(c);

G. Grant such other and further relief as the Court may deem just and proper.

(Doc. 138 at 45–46.)

The Chairs have no power to redress of any of these requests, however:

- The Chairs cannot exercise the judicial power prayed for in requests A, B, D, E, F, or G. *See*, *e.g.*, U.S. Const., Art. III, Sec. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.");

- The Chairs do not administer elections and so cannot grant the request prayed for in request B. *See Chestnut v. Merrill*, no. 2:18-CV-907-KOB, 2018 WL 9439672, *2 (N.D. Ala. Oct. 16, 2018) ("Under Alabama law, the Secretary of State is the proper state entity to administer the congressional district plan and state election law.");

- The Chairs would presumably be involved in adopting and enacting any remedial map, if necessary, but have no control over calling legislative sessions or over the Legislature's calendar, and so cannot grant the request prayed for in request C. *See* 2022 Alabama Constitution, Art. IV, § 48.01, Art. V, § 122; and

- The Chairs have no power to grant the prayer in request F, because any preclearance submission would come from the Attorney General, not from the Chairs. *Cf.* Ala. Code §§ 29-2-50 – 52 (duties of the Chairs) *with* Ala. Code § 36-15-17 (powers of the Attorney General).

The Chairs note precisely this in their sworn affidavits attached to the Motion to Dismiss, each stating that:

> I cannot declare that SB 1 violates the Voting Rights Act; I have no authority to prevent the 2021 Senate districts from being used in elections; I have no authority to cause the adoption and enactment of a new redistricting plan for the Senate; I cannot exercise the Court's judicial power; and I cannot exercise or determine any preclearance requirements.

(Aff. of Rep. Pringle, Doc. 130-1 at ¶ 8.) (*See also* Aff. of Sen. Livingston, 130-2 at ¶ 8) (materially identical).[3]

[3] In that context, Plaintiffs cite the Chairs' affidavits, which were attached to their motion to dismiss, (Doc. 138 at 42), while simultaneously stating that this Court should not consider these affidavits because they are outside the pleadings. (*Id.* at 41–42.) This Court, however, may consider matters outside of the pleadings on a Rule 12(b)(1) challenge to subject-matter jurisdiction, such as the Chairs challenge to Plaintiffs' standing here. *See Morrison v. Amway Corp.*, 323 F.3d 920, 924–25 (11th Cir. 2003) ("[W]hen a defendant properly challenges subject matter jurisdiction under Rule 12(b)(1) the district court is free to independently weigh facts….").

In short, while the Chairs certainly have a relationship to the subject-matter of this lawsuit, they are simply the wrong defendants to grant Plaintiffs the relief that they seek in the Fourth Amended Complaint. Plaintiffs' alleged injuries and requested relief are not "redressable" by the Chairs, regardless of their arguments concerning "traceability." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 560 (1992) ("[O]ur cases have established that the **irreducible** constitutional minimum of standing contains three elements . . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' The party invoking federal jurisdiction bears the burden of establishing these elements.") (cleaned up). As such—because a "favorable decision" against the Chairs would not "redress" the Plaintiffs' alleged injury—Plaintiffs have not met the elements of standing to sue the Chairs. *Jacobson*, 974 F.3d at 1245.

IV. Plaintiffs Lack a Private Cause of Action Under The Voting Rights Act, And Fail To Show An Unequal Opportunity To Participate In The Political Process.

As previously stated by all Defendants, (*see* Docs. 130 at 11–29; 131; 139), Plaintiffs' claims under Section 2 of the Voting Rights Act fail because Section 2 does not create a private cause of action, and Plaintiffs have failed to state a valid Section 2 claim, in any case. The Chairs stand on these arguments.

CONCLUSION

The Fourth Amended Complaint is due to be dismissed with prejudice.

Respectfully submitted this 25th day of January, 2024.

s/ Dorman Walker
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CERTIFICATE OF SERVICE

I certify that on January 25, 2024, I electronically filed the foregoing notice with the Clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

s/ Michael P. Taunton
Of Counsel