

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

GREATER BIRMINGHAM)
MINISTRIES,)

Plaintiff,)

v.)

No. 2:22-cv-00205-MHT-SMD

JOHN H. MERRILL, in his official)
capacity as Alabama Secretary of)
State,)

Defendant.)

SECRETARY OF STATE’S NOTICE AND MOTION FOR EXPEDITED RULING

Secretary of State John H. Merrill, who is sued in his official capacity, hereby respectfully moves this Court for an expedited ruling as to the fee Plaintiff GBM will be required to pay for records which this Court ordered the Secretary to turn over to GBM. *See* doc. 92-1.

An expedited ruling, if received before the Secretary notices his appeal, would eliminate issues around the finality of this Court’s October 4, 2022 Judgment. Accordingly, the Secretary respectfully requests that the fee Order and a Final Judgment be entered no later than November 2, 2022, so that he may file only one notice of appeal and the entire litigation can be resolved in one appellate proceeding.

The Court's Judgment is Likely Not Final.

The Court issued an Opinion “find[ing] in favor of GBM on all of its claims,” doc. 90 at 2, and entered a Judgment requiring Secretary Merrill to “forthwith” produce “three categories of records[,]” doc. 92-1. The Judgment further provided:

(3) The parties have until November 22, 2022, to reach an agreement as to the reasonable fee for the records requested by and turned over to plaintiff Greater Birmingham Ministries, based on the actual costs that defendant Merrill incurs in their production to Greater Birmingham Ministries. If they are unable to do so, they should notify the court by 5 P.M. on November 23, 2022.

Doc. 92-1.

Accordingly, the Court left open the issue of what GBM would be required to pay for the records. This seemingly presents an issue because “[a] final judgment is ‘one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *Riley v. Kennedy*, 553 U.S. 406, 419 (2008) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)) (footnote omitted). Here, there is more to do.

In *Riley*, a three-judge court granted a declaratory judgment that preclearance pursuant to Section 5 of the Voting Rights Act was required and granted the State 90 days within which to obtain preclearance, if it so chose. *Riley*, 553 U.S. at 416-17, 419. While maintaining that preclearance was not required, the State made a submission to the United States Department of Justice, which interposed an objection. *Id.* at 417. At that point, plaintiff returned to the three-judge court seeking

relief, and that court declared the appointment of a Mobile County commissioner unlawful and vacated it. *Id.* Thereafter, the Governor appealed, and plaintiffs argued that his appeal should have been taken after the initial declaratory judgment that preclearance was required. *Id.* at 417-18. The Supreme Court held that Governor Riley's appeal was timely. *Id.* at 420. It rejected the argument that the earlier decision was final just because it had been so labeled by the district court. *Id.* at 419-20. It also rejected the argument that the original decision had "conclusively settled the key remedial issue," because, on the facts there, it had not. *Id.* at 419. That was because the State was not required to seek preclearance but given the opportunity to do so. *Id.*

Here, the Secretary was ordered to produce three categories of records, and the unresolved issue is what GBM will pay to the Secretary. These differences do not take the case outside the rule set forth in *Riley*, but rather bring it closer to the facts in *Caitlin*, upon which *Riley* relied. *Caitlin* concerned condemnation of property and made clear that the general rule is that "appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property." *Caitlin*, 324 U.S. at 233. "The foundation of this policy is not in merely technical conceptions of finality. It is one against piecemeal litigation. The case is

not to be sent up in fragments” *Id.* at 233-34 (internal quotation marks and citations omitted; alteration by the Court).

Thus, while there are exceptions, *see, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-03 (1988); *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 67-72 (1948), and the Supreme Court has described the “line . . . dividing judgments that were deemed ‘final’ from those found not to be so” as “faint and faltering at times,” *Republic Nat. Gas Co.*, 334 U.S. at 69, the Court’s October 4 Judgment appears to fall on the non-final side of the line. It leaves undetermined the fee that Secretary Merrill is to receive for turning over the three categories of records. That is more akin to the “condemnation precedents” than “the accounting cases” because the money is to be paid to the Secretary, not by him, *cf. id.* at 71, and, importantly, because the setting of the fee may prompt further federal appellate review, *id.* at 71-72, which is not the case where the Supreme Court has found finality where the federal issues are decided and only State issues remained.

Accordingly, while the Secretary certainly can take up the October 4 Judgment because it is an injunction, 28 U.S.C. § 1292(a)(1); *Liberty Mut. Inc. Co. v. Wetzel*, 424 U.S. 737, 744-45 (1976), the appellate review process will be less complicated if final judgment is entered before that appeal is noticed.

The Court Concluded the Secretary Will be Paid “A Reasonable Fee” “Based on the Actual Costs” Incurred.

The Court’s October 4, 2022 Opinion determined “that Secretary Merrill must provide the records GBM has requested for a reasonable cost.” Doc. 90 at 23. The Opinion recited that, “[a]t trial, GBM indicated its willingness to pay ‘reasonable costs’ for accessing digital records, including the costs of a thumb drive to transfer information or of the staff time required to execute a request[,]” *id.* at 25, and indicated that a fee for these records should be “based on the actual costs the Secretary incurs in their production to GBM[,]” *id.* at 26.

It remains the Secretary’s position that he was prepared to sell to GBM for one cent per name the records responsive to the Purged Voters Request. At that rate, the fee would be \$1,350.74. *See* Decl. of Clay S. Helms, attached hereto as **Exhibit A**, ¶ 6. It further remains the Secretary’s position that the records responsive to the Felony Records Request need not be produced pursuant to the NVRA. Accordingly, should the Secretary ultimately prevail on appeal, those records should be returned or destroyed. *See Ala. Disabilities Advoc. Program v. J.S. Tarwater Dev. Ctr.*, 97 F.3d 492, 496 & n.1 (11th Cir. 1996). Should the Secretary not ultimately prevail in this position but be entitled to collect one cent per name for these files, the fee for the *final* felon files provided would be \$240.63. *See* Helms Decl. ¶¶ 7 & 13.

Without retreating from this position, the Secretary offers the following information that he believes is relevant to the setting of a fee as defined by the Court. He first discusses the process and then the costs he incurred.

As this Court is aware from the evidence and argument in this case, the Secretary was not in possession of the records that this Court required him to turn over to GBM.¹ Accordingly, the Secretary immediately began working with his PowerProfile vendor, ES&S, to create records in response to the Court's Judgment. Helms Decl. ¶ 2. In the interim, on October 5, 2022, the undersigned provided to GBM's counsel the full files from which the samples in Joint Exhibits 18, 19, and 20 were created.² **Exhibits B & C**; *see also* Helms Decl. ¶ 2. The next day, October 6, 2022, the undersigned provided to GBM's counsel newly created files provided by ES&S. **Exhibits D & E**; *see also* Helms Decl. ¶ 4.³

¹ *See e.g.*, doc. 69 (Joint Stipulations) ¶¶ 23-24 (GBM requested that current status be added to one list); doc. 80 (Secretary of State's Pretrial Brief) at 26-27 (discussion of same list); *id.* at 29-31, 51, 68-73 (discussion of other two lists and argument that they need not be created in response to GBM's request); doc. 90 at 16-17 (rejecting argument that the Secretary is not required to create records).

² Joint Exhibit 18, doc. 72-73, related to the Purged Voters Request. Joint Exhibit 19, doc. 72-74, and Joint Exhibit 20, doc. 72-75, related to the Felony Records Request.

³ Counsel discussed proceeding with respect to the felon files *via* a method used in earlier litigation through the morning of October 6, 2022. **Exhibit F**. By that time, ES&S had already created the records in a different manner in an attempt to better comply with the Court's Judgment. Helms Decl. ¶ 5.

Thereafter, on October 11, 2022, GBM’s counsel emailed and asked for three fields, namely date of birth, gender, and race, to be added to the records concerning removals and denials for disenfranchising felony convictions. **Exhibit F.** The Secretary’s office again worked with ES&S to create the records. Helms Decl. ¶ 8. Date of birth, gender, and race had been requested by GBM before it initiated litigation *but had not been included in this Court’s Judgment*. Neither the Judgment nor Opinion gave any indication that the omission was intentional. While the Opinion indicated that the Secretary “should . . . redact certain uniquely sensitive information like voters’ social security numbers[,]” doc. 90 at 16, the requested fields are fields that the Secretary routinely provides in lists of active and inactive voters. Thus, it appeared a virtual certainty that the Court would order the Secretary to produce these fields if asked. Accordingly, on October 13, 2022, the undersigned provided to GBM’s counsel records with the date of birth, gender, and race added. **Exhibits G & H.**

One of the records created to respond to GBM’s request for date of birth, gender, and race included a different number of individuals than the record without these fields. Helms Decl. ¶¶ 9-10. After further review and work, ES&S produced a new record, which the undersigned provided to GBM’s counsel on October 19, 2022. **Exhibits I & J; see also** Helms Decl. ¶¶ 11-12. This record was created using a different set of criteria and included more individuals. Helms Decl. ¶¶ 11-12.

The undersigned consistently received records from the Secretary of State's office on a USB drive and then transmitted records to GBM's counsel *via* OneDrive and returned the USB drive. Accordingly, the Secretary did not incur a discrete cost in transmitting the records to GBM after they were created. There were, however, many hours involved in creating the records.

As Mr. Helms' declaration sets out, ES&S has estimated that it spent 15.5 hours responding to the Court's Judgment. Helms Decl. ¶¶ 16-17. In the normal course, ES&S would charge \$150 per hour for this work for a total of \$2,325.00. *Id.* ¶¶ 15-17. However, ES&S has indicated that it will not be charging the Secretary for the creation of these records. *Id.* at 15-19.

In addition to ES&S's time, the Secretary's staff spent time responding to the Court's Judgment. Mr. Helms, who is a salaried employee, estimates that he spent seven hours responding to this Court's Judgment. Helms Decl. ¶ 20. That includes time necessitated by the fact that this Court's Judgment required that the files be produced "forthwith," doc. 92-1 at 1; *see also* doc. 90 at 25 ("immediately"), and issued the day before Mr. Helms was flying to Montana for a long-planned vacation, *see* Helms Decl. ¶ 2. Because Mr. Helms was out of the office, he required assistance from Adam Alexander, another salaried employee, who estimates that he spent three hours responding to this Court's Judgment. Decl. of Adam Alexander, attached hereto as **Exhibit K**, ¶ 3. Applying hourly rates to these figures results in

\$293.72 for Mr. Helms' time, Helms Decl. ¶ 22, and \$135.45 for Mr. Alexander's time, Alexander Decl. ¶ 4, for a total of \$429.17.

Without retreating from his position stated *supra* at page 5 and maintained throughout this litigation, Secretary Merrill asserts that the \$429.17 in staff costs fit within the Court's narrow definition of "reasonable costs." Had ES&S chosen to charge for its work, as it was entitled to do, then those costs too would fit within the Court's narrow definition of "reasonable costs."

The undersigned reached out to GBM's counsel about this issue. Counsel indicated that they have not yet had an opportunity to address this matter with their client given the press of other work, primarily related to the upcoming election, and that they consider the Court's Judgment to be final and thus there to be no reason to bring this issue to the Court urgently. The undersigned also understands that it may—or may not—be GBM's position that none of the costs described herein are reimbursable because they concern creation of the records, which would have to be done for public inspection for which no fee is due, and not with actually transmitting the records to GBM.

* * *

With this information before the Court, the Secretary respectfully moves the Court to enter an Order setting the fee that GBM shall pay the Secretary for the records he created and turned over to GBM in response to this Court's Judgment.⁴ To avoid any issues as to the finality of the Court's October 4, 2022 Judgment, the Secretary further respectfully requests that the fee Order and a Final Judgment be entered no later than November 2, 2022, so that Secretary Merrill may file only one notice of appeal and the entire litigation can be resolved in one appellate proceeding.

Respectfully submitted,

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⁴ Should the Secretary accept any payment, he will be doing so without waiver of his right to additional payment should he prevail on appeal.

CERTIFICATE OF SERVICE

I certify that on October 26, 2022, I filed the foregoing document electronically via the Court's CM/ECF system, which will send a copy to the following counsel of record: dlang@campaignlegalcenter.org; mgaber@campaignlegalcenter.org; ahuling@campaignlegalcenter.org; vrichardson@campaignlegalcenter.org; clapinig@campaignlegalcenter.org; bbowie@campaignlegal.org; and, jmcguire@mandabusinesslaw.com.

s/ Misty S. Fairbanks Messick
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