IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

BALTIMORE COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, Plaintiffs, v. BALTIMORE COUNTY, MARYLAND, *et al*., Defendants.	Civil Action No. 1:21-cv-03232-LKG

JOINT STATUS REPORT

Plaintiffs Baltimore County Branch of the National Association for the Advancement of Colored People, League of Women Voters of Baltimore County, Common Cause of Maryland, Charles Sydnor, Anthony Fugett, Dana Vickers Shelley, Danita Tolson, Sharon Blake, Gerald Morrison, and Niesha McCoy ("Plaintiffs"), along with Defendant Baltimore County, Maryland ("Baltimore County"), by their undersigned counsel and pursuant to this Court's Order of March 25, 2022, ECF 80, hereby submit a Joint Status Report setting forth their respective views on whether the Court should dismiss this matter, or, if warranted, proposing a schedule for further proceedings.

PLAINTIFFS' POSITION

Summary of Proceedings and Additional Background

On December 20, 2021, Baltimore County enacted Bill 103-21, a new County voting district map. It did so despite glaring defects in the County's proposed map and despite repeated warnings from Plaintiffs that the proposed map would violate the Voting Rights Act by

unlawfully packing Black voters into District 4 and leaving the remaining six councilmanic districts controlled by white majorities. Prior to adoption of Bill 103-21, Plaintiffs offered alternative maps that would remedy the clear violation in the County's plan and obviate the need for any litigation. The County ignored all criticism and passed Bill 103-21. The next day, December 21, 2021, Plaintiffs filed a Complaint seeking declaratory and injunctive relief concerning Bill 103-21 and including a request for reimbursement of costs covering attorneys' and expert witness fees.

Plaintiffs sought a preliminary injunction, and after extensive briefing, analysis by demographers and political science experts, and a hearing with multiple witnesses, this Court found that Plaintiffs had established a "substantial likelihood of success of the merits of their Section 2 claim." Mem. Op. & Order (Feb. 22, 2022), ECF 55 at 9. In short, the Court stopped elections from going forward under Bill 103-21 and in doing so granted much of the relief sought by Plaintiffs in their Complaint:

Relief Sought in Complaint Prayer for Relief, ECF 1 at 25	Success Achieved Through Litigation Mem. Op. & Order (Feb. 22, 2022), ECF 55
"A declaratory judgment that the Plan violates the rights of Plaintiffs as secured by the Voting Rights Act, 52 U.S.C. § 10301;"	"At this preliminary stage, the Court need not resolve plaintiffs' Section 2 claim on the merits. But, plaintiffs must show, among other things, that they have a substantial likelihood of succeeding on the merits of their Section 2 claim, to obtain emergency injunctive relief. *Winter*, 555 U.S. at 20. Plaintiffs have met their burden."
"Permanent injunctive relief preventing the Defendants and their officers, agents, and employees, successors in office, and all other persons in active concert and participation with them, from conducting future elections for Baltimore County Council under the unlawful redistricting plan enacted December 20, 2021;"	Preliminary injunction preventing "defendants from conducting future elections in the County under the County's 2021 redistricting plan[.]"
"An Order of this Court adopting a redistricting plan for the election of members to the Baltimore County Council that comports with the Voting	Order directing "the County to adopt a redistricting map that either includes two reasonably compact majority-Black Districts for

Rights Act, 52 U.S.C. § 10301, as well as all other relevant constitutional and statutory requirements[.]"	the election of County councilmembers, or an additional County District in which Black voters otherwise have an opportunity to elect a representative of their choice and that comports with the requirements of the Voting Rights Act, 52 U.S.C. § 10301, and any other relevant constitutional and statutory requirements[.]"

Following entry of the preliminary injunction, the County enacted a new map, rescinding Bill 103-21, the subject of the complaint.

A primary election under the County's remedial map is scheduled for July 19, 2022. A Black candidate is mounting a campaign against the incumbent Councilman in District 2, and four other Black candidates have filed to run in Districts 1, 5 and 6. As such, whether the County's remedial map in fact provides Black voters an opportunity to elect a representative of their choice as the County has suggested in its factual proffers to the Court will soon be put to the test.

Plaintiffs' Proposed Next Steps

1. Given the interim posture of the case and upcoming elections under the County's remedial plan, Plaintiffs propose that this litigation be stayed pending the outcome of the July 19, 2022, election.

2. If, following that election, the County's remedial map shows no legal violation, Plaintiffs will petition for recovery of their reasonable attorneys' fees and dismiss their suit. If, on the other hand, voting in the July 19 election demonstrates that the County's remedial map violates the Voting Rights Act and/or the Constitution, Plaintiffs will file an Amended Complaint challenging the current plan and prepare to continue litigation of this matter in light of the more complete factual record. Plaintiffs anticipate that their experts' analysis will allow them to make that decision and either dismiss the case or file an amended complaint by September 15, 2022.

3. In the alternative, if the Court prefers to dismiss this case without awaiting the July election results, Plaintiffs submit that any dismissal should be without prejudice to their rights to (i) file a new complaint if their analysis of the July 19 election demonstrates a violation of the Voting Rights Act and/or the Constitution, and (ii) file a motion for attorneys' fees within 30 days of dismissal. Local Rule 109.2 requires that motions for attorneys' fees be filed within 14 days of judgment "or [as] otherwise ordered by the Court." Plaintiffs request that the Court order that their motion requesting attorneys' fees be due in 30 days, with the memorandum in support to follow as provided in Local Rule 109.2.[1] Plaintiffs would also be willing to submit further briefing on their entitlement to recover fees and costs.

4. Plaintiffs met and conferred with the County to suggest that the parties resolve the fee claim through mediation. The County responded that it believes Plaintiffs are entitled to zero fees and is not willing to negotiate. The County's position is regrettable, both because it will require adjudication of a much-contested fee petition and because it ignores the fact that, without this litigation, Bill 103-21 would still be on the books and Plaintiffs have, to date, achieved most of the relief sought in the complaint concerning Bill 103-21.[2]

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[1] Local Rule 109.2 provides for a memorandum in support to be filed within 35 days after the filing of a motion for fees.

[2] Plaintiffs are entitled to attorneys' fees in this matter. As they will further explain in their fee petition, Plaintiffs' successful procurement of a preliminary injunction blocking the County's use of Bill 103-21 for the upcoming election cycle and ordering the County to adopt a new map that complies with the Voting Rights Act makes Plaintiffs "prevailing parties" for the purpose of fees. Plaintiffs anticipate that the County will attempt to rely on *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), but *Smyth* is no longer good law. In *Lefemine v. Wideman*, 568 U.S. 1 (2012), the Supreme Court summarily reversed the Fourth Circuit's denial of fees where an injunction was entered; subsequently, courts in the Fourth Circuit have recognized that *Smyth* should no longer be binding precedent. *See e.g.*, *Veasey v. Wilkins*, 158 F. Supp. 3d 466 (E.C.N.C. 2016). Indeed, in a case currently fully briefed and pending in the Fourth Circuit, *Stinnie v. Holcomb*, No. 21-1756, counsel from McGuire Woods (the attorneys for the County) have convincingly explained why *Smyth* is no longer good law and why a plaintiff who obtains a

BALTIMORE COUNTY'S POSITION

The Court should dismiss this matter. Plaintiffs' Complaint, ECF 1, and Motion for Preliminary Injunction, ECF 28, challenged the legality of the redistricting map enacted by Bill 103-21. That map has since been superseded by the redistricting map approved by this Court and enacted into law by Bill 22-22. Because the challenged map is no longer in effect, and the preliminary injunction has been modified by this Court to allow elections under the approved map, Plaintiffs' claims are moot. *See, e.g., Fayetteville, Cumberland Cty. Black Democratic Caucus v. Cumberland Cty., N.C.*, 927 F.2d 595 (4th Cir. 1991) ("[W]e find that the district court properly denied the motions because they addressed the lawfulness of a voting system that was no longer viable. A court should not consume its time, or the means and substance of the parties, by resolving a dispute that is no longer a case or controversy.").

Plaintiffs have informed Baltimore County that they do not intend, at this time, to amend their Complaint to challenge the legality of the current redistricting map. Even if Plaintiffs did, however, any challenge to that map would be futile. On March 24, 2022, Baltimore County, pursuant to this Court's oral order, enacted the new redistricting map into law. In the March 25, 2022 Memorandum Opinion and Order approving the map and modifying the preliminary injunction, this Court explicitly found that the new map "meets the relevant standards and complies with Section 2 of the Voting Rights Act." ECF 80 at 6. Specifically, the Court was presented with evidence of cross-over voting patterns and found that "there will be sufficient cross-over voting by White County voters in District 2, to allow the Black County voters in this district to elect their candidates of choice." *Id.* at 7. The Court was also presented with a performance analysis of the

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preliminary injunction against a government entity that then passes a new law to comply with that injunction is a prevailing party entitled to attorneys' fees.

new map by Dr. Barreto and found that "the County's proposed District 2 can perform for Black County voters." *Id.* at 9. It would be incredibly wasteful and unnecessarily burdensome to continue this case by engaging in further motions practice, potentially discovery, and ultimately potentially proceeding to trial on any challenge to the currently enacted redistricting map, which this Court has already determined complies with the Voting Rights Act.

Additionally, Plaintiffs are not entitled to attorney's fees. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes a district court to award reasonable attorney's fees to "prevailing parties." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). But, Plaintiffs are not prevailing parties. The governing Fourth Circuit law makes it clear that the grant of a preliminary injunction in and of itself does not confer prevailing party status under facts similar to those here. *Smyth ex rel. Smyth v. Rivero*, 282 F.3rd 268, 277 n.9 (4th Cir. 2002) ("[T]he characteristics of a preliminary injunction . . . make such an injunction an improper basis for the conclusion that a party has prevailed."). While the Supreme Court has yet to address this issue specifically, it has previously explained that "enforceable judgment on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 601, 604 (2001). A preliminary injunction is neither. Short of a favorable final judgment on the merits or a settlement agreement enforced through a consent decree, Plaintiffs cannot be prevailing parties.

Furthermore, even if a preliminary injunction were sufficient to confer "prevailing party" status (which it is not), the preliminary injunction did not grant Plaintiffs' requested relief, *i.e.*, an Order requiring the creation of a second majority-Black district. From the outset, Plaintiffs have persisted that the Voting Rights Act requires the establishment of a second majority-Black district

in Baltimore County and that no other remedy is sufficient. The Court has rejected Plaintiffs' position twice, and Plaintiffs have not sought an appeal. Both of this Court's opinions explicitly state that the creation of a second majority-Black district is not required under the Voting Rights Act. ECF 55 at 23 ("[T]he proper remedy is to create a County redistricting plan that includes either an additional majority-Black County District, ***OR*** an additional County District in which Black voters otherwise have an opportunity to elect a representative of their choice.") (emphasis added); ECF 80 at 10 ("[T]he County may also remedy this violation by proposing a remedial redistricting plan that provides for an additional County district in which Black County voters otherwise have an opportunity to elect a representative of their choice and that comports with the requirements of the Voting Rights Act.").

Accordingly, should Plaintiffs disagree that this matter must be summarily dismissed, then Baltimore County respectfully requests that the Court enter an Order setting forth a briefing schedule on a motion to dismiss.

CONCLUSION

The Parties are available for a status conference to further discuss their respective positions outlined herein at the Court's convenience.

[*signatures on following page*]

Dated: April 29, 2022

Respectfully submitted,

/s/ Andrew D. Freeman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2022, a copy of the foregoing Joint Status Report was served via the Court's CM/ECF system upon all counsel of record.

/s/ Melissa O. Martinez
Melissa O. Martinez