IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs,

v.

BRIAN KEMP, in his official capacity as Secretary of the State for the State of Georgia

Defendant.

AUSTIN THOMPSON, et al.

Plaintiffs,

v.

BRIAN KEMP, in his official capacity as Secretary of the State for the State of Georgia

Defendant.

Civil Action No.

1:17-cv-01427-TCB-MLB-BBM

CONSOLIDATED

PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

The *NAACP* Plaintiffs, by and through their undersigned counsel, respectfully move the Court, pursuant to Rule 15 of the Federal Rules of Civil

Procedure, for leave to file a First Amended Complaint, a copy of which is attached hereto as Exhibit A.[1] It re-pleads the partisan gerrymandering claim, now as a violation of the First Amendment in addition to the Fourteenth Amendment, and adds a judicially manageable discriminatory effect standard pursuant to this Court's Order on Defendant's Partial Motion to Dismiss dated August 25, 2017. Doc. 28, pp. 32-35. That standard is framed in light of the Supreme Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (June 18, 2018), and lower court decisions that were issued after the briefing on Defendant's motion to dismiss. The First Amended Complaint also incorporates facts obtained in discovery, nearly all of which the Court incorporated into its Order dated June 1, 2018. Doc. 159, pp. 2-11.

The Defendants do not consent to the motion on the basis that Plaintiffs oppose re-opening discovery and oppose having one consolidated pretrial order, set of Daubert motions, and trial that also includes the *Thompson* Plaintiffs' Section 2 claim. Accordingly, Plaintiffs file this motion seeking the Court's leave to amend, which should be granted for the reasons set forth below.

[1] Exhibit B indicates the differences between the First Amended Complaint and the original Complaint, Doc. 1.

BACKGROUND

The *NAACP* Plaintiffs pleaded a partisan gerrymandering claim in their original complaint. Doc. 1, pp. 25-27. The Court dismissed that claim on August 25, 2017, on the basis that the *NAACP* Plaintiffs did not present a metric, statistical analysis such as the "efficiency gap", or another judicially manageable standard for measuring discriminatory effect. Doc. 28, p. 35. The Plaintiffs declined to re-plead the partisan gerrymandering claim in anticipation of the Supreme Court's resolution of *Gill v. Whitford*, which had been docketed for oral argument at the time of this Court's Order. *See* 218 F. Supp. 3d 837 (W.D. Wis. 2016), 85 U.S.L.W. 3587 (U.S. June 19, 2017) (No. 16-1161). *Gill* squarely presented the question of what discriminatory effect standard courts should use in partisan gerrymandering cases, as well as the efficacy of the "efficiency gap" analysis. *See Gill v. Whitford*, 138 S. Ct. 1916, 1932-33 (June 18, 2018). Indeed, in its August 25, 2017 Order, this Court recognized that the Supreme Court decision in *Gill* may affect the standards for partisan gerrymandering claims. Doc. 28, p. 31 (noting that "[i]f the Supreme Court's ruling in *Whitford* impacts any ruling in this case, that ruling can be adjusted accordingly."). Later in 2017, the Supreme Court decided to hear oral argument on appeal in a second, district-specific partisan gerrymandering case concerning Maryland's Sixth Congressional district. *Benisek v. Lamone*, 266

F. Supp. 3d 799 (D. Md. 2017), 86 U.S.L.W. 3292 (U.S. Dec. 8, 2017) (No. 17-333).

On June 1, 2018, this Court issued an Order denying the *NAACP* Plaintiffs' request to preliminarily enjoin the use of the 2015 redistricting plan based on their racial gerrymandering claim. Doc. 159. The Court's majority opinion noted that the State's defense to the racial gerrymandering claim is "rooted in partisan gerrymandering." *Id*. at 12. The majority added: "[t]his would be a more obvious case if it were a challenge to partisan gerrymandering. The state openly acknowledges it redrew Districts 105 and 111 with political ends in mind." Doc. 159, p. 23. Based, in large part, upon its finding that "[Gina] Wright and her colleagues openly undertook to help Republican incumbents," the majority concluded that "fair and effective representation is decidedly not what the voters removed from House Districts 105 and 111 got." *Id*. at 24.

THE DECISION IN *GILL V. WHITFORD* IMPACTS THIS CASE

A little over two weeks later, the Supreme Court issued its opinions in *Benisek v. Lamone*, 138 S. Ct. 1942 (June 18, 2018),[2] and *Gill v. Whitford*, 138 S. Ct. 1916 (June 18, 2018). *Gill* declined to reach the specific issue of whether or not a partisan gerrymandering claim presents a justiciable controversy. *See Gill*,

[2] *Benisek* was ultimately decided on procedural grounds not relevant here.

138 S. Ct. at 1932 (discussing whether plaintiffs established injury in fact and "assuming such [partisan gerrymandering] claims present a justiciable controversy"). The *Gill* Court clearly did not rule out justiciability, as reflected not only by the majority's remanding of the case for further proceedings but its exhortation that courts should allow for the development of a full factual record in cases of this sort:

> In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. *See*, *e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 354 (2006). This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

Id. at 1933-34. The dissent picked up on the significance of this procedural holding, and would have instead instructed the district court to dismiss the case. *Id*. at 1941 (Thomas, J., dissenting).

The majority opinion in *Gill*, furthermore, shed light on the nature of partisan gerrymandering claims that are based upon a vote dilution theory:

> That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.

Id. at 1931. Since the alleged harm in a partisan gerrymandering claim brought under a vote dilution theory must be specific to the voter, the Court made clear that any injury and potential remedy must necessarily be district-specific:

> To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. . . The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[ ]," therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." . . . In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

Id. at 1930. *Gill* therefore clarifies that, for standing purposes, the injury to individual voters can be demonstrated by showing that the voter resides in a district that was packed or cracked by the partisan gerrymander. In contrast, demonstrating partisan asymmetry using a plan-wide statistical measurement, such as the "efficiency gap" of wasted votes, is not sufficient to show injury. *Id*. at 1932-33 (observing that the efficiency gap "do[es] not address the effect that a gerrymander has on the votes of particular citizens.").[3]

[3] In *Gill*, four members of the Court endorsed the view that "partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members," in accordance with the position taken by Justice Kennedy in *Vieth v. Jubelirer*. *Gill*, 138 S. Ct. at 1938-39 (Kagan, J., concurring) (*citing Vieth*, 541 US. 267, 314-15 (2004) (Kennedy, J., concurring)).

The *NAACP* Plaintiffs' pinpoint partisan gerrymandering claim epitomizes the district-specific vote dilution theory envisaged by the *Gill* Court. Plaintiffs include individual voters living in Districts 105 and 111 who assert their opportunity to elect a candidate of choice has been infringed by the 2015 redistricting. Doc. 1 ¶¶ 20-25. These voters assert a harm "arising from a burden on [their] own votes" because they live in districts that were diluted or "cracked" by the 2015 redistricting plan. *Compare id*., *with* 138 S. Ct. at 1931.

Moreover, the discriminatory effect of the 2015 redistricting plan can be expressed more simply than through a statewide analysis of partisan asymmetry. Plaintiffs' preferred candidates of choice in Districts 105 and 111 lost narrowly in 2016, but they would have won if the contests had been held under the old map. Doc. 159, p. 11 (noting that Plaintiff's expert estimated that the 2015 redistricting changed the outcome of the District 105 and 111 elections in 2016 and that Dan O'Connor agreed). Defendants' expert, Dr. John Alford, does not contest this fact. Alford Dep. 75:15-77:2.

PLAINTIFFS' PROPOSED DISCRIMINATORY EFFECT STANDARDS

Plaintiffs' allegations in the First Amended Complaint that Georgia's 2015 redistricting thwarted the "votes of particular citizens," 138 S. Ct. at 1933, and changed the outcome of District 105 and 111 elections in 2016 comport with

standards for evaluating discriminatory effect that district courts in other recent partisan gerrymandering cases have deemed to be judicially manageable.

Fourteenth Amendment

Plaintiffs' proposed discriminatory effect standard under the Fourteenth Amendment parallels the one adopted by the three-judge district court in *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. Jan. 9, 2018), *vacated and remanded on other grounds*, --- S. Ct. ----, 2018 WL 1335403 (June 25, 2018). In *Rucho*, the three-judge panel held that "to meet the discriminatory effects requirement, the Equal Protection Clause demands that a partisan gerrymandering plaintiff show that a challenged districting plan 'subordinate[s the interests] of one political party and entrench[es] a rival party in power.'" *Id*. at 656 (*citing Ariz. State Leg. v. Ariz. Indep. Redistricting Com'n*, 135 S. Ct. 2652, 2658 (2015)).

The *Rucho* court characterized the "subordination" prong as requiring a showing that "the redistricting plan is biased against such individuals." 279 F. Supp. 3d at 656. The "entrenchment" prong, meanwhile, entails showing that the "bias towards a favored party is likely to persist in subsequent elections such that an elected representative from the favored party will not feel a need to be responsive to constituents who support the disfavored party." *Id*. The court found that the plaintiffs met their burden by, in part, comparing the results of

congressional elections held in 2016 (under the plan at issue) with those from 2012 and 2014, which were held under a predecessor plan. *Compare id.* at 657, *with* 667-68 (noting that "most of the districts created by the 2016 Plan retained the 'core' of their constituency under the 2011 Plan.").

"Subordination" and "entrenchment" both apply here. The Georgia Legislature's 2015 redistricting plan was biased against Democratic voters in District 105 and 111 – who are overwhelmingly African-American – because it removed a significant number of them while simultaneously adding a significant number of Republican voters (who are overwhelmingly white). *See, e.g.*, Doc. 159, p. 10. The entrenchment requirement is satisfied because the redistricting changed the outcome of the 2016 elections in Districts 105 and 111, thereby thwarting the votes of Plaintiffs and similarly situated voters. *See id*. at 11. The Republican incumbents in Districts 105 and 111 did not need to appeal to swing voters because the 2015 redistricting supplied the additional Republican voters necessary to ensure their reelection, in spite of significant demographic changes favoring their opponents.[4]

[4] The rest of Plaintiffs' standard for its partisan gerrymandering claim, including the discriminatory partisan intent portion and the assertion that the redistricting cannot be justified by – and is unrelated to – any legitimate legislative objective, are unchanged. *Compare* Doc. 1, pp. 25-27, *with* Exhibit A.

First Amendment

Plaintiffs' proposed standard for adjudicating its First Amendment "retaliation" claim is based upon the vote dilution theory employed by the district court in the Maryland congressional redistricting case, *Benisek v. Lamone*:

> [T]o establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect.... Finally, the plaintiff must allege causation—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

266 F. Supp. 3d 799, 802 (D. Md. 2017) (*citing Shapiro v. McManus*, 203 F. Supp. 3d 579, 596-97 (D. Md. 2016) (holding that if these elements are met in conjunction with an intent requirement, a Plaintiff "states a plausible claim that a redistricting map violates the First Amendment")). To satisfy the "adverse effect" prong, the Plaintiff "need not show that the linedrawing altered the outcome of an election—though such a showing would certainly be relevant evidence of the extent of the injury," but must instead show that voters' "electoral effectiveness was meaningfully burdened." 266 F. Supp. 3d at 833 (Niemeyer, J., dissenting) (*citing Shapiro*, 203 F. Supp. 3d at 598). The facts surrounding Georgia's 2015 redistricting identified above, *see supra* at 5-6, fit within this framework and provide the court with a judicially manageable standard.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." A scheduling order may be modified for good cause and with the Court's consent. Fed. R. Civ. P. 16(b)(4).

The decision as to whether or not to grant leave to amend a pleading is within the sound discretion of the district court, but this discretion is strictly circumscribed by the proviso that "leave shall be freely given when justice so requires." *Gramegna v. Johnson*, 846 F.2d 675, 678 (11th Cir. 1988). Therefore, a justifying reason must be apparent for denial of a motion to amend. *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993). The district court's discretion is not broad enough to permit denial absent a substantial reason to deny leave to amend. *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989).

There is good cause for filing the First Amended Complaint, in light of the significant developments since the Court originally dismissed Plaintiffs' partisan gerrymandering claim in August of 2017. First, the Defendant has defended against Plaintiffs' racial gerrymandering claim by asserting that the Georgia Legislature gerrymandered Districts 105 and 111 for partisan reasons. Second, the Supreme Court opinion in *Gill v. Whitford* endorses precisely the sort of district-specific partisan gerrymandering claim that Plaintiffs seek to bring here. Third, a

three-judge district court issued a decision in *Rucho* identifying a judicially manageable discriminatory effect standard that can be applied to district-specific partisan gerrymandering cases under the Fourteenth Amendment.

None of the factors that may militate against granting a motion to amend is present in this case. There is no undue delay in Plaintiffs' request to amend. The newly alleged facts were entirely unknown at the time the Plaintiffs filed their Complaint or when this Court dismissed Plaintiffs' partisan gerrymandering claim. Plaintiffs are not seeking the amendment in bad faith or with a dilatory motive. Plaintiffs raised this issue with the Court on June 28, 2018, and they discussed it with Defendants' counsel well before that.

The interests of justice and judicial economy will undoubtedly be served by having all allegations properly before the Court as set forth in Plaintiffs' proposed First Amended Complaint. The amendments are narrowly tailored to reflect the present circumstances and Plaintiffs' present understanding of the case. They will enable the action to more effectively proceed on the merits. Moreover, this Court is best disposed to efficiently adjudicate Plaintiffs' partisan gerrymandering claim. Judicial economy would not be served by forcing the Plaintiffs to file a separate action to vindicate that claim, requiring the convening of a new three-judge panel.

Defendants will not suffer any undue prejudice by virtue of the Court's allowance of the proposed amendment. The determination of whether prejudice would occur involves assessing whether an amendment would result in additional discovery, cost, or preparation to defend against new facts or theories. *See, e.g.*, *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001); *Frontline Int'l v. Edelcar, Inc.*, 2011 WL 13209612, at *3 (M.D. Fla. Apr. 6, 2011). Defendant is familiar with the facts supporting Plaintiffs' partisan gerrymandering claim and is not prejudiced by the restoration of the claim based on a subsequent legal authority and the facts revealed during discovery. Moreover, this Court explicitly left open the possibility that the Supreme Court decision in *Gill* could lead to a reexamination of the partisan gerrymandering claim, Doc. 28, p. 31, so Defendant was on notice of the possibility the claim could be restored.

There is no need to reopen discovery because Plaintiffs are prepared to try the case based on the merits.[5] Plaintiffs' First Amendment partisan

[5] Defendant argues that he "need[s]. . . additional discovery" on the partisan gerrymandering claim, Doc. 170, p. 8, but fails to identify what discovery that is. Moreover, Defendant's argument that the *NAACP* Plaintiffs' partisan and racial gerrymandering claims should be consolidated with the *Thompson* Plaintiffs' Section 2 claim is misplaced. Defendant fails to address the likelihood that the complicated factual issues raised by the Section 2 claim, and the extensive expert discovery inherent in such cases, will result in further delays, delaying the adjudication of, and risking Plaintiffs' ability to obtain relief on, the partisan and racial gerrymandering claims prior to the beginning of the 2020 election cycle.

gerrymandering theory does not implicate different facts or issues from those raised by the Fourteenth Amendment claim, and is a sensible addition to the First Amended Complaint in light of Justice Kagan's concurrence in *Gill* endorsing such claims. *Id*. at 1938-39 (Kagan, J., concurring) (*citing Vieth*, 541 US. 267, 314-15 (2004) (Kennedy, J., concurring)). Finally, the proposed amended complaint does not involve the addition of any new parties.

Accordingly, the interests of justice militate in favor of granting Plaintiffs' motion for leave to file the proposed First Amended Complaint. The grant of this motion is particularly appropriate given the absence of any substantial reason to deny leave to amend and its benefits with respect to judicial economy.

CONCLUSION

For the reasons identified above, Plaintiffs respectfully request that the Court grant this motion for leave to file the proposed First Amended Complaint.

Respectfully submitted this 13th day of July, 2018.

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Plaintiffs will provide additional briefing on this issue in a forthcoming reply brief.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on July 13, 2018, I served the within and foregoing **PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification or otherwise:

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Pursuant to L.R. 7.1(D), the undersigned also hereby certifies that the foregoing **PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT** has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(C).

This 13th day of July, 2018.

/s/ John Powers
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