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 State for the State of Georgia,

Defendant.

AUSTIN THOMPSON *et al.*,

Plaintiffs,

v.

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

Defendant.

Case No. 1:17-cv-01427-TCB-WSD-BBM

CONSOLIDATED CASES

THOMPSON PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT

Plaintiffs Austin Thompson *et al*. (the "Thompson Plaintiffs") move for leave to amend their First Amended Complaint[1] to add a new claim of relief in light of new facts, this Court's June 1 Order denying Plaintiffs' motion for a

[1] Plaintiffs filed their First Amended Complaint as of right on November 1, 2017. ECF No. 84.

preliminary injunction on their racial gerrymandering claim, and recent decisions issued by the U.S. Supreme Court. Specifically, the Thompson Plaintiffs seek to amend their Complaint to add a partisan gerrymandering claim. The new claim would allege that the General Assembly intentionally drew House Districts 105 and 111 to have the effect of diluting the votes of individuals on account of their voting history and political affiliations, with the result of diluting the votes of Democratic voters in violation of the First and Fourteenth Amendments to the U.S. Constitution. A proposed Second Amended Complaint is attached hereto as Exhibit A.

Two events have altered the course of this litigation and compel a finding of good cause to permit amendment at this juncture. First, on June 1, this Court denied Plaintiffs' motion for a preliminary injunction on their racial gerrymandering claim. Order Denying Pls.' Mot. for Prelim. Inj. ("Prelim. Inj. Order"), ECF No. 159. In doing so, this Court explicitly noted that clear partisan intent motivated H.B. 566's passage. *See id. at* 12.

Second, the U.S. Supreme Court decided two cases involving partisan gerrymandering that made clear that district-specific vote dilution claims remain viable, and individuals who live in "packed" or "cracked" districts have standing to bring them. In June 2018, the Supreme Court declined to rule on the merits of partisan gerrymandering claims in *Gill v. Whitford*, 138 S. Ct. 1916, 585 U.S. ___

(2018), and *Benisek v. Lamone*, 585 U.S. ___ (2018), instead addressing both cases on bases that only bolster Thompson Plaintiffs' proposed claim. The decisions leave open the possibility that a partisan gerrymandering claim can provide Thompson Plaintiffs' relief, particularly in light of this Court's recognition that the General Assembly was driven by partisan intent in the drafting of House Districts 105 and 111.

Accordingly, Thompson Plaintiffs seek to amend their First Amended Complaint to add a partisan gerrymandering claim with respect to House Districts 105 and 111.[2] Because the Thompson Plaintiffs do not seek to engage in additional discovery with respect to the partisan gerrymandering claim, they would litigate the partisan gerrymandering claim according to the Scheduling Order for the racial gerrymandering claim. *See* Scheduling Order, ECF No. 56 at 2.[3]

[2] Counsel for Thompson Plaintiffs has conferred with counsel for Defendant in advance of filing the present motion, and Defendant does not consent to the motion.

[3] The Georgia State Conference of the NAACP and several individual plaintiffs ("NAACP Plaintiffs") moved to modify the Scheduling Order for the racial gerrymandering claim, *see* ECF No. 165, and the Thompson Plaintiffs consented to the NAACP Plaintiffs' requested sixty-day extension. At the time of this filing, the Court has not ruled on the NAACP Plaintiffs' motion. The Thompson Plaintiffs' Section 2 claim is governed by and proceeding under a separate schedule, *see* ECF Nos. 142, 144, and 161, that is not at issue here.

I. PLAINTIFFS' AMENDMENT IS WARRANTED AS THERE ARE NO COUNTERVAILING REASONS TO DENY AMENDMENT

Federal Rule of Civil Procedure 15(a) provides that, after a responsive pleading is filed, subsequent amendments to a party's pleadings may be made "only with the opposing party's written consent or the court's leave." However, "rule 15(a) severely restricts the judge's freedom, directing that leave to amend 'shall be freely given when justice so requires.'" *Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (citation omitted). This policy of liberal amendment "facilitate[s] determination of claims on the merits …; thus, '[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.'" *Id*. In making this determination, a court considers "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and the futility of the amendment." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1110 (11th Cir. 1996).

In light of Rule 15(a)'s liberal policy in favor of amendment, and the absence of any substantial countervailing reason for denial, the Thompson Plaintiffs' motion for leave to amend should be granted.

A. There is no undue delay.

First, there is no undue delay in seeking amendment. Amendment is appropriate where, as here, no motions or rulings for summary judgment have been

made, let alone decided. *Compare Genworth Fin. Servs., Inc. v. Lawyers Title Ins. Corp.*, No. 1:05-CV-3057-MHS, 2008 WL 11404241, at *2 (N.D. Ga. May 30, 2008) (finding good cause to allow plaintiff to amend two years after the deadline and within two months of receiving a dispositive ruling on a threshold issue because the facts underlying the amendment could not be explained by plaintiff's lack of diligence), *with Best Canvas Prod. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 623 (11th Cir. 1983) (finding undue delay in submitting motion for leave to amend where plaintiff "had waited until after the entry of an adverse summary judgment and after the close of a two-year discovery period" even after the legal theory plaintiff sought to add had been repeatedly suggested to plaintiff by the district judge).

Plaintiffs file this motion just six weeks after this Court's June 1 Order denying Plaintiffs' motion for a preliminary injunction, in which it expressly recognized that "[t]his would be a more obvious case if it were a challenge to partisan gerrymandering." Prelim. Inj. Order at 23. That Order not only recognized the overwhelming evidence of partisan intent behind the drawing of House Districts 105 and 111, *see, e.g.*, *id.* at 12 (noting that "the State offers a defense rooted in partisan gerrymandering"), it also found as a matter of fact that the mapdrawers' "express purpose was to change Districts 105 and 111 just enough to

protect the incumbents there, without endangering the incumbent Republican House members in the neighboring districts." *Id*. at 11.

Finally, this motion to amend comes a mere three weeks after the U.S. Supreme Court's June 18 decisions in *Gill v. Whitford* and *Benisek v. Lamone*, two cases that were pending when the Thompson Plaintiffs' filed their original complaint in October 2017. As discussed *infra* Section I.B, *Whitford* and *Benisek* did not rule out the justiciability of partisan gerrymandering claims. Instead they clarified that partisan gerrymandering imposes a harm on voters who live in districts that have been "cracked" or "packed" for partisan purposes. Plaintiffs have not unduly delayed in seeking leave to amend; they file this Motion on the heels of this Court's Order and the *Whitford* and *Benisek* decisions.

B. The addition of a partisan gerrymandering claim is not futile.

Second, the addition of a partisan gerrymandering claim is not futile; on the contrary, this Court has already indicated that there is evidence to support a claim that House Districts 105 and 111 are partisan gerrymanders.

"[A]mendment is futile if the allegations of the proposed complaint would be unable to withstand a motion to dismiss." *Geary v. City of Snellville*, No. CIV.A.1:05CV3128-TWT, 2006 WL 1042365, at *1 (N.D. Ga. Apr. 18, 2006), *aff'd*, 205 F. App'x 761 (11th Cir. 2006). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim

to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, a motion to dismiss under Federal Rule 12(b)(6) "should be granted 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Bowers v. Am. Heart Ass'n., Inc.*, 513 F. Supp. 2d 1364, 1369 (N.D. Ga. 2007) (citation omitted).

The U.S. Supreme Court's decision in *Whitford* confirms the viability of partisan gerrymandering claims, especially district-specific claims brought by plaintiffs who live in districts that have been "cracked" or "packed." Indeed, the type of claim envisioned by the majority opinion in *Whitford* is precisely the type of claim Plaintiffs seek to bring here. *See Gill*, 138 S. Ct. at 1931. The district court's opinion in *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), vacated and remanded on other grounds, ---S. Ct. ----, 2018 WL 1335403 (June 25, 2018) issued on January 9, 2018, further confirms the viability of partisan gerrymandering claims, and provides a standard for adjudicating such claims under the Fourteenth Amendment. *See Common Cause*, 279 F. Supp. 3d at 637 (plaintiffs must establish that the plan was enacted with discriminatory intent and resulted in discriminatory effects, and such effects must not be attributable to a legitimate redistricting objective). Similarly, the district court's opinion in *Benisek v. Lamone*, 266 F. Supp. 3d 799, 802 (D. Md. 2017), provides that partisan

gerrymandering claims under the First Amendment may be established where the mapdrawer redrew the lines of a district with the specific intent to impose a burden on voters because of how they voted or the political party with which they are affiliated. *Id*. Plaintiffs must show that the map resulted in a tangible and concrete adverse effect on the targeted voters and that absent the intent to burden a particular group of voters by reason of their views, the adverse impact would not have occurred. *Id*.

In their Proposed Second Amended Complaint, the Thompson Plaintiffs make allegations that satisfy the standards set forth in these cases for proving partisan gerrymandering under the First and Fourteenth Amendments. The proposed Second Amended Complaint alleges that the General Assembly engaged in a mid-cycle redistricting of House Districts 105 and 111 with an intent to burden, disfavor, and retaliate against Democratic voters in those districts, including Plaintiffs Thompson and Payton, for their First Amendment-protected conduct and based on their political affiliation for a discriminatory purpose that had nothing to do with achieving a legitimate legislative objective. Exhibit A ¶ 164. Moreover, it alleges that the changes made to House Districts 105 and 111 had the intended effect of diluting the growing minority and Democratic population's voting strength in those two districts. *Id.* ¶ 165. But for the General Assembly's targeting of Democratic voters on the basis of their voting history and

political views by moving Democratic voters out of House Districts 105 and 111 and intentionally diluting the votes of Democratic voters remaining in the districts, the Democratic candidates in both districts likely would have won the 2016 general election. *Id.* ¶ 166. Finally, Defendant cannot justify the cracking of Democratic voters or the movement of Democratic voters out of House Districts 105 and 111 by reference to geography, compliance with constitutionally legitimate redistricting criteria, or other non-discriminatory reasons. *Id.* ¶ 168.

The Thompson Plaintiffs' partisan gerrymandering claim clearly meets the standard of plausible pleading required to withstand dismissal under Rule 12(b)(6). By the State's own admission, the primary drafter of House Districts 105 and 111 was motivated by partisan intent to favor Republican candidates running for office in those districts. Prelim. Inj. Order at 12, ECF No. 159. This Court's June 1 Order identified the clear evidence of both partisan intent and discriminatory effect with respect to the mid-cycle redistricting of House Districts 105 and 111 when, upon consideration of the evidence, the Court summarized the State's argument against the racial gerrymandering claim as an intent not to "move these voters because they were black" but "because they were Democrats." *Id*. at 23. Indeed, the deposition testimony of the lone mapdrawer concedes the use of racial data and political estimate data to gerrymander House Districts 105 and 111 for the purpose and with the effect of enhancing the effectiveness of votes cast in favor of

Republican candidates and diluting the effectiveness of votes cast in favor of Democratic candidates. *See* ECF 137-1 (Wright Decl. at ¶ 6) ("In redistricting HD 105 and HD 111, I understood the goal to be improving the political performance of the two districts for the Republican incumbents.").

The injury to Democratic voters is also clear, as H.B. 566 moved approximately 15,000 people into and out of District 105, and 31,000 people into or out of District 111, so that the Democratic-leaning "black share of the voting age population in both districts decreased by just over 2% as a result of the redistricting." Prelim. Inj. Order at 10, ECF No. 159. Overall, according to Ms. Wright, the changes she made to House District 105 under H.B. 566 decreased Democratic performance from 48.13% to 43.16%, and increased Republican performance nearly five percentage points, from 50.98% to 55.79%. ECF No. 137-1 (Wright Decl. at ¶ 21, Ex. 5C). Similarly, the changes Ms. Wright made to House District 111 decreased the District's Democratic vote share from 48.65% to 44.38%, and increased the Republican vote share from 50.14% to 54.40%. ECF No. 137-1 at 57 (Wright Decl., Ex. 15C). As the Thompson Plaintiffs alleged in their First Amended Complaint, the result of this movement was the election of Republican candidates who would have otherwise lost to Democratic challengers but for the mid-cycle redistricting. ECF No. 84 at ¶ 84 (House District 105); ¶ 96 (House District 111); *see also* Expert Report of Jowei Chen, Ph.D., ECF No. 63 at

20-21. The Court noted that Mr. O'Connor, a staff member of the Georgia Legislative and Congressional Reapportionment Office, "agreed that both Representatives [in House Districts 105 and 111, respectively] would have lost their seats had their districts not been redrawn." Prelim. Inj. Order at 11, ECF No. 159.

The Thompson Plaintiffs' proposed partisan gerrymandering claim is not only plausible enough to withstand a motion to dismiss, this Court has suggested that it is strong enough to support the entry of a motion for a preliminary injunction. In its June 1 Order, the Court stated that Plaintiffs' motion for a preliminary injunction "would be a more obvious case if it were a challenge to partisan gerrymandering." Prelim. Inj. Order at 23. The standard for granting a preliminary injunction requires a determination of whether the plaintiff has shown "a substantial likelihood of success on the merits of the underlying case," *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008) (quotation omitted), a higher bar than the plain statement of facts necessary to withstand a motion to dismiss. *See Benisek v. Lamone*, 266 F. Supp. 3d 799, 801 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018) (denying a preliminary injunction on plaintiffs' partisan gerrymandering claim after denying a motion to dismiss the same claim).

C. There is no undue prejudice to Defendant.

Because evidence of partisan intent in the redistricting of House Districts 105 and 111 has pervaded the course of the parties' litigation, Defendant will not be unduly prejudiced if Plaintiffs are granted leave to amend.

The Thompson Plaintiffs' proposed partisan gerrymandering claim can hardly come as a surprise to Defendant. Defendant was first notified of potential liability for partisan gerrymandering in April 2017, when the NAACP Plaintiffs filed their original complaint alleging that House Districts 105 and 111 were partisan gerrymanders in violation of the Fourteenth Amendment to the United States Constitution. *See* ECF No. 1. The NAACP Plaintiffs' partisan gerrymandering claim was dismissed—without prejudice—because the Court found that the plaintiffs failed to meet their burden in alleging discriminatory effect under the standard set forth in *Gill v. Whitford*. ECF No. 28 at 32. In alleging partisan gerrymandering in violation of the First and Fourteenth Amendments, Thompson Plaintiffs have specifically alleged partisan intent, effect, and causation, and propose a judicially manageable standard that measures discriminatory effect by assessing whether H.B. 566 diluted the votes of Democratic voters to such a degree that they suffered a tangible and concrete adverse effect. *See* Exhibit A.

Further, Defendant was well aware of the various partisan gerrymandering cases pending in federal courts, including the two before the Supreme Court, *see*,

e.g., ECF No. 20-1, Def. Br. in Support of Partial Mot. to Dismiss at 20-25 (discussing the standard under *Whitford*), in which the plaintiffs proffered one or more judicially manageable standards by which to adjudicate partisan gerrymandering claims. Yet despite the Court's repeated admonitions that "'partisan gerrymanders are incompatible with democratic principles,'" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)) (brackets omitted), and the possibility of a Supreme Court affirmance of a partisan gerrymandering finding in *Gill*, Defendant *still* chose to defend against Plaintiffs' racial gerrymandering claims by asserting that they altered the boundaries of House Districts 105 and 111 "for a partisan reason, using partisan data." Def.'s Resp. in Opp'n to Pls.' Mot. for Prelim. Inj., ECF No. 137 at 2; *see also* Prelim. Inj. Order at 12 (noting "the State offers a defense rooted in partisan gerrymandering").

Indeed, as the NAACP Plaintiffs have noted, "[t]here would be no need to reopen discovery if the partisan gerrymandering claim was replead, as there has already been significant factual development around the issue because … the Defendant raised it as an affirmative defense to the racial gerrymandering claim." ECF No. 165 at 4. Thompson Plaintiffs agree that there is no need to re-open discovery, as the new partisan gerrymandering claim can proceed on the same

track as the Plaintiffs' racial gerrymandering claims. *See* ECF No. 56. And, to the extent Defendant argues it "will be required to research and brief new issues" as a result of the amendment, this "does not amount to unfair prejudice." *Genworth*, 2008 WL 11404241, at *2.

In sum, "although leave to amend may be denied … courts exercise this power only under exceptional circumstances," *Flagg v. First Premier Bank*, No. 1:15-CV-324-MHC, 2017 WL 5665564, at *4 (N.D. Ga. Feb. 24, 2017), none of which is present here. The Court should accordingly grant Thompson Plaintiffs' leave to amend their First Amended Complaint.

II. PLAINTIFFS HAVE SHOWN GOOD CAUSE FOR MODIFICATION OF THE SCHEDULING ORDER

Thompson Plaintiffs have shown the good cause necessary for modification of the Scheduling Order on the racial gerrymandering claim, *see* ECF Nos. 25, 56, to allow them to file an amended complaint. Federal Rule of Civil Procedure 16(b) provides that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge." Fed. R. Civ. P. 16(b). A finding of good cause depends on the diligence of the moving party. *See Jones v. Anderson*, No. 5:17-CV-77, 2018 WL 1980372, at *1 (S.D. Ga. Mar. 27, 2018).

The Eleventh Circuit considers three factors when evaluating diligence under Federal Rule 16: "(1) whether the party seeking amendment failed to ascertain facts prior to filing the pleading and to acquire information during the

discovery period; (2) whether the information supporting the proposed amendment was available to the party seeking amendment; and (3) even after acquiring information, whether the party seeking amendment was delayed in asking for amendment." *Interstate*, 2015 WL 13273318, at *8 (citation omitted).

Each of these three factors weighs in favor of allowing the Thompson Plaintiffs to amend. *First*, the Thompson Plaintiffs did not fail to ascertain facts necessary to their partisan gerrymandering claim. To the contrary, as explained herein, information obtained during discovery of Plaintiffs' racial gerrymandering claim supports Plaintiffs' proposed Second Amended Complaint. *Second*, the information the Court relied on in determining the viability of a partisan gerrymandering claim became clear during the course of discovery, and was not known by Plaintiffs prior to filing their Complaint. *Third*, as stated above, Plaintiffs have not delayed seeking amendment, and there is no legitimate argument that modification of the Scheduling Order at this time will prejudice the Defendant. *See Indymac Bank, F.S.B. v. Nationwide Fin. Corp*., No. 1:07CV01472WSD, 2007 WL 3170068, at *2 (N.D. Ga. Oct. 25, 2007) (good cause shown where "Plaintiff's delay is minor and appears to have no prejudice on any party to this action").

Finally, "even when parties fail to demonstrate diligence, the term 'good cause' is broad enough to permit the Court to grant the [motion to amend the

scheduling order] for other reasons." *Ballard v. Chattooga Cty. Bd. of Tax Assessors*, No. 4:12-CV-0012-HLM, 2014 WL 12648454, at *3 (N.D. Ga. Mar. 5, 2014) (citation omitted) (modification in original). Here, all parties — Plaintiffs, Defendant, and the Court — agree that the State drew House Districts 105 and 111 with partisan intent and effect. These facts clearly support the viability of a partisan gerrymandering claim under the First and Fourteenth Amendments. In the interests of judicial economy, this Court is best positioned to effectively adjudicate Plaintiffs' partisan gerrymandering claim alongside their racial gerrymandering claim.

III. CONCLUSION

For the reasons set forth, the Thompson Plaintiffs respectfully request that this Court grant them leave to amend their First Amended Complaint to add a partisan gerrymandering claim as set forth in Exhibit A.

Dated: July 14, 2018

Respectfully Submitted,

By: */s/ Aria C. Branch*
Marc Erik Elias (admitted *pro hac vice*)
Aria C. Branch (admitted *pro hac vice*)
Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.654.6338
Facsimile: 202.654.9106
Email: MElias@perkinscoie.com

Email: ABranch@perkinscoie.com

Abha Khanna (admitted *pro hac vice)*
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.7499
Email: AKhanna@perkinscoie.com

Quinton Washington
Bell & Washington LLP
196 Peachtree Street SW, Suite 301
Atlanta, GA 30303
quinton@bellwashington.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2018 I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record in this case.

/s/ *Aria Branch*
Counsel for Plaintiffs
Perkins Coie, LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
Email: ABranch@perkinscoie.com