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

NAACP, *et al.*,	*	
	*	
Plaintiffs,	*	
	*	Case No. 1:17-CV-01427-TCB-MLB-BBM
v.	*	
	*	
BRIAN KEMP, in his official capacity as Secretary of State for the State of Georgia,	*	CONSOLIDATED CASES
	*	
	*	
Defendant.	*	
	*	
AUSTIN THOMPSON, *et al.*,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	
BRIAN KEMP, in his official capacity as Secretary of State of the State of Georgia,	*	
	*	
	*	
Defendant.	*	

DEFENDANT'S RESPONSE IN OPPOSITION TO NAACP PLAINTIFFS' MOTION TO FOR LEAVE TO AMEND COMPLAINT

COMES NOW DEFENDANT BRIAN KEMP, in his official capacity as Georgia Secretary of State, by and through his attorney of record, the

Attorney General of the State of Georgia, and files this Response in opposition to the Motion to Amend Complaint filed by the NAACP Plaintiffs,[1] as follows:

INTRODUCTION

On April 24, 2017, the NAACP Plaintiffs filed their original Complaint in this action, challenging the 2015 redistricting of Georgia House Districts 105 and 111 and naming as defendants the State of Georgia ("the State") and Secretary Kemp ("Defendant Kemp"). [Doc. 1]. The Complaint contained three counts: (1) the redistricting process was intentionally racially discriminatory in violation of the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301; (2) the redistricting is a racial gerrymander which violates the Fourteenth and Fifteenth Amendments; and (3) the redistricting is a political gerrymander. [Doc. 1, Counts I-III].

The Defendants filed a partial motion to dismiss. [Doc. 20]. In its August 25, 2017 Order on that motion, [Doc. 28], this Court dismissed the NAACP Plaintiffs' first count, concluding that the Court did not have jurisdiction over the State on the Fourteenth Amendment claim, and, additionally, that the NAACP

[1] The "NAACP Plaintiffs" are the Georgia State Conference of the NAACP, Lavelle Lemon, Marlon Reid, Lauretha Celeste Sims, Patricia Smith, and Coley Tyson.

Plaintiffs' Complaint failed to state a Fourteenth Amendment or Section 2 claim against either defendant. *Id*. The Court also dismissed the partisan gerrymandering count for failure to state a claim against Defendant Kemp. *Id.*

Therefore, for the last year, the NAACP Plaintiffs have had a sole claim: racial gerrymandering. The extensive discovery, including written discovery, expert reports, and depositions of both expert and lay witnesses, has necessarily been limited to that one claim.

The NAACP Plaintiffs now ask the Court to allow them to amend their Complaint to "re-plead" or "restore" their prior partisan gerrymandering claim. [Doc. 171 at 2, 13]. They maintain that after the Supreme Court's recent decision in *Gill v. Whitford*, 138 S. Ct. 1916 (June 18, 2018), partisan gerrymandering claims are justiciable and that *Gill* – and several lower court decisions predating it – provide a judicially-manageable standard for adjudicating such claims.

But *Gill* does not change the partisan gerrymandering landscape and certainly does not provide a new basis for the NAACP Plaintiffs to assert their political claim. First, *Gill* does not stand for the proposition that partisan gerrymandering claims are justiciable. In fact, the Supreme Court's opinion specifically calls that issue into question at least three times and never answers it. Second, *Gill* does not provide a standard for proving a partisan gerrymandering

claim. Justice Kagan's concurrence addresses several hypothetical situations and potential standards, but the variations show exactly why the Supreme Court has not agreed, and is apparently no closer to agreeing, on whether there is a claim and, if so, what standard should be used to adjudicate it.

To avoid the reality that allowing the proposed amendment at this late date does prejudice Defendant Kemp, the NAACP Plaintiffs maintain that the Court should permit them to file the Amended Complaint but deny Defendant Kemp's right to undertake *any* discovery on their new claim. The NAACP Plaintiffs announce that they are ready for trial on their new claim and that Defendant Kemp should be. They base their conclusion on the opinion that Defendant Kemp should be "familiar with" the new partisan gerrymandering claim because politics has been a subject in this case and the NAACP Plaintiffs told Defendant Kemp they might "restore" that claim.

Those arguments ignore the facts. Defendant Kemp is not "familiar with" the new claim. Defendant Kemp first heard of NAACP Plaintiffs' intention to file a Motion to Amend shortly before they filed it and first saw the proposed Amended Complaint when it was filed with the motion two weeks ago. Furthermore, the claim is not a "restored" claim. The proposed Amended Complaint pleads an alternative claim, changes a number of allegations in the

original Complaint (including some relating to the racial gerrymandering claim), adds new allegations (including those of retaliation), sets forth the NAACP Plaintiffs' own vague standards for adjudicating partisan gerrymandering claims, and relies on the First Amendment for the first time. Because the Court dismissed the previous partisan gerrymandering claim and the NAACP Plaintiffs never refiled it, the parties did not engage in discovery on that claim.

ARGUMENT AND CITATION OF AUTHORITIES

I. The NAACP Plaintiffs' Motion to Amend Should be Denied Because There is Undue Delay, Undue Prejudice to Defendant Kemp, and the Amendment is Futile.

Although the NAACP Plaintiffs correctly note that the Court has broad discretion in allowing an amendment to the complaint "when justice so requires," Fed.R.Civ.P. 15(a), justice does not require the allowance of an amendment when, as here, there is "'undue delay, undue prejudice to the defendants, and futility of the amendment.'" *Carruthers v. BSA Advertising, Inc.*, 357 F.3d 1213, 1218 (11th Cir. 2004), quoting *Maynard v. Board of Regents of Div. of Univ. of Florida Dept. of Ed. Ex rel. Univ. of S. Florida*, 342 F.3d 1281, 1287 (11th Cir. 2003).

Taking those in reverse order, the NAACP Plaintiffs' proposed amendment is futile. Defendant Kemp agrees with the NAACP Plaintiffs that *Gill* impacts this case but not in any way that is favorable to the Plaintiffs. This Court dismissed the

NAACP Plaintiffs' prior partisan gerrymandering claim for their failure to show injury by providing a "judicially manageable method for measuring the discriminatory effect of partisan gerrymandering." [Doc. 28 at 32-33].

Just as this Court predicted might happen, the *Gill* Court did not provide such a standard. [Doc. 28 at 31] ("The Supreme Court's jurisprudence on partisan gerrymandering teaches us that the Court could rule in a variety of ways on the issues before it in Whitford, including not ruling on them at all."). However, as the NAACP Plaintiffs correctly recognize, [Doc. 171 at 6], the Supreme Court did reject the so-called "efficiency gap" as a way to calculate discriminatory effect because it does not measure "the effect a gerrymander has on the votes of particular citizens . . . [but] . . . measure[s] something else entirely: the effect that a gerrymander has on the fortunes of political parties." *Gill*, 138 S. Ct. at 1922.

Considering that pronouncement, the NAACP Plaintiffs turn to other proposed methods of demonstrating a discriminatory effect in a partisan gerrymandering claim. For their claim under the Fourteenth Amendment, the NAACP Plaintiffs adopt a "subordination and entrenchment" test. [Doc. 171 at 8-9]. Citing *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated and remanded*, ____ S.Ct. _____, 2018 Westlaw 1335403 (June 25, 2018), they argue that a discriminatory effect can be shown by establishing that "a

challenged districting plan subordinate[s the interests] of one political party and entrench[es] a rival party in power." [Doc. 171 at 8-9, paraphrasing *Rucho* at 656].

For their claim under the First Amendment, they argue a different standard, citing the dissenting opinion in *Benisek v. Lamone*, 266 F. Supp.3d 799, 833 (D. Md. 2017). Under that standard, plaintiffs making a partisan gerrymandering claim would not have to show that the challenged districting changed the election outcome; instead, they would have to show that their "electoral effectiveness was meaningfully burdened." [*Id*. at 10].

Setting aside the fact that the NAACP Plaintiffs' two suggested standards for determining injury in a partisan gerrymandering claim differ from one another, neither is in keeping with the Supreme Court's direction in *Gill* nor is a judicially manageable standard. With respect to the *Rucho* test proposed by the NAACP Plaintiffs, the Supreme Court in *Gill* made clear that injury to a political party is not what is at stake. An injury to the voter is.

While the First Amendment test proposed by the NAACP Plaintiffs may correctly focus on the voter, it is not judicially manageable. How is the Court to decide what a voter's electoral effectiveness is and whether it is meaningfully burdened? Similarly, to the extent that the fortunes of political parties as measured by the *Rucho* test can even be considered, what constitutes "entrenchment" by the

rival party? The results of one election, as here? The answer is no, whether one looks to the *Gill* majority opinion or concurring opinion.

While certainly not embracing the "entrenchment" theory, the majority noted Justice Breyer's description of that concept in his dissenting opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2005). After concluding that single-member legislative districts are rarely drawn to be politically neutral, Justice Breyer distinguished between "gerrymandering for passing political advantage and gerrymandering leading to the 'unjustified entrenchment of a political party.'" *Gill*, 138 S.Ct. at 1928, quoting *Vieth*, 541 U.S. at 360-361 (Breyer, J. dissenting). In Justice Kagan's *Gill* concurrence, she defined "entrenchment" as a party entrenching itself in a district "for a decade or more." *Id*. at 1940. Therefore, even if "entrenchment" were part of a workable standard, that prong cannot be met here.

The NAACP Plaintiffs' proposed Amended Complaint will be futile because there is still no judicially-sanctioned mechanism for assessing harm to the voter and thus the voter's standing. The different tests urged by the NAACP Plaintiffs are nothing more than calls for conjecture to establish standing.

Last, even if the NAACP Plaintiffs could present a judicially manageable standard to demonstrate standing, the question remains as to whether partisan gerrymandering claims are justiciable. In *Gill*, the majority opinion made clear

that the question has not been settled. 138 S. Ct. at 1929 ("[T]wo threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable."); *Id*. at 1934 (describing partisan gerrymandering as "an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved.").

In short, nothing has changed in the law since the Court dismissed the NAACP Plaintiffs' partisan gerrymandering claim last year. An amended complaint to "re-plead" or "restore" that claim should also be dismissed on the same grounds. For those reasons, the proposed amendment is futile and should not be allowed.

Additionally, the NAACP Plaintiffs unduly delayed in seeking to amend the Complaint. The Scheduling Order, as amended, called for all amendments to the pleadings to be filed as set forth in the Federal Rules of Civil Procedure and Local Rules of this Court, i.e., within thirty days of the filing of the Joint Preliminary Report and Scheduling Plan. [Docs. 25, 29, 56,144]; Fed. R. Civ. P. 15(a); Local Rule 15(a) and Appendix B. II. The NAACP Plaintiffs may respond that they had no need to move to amend their partisan gerrymandering claim until after the Court dismissed it on August 25, 2017. However, the Court issued all the Amended Scheduling Orders after it dismissed that claim, noting that the federal and local

rules for amending the complaint were still in effect. At the very least, the NAACP Plaintiffs should have moved to amend within 30 days of the August 25, 2017 Order dismissing their Complaint or within 30 days of the entry of the first Amended Scheduling Order on September 6, 2017.

Discovery on the NAACP Plaintiffs' claim, including expert reports and depositions, ended on February 16, 2018. [Doc. 56]. Neither the *Gill* decision nor any of the other redistricting decisions made since the dismissal of their partisan gerrymandering claim had any impact on that claim, except to reinforce that its justiciability is still very much in question and that there still is no manageable standard for measuring harm.

While the NAACP Plaintiffs may have wished to wait to amend their Complaint until the Supreme Court issued decisions in those cases, this Court made clear that it would not wait for that to occur. Rather, the Court concluded that if the Supreme Court's decision in *Gill* meant that this Court erred in dismissing the partisan gerrymandering claim, the Court would have reconsidered that dismissal.

The NAACP Plaintiffs misstate the Court's position, arguing that because the Court agreed that it would consider the dismissal of the partisan gerrymandering claim they brought if *Gill* changed anything, their claim could be

amended and that Defendant Kemp was on notice of what the amendment would be. [Doc. 171 at 13]. The Court, however, simply left open the possibility of reconsidering its Order after the *Gill* decision if that decision required a new order, which it did not.[2] This Court did not issue an open-ended opportunity for the NAACP Plaintiffs to amend at any time. [Doc. 28 at 31]. Second, even if the NAACP's reading of the Court's dismissal were correct, *Gill* did not provide a new vehicle for them to state a partisan gerrymandering claim. Finally, Defendant Kemp was not on notice that the NAACP Plaintiffs would amend their Complaint to add the partisan gerrymandering claim in the ways reflected in the proposed Amended Complaint, i.e., a First Amendment claim, a retaliation claim, restated and new racial claims, etc.

The NAACP Plaintiffs could have refiled their claim at any time before the deadline for amendments and certainly did not have to wait a year. There is no good cause to allow an amended complaint to be filed at this late date. That is particularly so when the NAACP Plaintiffs are insisting on a trial immediately.

Finally, if the Court allowed the NAACP Plaintiffs to amend their Complaint now, there would be undue prejudice to Defendant Kemp. Despite their

[2] Likewise, the Supreme Court did not adopt either test used by the lower courts in *Rucho* or *Benisek* and neither of those are anything new, having both originated in 2017.

claim that the proposed amendments are simply "repleading" and "restoring" their prior claim, that is not so. The proposed Amended Complaint adds a new legal basis for the partisan gerrymandering claim, [Doc. 171-2 at 38-41], claims retaliation against voters, and states new racial allegations. [*Id*. at ¶¶ 76, 77, 84, 95, 96 (new racial allegations); ¶¶ 128, 129, 132 (new retaliation allegations)]. Although the NAACP Plaintiffs claim that they are stating an alternative claim, their proposed Amended Complaint shows they are making the same racial gerrymandering claim a different way, as they only contend that black voters who are Democratic voters were gerrymandered, i.e., not that Democratic voters generally were gerrymandered. [*Id*. at ¶¶ 124, 130]. The NAACP Plaintiffs have also created separate tests for partisan gerrymandering claims made under the Fourteenth Amendment and the First Amendment, which include examining whether (1) there has been a "subordination" of one political party" and "the entrenchment" of another; and (2) Plaintiffs' "electoral effectiveness" has been "meaningfully burdened." [*Id*. at 35-41; Doc. 171 at 7-10]. Finally, in their proposed Amended Complaint, they describe their "subordination" and "entrenchment" claim but also seem to rely on yet another three-part test. Doc. [171-2 at 36-38].

To defend against the proposed amendment, Defendant Kemp must engage in more discovery and likely obtain additional expert testimony. The NAACP Plaintiffs argue for judicial economy in support of being able to bring their new claim, [Doc.171 at 12, 14], but they ignore that principle when contending that there is no undue burden on Defendant Kemp. Discovery is closed, but the NAACP Plaintiffs' new claim will necessitate it being reopened. That is an undue burden on Defendant Kemp, as well as the taxpayers who must fund this litigation.

II. If the Court Allows the NAACP Plaintiffs' Proposed Amended Complaint, Defendant Kemp is Entitled to Respond to Plaintiffs' Alternative Claim during a Reasonable Discovery Period.

The NAACP Plaintiffs' opinion seems to be that, despite moving to add a new claim at this late date, they should be allowed to do it and proceed right to trial because *they* know what their claim is and *they* are ready for trial on it. [Doc. 171 at 13]. That conclusion completely ignores the fact that Defendant Kemp has the right to file a response, including a motion to dismiss. Such a motion is especially appropriate when *Gill* and the other cases the NAACP Plaintiffs cite have changed nothing since this Court's dismissal of their partisan gerrymandering claim. There is still no standard to assess the harm to (and thus the standing of) an individual plaintiff, and the Supreme Court seems even more distanced from concluding that partisan gerrymandering claims are justiciable.

Contrary to the NAACP Plaintiffs' statements, Defendant Kemp is not "familiar with the facts supporting" their new "alternative" claim for partisan gerrymandering. [Doc. 171 at 13]. Likewise, there is no "subsequent legal authority" that mandates the allowance of the new claim. [*Id.*]. Also, the Court's statement that it would reconsider the dismissal of the partisan gerrymandering claim if *Gill* was decided to the contrary did not put Defendant Kemp "on notice of the possibility that the claim could be restored" so that he should have been engaging in discovery on an unknown and unstated claim, as the NAACP Plaintiffs seem to suggest. [*Id.*].

Plaintiffs waited two years to bring their complaint against the 2015 redistricting of House Districts 105 and 111. After their partisan gerrymandering claim was dismissed, they waited another year to attempt to amend the Complaint, hoping for additional ammunition from *Gill*. They did not get any but nonetheless have returned with a new claim, at the same time they are clamoring for an immediate trial.

The decisions to wait to file their Complaint and try to add their new claim were those of the NAACP Plaintiffs. If they are allowed to file their Amended Complaint, they must not be allowed to pursue that claim without an opportunity for Defendant Kemp to move for dismissal based on the current – and same – state

of the law. Additionally, he is entitled to discover factual and expert information related to the NAACP Plaintiffs' new allegations and newly-embraced standards for establishing standing.

CONCLUSION

For the foregoing reasons, Defendant Kemp respectfully requests that the NAACP Plaintiffs' Motion to Amend be denied. In the event that the Court grants the motion and the Thompson Plaintiffs' similar motion, Defendant Kemp is entitled to the opportunity to file a responsive pleading, including a motion to dismiss. If the claim proceeds, Defendant Kemp asks that the Court allow discovery on the Amended Complaint and consolidate the two cases for trial so that judicial economy will be served in determining both liability and a remedy if liability is found.

CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing **DEFENDANT'S RESPINSE IN OPPOSITION TO NAACP PLAINTIFFS' MOTION TO AMEND COMPLAINT** was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

This 27th day of July, 2018.

Respectfully submitted,

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	*	
	*	
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CERTIFICATE OF SERVICE

I hereby certify that I served the within and foregoing **DEFENDANT'S RESPONSE TO NAACP PLAINTIFFS' MOTION TO AMEND COMPLAINT** 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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