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 THOMPSON PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

COMES NOW DEFENDANT BRIAN KEMP, in his official capacity as Georgia Secretary of State ("Defendant Kemp"), 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 Thompson Plaintiffs,[1] as follows:

INTRODUCTION

On October 3, 2017, the Thompson Plaintiffs filed their original Complaint against Defendant Kemp, challenging the Georgia General Assembly's 2015 redistricting of certain state House Districts in House Bill 566 ("HB 566"). [Dkt. 1:17-cv-3856-TCB, Doc. 1]. The Complaint contained three counts: (1) the 2015 redistricting of state House Districts 105 and 111 "was enacted with a discriminatory purpose in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution" ("Count I"); (2) the 2015 legislation violated the results prong of Section 2 of the Voting Rights Act, both with respect to the drawing of House Districts 105 and 111 and House Districts in the "Atlanta metropolitan area"[2] ("Count II"); and (III) House Districts 105 and 111 are racial gerrymanders which violate the Fourteenth

[1] The "Thompson Plaintiffs" are Austin Thompson, Darryl Payton, Audra Cunningham, Sabrina McKenzie, Jamida Orange, Andrea Snow, Sammy Arrey-Mbi, Lynne Anderson, and Coretta Jackson.

[2] The Thompson Plaintiffs describe the "Atlanta metropolitan area" as the following counties: Cherokee, Clayton, Cobb, DeKalb, Douglas, Fayette, Fulton, Gwinnett, Henry, and Rockdale. [Dkt. 1:17-cv-3856-TCB, Doc. 1 at ¶ 109].

Amendment ("Count III"). [*Id*., Counts I-III]. The Thompson Plaintiffs did not make a partisan gerrymandering claim.

On October 27, 2017, the Thompson Plaintiffs filed their First Amended Complaint. [Dkt. 1:17-cv-3856-TCB, Doc. 20]. The three counts were the same, with one exception: Count II no longer claimed that House Districts 105 and 111 violated Section 2 but instead based that alleged violation only on the failure to create an additional majority minority district somewhere in the ten-county metro Atlanta area. [*Id*. at ¶¶ 129-136]

The Court then consolidated the Thompson Plaintiffs' case with that of the NAACP Plaintiffs.[3] [Doc. 46]. The Thompson Plaintiffs refiled their First Amended Complaint in this action. [Doc. 84].

Defendant Kemp filed a partial motion to dismiss. [Doc. 47]. Under Federal Rule of Civil Procedure 12(b)(1), Defendant Kemp moved to dismiss Plaintiffs McKenzie, Orange, Snow, Arrey-Mbi, Anderson, and Jackson for lacking standing to challenge H.B. 566 and Plaintiff Cunningham for her lack of standing to make the claims in Counts I and III. [Doc. 47 at 5-9]. Additionally, Defendant Kemp

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

moved to dismiss Counts I and II for failure to state a claim Federal Rule of Civil Procedure 12(b)(6). [*Id*. at 10-13].

On February 23, 2018 Order, this Court entered is Order on Defendant Kemp's motion. [Doc. 122]. With regard to standing to bring the claims in Counts I and III, which are specifically directed at House Districts 105 and 111, the Court agreed with the parties' position that only the plaintiffs residing in those districts have standing to bring those two claims. [*Id.* at 7-8]. As for standing to bring Count II, this Court concluded that because the Thompson Plaintiffs' case "challeng[ed] the current House voting map as a whole," all Plaintiffs had standing to make that claim. [*Id.* at 8-10].

Turning to Defendant Kemp's assertion that the Thompson Plaintiffs failed to state a claim in Counts I and II, this Court dismissed Count I without prejudice but denied dismissal of Count II. [*Id.* at 17]. As for Count I, the Court concluded that the Thompson Plaintiffs had not sufficiently alleged discriminatory intent under Section 2 or the Fourteenth and Fifteenth Amendments. [*Id.* at 11-14]. The Court specifically noted that the Thompson Plaintiffs could attempt to replead that claim, [*id.* at 13-14], but they have never done so.[4] The Court denied the motion as

[4] In their proposed Amended Complaint, the Thompson Plaintiffs acknowledge that Court dismissed Count I, but they do not strike that Count from their proposed Second Amended Complaint. Because the Thompson Plaintiffs do not seek to

to Count II, deciding that for purposes of a motion to dismiss, the Thompson Plaintiffs had alleged a claim of discriminatory effects. [*Id.* at 14-17].

Therefore, for the last six months, all the Thompson Plaintiffs have shared one claim: that HB 566 violates the results prong of Section 2 to the drawing of House Districts 105 and 111 and House Districts in the "Atlanta metropolitan area." Plaintiffs Thompson and Payton have the additional claim under Count III, that House Districts 105 and 111 are racial gerrymanders. The discovery to date has necessarily been limited to those two claims.

The Thompson Plaintiffs now ask the Court to allow them to amend their Complaint to add a new claim of partisan gerrymandering. [Doc. 172 at 2]. They allege that the General Assembly intentionally drew House Districts 105 and 111 to have the effect and result of diluting the votes of Democratic voters in violation of the First and Fourteenth Amendments. [*Id.*; Doc. 172-2 at 51-55]. Under this Court's Order on the motion to dismiss, to the extent that any standing exists, only Plaintiffs Thompson and Payton have standing to bring this claim which is

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amend the complaint as to that Count and the allegations are identical to those in the Count dismissed by the Court, Defendant Kemp presumes that the Thompson Plaintiffs' motion does not include amending Count I. [Doc. 172 at 1-2 (the Thompson Plaintiffs seek leave "to add a new claim for relief . . . . Specifically, the Thompson Plaintiffs seek to amend their Complaint to add a partisan gerrymandering claim.")]

specifically directed at the drawing of House Districts 105 and 111. [Doc.122 at 7-8].

The Thompson Plaintiffs give no explanation of why they previously elected not to bring a partisan gerrymandering claim, particularly when their Complaint is otherwise virtually identical to the NAACP Plaintiffs' Complaint, which did include that claim. Perhaps they will assert that the partisan gerrymandering claim was futile, considering this Court's dismissal of the NAACP Plaintiffs' claim. However, the Court's decision was based on the conclusion that there was no judicially-manageable standard for adjudicating such claims, [Doc. 28 at 32-35].

That is still the case. Both the Thompson and NAACP Plaintiffs rely on *Gill v. Whitford*, 138 S. Ct. 1916 (June 18, 2018) and *Benisek v. Lamone*, 585 U.S. ___ (2018), that they should be permitted to add a partisan gerrymandering claim. However, neither case changes the legal landscape, except to make the very existence of partisan gerrymandering claims even more questionable. 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 and seems to reject the usefulness of the "efficiency gap" theory. Finally, although Justice Kagan's

concurrence addresses several hypothetical situations and potential standards, those variations show exactly why the Supreme Court has never 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.

Likewise, *Benisek* does not provide anything new to support allowing the two Thompson Plaintiffs to assert a partisan gerrymandering claim. There, the Supreme Court simply reviewed whether the lower court properly denied a preliminary injunction. While the Court acknowledged that the "legal uncertainty surrounding any potential remedy for the plaintiffs' asserted injury" made the denial of a preliminary injunction appropriate, the Court did not provide any guidance on that issue.

Neither *Gill* nor *Benisek* provide a new legal development that requires the allowance of an amendment here. The Thompson Plaintiffs contend that the *Gill* restriction of plaintiffs to those with district-specific claims means that such claims can and do exist. That reading ignores that *Gill* again raises – and again declines to answer – the more important initial question of justiciability and, if justiciable, that of a judicially-manageable standard for determining whether unlawful partisan gerrymandering has occurred.

The other basis for the Thompson Plaintiffs' amendment is this Court's June 1, 2018 Order denying their motion for preliminary injunction. [Doc. 159]. The Thompson Plaintiffs maintain that this Court determined that "clear partisan intent motivated HB 566's passage," [Doc. 172 at 2], and "recogni[zed] that the General Assembly was driven by partisan intent in the drafting of House Districts 105 and 111." [*Id*. at 3]. The Thompson Plaintiffs appear to imply that until that June 1 Order, they could not have brought their new proposed claim.

That argument simply ignores the facts. As noted above, the Thompson Plaintiffs filed a complaint almost identical to that of the NAACP Plaintiffs, except for a partisan gerrymandering claim. Second, the proposed Amended Complaint states clearly that they knew that Defendant Kemp would agree that politics played a role in the redistricting of House Districts 105 and 111. [Doc. 172-2, ¶4 (the Thompson Plaintiffs "predicted" that politics was a reason for the redrawing of House Districts 105 and 111]. Third, in seeking a preliminary injunction, the Thompson Plaintiffs built their plea around statements concerning political motivations, which, of course, they plainly discovered well before filing their motion.

In summary, neither *Gill* nor *Benisek* provide a reason for the Thompson Plaintiffs' delay in attempting to bring a partisan gerrymandering claim and neither

provide any basis for doing so now. Likewise, this Court's June 1 Order did not provide a new basis for alleging a partisan gerrymandering claim. Having "predicted" that there was partisan motivation for redrawing House Districts 105 and 111, the Thompson Plaintiffs cannot claim now that the June 1 Order is a reason to allow a late amendment.

Like the NAACP Plaintiffs, the Thompson Plaintiffs maintain that *they* do not need any discovery on the proposed claim, and therefore the Court should continue with the current schedule for their racial gerrymandering claim. Both sets of Plaintiffs ignore the fact that they are stating a new claim that they have to prove and that Defendant Kemp is entitled to respond to (including a filing motion to dismiss) and investigate that claim if the Court permits it.

Defendant Kemp first heard of Thompson Plaintiffs' intention to file a Motion to Amend on the afternoon before they filed that motion. The proposed Second Amended Complaint pleads what can only be described as an alternative claim, adds many new allegations (including those of retaliation), sets forth the Thompson Plaintiffs' own vague standards for adjudicating partisan gerrymandering claims, and relies on the First Amendment for the first time.

ARGUMENT AND CITATION OF AUTHORITIES

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

Although the Thompson 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).

Contrary to the Thompson Plaintiffs' assertion, there is undue delay here. The Scheduling Order calls 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. [Doc. 144]; Fed. R. Civ. P. 15(a); Local Rule 15(a) and Appendix B. II. The Thompson Plaintiffs therefore should have moved to amend by May 11, 2018, i.e., within 30 days of April 11, 2018 Scheduling Order. Instead, without explanation, they waited two more months.

There is no good explanation for their delay. The Thompson Plaintiffs filed their Complaint ten months ago and made the same basic claims as the NAACP – except for a partisan gerrymandering claim. Perhaps they recognized that such a claim would be – and is – inconsistent with their racial gerrymandering claim. No matter the reason, they nonetheless "predicted" that the role of politics would be in play.

Furthermore, the two Maryland district court cases they rely on for their standard, *Benisek v. Lamone*, 266 F. Supp. 3d 799, 802 (D. Md. 2017) and *Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016), were both decided before they filed their Complaint. Likewise, *Genworth Fin. Servs., Inc. v. Lawyers Title Ins. Corp.*, No.1:05-CV-3057-MHS, 2008 WL 11404241, at 2 (May 30, 2008) does not advance the Thompson Plaintiffs' argument. Here, there has been no "dispositive ruling on a threshold issue" by either this Court or the Supreme Court.

Neither does this Court's June 1 Order make the Thompson Plaintiffs' proposed amendment timely. The quotes that they give from that Order were not surprises to the Thompson Plaintiffs. They *argued* the points to the Court.

Finally, while the Thompson Plaintiffs may have wished to wait to amend their Complaint until the Supreme Court issued decisions in *Gill* and *Benisek*, this Court made clear that it would not wait for that to occur. Rather, the Court

concluded that if the Supreme Court's decisions (and presumably any other case) meant that this Court erred in dismissing the NAACP Plaintiffs' partisan gerrymandering claim, the Court would have reconsidered that dismissal. More importantly, neither case held that partisan gerrymandering claims are justiciable or, even if justiciable, provided a standard for adjudicating such claims.

The Thompson Plaintiffs, without ever explaining why, waited a year to attempt to bring a partisan gerrymandering claim, after waiting two years to bring any claims at all. An amendment to add a new claim at this late date is untimely. At the very least, however, if the amendment is allowed, Defendant Kemp must be given time to respond to the new claim and to investigate it. If the Thompson Plaintiffs do not wish to undertake their own discovery, that is their choice.

In addition to being untimely, the proposed amendment is futile. Defendant Kemp agrees with the Thompson Plaintiffs that *Gill* and *Benisek* impact this case but not in any way that is favorable to the Plaintiffs. As an initial matter, the question remains as to whether partisan gerrymandering claims are justiciable at all. 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.").

Secondly, this Court dismissed the NAACP Plaintiffs' 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]. Each set of Plaintiffs now suggest different "standards" for adjudication of their proposed claims. [Doc. 171-2 at 35-41 and 172-2 at 51-56]. Both appear to embrace a "subordination and entrenchment" test, [Doc. 171 at 8-9; Doc. 172-2 at 52]. 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].

Although the Thompson Plaintiffs argue that test for First and Fourteenth Amendment claims, the NAACP Plaintiffs argue a different standard for their First Amendment claim, citing the dissent in the *Benisek* district court decision. *Benisek*, 266 F. Supp.3d at 833. 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].

In short, even these sets of Plaintiffs do not agree on a standard. More importantly, none of their suggestions have been adopted by the Supreme Court. Just as this Court predicted might happen, the *Gill* Court did not provide such a partisan gerrymandering 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 rejected 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.

In *Gill*, the Supreme Court went on to make 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 and apparently shared by the Thompson 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 and is not even alleged.

Setting aside the looming issue of justiciability, the Thompson 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 tests urged by the NAACP and Thompson Plaintiffs are nothing more than calls for conjecture to establish standing.

Finally, if the Court allowed the Thompson Plaintiffs to amend their Complaint now, there would be undue prejudice to Defendant Kemp. The proposed Amended Complaint adds a new legal basis for the partisan gerrymandering claim, [Doc. 172-2 at 51-58], claims retaliation against voters, and states at least one new racial allegation. [*Id*. at ¶¶ 20, 160, 164, 165, Prayer for Relief, ¶ D; Doc. 172 at 8 (retaliation); ¶62 (racial)]. Although the Thompson Plaintiffs claim that they are stating an alternative claim, their brief and proposed Amended Complaint show they are making the same racial gerrymandering claim a different way, as they only bring a claim for black Democratic voters – Thompson and Payton – who were allegedly discriminated against on a partisan basis. [Doc. 172 at 8].[5]

To defend against the proposed amendment, Defendant Kemp must engage in more discovery and obtain additional expert testimony. The Thompson Plaintiffs argue for judicial economy in support of being able to bring their new claim, [Doc.172 at 16], but they ignore that principle when contending that there is

[5] The Thompson Plaintiffs bring their partisan gerrymandering claim solely as to House Districts 105 and 111. [Doc. 172-2, ¶¶ 163-168, Prayer for Relief, ¶D; Doc. 172 at 2, 8-11, 16].

no undue burden on Defendant Kemp. An entirely new claim, more discovery, and more expert testimony is a burden on Defendant Kemp, as well as the taxpayers who must fund this litigation. A timely partisan gerrymandering claim would have avoided such an additional burden.

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

The Thompson 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 along the same schedule because *they* know what their claim is and *they* are ready for trial on it. [Doc. 172 at 3]. 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 Thompson 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.

Plaintiffs waited two years to bring their complaint against the 2015 redistricting of House Districts 105 and 111. They have waited almost 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 unchanged schedule.

The decisions to wait to file their Complaint and try to add their new claim were those of the Thompson Plaintiffs. If the Court permits them 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 Thompson Plaintiffs' new allegations and newly-embraced standards for establishing standing.

CONCLUSION

For the foregoing reasons, Defendant Kemp respectfully requests that the Thompson Plaintiffs' Motion to Amend be denied. In the event that the Court grants the motion and the NAACP 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 THOMPSON 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 30th day of July, 2018.

Respectfully submitted,

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	*	
	*	
Defendant.	*	

CERTIFICATE OF SERVICE

I hereby certify that I served the within and foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO THOMPSON PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED 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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This 30th day of July, 2018.

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