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-WSD-BBM

CONSOLIDATED

REPLY BRIEF IN SUPPORT OF THE NAACP PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

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I. INTRODUCTION

Democratic voters were denied "fair and effective representation" when Republicans secured reelection by removing Black Democrats from Georgia House Districts 105 and 111. ECF No. 159 at 24 (Preliminary Injunction Order) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring)). In their original complaint in this action, the *NAACP* Plaintiffs included a partisan gerrymandering claim. ECF No. 1 at ¶¶ 95–106. This Court dismissed that claim for failure to provide a judicially manageable method for measuring the discriminatory effects of Defendant's unconstitutional acts. ECF No. 28 at 32, 35. Thereafter, Plaintiffs waited for further guidance from the Supreme Court as to the best path forward for vindicating their constitutional rights.

In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Supreme Court endorsed the possibility of causes of action for partisan gerrymander claims grounded in vote dilution within specific districts, like those the NAACP Plaintiffs seek to add through this motion. In light of *Gill* and recent district court rulings in other partisan gerrymandering cases, Plaintiffs have moved for leave to restore their partisan gerrymandering claim under the Fourteenth Amendment, and to add a similar claim based on the First Amendment. *See* ECF No. 171. Because

Defendant has not identified any valid justifying reason for denying leave to amend, the motion should be granted.

II. ARGUMENT

Rule 15(a)(2) provides that courts must "freely give leave [to amend] when justice so requires." Thus, "[a] district court's discretion to deny leave to amend a complaint is 'severely restricted.'" *Woldeab v. Dekalb Cty. Bd. of Educ.*, 885 F.3d 1289, 1291 (11th Cir. 2018) (quoting *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988)). Unless good cause is provided—"such as undue delay, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."—leave should be granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554–55 (11th Cir. 1984) (noting "Rule 15's liberal mandate that leave to amend be 'freely given when justice so requires'").

In his opposition, Defendant has identified no "justifying reason" supporting the denial of Plaintiffs' motion for leave to amend. *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993). As discussed below, recent Supreme Court precedent and this Court's preliminary injunction order make clear that Plaintiffs' partisan gerrymandering claims are not futile, there has been no undue delay, and

Defendant will not be unduly prejudiced. Accordingly, this Court should grant Plaintiffs' motion for leave to amend.

A. Plaintiffs' Partisan Gerrymandering Claims Are Not Futile

Defendant makes two arguments that Plaintiffs' partisan gerrymandering claims are futile. First, he argues that neither partisan gerrymandering claim alleged in Plaintiffs' proposed amended complaint provides a means to measure discriminatory effect. ECF No. 175 at 6–8. Second, he argues that even if a means to measure discriminatory effect is alleged, partisan gerrymandering claims are not justiciable. *Id.* at 8–9. Neither argument has merit.

1. Plaintiffs have alleged two viable means of measuring discriminatory effect.

Last year, this Court dismissed Plaintiffs' partisan gerrymandering claim because it concluded Plaintiffs had not given the Court any "metric by which [it] can measure discriminatory effect." ECF No. 28 at 35. Plaintiffs' proposed amended complaint and associated motion provide two such metrics under the Fourteenth and First Amendments. *See generally* ECF No. 171. Both are judicially manageable and align with *Gill* and the district court in *Rucho*. Accordingly, Plaintiffs' proposed amendments are not futile.

(a) *Subordination and Entrenchment: Proving Discriminatory Effect under the Fourteenth Amendment*

As the Supreme Court emphasized in *Gill*, the dilution of individual votes within a district is a concrete injury to individuals—not to political parties. *See Gill*, 138 S. Ct. at 1933. The subordination and entrenchment test set forth in *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 656 (M.D.N.C.), *vacated and remanded by* 138 S. Ct. 2679 (2018), is a judicially manageable means of proving this injury.

Defendant argues the *Rucho* test is inadequate because he concludes it focuses on "injury to a political party" and not "injury to the voter." ECF No. 175 at 7. Defendant is wrong. The *Rucho* test in fact requires at least *two* injuries to individual voters: (1) the subordination of *voters*' interests on account of partisan bias and (2) a likelihood that the favored party need not respond to the needs of the subordinated *voters*. *Rucho*, 279 F. Supp. 3d at 656 (finding that "Plaintiffs satisfied their burden under the discriminatory effects prong by proving the 2016 Plan dilutes the votes of non-Republican *voters*" (emphasis added)). Thus, contrary to Defendant's assertions, the injuries on which *Rucho* focuses are not injuries suffered by a political party. Rather, the *Rucho* test focuses, just as *Gill* says it must, on injuries suffered by the *individual* voter—i.e., the denial of access to fair and effective representation on account of partisan bias and the creation and/or maintenance of partisan advantage in future elections.

In the alternative, Defendant argues that Plaintiffs' partisan gerrymandering claims necessarily fail because Republicans have not held power in Districts 105 and 111 for over a decade. ECF 175 at 8. But Defendant does not cite a single case requiring the plaintiffs to make such a showing, and Plaintiffs are not aware of one. *See id.*; *see also Rucho*, 279 F. Supp. 3d at 657 (finding that the results from *one* election "likely will persist through multiple election cycles"). Indeed, if Defendant's argument is taken to its logical conclusion, no partisan gerrymandering claim could ever exist for recently created districts—like Districts 105 and 111—and parties would be free to dilute the votes of disfavored populations for at least the first ten years of any new district. This result would be contrary to established authority and to democracy itself:

> Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around."

Gill, 138 S. Ct. at 1940 (Kagan, J., concurring) (citations omitted).

Here, instead of "outwork[ing]" their competitors, Representatives Strickland and Chandler "ask[ed] that more Republicans be put into their districts

and that Democrats be taken out." ECF No. 159 at 22–23 (Preliminary Injunction Order).

And the Georgia Republican leadership responded by doing exactly that. In so doing, they denied "fair and effective representation" to "voters removed from House Districts 105 and 111." *Id.* at 24. Therefore, Plaintiffs' proposed amendments would not be futile.

(b) *Retaliation: Discriminatory Effect under the First Amendment*

Defendant concedes that Plaintiffs' proposed First Amendment claim "correctly focus[es] on the voter," but argues it is not "judicially manageable" by posing questions that Justice Kagan answered in her concurring opinion. ECF No. 175 at 7. Thus, Justice Kagan faulted the Plaintiffs in *Gill* for not "speak[ing] to any tangible associational burdens—ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes." 138 S. Ct. at 1939.

Here, Democrats' right to join together and elect representatives of their choice in Districts 105 and 111 was unconstitutionally burdened when Republican legislators retaliated against Democrats' free association. As this Court has previously concluded, Democratic voters in Districts 105 and 111 would likely have succeeded in their goal of electing Democrats had the redistricting challenged

here not occurred in retaliation for their political beliefs. ECF No. 159 at 10 (Preliminary Injunction Order) ("the redistricting likely changed the outcome of the 2016 election in both Districts 105 and 111"); *id.* at 11 (noting "[e]ven Mr. O'Connor agreed that both Representatives likely would have lost their seats had their districts not been redrawn"); *id.* at 23 ("This 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."). The discriminatory effects of the retaliatory 2015 redistricting are clear: Democratic voters suffered the injury of losing the associational right to elect the candidate of their choice. Plaintiffs' First Amendment claim is not futile.

2. *Gill* does not support reversing this Court's conclusion as to the justiciability of partisan gerrymandering claims

Defendant asserts that "*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." ECF No. 175 at 3. That is incorrect. The *Gill* decision changes the partisan gerrymandering landscape because it identifies what constitutes a legally cognizable harm with respect to claims based upon a vote dilution theory. *See generally* 138 S. Ct. at 1931–33. The majority opinion rejects party-based injuries, such as those alleging partisan asymmetry using a statistical measurement like the "efficiency gap," *id*. at 1932–33, and instead endorses a

"district specific" theory focusing on whether "a particular voter is packed or cracked," and whether these individuals have suffered "the dilution of their votes." *Id*. at 1930. Plaintiffs allege individual injuries tied to vote dilution in particular districts. That is, their preferred candidates of choice in Districts in 105 and 111 would have won if their votes had not been diluted on account of partisan bias. *See* ECF No. 171 at 7 (citing ECF No. 159 at 11). This voter-specific harm is tied directly to the theory of discriminatory effect underlying Plaintiffs' partisan gerrymandering claims. *Compare* ECF No. 171-1 ¶¶ 20–25, *with* ¶¶ 123–126, 131–135.

It is also noteworthy that *Gill* buttressed the Supreme Court's prior finding of justiciability by remanding the case for further proceedings, a directive that is inconsistent with the notion that federal courts lack jurisdiction because partisan gerrymandering cases are not justiciable. 138 S. Ct. at 1933–34. In his concurrence, by contrast, Justice Thomas, joined by Justice Gorsuch, criticized the majority for "giv[ing] the plaintiffs another chance to prove their standing" and instead "would have remanded this case with instructions to dismiss." *Id*. at 1941 (Thomas, J., concurring).

In a final effort, Defendant argues *Gill* did not settle the question of whether partisan gerrymandering claims are justiciable and that, therefore, the Court should

conclude Plaintiffs' claims are futile. ECF No. 175 at 8–9. Defendant concedes, however, that *Gill* did not change the law regarding the justiciability of partisan gerrymandering claims. *Id*. at 9 (noting that "nothing has changed in the law since the Court dismissed the . . . partisan gerrymandering claim"). And he ignores the fact that this Court has already determined that authorities predating *Gill* make certain that such claims *are* justiciable. ECF No. 28 at 28 ("[t]he justiciability of partisan gerrymandering claims is therefore certain under current caselaw"); *see also Gill*, 138 S. Ct. at 1927 (noting that a majority of the Supreme Court found that partisan gerrymandering cases were justiciable in *Davis v. Bandemer*, 478 U.S. 109 (1986)).

* * *

For all of the reasons discussed above, Plaintiffs' proposed amendments are not futile.

B. Plaintiffs Did Not Unduly Delay Amendment

Defendant argues that Plaintiffs' motion should be denied because of undue delay. This is not correct.

Plaintiffs' caution with respect to re-pleading a partisan gerrymandering claim was vindicated by the Supreme Court's decision in *Gill*. Indeed, that decision would have negated any attempt by Plaintiffs to add partisan

gerrymandering claims based upon the efficiency gap test. *See* 138 S. Ct. at 1932–33. Plaintiffs instead proceeded with the approach *Defendant* suggested when he moved to dismiss Plaintiffs' original complaint, which was to wait for guidance from the Supreme Court's anticipated opinion in *Gill*. ECF No. 20-1 at 25. In the intervening months, Plaintiffs told the Court they were considering amendments and informed Defendant of the same. Plaintiffs should not be penalized for acting consistently with Defendant's suggestion to wait and for filing this motion for leave to amend promptly after the *Gill* opinion was issued. In short, Plaintiffs have not unduly delayed in moving for leave to amend.

C. Defendant Will Not Be Unduly Prejudiced

Defendant argues he will be unduly prejudiced if the Court grants Plaintiffs' motion for leave to amend. He argues these amendments require him to "engage in more discovery and likely obtain additional expert testimony." ECF No. 175 at 13. But he does not and has not explained what new discovery will be required by these proposed amendments. *See* ECF 175; *see also* Decl. of John Powers, at ¶¶ 4–6.

Moreover, the record is replete with evidence of partisan bias, retaliation, and discriminatory effect. *See, e.g.*, ECF No. 159 at 4–5 (Preliminary Injunction Order) ("Both Representatives Chandler and Strickland . . . approached

Representative Randall Nix, chair of the House Reapportionment Committee, to express their interest in redrawing the lines of the districts where they had been elected, *to increase their likelihood of being reelected*" (emphasis added)); *id.* at 7 ("Ms. Wright says she considered only partisan and population data"); *id.* at 10–11 ("But in any event, the redistricters were not trying to change the demographic makeup of Districts 105 and 111 dramatically. Their 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. And that's exactly what they did. Under the new map, Representatives Chandler and Strickland were both narrowly reelected."); *id.* at 11 ("An expert for the plaintiffs estimated that if the 2016 elections had been held using the old maps, both Representatives Chandler and Strickland would have lost."); *id.* ("Even Mr. O'Connor agreed that both Representatives likely would have lost their seats had their districts not been redrawn."); *id.* at 22 ("As for the group sitting in a room clicking on Maptitude, our opinion conjured this up only to the extent that we rely on the testimony of Representative Nix that it happened. He plainly testified that *interested parties did indeed sit together in a room and click through Maptitude in an attempt to draw safer Republican districts.*" (emphasis added)); *id.* at 23 ("But what both Representative Chandler and Representative Strickland did as well was

to ask that *more Republicans be put into their districts and that Democrats be taken out.* This movement of voters helped these Representatives get reelected." (emphasis added)); *id.* ("This 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."); *id.* ("Ms. Wright and her colleagues openly undertook to help Republican incumbents. In doing so, the 2015 redistricting removed many black voters from districts where their votes would have made an impact into districts where they did not."); *id.* at 24 ("But fair and effective representation is decidedly not what the voters removed from House Districts 105 and 111 got."); ECF No. 137-1 at ¶ 6 (Wright Decl.) (admitting her "goal" was to "improv[e] the political performance of the two districts for the Republican incumbents"); *id.* at ¶ 21 (admitting she increased Republican votes in House District 105 by "nearly 5%"); *id.* at 57 (beginning and ending Republican vote totals in House District 111 demonstrate Ms. Wright increased Republican votes by over 4% by removing Democratic voters from the district); *id.* at ¶ 42 ("Both Representative Chandler and Strickland [sic] were interested in political performance numbers (%TRepVots14) of their respective districts."); *see also* ECF No. 145 at 75:15–76:8 (Alford Dep. Tr.) ("Q. Okay. Now, you saw that Dr. Chen did an analysis in his, in his report, first report, and we can go to the analysis, if

you want, where he reached the same conclusion that, had the re-districting not happened, Chandler and Strickland would have lost. Do you recall seeing that? A. Yes. Q. And so do you have any means to dispute what Dr. Chen's opinion was on that or any information to dispute that? A. No. I mean, he, his – Dr. Chen's analysis would seem to validate what I think was probably a more impressionistic analysis in terms of the redistricting expert, that they both reached the same conclusion. Q. And you don't dispute that conclusion? A. No.").

In short, Defendant has not been unduly prejudiced.

In any event, as Plaintiffs have emphasized, should the Defendant identify the specific discovery he needs and the Court concludes further discovery is required with respect to Plaintiffs' proposed partisan gerrymandering claims, Plaintiffs would not object to reopening discovery for a limited time for the purpose of completing those discrete items, so long as the ability to obtain relief before the 2020 election cycle is not compromised. As Plaintiffs outlined in their recently filed reply brief in support of their motion to modify the scheduling order in this case, there is good reason to believe further delay will result in dilution of their votes through the 2020 cycle. *See* ECF No. 174 at 2–7. Given the significant discovery already completed in this case, there is no need to jeopardize Plaintiffs' ability to associate freely and cast undiluted votes in that election.

III. CONCLUSION

For all of these reasons, Plaintiffs respectfully ask the Court to grant their motion for leave to amend.

DATED: August 10, 2018

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CERTIFICATE OF SERVICE AND COMPLIANCE

On August 10, 2018, I served true copies of the following document(s) described as **REPLY BRIEF IN SUPPORT OF THE NAACP PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT** on the interested parties in this action as follows:

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

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 10, 2018, at New York, New York.

/s/ John Powers

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