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

REPLY BRIEF IN SUPPORT OF THOMPSON PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

I. INTRODUCTION

The Thompson Plaintiffs, by counsel, submit this memorandum in reply to Defendant's Opposition to the Thompson Plaintiffs' Motion for Leave to File Second Amended Complaint. In the interest of judicial economy, and because there

are no countervailing reasons to deny amendment, this Court should grant the Thompson Plaintiffs' Motion for Leave to File Second Amended Complaint.

The Thompson Plaintiffs seek to amend their Complaint to add a claim for partisan gerrymandering in this case, where all parties — Plaintiffs, Defendant, and the Court — agree that the State drew House Districts 105 and 111 with unabashed partisan intent, *see* ECF No. 159 ("Prelim. Inj. Order") at 23 ("The state openly acknowledges it redrew Districts 105 and 111 with political ends in mind."), and outcome-determinative partisan discriminatory effect, *see id.* at 10 ("the redistricting likely changed the outcome of the 2016 election in both Districts 105 and 111"). Plaintiffs filed their Motion for Leave to Amend just six weeks after this Court recognized the overwhelming evidence of partisan map-drawing in this case in its June 1 Order, and just three weeks after the Supreme Court's partisan gerrymandering decisions in *Gill v. Whitford* and *Benisek v. Lamone*. Together, the decision of this Court and the decisions of the Supreme Court changed the course of this litigation by making two things clear: (1) plaintiffs who live in districts that have been "cracked" or "packed" (such as Plaintiffs Thompson and Payton) have standing to bring targeted, district-specific partisan gerrymandering claims, *see Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018); and (2) the evidence of partisan map-drawing adduced by Plaintiffs during discovery thus far may have been significant

enough to warrant preliminary injunctive relief on a partisan gerrymandering claim, *see* Prelim. Inj. Order at 23 ("This would be a more obvious case if it were a challenge to partisan gerrymandering.").

Accordingly, for the reasons detailed below and set forth in the Thompson Plaintiffs' Motion for Leave to File Second Amended Complaint, the Thompson Plaintiffs respectfully request that this Court allow them to file a Second Amended Complaint to add a partisan gerrymandering claim.

II. ARGUMENT

Federal Rule of Civil Procedure 15(a)(2) makes clear that "[t]he court should freely give leave [to amend] when justice so requires." The Eleventh Circuit has repeatedly noted that Rule 15(a) "severely restricts the judge's freedom" to deny amendment because "[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." *Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (citation omitted); *see also Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993); *Shipner v. E. Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989); *Gramegna v. Johnson*, 846 F.2d 675, 678 (11th Cir. 1988). There is no such reason here. Indeed, Defendant's brief is devoid of case law to support his argument that any purported delay, prejudice, or futility would provide a "substantial reason" to deny Plaintiffs' motion. To the contrary, the liberal

amendment policy under Rule 15(a) and the case law support Plaintiffs' ability to amend.

A. There is no undue delay.

Plaintiffs have not unduly delayed seeking amendment. As explained in their Motion, ECF No. 172 at 1-2, the Thompson Plaintiffs moved to file an amended complaint because of two events: this Court's June 1 Order, and the Supreme Court decisions in *Gill* and *Benisek*. Plaintiffs moved to amend their complaint within mere weeks of those decisions. This does not constitute undue delay. *See 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 two months after dispositive ruling—where the parties had been "actively litigating the issue" during that time).

In a misguided effort to convince the Court that Plaintiffs have unduly delayed amendment, Defendant makes several assertions in his Opposition Brief that are incorrect. *First*, Defendant apparently takes the position that because Plaintiffs predicted in their original complaint that "[t]he State is almost certain to argue that the goal was political, not race-based," ECF No. 84 ¶ 3, their partisan gerrymandering claim should have been included in that complaint (and cannot be included now). ECF No. 177 ("Opp.") at 9. But Plaintiffs' prediction was based in

large part on their knowledge that state defendants often seek refuge in partisan politics to explain away evidence of racial gerrymandering (especially in states like Georgia where voting is racially polarized), *see, e.g.*, *Harris v. McCrory*, 159 F. Supp. 3d 600, 618 (M.D.N.C. 2016) ("Defendants claim that politics, not race, was the driving factor behind the redistricting in CD 12."); *Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *14 (E.D. Va. June 5, 2015) ("While Defendants have offered post-hoc political justifications for the 2012 Plan in their briefs, neither the legislative history as a whole, nor the circumstantial evidence, supports that view to the extent they suggest."), not based on facts specific to this case. Since that time, specific evidence adduced during discovery—along with a defense strategy "rooted in partisan gerrymandering," Prelim. Inj. Order at 12—has infused the record with an overwhelming body of evidence and admissions to support the addition of a partisan gerrymandering claim. *See, e.g.*, *id*. at 23 (summarizing 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"); *see also* 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.").

Second, Defendant repeatedly suggests that because the Thompson Plaintiffs' original complaint was "otherwise virtually identical to the NAACP Plaintiffs' Complaint, which did include [a partisan gerrymandering] claim," Opp. at 6, the Court should deny the present Motion. As an initial matter, it is simply untrue that the Thompson Plaintiffs' complaint was ever "almost identical to that of the NAACP Plaintiffs, except for a partisan gerrymandering claim," *id.* at 8. While the Thompson Plaintiffs and the NAACP Plaintiffs both allege racial gerrymandering with respect to House Districts 105 and 111,[1] the Thompson Plaintiffs have also alleged that the current Georgia State House Map violates Section 2 of the Voting Rights Act. *See* ECF No. 84 ¶¶ 129-36. The NAACP Plaintiffs have not advanced that claim. In any event, Defendant's circular argument that the Thompson Plaintiffs were required to plead a partisan gerrymandering claim simply because the NAACP Plaintiffs did so has no merit. Particularly given the evidence and authority that has developed between August 25, 2017, when this Court dismissed the NAACP Plaintiffs' partisan gerrymandering claim for failure to provide a judicially manageable method for measuring discriminatory partisan effect, ECF No. 28, and June 1, 2018, when this Court determined that witness testimony and evidence presented a "more obvious

[1] Both sets of Plaintiffs also brought intentional discrimination claims, but they were dismissed by this Court. *See* Order on Motion to Dismiss, ECF No. 122.

case" of partisan gerrymandering, Prelim. Inj. Order at 23, Defendant can hardly fault the Thompson Plaintiffs for not including the partisan gerrymandering claim in their October 3, 2017 complaint.[2]

B. There is no undue prejudice to Defendant.

To be sure, Defendant has been on notice that partisan gerrymandering is an issue in this case ever since the NAACP Plaintiffs filed their complaint in April of last year. *See* ECF No. 1 at 25-27. Yet still Defendant chose to advance a litigation strategy "rooted in partisan gerrymandering." *See* Prelim. Inj. Order at 12. While Defendant may now regret his chosen defense strategy, he cannot credibly claim that he would somehow be blindsided or unduly prejudiced by the addition of a partisan gerrymandering claim.

Defendant specifically contends that he would be prejudiced if Plaintiffs are granted leave to amend because the Thompson Plaintiffs 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." Opp. at 16. To the extent Defendant contends that claims

[2] Defendant also claims that Plaintiffs changed the scope of Count II of their Complaint between their original complaint and their first amended complaint. Opp. at 2-3. This is incorrect. The Thompson Plaintiffs' Section 2 claim has been the same throughout the course of this litigation, alleging that the current State House map fails to include at least one additional majority African-American district in the Atlanta metropolitan area in violation of Section 2 of the Voting Rights Act. *Compare* Dkt. 1:17-cv-3856, ECF No. 1 ¶¶ 130-37, *with* ECF No. 84 ¶¶ 129-36.

brought by Black voters are necessarily—and exclusively—race-based, this assertion is as offensive as it is wrong. Partisan gerrymandering claims are not limited to White plaintiffs. Black Democrats have standing to bring a partisan gerrymandering claim just as White Democrats do, and the fact that Plaintiffs are Black does not mean that their partisan claim should be construed as a racial claim. Ultimately, as alleged in their proposed Second Amended Complaint, ECF No. 172-1 ("Thompson Pls.' Second Am. Compl."), whether the State discriminated against Plaintiffs Thompson and Payton because they are Black or because they are Democrats, the House Districts in which they reside are unlawful.

Defendant's final argument on prejudice is that if Plaintiffs are granted leave to amend, he is entitled to discovery on the partisan gerrymandering claim. Given that there has already been significant factual development around the issue, the Thompson Plaintiffs reiterate that they do not believe additional discovery would be necessary. Specifically, because their proposed partisan gerrymandering claim is based entirely on the evidence and admissions adduced in the course of litigating the racial gerrymandering claim, the Thompson Plaintiffs agree with the NAACP Plaintiffs that the partisan gerrymandering claim can proceed on the same scheduling track as the racial gerrymandering claims. *See* ECF No. 56 (racial gerrymandering Scheduling Order). However, to the extent that the Court would only allow Plaintiffs

to amend if discovery is permitted on the partisan gerrymandering claim, the Thompson Plaintiffs would not object to reopening discovery for the purpose of engaging in limited discovery, so long as the ability to obtain relief on all of the Thompson Plaintiffs' claims before the 2020 election cycle is not compromised.

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

"[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.1:05-CV-3128-TWT, 2006 WL 1042365, at *1 (N.D. Ga. Apr. 18, 2006), *aff'd*, 205 F. App'x 761 (11th Cir. 2006). Plaintiffs' partisan gerrymandering claim clearly would not be futile because this Court has already indicated that there may be sufficient evidence to support a motion for preliminary injunction on the claim. Prelim. Inj. Order at 23 ("This would be a more obvious case if it were a challenge to partisan gerrymandering.").

Defendant contends that Plaintiffs' partisan gerrymandering claim would be futile for two reasons: (1) the claim proposed in Plaintiffs' Second Amended Complaint provides no means to measure partisan discriminatory effect; and (2) even if a means to measure partisan discriminatory effect is alleged, partisan gerrymandering claims are not justiciable. Opp. at 13-15. Both reasons are meritless.

First, the Court dismissed the NAACP Plaintiffs' original partisan gerrymandering claim last year because the Court held that the NAACP Plaintiffs failed to provide the Court with a judicially manageable method for measuring the discriminatory effect of Defendant's unconstitutional acts. ECF No. 28 at 35. But that issue has now been resolved, as both sets of Plaintiffs have provided the Court with a judicially manageable standard to measure harm. In alleging partisan gerrymandering in violation of the First and Fourteenth Amendments, the Thompson Plaintiffs have alleged partisan intent, effect, and causation, and propose a judicially manageable standard that measures discriminatory effect by assessing whether H.B. 566 dilutes the votes of Democratic voters to such a degree that they have suffered a tangible and concrete adverse effect. Thompson Pls.' Second Am. Compl. ¶¶ 158-68.

Specifically, the Thompson Plaintiffs propose the following standard from *Benisek v. Lamone* for their First Amendment claim: the plaintiff must show that the challenged map dilutes the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect, and 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. Mot. to Amend at 7-8; Thompson Pls.' Sec. Am. Compl. at ¶ 161; *see also* ECF No. 171

(NAACP Pls.' Mot. to Amend) at 10.[3] To satisfy the "adverse effect" prong of this test, Plaintiffs "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." *Benisek v. Lamone*, 266 F. Supp. 3d 799, 833 (Neimeyer, J., dissenting). As called for by the Supreme Court in *Gill*, Defendant recognizes that the standard proposed by Plaintiffs properly focuses on the individual voter. *See* Opp. at 14; *see also Gill*, 138 S. Ct. at 1930-31.

Notably, here, not only have Plaintiffs pointed to concrete adverse electoral outcomes that resulted because of the changes made to House Districts 105 and 111 under H.B. 566, *see* Thompson Pls.' Second Am. Compl. ¶ 166 ("But for the General Assembly's targeting of Democratic voters on the basis of their voting history and political views . . . the Democratic candidates in both districts likely would have won the 2016 general election."), but both the Court and the legislative mapdrawers have expressly recognized that the 2015 re-redistricting had a dispositive effect on 2016 elections in Districts 105 and 111, *see* Prelim. Inj. Order at 23 ("This movement of

[3] Contrary to Defendant's assertion, the NAACP Plaintiffs and the Thompson Plaintiffs propose the same standard for the adjudication of their First Amendment claim. Indeed, even Defendant appears to recognize that the proposed standards are the same. *See* Opp. at 14 (referring to "the First Amendment test proposed by the NAACP Plaintiffs and apparently shared by the Thompson Plaintiffs").

voters helped these [incumbent Republican] Representatives get reelected."); *id.* at 11 ("Even Mr. O'Connor agreed that both Representatives likely would have lost their seats had their districts not been redrawn.").

The Thompson Plaintiffs additionally propose the following standard from *Common Cause v. Rucho* for their Fourteenth Amendment claim: the plaintiff must show that (1) the mapdrawers constructed the districts with the intent to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation; (2) the redistricting plan has that effect; and (3) it cannot be justified on other, legitimate legislative grounds. *See* Thompson Pls.' Sec. Am. Compl. ¶ 162. Moreover, the challenged districting plan subordinates the interests of one political party and entrenches a rival party in power. *Id*. (*citing Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), v*acated and remanded on other grounds*, 138 S. Ct. 2679 (2018)).

Other courts have found the standards proposed by Plaintiffs to be judicially manageable. *See Benisek*, 266 F. Supp. 3d at 802; *Common Cause v. Rucho*, 279 F. Supp. 3d 587. But if this Court prefers a standard that is different from the one proposed by Plaintiffs, that would not foreclose Plaintiffs from being able to allege partisan gerrymandering. As other district courts have done, *see, e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), *vacated and remanded, Gill v.*

Whitford, 138 S. Ct. 1916 (2018), this Court could simply lay out and implement the standard it finds appropriate.

Second, while it is true that the Supreme Court in *Gill* declined to rule on the ultimate question of whether partisan gerrymandering claims are justiciable, the Court did not rule out the justiciability of partisan claims. It further made clear that if such claims are justiciable, then plaintiffs like Thompson and Payton—who live in districts that have been "cracked" or "packed" for partisan purposes—have standing to bring them. This Court already determined prior to *Gill* that partisan gerrymandering claims are justiciable. *See* ECF No. 28 at 28 ("[t]he justiciability of partisan gerrymandering claims is therefore certain under current case law"). Accordingly, because the type of claim envisioned by the majority opinion in *Gill* is precisely the type of claim the Thompson Plaintiffs seek to bring here, *see Gill*, 138 S. Ct. at 1931, Plaintiffs should be permitted to amend their Complaint to add it.

III. CONCLUSION

For the reasons set forth, and because it would not be in the interest of judicial economy to file a separate action, the Thompson Plaintiffs respectfully request that this Court grant them leave to amend their First Amended Complaint to add a partisan gerrymandering claim.

Dated: August 13, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **REPLY BRIEF IN SUPPORT OF THOMPSON PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 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.

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