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

PAMELIA DWIGHT, *et al.* *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, *Defendant*.	CIVIL ACTION FILE NO. 1:18-cv-2869-JPB

SECRETARY OF STATE BRAD RAFFENSPERGER'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Faced with the reality that this case is about partisan politics, Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment [Doc. 72] attempts to distract the Court from Plaintiffs' clear purpose by citing cases that are either not applicable or not controlling authority. Plaintiffs ignore clear and controlling precedent from the Eleventh Circuit on laches, which requires judgment in Defendant's favor. Plaintiffs still cannot identify any basis other than race for uniting Augusta, Macon, and Savannah in a single congressional district, meaning they cannot prevail on the first prong of the three-prong test of *Thornburg v. Gingles*, 478 U.S.

30, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986). Plaintiffs do not even contest the fact that Georgia's congressional districts are already proportional—they just complain that it is too early in this case to reach that question. As explained below, Defendant is entitled to judgment as a matter of law and Plaintiffs have shown nothing that requires a different outcome.

ARGUMENT AND CITATION TO AUTHORITY

I. Laches bars Plaintiffs' claims.

Plaintiffs devote most of their response brief to laches. As explained below, Defendant has established each of the three elements of laches: "(1) [A] delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *Venus Lines Agency Inc. v. CVG Int'l Am., Inc.*, 234 F. 3d 1225, 1230 (11th Cir. 2000).

A. The doctrine of laches applies to redistricting cases in the Eleventh Circuit.

Plaintiffs begin with a broad (and incorrect) claim, alleging that "[t]he doctrine of laches does not apply to voting rights actions seeking prospective injunctive relief." [Doc. 72, p. 5[1]]. In support of this position, Plaintiffs rely on

[1] This brief uses the top, court-generated page numbers when referring to sections of Plaintiffs' response brief.

a single case from the Middle District of Georgia in 1998, and a series of cases that are either outside this circuit or inapplicable.

Plaintiffs' reliance on *Miller v. Board of Comm'rs of Miller County*, 45 F. Supp. 2d 1369 (M.D. Ga. 1998) is misplaced for a number of reasons. Contrary to Plaintiffs' statement in their brief, the *Miller* court actually denied a preliminary injunction request based on laches. *Id.* at 1375 ("the Court also concludes that Plaintiffs' unreasonable delay has placed County officials in the untenable position of having to rectify an allegedly unconstitutional electoral process in less than two weeks, and further holds therefore, that Plaintiffs' motion for preliminary injunctive relief is barred under the doctrine of laches"). Second, it is true that the *Miller* court stated in dicta that "[t]he defense of laches does not apply to voting rights actions wherein aggrieved voters seek *permanent* injunctive relief insofar as the electoral system in dispute has produced a recent injury or presents an ongoing injury to the voters." *Id.* at 1373 (emphasis in original). But the court relied on a Ninth Circuit case for that proposition and was not directly considering the issue the quote seems to suggest. Instead, the *Miller* court was in the midst of considering a *preliminary* injunction, and had no need to address whether laches could apply in a suit seeking permanent relief. As discussed below, the Eleventh Circuit guidance on this point is clear.

The most relevant decision on laches, rooted in Eleventh Circuit law, is the case cited by Defendant from the Northern District of Alabama, which found that "redistricting challenges are subject to the doctrine of laches because of the ten-year expiration date of electoral districts." *Chestnut v. Merrill*, 2019 U.S. Dist. LEXIS 51548 at *13, citing *Sanders v. Dooly Cty*., 245 F. 3d. 1289, 1290-1291 (11th Cir. 2011).[2]

Plaintiffs' only real response is to point out that *Chestnut* is "neither controlling nor instructive." [Doc. 72, p. 8]. In support of this position, and without a hint of irony, Plaintiffs then cite cases that are neither controlling nor instructive. Plaintiffs even call on a copyright infringement suit for the proposition that laches only bars "recovery of retrospective damages," and does not apply to prospective relief. But copyright suits are subject to a statute of limitations, which requires a different analysis of the common-law doctrine of laches. *See Peter Letterese & Assocs. v. World Inst. of Scientology Enters*., 533 F.3d 1287, 1321 (11th Cir. 2008).

Plaintiffs claim the Eleventh Circuit "has yet to resolve directly whether laches applies to voting rights claims seeking prospective injunctive

[2] As Plaintiffs point out, Defendant in its principal brief inadvertently attributed the *Chestnut* quote to the *Sanders* court. *Chestnut* relied on *Sanders* for the proposition that laches applies to voting rights cases.

relief," [Doc. 72, p. 7], but this is a poor synopsis of the current state of the law. Plaintiffs cannot point to a single Eleventh-Circuit case where a court directly considered the issue and found laches inapplicable. Moreover, by citing with approval two lower court cases that applied laches to voting rights actions, the Eleventh Circuit demonstrated in *Sanders* that applicability of laches to voting-rights claims is not quite as nebulous as Plaintiffs would like this Court to believe. *See Sanders,* 245 F. 3d at 1291.

In addition to *Chestnut*, Plaintiffs also ignore a three-judge decision in Florida that was issued after *Miller*. That panel found laches applied to congressional redistricting plans where, as here, there was only one election remaining before the next census was to take place:

> Laches has been applied to bar actions challenging redistricting plans. *See Mac Govern v. Connolly*, 637 F. Supp. 111 (D. Mass. 1986) (1986 suit barred by laches where only viable claim challenged a 1977 apportionment plan); *White v. Daniel,* 909 F.2d 99 (4th Cir. 1990) (1988 suit barred by laches where the redistricting plan occurred in 1971 and the legislature decided not to redistrict in 1981 in light of the 1980 census).

Fouts v. Harris, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999). The U.S. Supreme Court later summarily affirmed the dismissal on the basis of laches in *Chandler v. Harris,* 529 U.S. 1084, 120 S. Ct. 1716 (2000).

The district courts of this circuit are clear that laches applies to redistricting cases. The Eleventh Circuit has had opportunity to overturn the

district courts and has declined to do so. The Supreme Court of the United States, too, has had opportunity to overturn a redistricting case nearly identical to the one now before the Court, and declined to do so. These cases stand in stark contrast to Plaintiffs' claim that laches does not apply in voting-rights cases.

B. Plaintiffs delayed asserting their claims.

Turning to the three elements of laches, Plaintiffs next contend they have not unreasonably delayed in filing their claims. This broad assertion responds to two elements of laches: That plaintiffs have delayed; and that plaintiffs' delay was not excusable. But it appears Plaintiffs agree (or at least do not contest) the first element—that they delayed in filing their claims. Nowhere in their response do they claim they have not delayed. Rather, they focus only on the idea that their delay was either not "unreasonable" or was otherwise excusable.

C. Plaintiffs' delay was inexcusable.

There is good reason to avoid creating a "powerful and perverse incentive for plaintiffs to file premature and even frivolous suits to avoid the invocation of laches." [Doc. 72, p. 10], quoting *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs,* 781 F. 3d 1271, 1285 (11th Cir. 2015). But there is a huge difference between the kind of hasty filing the *Black Warrior* court

cautioned against and the inexcusable delay the Plaintiffs engaged in here. Plaintiffs give two possible excuses for their delay: (1) that their claim was not ripe until after the Democratic incumbent in District 12 lost and (2) that they needed time to investigate their claims.

Plaintiffs' idea that their claim did not exist until after their preferred incumbent lost reinforces the political nature of this case—they only believed a violation of the Voting Rights Act occurred once a Democratic candidate lost.[3] Further, if a plaintiff does not have a ripe claim until after their preferred candidates have been defeated, then no case could be filed against redistricting plans until they have been used for several cycles because a plaintiff would have to see the effect of the plan first. The reality is exactly what Defendant explained: congressional districts are used for five election cycles. Waiting until four of the five election cycles are essentially complete before filing the case is not an excusable delay.

Although the Plaintiffs also cite the need to "fully investigate" their claims as an explanation for filing when they did, they fail to offer any

[3] If Section 2 of the Voting Rights Act is used for the blatantly partisan purposes Plaintiffs seek, its constitutionality could be endangered. *See, e.g.*, Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 Duke J. Const. Law & Pub. Pol'y 125, 152 (2010).

evidence of the content or scope of such investigation. Instead, they simply state that the various Plaintiffs realized at different times that there was an apparent Section 2 violation, which suggests the so-called "investigation" by Plaintiffs was a passive event that happened *to* them, rather than an active inquiry conducted *by* them.

Beyond their failure to provide evidence of an investigation, Plaintiffs fail to provide any effective response to the court cases cited by Defendant that show "investigations" should not drag on for years. Both *Chestnut* and *Fouts* are redistricting cases that occurred in the Eleventh Circuit—the latter of which was affirmed by the Supreme Court—and both stand for the proposition that plaintiffs who choose to wait to file their complaint until relief can only be had in the last election in a five-election decennial cycle have inexcusably delayed. In spite of these clear cases, Plaintiffs again call upon cases dealing with laches in unrelated contexts, or from circuits that have clearly taken a different approach to the doctrine than has been taken by courts in this circuit. These cases are unpersuasive.

Finally, Plaintiffs suggest Defendant has engaged in a "one-size-fits-all theory of laches," [Doc. 72, p. 12], despite Defendant's explaining the differing situations of the individual plaintiffs in his principal brief. Notwithstanding Plaintiffs' new claim that the current map was perfectly acceptable in 2012,

but suddenly violated the VRA in 2014, each of the Plaintiffs' claims (with the exception of Plaintiff Hatcher) materialized in 2011. That is the year the map was drawn, and that is the year each of the other Plaintiffs knew or should have known they could have begun their supposed investigation.

> Delay is 'measured from the time at which plaintiff knows or should know she has a **provable** claim…' [E]ven if the nine Plaintiffs who were citizens in 2011 did not realize their claim arose in June 2011 [when the map was implemented], they were registered voters in Alabama for the next three election cycles before bringing a claim.

Chestnut, 2019 U.S. Dist. LEXIS 51548 *15, quoting *Kason Indus., Inc. v. Component Hardware Grp., Inc.,* 120 F. 3d 1199, 1206 (11th Cir. 1997) (emphasis added).[4] Ms. Hatcher's inclusion in this suit does not save it from the defense of laches. *Id.* at *16. Ms. Hatcher waited more than twice the amount of time before filing suit than did the last plaintiff in *Chestnut.* The Plaintiffs apparently attempt to use Ms. Hatcher's decision to attend school out of state as an excuse for her delay in bringing her claim. But Ms. Hatcher explained that she voted in every election since she registered to vote in 2014, including the primaries. Hatcher Dep. [Doc. 59] 10:22-11:5. Ms. Hatcher was

[4] Delay is not measured from when an investigation by a plaintiff *proves* a claim. It begins when the claim is *provable.* To the extent Plaintiffs are able to draw a map that creates another majority-minority district, that claim was provable as of 2011 because all parties have continued to operate from statistics that were available following the 2010 Census. Election data was similarly available in 2011.

aware in 2014 whether her preferred candidate won or lost the election, just as she was aware in 2016. That she only decided to pursue this lawsuit when she moved back to Georgia does not change the fact that she became aware of a provable claim by 2014 at the latest, and she chose to delay bringing the claim anyway.

D. The State is prejudiced by Plaintiffs' delay.

As Defendant has already explained, [Doc. 65-1, pp. 12-15], courts in this circuit have held that back-to-back redistricting is prejudicial because the district changes cause confusion and challenges for voters, candidates, and election officials. *See Chestnut,* 2019 U.S. Dist. LEXIS at *17-21; *Fouts,* 88 F. Supp. 2d at 1354-1355; *Sanders,* 245 F. 3d at 1290-1291. Unlike the cases cited by Plaintiffs where districts were changed early in a decennial cycle, *e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *aff'd* 542 U.S. 947 (2004), the current congressional districts have already been in use for more than eight years and will have to change in 2021. While the state sometimes makes small changes to its *legislative* plans between Census enumerations, Plaintiffs' proposed remedies in this case would require changes to districts that span 121 of the 159 counties in Georgia and would affect more than a million Georgians. Wright Report, [Doc. 65-1, pp. 10, 14].

Redistricting at the end of a Census cycle also carries costs that are different from changes near the beginning of that cycle. Courts recognize that redistricting based on outdated statistics—like a ten-year-old census—"would come at great cost and yield results that are at best uncertain, and at worst, perverse." *MacGovern v. Connolly,* 637 F. Supp. 111, 116 (D. Mass. 1986). The *Fouts* court came to a similar conclusion, saying use of "[s]uch old census figures have been recognized as unduly prejudicial because they fail to provide a basis for 'fair and accurate representation to the citizens.'" 88 F. Supp. 2d at 1354, quoting *White,* 909 F. 2d at 104. In addition, as the *Chestnut* court explained, the confusion resulting from multiple redistrictings in quick succession is not lessened by the more-publicized nature of congressional races as compared to smaller elections. "[W]hile congressional races are better funded and more highly publicized, the court remains unconvinced that a more publicized election will necessarily educate voters on where the newly drawn district lines lay." *Chestnut,* 2019 U.S. Dist. LEXIS at *20.

Laches is an equitable defense designed to look at the case as a whole. As these cases clearly demonstrate, laches contemplates not only the time of *filing* of a case—as Plaintiffs suggest—but the desired result as well. It is incontrovertible that it is more difficult for the state to litigate a claim filed in

2018 related to a map drawn in 2011, because the data relied upon by the parties necessarily becomes progressively more out-of-date with time and the reliance interests of the citizens grow. Had the Plaintiffs filed in 2013, for example, the parties could be more assured of the reliability of the statistics and voters would be less reliant on the long use of particular districts.

E. Declaratory judgment actions remain subject to laches.

Finally, Plaintiffs' suggestion that their claim for a declaratory judgment should survive laches misunderstands the holding of *Sanders*, 245 F.3d at 1291. *Sanders* was decided prior to *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612 (2013), which ended the need for the State of Georgia to receive preclearance from the United States Department of Justice prior to enforcing changes in laws related to voting. The issue of preclearance was critical to the *Sanders* court's analysis of whether a declaratory judgment could be subject to laches, because the prior map was used as a comparison point for future redistricting plans:

> An effect of a grant of such declaratory relief could be to prevent the Attorney General from using the 1993 consent-decree plan as a **baseline for retrogression analysis** in the post-2000 census round of preclearance under § 5 of the Voting Rights Act.

Sanders, 245 F. 3d at 1292 (emphasis added). Today, there is no longer a need for preclearance and thus, *Sanders'* reasoning for not imposing laches is

no longer applicable. It should not control the outcome of this case with respect to declaratory relief. Simply put, the 2011 Plan will not be used again after next year's elections and will have no continuing relevance because of the lack of preclearance.

II. Plaintiffs' Illustrative Plans do not satisfy *Gingles* prong one.

As previously explained by Defendant, Plaintiffs' rephrasing of *Gingles* prong one is inconsistent with the Supreme Court precedent, which requires a review of the minority *population*, not just the *district* created by Plaintiffs. [Doc. 71, pp. 12-14]. Plaintiffs also claim that their proposed plans would not result in retrogression, despite the statement by their expert that making significant changes to District 2—which is required to create a majority-African-American District 12—would be retrogressive. [Doc. 65-1, pp. 16-20]. While Plaintiffs cherry-pick Ms. Wright's testimony, she testified that reducing the African-American percentages in District 2 in 2011 would have been "problematic" because Georgia was still required to obtain preclearance for redistricting plans. Wright Dep. [Doc. 64] at 92:21-94:11.

Plaintiffs next ask the Court to put on blinders and not consider any metric other than African-American voting-age population in evaluating districts. While citing cases discussing whether to look at total population versus voting-age population, Plaintiffs continue to ignore the requirements

of *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994) (en banc), that require a review of the proposed remedy. The percentage of registered voters is important to this analysis, because Plaintiffs must show that their proposed remedy will accomplish what they set out to do. *Id*. Having an African-American majority of voter registration[5] is critical to making that determination, even if the voting-age population is below a majority—because the key question for prong one is whether African-Americans have the "ability to elect" candidates of choice. *Gingles*, 478 U.S. at 46.

Defendant incorporates his prior argument about the compactness of the minority community and the failure of Plaintiffs to show they have complied with *Gingles* prong one. [Doc. 65-1, pp. 15-21]; [Doc. 71, pp. 9-14].

III. Proportionality is relevant to this Court's consideration of this case.

While Plaintiffs argue that this Court should not consider proportionality at this stage of the proceeding, they do not contest the fact that candidates of choice of the African-American community are currently

[5] Plaintiffs mischaracterize Ms. Wright's testimony about the proper method of calculating the percentage of African-American registered voters. Ms. Wright testified that some of the voters whose race is listed as unknown are likely African-American, Wright Dep. at 194:13-16, but her method was the only way to avoid artificial inflation or deflation of registered-voter percentages. Wright Dep. at 196:12-20

representing five of Georgia's fourteen congressional districts, more than the proportion of African-Americans in the state as a whole. [Doc. 65-1, pp. 23-24]. Plaintiffs also ignore the Supreme Court's clear direction that proportionality is analyzed on a statewide basis, not a subset of the state. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006). Whether proportionality is considered now or during the totality-of-the-circumstances stage of this case, the 2011 Plan reflects—at a minimum—rough proportionality, which indicates that minority voters in Georgia have an equal opportunity to participate in the political process and to elect representatives of their choice.

CONCLUSION

Plaintiffs' inexcusable delays require this Court to dismiss their claims due to laches. But even if this case proceeds, Defendant is entitled to judgment as a matter of law regarding the first prong of *Gingles*. The rough proportionality of the African-American population and the number of effective districts demonstrate that no vote dilution is occurring in Georgia's Congressional elections. Defendant is entitled to summary judgment.

Respectfully submitted this 20th day of June, 2019.

Christopher M. Carr
Attorney General
Georgia Bar No. 112505

Annette M. Cowart
Deputy Attorney General
Georgia Bar No. 191199
Russell D. Willard
Senior Assistant Attorney General
Georgia Bar No. 760280
Cristina M. Correia
Senior Assistant Attorney General
Georgia Bar No. 188620
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Telephone: (404) 656-7063

/s/ Bryan P. Tyson
Bryan P. Tyson
Georgia Bar No. 515411
btyson@taylorenglish.com
Special Assistant Attorney General
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com
Taylor English Duma LLP
1600 Parkwood Circle, Suite 200
Atlanta, GA 30339
770-434-6868 office

Josh Belinfante
Georgia Bar No. 047399
jbelinfante@robbinsfirm.com
Special Assistant Attorney General
Robbins Ross Alloy Belinfante Littlefield LLC
500 14th Street, N.W.
Atlanta, Georgia 30318
678-701-9381 – Office
404-856-3250 – Fax

Attorneys for Defendant Secretary of State Brad Raffensperger

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing SECRETARY OF STATE BRAD RAFFENSPERGER'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT was prepared double-spaced in 13-point Century Schoolbook pursuant to Local Rule 5.1(C).

/s/ Bryan P. Tyson
Bryan P. Tyson
Georgia Bar No. 515411

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, I served the within and foregoing SECRETARY OF STATE BRAD RAFFENSPERGER'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT 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.

This 20th day of June, 2019.

/s/ Bryan P. Tyson
Bryan P. Tyson
Georgia Bar No. 515411