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

GEORGIA STATE CONFERENCE OF THE NAACP, as an organization; et al. Plaintiffs, v. STATE OF GEORGIA; et al. Defendants.	Civil Action No.: CA No. 1:17cv01427- TCB-WSD-BBM

Joint Preliminary Report and Discovery Plan

1. Description of Case:

(a) Describe briefly the nature of this action.

This is an action to enjoin the State of Georgia and its Secretary of State from enforcing Act No. 251 (2015 Ga. Laws 1413) ("H.B. 566"), insofar as it redistricts Georgia House of Representative Districts 105 and 111. Plaintiffs allege that H.B. 566:

1. was enacted with a discriminatory purpose and effect in violation of the Fourteenth Amendment of the U.S. Constitution and Section 2 of the Voting Rights Act of 1965 (52 U.S.C. §10301);

2. is a racial gerrymander that violates the Fourteenth Amendment because racial considerations predominated with respect to the drawing of the House District 105 and 111 boundary lines and the plan does not satisfy strict scrutiny; and,

3. is a partisan gerrymander that invidiously and improperly distorts the political process in violation of the Fourteenth Amendment.

Defendants deny the Plaintiffs' allegations.

(b) Summarize, in the space provided below, the facts of this case. The summary should not be argumentative nor recite evidence.

Plaintiffs' Statement of Facts:

The Georgia House of Representatives is composed of 180 members, each of whom is elected from a single-member district. Traditionally, states adopt a new redistricting plan every ten years, after the decennial Census, so as to comply with the Constitution's "one person, one vote" requirement.

The Georgia legislature, however, has repeatedly sought to amend its post-2010 redistricting plan for its House of Representatives, with the intention of protecting white Republican incumbents and ensuring the election of white Republican candidates.

It most recently did so in 2015, when it passed H.B. 566 in ways that departed from normal procedures. For example, African American legislators serving on reapportionment committees were excluded from the process of determining the changes.

Most importantly, the white Republican majority in the Georgia legislature used race as the predominant factor to move white votes in, and move African-American and other minority voters out, of House Districts 105 and 111 after African-American candidates almost beat white Republican incumbents in those districts and as the changing demographics of the existing districts made it increasingly likely that the incumbents would lose in future elections. Coupled with racially polarized voting in these House Districts, the 2015 redistricting plan intentionally dilutes the voting strength of African-American voters.

Since Georgians do not register to vote by party, and because party in Georgia is closely aligned with race, Georgia used race as a proxy to achieve a partisan end. By conducting an unusual mid-decade redistricting to protect white Republican incumbents at the expense of African-American voters, H.B. 566 represents an invidious partisan gerrymander.

Thus, Plaintiffs contend the redistricting constituted a racial gerrymander and a partisan gerrymander and was done with a racially discriminatory purpose.

Plaintiffs filed this action after the close of the 2017 legislative session because: 1) the results of the November 2016 general election demonstrate that the 2015 redistricting in House Districts 105 and 111 had a discriminatory impact; and 2) the Georgia House passed another redistricting bill (H.B. 515) on March 3, 2017. If H.B. 515 had been enacted, it would have raised legal issues similar to those in the present case. The Georgia Senate did not table H.B. 515 until March 28, 2017 and the legislative session closed on March 31, 2017.[1] Under these circumstances, it made sense for Plaintiffs to wait until the 2017 legislative session ended before filing this action.

Defendants' Statement of Facts:

Plaintiffs filed this action *after* the close of the 2017 legislative session, challenging 2015 legislation that revised the boundaries of a number of Georgia's 180 Georgia House of Representative districts, including the two (2) districts challenged here. The challenged districts were part of a routine mid-census redistricting. The Georgia Legislature has traditionally permitted, and in fact enacted, mid-census redistricting plans where all affected incumbents agree

[1] The legislative history of H.B. 515 can be found on the Georgia Legislature's website at: http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/515 (last checked June 26, 2017).

to the changes and the revisions otherwise comply with traditional redistricting principles. The challenged districts (105 and 111) were not majority minority districts either before or after the 2015 redistricting. The 2015 changes made to House Districts 105 and 111 did not have the purpose or effect of discriminating against minority voters. Race was not the predominant factor in the 2015 changes made to House Districts 105 and 111. The 2015 changes to House Districts 105 and 111 were not a partisan gerrymander.

(c) The legal issues to be tried are as follows:

Plaintiffs Statement of the Issues:

1. Whether the redistricting of House Districts 105 and 111 in H.B. 566 was done with a discriminatory purpose and had a discriminatory effect, in violation of Section 2 of the Voting Rights Act of 1965 and the Fourteenth Amendment to the U.S. Constitution.

2. Whether the redistricting of House Districts 105 and 111 in H.B. 566 constitute an unconstitutional racial gerrymander in violation of the Fourteenth and Fifteenth Amendments because traditional districting principles were subordinated to race and the plans fail to satisfy strict scrutiny.

3. Whether the redistricting of House Districts 105 and 111 in H.B. 566 constitutes an unconstitutional partisan gerrymander because (1) it invidiously

used race as a proxy to change district lines to protect Republican incumbents when no redistricting was required and thus was intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.

4. The nature, extent and timing of appropriate remedial relief in the event the Court concludes that Plaintiffs have established liability on any of their three claims for relief.

Defendants' Statement of the Issues:

Legal Issues Related to Count I of Plaintiffs' Complaint

1. Whether Plaintiffs' constitutional and statutory claims against the State of Georgia are barred by the Eleventh Amendment?
2. Whether the minority population is sufficiently large and geographically compact to constitute a majority of the citizen voting age population in either of the challenged districts?
3. Whether the minority population is politically cohesive?
4. Whether white voters vote as a bloc sufficiently to defeat the minority's preferred candidate?

5. Whether the 2015 legislative changes to House Districts 105 and 111 were racially motivated?

Legal Issues Related to Count II of Plaintiffs' Complaint

1. Whether race was the predominant factor in the 2015 legislative changes made to House Districts 105 and 111, and if so whether the plan satisfies strict scrutiny?

Legal Issues Related to Count III of Plaintiffs' Complaint

1. Whether the legal standard Plaintiffs propose for a partisan gerrymander claim is reliable in general and is reliable for examining single districts?
2. Whether race is a sufficient proxy for partisanship to be the basis for a partisan gerrymander claim?
3. If Plaintiffs' proposed standard is reliable, whether the changes made to House Districts 105 and 111 were intended to severely prejudice Plaintiffs on the basis of partisanship and had that effect?
4. If Plaintiffs' proposed standard is reliable, whether the changes made to House Districts 105 and 111 can be justified on other, legitimate legislative grounds?

(d) The cases listed below (include both style and action number) are:

(1) Pending Related Cases: None.

(2) Previously Adjudicated Related Cases: None.

2. This case is complex because it possesses one or more of the features listed below (please check):

_____ (1) Unusually large number of parties
_____ (2) Unusually large number of claims or defenses
__X__ (3) Factual issues are exceptionally complex (Plaintiffs disagree)
__X__ (4) Greater than normal volume of evidence (Plaintiffs disagree)
__X__ (5) Extended discovery period is needed (Plaintiffs disagree)
_____ (6) Problems locating or preserving evidence
_____ (7) Pending parallel investigations or action by government
__X__ (8) Multiple use of experts (Both parties agree)
_____ (9) Need for discovery outside United States boundaries
__X__ (10) Existence of highly technical issues and proof (Both parties agree)
_____ (11) Unusually complex discovery of electronically stored information

3. Counsel:

The following individually-named attorneys are hereby designated as lead counsel for the parties:

Plaintiff: William V. Custer and Jennifer Dempsey of Bryan Cave LLP are lead local counsel. Jon Greenbaum and Bradley S. Phillips are lead co-counsel for the Lawyers' Committee for Civil Rights Under Law and Munger, Tolles and Olson LLP, respectively.

Defendant: Cristina Correia, Assistant Attorney General

4. Jurisdiction:

Is there any question regarding this Court's jurisdiction?

__X__ Yes _____ No

If "yes," please attach a statement, not to exceed one page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.

Defendants contend that the constitutional and statutory claims against the State of Georgia are barred by the Eleventh Amendment and therefore this Court lacks subject matter jurisdiction over those claims.

Plaintiffs dispute that their claim under Section 2 of the Voting Rights Act against the State of Georgia is barred by the Eleventh Amendment and filed a response to the State's assertions concerning sovereign immunity in their pending motion to dismiss.

However, since the State has now declined to waive Eleventh Amendment sovereign immunity as a defense, Plaintiffs concede that their 14th Amendment claim under 42 U.S.C. § 1983 in Count One of the Complaint against the State is barred by the Eleventh Amendment and noted this concession in their response to Defendants' motion to dismiss.

5. Parties to This Action:

(a) The following persons are necessary parties who have not been joined:

None known at this time.

(b) The following persons are improperly joined as parties:

Defendants are challenging the joinder of the State of Georgia based upon the contention that the State has sovereign immunity under the 11th Amendment and therefore both the constitutional and statutory claims against the State of Georgia are barred. Plaintiffs dispute that

the State has sovereign immunity because they contend Congress abrogated sovereign immunity when it enacted Section 2 of the Voting Rights Act of 1965 pursuant to its authority under the Fourteenth and Fifteenth Amendments of the U.S. Constitution. As noted above, Plaintiffs concede that their constitutional claim against the State of Georgia, brought pursuant to 42 U.S.C. § 1983, is barred by the Eleventh Amendment.

(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted:

None known at this time.

(d) The parties shall have a continuing duty to inform the Court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.

6. Amendments to the Pleadings:

Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed.R.Civ.P. 15. Further instructions regarding amendments are contained in LR 15.

(a) List separately any amendments to the pleadings that the parties anticipate will be necessary:

None known at this time.

(b) Amendments to the pleadings submitted LATER THAN

THIRTY DAYS after the Joint Preliminary Report and Discovery Plan is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

7. Filing Times For Motions:

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below.

All other motions must be filed WITHIN THIRTY DAYS after the beginning of discovery, unless the filing party has obtained prior permission of the court to file later. Local Rule 7.1A(2).

(a) *Motions to Compel*: before the close of discovery or within the extension period allowed in some instances. Local Rule 37.1.

(b) *Summary Judgment Motions:* within thirty days after the close of discovery, unless otherwise permitted by court order. Local Rule 56.1.

(c) *Other Limited Motions*: Refer to Local Rules 7.2A; 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

(d) *Motions Objecting to Expert Testimony:* Daubert motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted. Refer to Local Rule 7.2F.

8. Initial Disclosures:

The parties are required to serve initial disclosures in accordance with Fed.R.Civ.P. 26. If any party objects that initial disclosures are not appropriate, state the party and basis for the party's objection. NOTE: Your initial disclosures should include electronically stored information. Refer to Fed.R.Civ.P. 26(a)(1)(B).

The parties will exchange initial disclosures on or before July 5, 2017.

9. Request for Scheduling Conference:

Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.

The Parties jointly request a scheduling conference in this matter. The issues proposed to be discussed at the status conference are:

1. The parties' disagreement with respect to their respective proposed discovery schedules which are set forth below.

Plaintiffs propose the following schedule:

1. Trial: Early December 2017

2. Pretrial Conference: November 2017

3. Close of discovery and deadline for dispositive motions: Early October 2017;

4. Mutual disclosure of expert reports: Early September 2017

5. Mutual disclosure of supplemental expert reports: Mid-September 2017

6. Commencement of discovery: June 13, 2017.

Defendants' Proposed Discovery Schedule

Pursuant to Local Rule 26.2A., discovery should *not* commence before Defendants have filed an Answer in this case. Defendants have filed a partial

motion to dismiss, seeking dismissal of all except the racial gerrymander claim asserted in the Complaint against Secretary Kemp. The differences in proof required for Plaintiffs' racial gerrymander claim and the partisan gerrymander and vote dilution claims are significant. For instance, a statistical analysis of racially polarized voting is required for Plaintiffs' vote dilution claim. That same statistical analysis is not necessary for Plaintiffs' racial gerrymandering claim. Likewise, statistical analysis of the partisan effects of the redistricting plan will be required for Plaintiffs' partisan gerrymandering claim and that same analysis is *not* probative of either of Plaintiffs' other claims. Therefore, Defendants request that the Court first address Defendants' motion to dismiss, to determine which claims will survive, *before* the commencement of discovery.

Additionally, Defendants oppose Plaintiffs' expedited discovery request because it does not afford Defendants sufficient time to consult with the multiple experts needed, depending on which claims move forward, to properly defend this action. Plaintiffs want *both* a larger number of depositions than permitted by local rule, and a shorter time than usual for a case of this complexity. While Defendants are mindful of the 2018 election calendar, it was Plaintiffs, not Defendants, that chose to file this action challenging 2015 legislation in mid 2017.

Defendants propose the following discovery schedule:

- Fact discovery begins: after ruling on MTD
- First Day to Conduct Depositions: two weeks after discovery opens
- Last day for Plaintiffs' Expert Disclosures:
    - 4 months after start of discovery (8 month discovery period for all claims)
    - 2 months after start of discovery (4 month discovery period if only racial gerrymandering claim proceeding)
- Last day for Defendants' Expert Disclosures: (30 days after Plaintiffs' Disclosures)
    - 5 months after start of discovery (8 month discovery period for all claims)
    - 3 months after start of discovery (4 month discovery period if only racial gerrymandering claim proceeding)
- Last day for Plaintiffs' Rebuttal Expert Disclosures:
    - 30 days after Defendants' Expert Disclosures (8 month discovery period for all claims)
    - 2 weeks after Defendants' Expert Disclosures (4 month discovery period if only racial gerrymandering claim proceeding)

- Last day to conduct depositions: 2 weeks before close of discovery
- Fact Discovery ends: 8 months after discovery begins
- Last Day for SJ motions: 30 days after close of discovery
- Last Day for Daubert motions: on last day to submit pretrial order
- Last Day to submit pretrial Order: 30 days after entry of the Court's ruling on summary judgment

10. Discovery Period:

The discovery period commences thirty days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed before expiration of the assigned discovery period. Cases in this Court are assigned to one of the following three discovery tracks: (a) zero month discovery period, (b) four months discovery period, and (c) eight months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing.

Please state below the subjects on which discovery may be needed:

1. The facts and circumstances leading to the enactment of H.B. 566;
2. Election histories and candidates;
3. Racially polarized voting;
4. Discriminatory purpose;
5. Discriminatory effect;
6. Partisan considerations;
7. Section 5 of the Voting Rights Act submissions to the U.S. Department of Justice;
8. Evidence concerning HD 105 and HD 111 electoral campaigns;

9. Socioeconomic conditions in HD 105 and 111;
10. Maps and demographics of HD 105 and 111;
11. Registration and turnout data by race.

If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery or that discovery should be conducted in phases or be limited to or focused upon particular issues, please state those reasons in detail below:

Defendants believe an 8 month discovery track is necessary *if* Plaintiffs are permitted to move forward on all three claims. Proceeding on all claims will require expert testimony for each of the three *Gingles* preconditions (at least two experts); expert testimony as to the proper measure of partisan gerrymandering; and expert testimony as to whether race was the predominant factor in the changes made to the challenged districts. Defendants believe 4 months is an appropriate discovery track *if* only Plaintiffs' racial gerrymander claim proceeds.

Additionally, the parties agree that more than ten (10) depositions per side will be necessary, and agree that the case involves highly technical issues of proof. For these reasons and the additional reasons identified in no. 2 above, Defendants believe this case is complex and should be assigned an 8 month discovery track.

11. Discovery Limitation and Discovery of Electronically Stored Information:

(a) What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court, and what other limitations should be imposed?

The parties request that both sides be permitted to take in excess of 10 but not more than 15 depositions without a further order of the Court, and Plaintiffs

request an expedited discovery, pretrial, and trial schedule. Defendants oppose commencing discovery prior to resolution of their partial motion to dismiss.

(b) Is any party seeking discovery of electronically stored information?

___X___ Yes _____ No

If "yes,"

(1) The parties have discussed the sources and scope of the production of electronically stored information and have agreed to limit the scope of production (e.g., accessibility, search terms, date limitations, or key witnesses) as follows:

Documents and information concerning elections and election histories; voter registration and turnout data; video and other electronically stored data related to legislative sessions, meetings, and actions by legislators, lobbyists, their staffs, and voters, including actions taken in connection with the enactment of H.B. 566, redistricting and proposed redistricting of HD 105 and 111, and other relevant electronic data to be determined.

(2) The parties have discussed the format for the production of electronically stored information (e.g., Tagged Image File Format (TIFF or .TIF files), Portable Document Format (PDF), or native), method of production (e.g., paper or disk), and the inclusion or exclusion and use of metadata, and have agreed as follows:

In most circumstances, the electronically stored data will be exchanged in commonly used formats such as Excel spreadsheets, PDF's, Word and common video or audio files. In the event files are in less commonly used formats, the parties will meet and confer about the best means for producing the data.

> In the absence of agreement on issues regarding discovery of electronically stored information, the parties shall request a scheduling conference in paragraph 9 hereof.

12. Other Orders:

> What other orders do the parties think that the Court should enter under Rule 26(c) or under Rule 16(b) and (c)?

Plaintiffs will renew their request for a scheduling conference to set a timeline for discovery, pretrial preparation, expert discovery, and trial in the event the parties cannot agree upon an expedited schedule to ensure that remedial relief can be implemented in time for the 2018 primary, runoff, and general elections in House Districts 105 and 111 in the event Plaintiffs establish liability on one or more of their three claims for relief.

13. Settlement Potential:

> (a) Lead counsel for the parties certify by their signatures below that they conducted a Rule 26(f) conference that was held on June 13, 2017, and that they participated in settlement discussions. Other persons who participated in the settlement discussions are listed according to party.
>
> For plaintiff: Lead local counsel (signature): Jennifer Dempsey

Other participants: Plaintiffs' Counsel: Gregory Phillips, Thomas Clancy, Julie Houk and John Powers.

For defendant: Lead counsel (signature): /s/Cristina Correia

Other participants: Josiah Heidt

(b) All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:

( ) A possibility of settlement before discovery.
( ) A possibility of settlement after discovery.
( ) A possibility of settlement, but a conference with the judge is needed.
(X) No possibility of settlement at this time but the parties will continue to confer during the course of the litigation.

(c) Counsel ( ) do or (X) do not intend to hold additional settlement conferences among themselves prior to the close of discovery. The proposed date of the next settlement conference is _____, 2017.

(d) The following specific problems have created a hindrance to settlement of this case:

This action was filed *after* the close of the 2017 legislative session. Defendants contend that this eliminated the possibility that a compromise districting plan could be adopted by the Georgia Legislature.

Plaintiffs acknowledge that the case was filed after the close of the 2017 legislative session for the reasons described above in section (b). However, Plaintiffs do not agree that this fact should necessarily preclude any possibility of settlement.

14. Trial by Magistrate Judge:

Note: Trial before a Magistrate Judge will be by jury trial if a party is otherwise entitled to a jury trial.

(a) The parties ( ) do consent to having this case tried before a magistrate judge of this Court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the clerk of court this day _____, of 20 .

(b) The parties (X) do not consent to having this case tried before a magistrate judge of this Court.

Respectfully submitted,

s/Julie Houk
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SCHEDULING ORDER

Upon review of the information contained in the Joint Preliminary Report and Discovery Plan form completed and filed by the parties, the Court orders that the time limits for adding parties, amending the pleadings, filing motions, completing discovery, and discussing settlement are as set out in the Federal Rules of Civil Procedure and the Local Rules of this Court, except as herein modified:

IT IS SO ORDERED, this day of , 2017.

_____
Hon. Timothy C. Batten, Sr.
United States District Court Judge

Certificate of Service

I hereby certify that on June 29, 2017, I electronically filed this Joint Preliminary Report and Discovery Plan using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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Julie Houk
John Powers
Ezra Rosenberg
Lawyers' Committee for Civil Rights Under Law
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I hereby certify that I have mailed by United States Postal Service, postage prepaid, the document to the following non-CM/ECF participants: NONE

This 29th day of June, 2017.

/s/Cristina Correia
Cristina Correia 188620
Assistant Attorney General