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

NAACP, et al., Plaintiffs, v. BRIAN KEMP, in his official as Secretary of State for Georgia, Defendant.	)	Case # 1:17-cv-01427-TCB-WSD-BBM
AUSTIN THOMPSON, et al., Plaintiffs v. BRIAN KEMP, in his official as Secretary of State for Georgia, Defendant	)	CONSOLIDATED CASES

AMICUS CURIAE BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Statement of Interest

Amici submitting this brief are Alliance for Better Georgia, Better Georgia and Fair District GA.

1. Alliance for Better Georgia is a 501(c)(3) nonprofit organization that works to promote community involvement across Georgia. Among its educational goals is increasing the effective participation of minorities in voting and more generally to promote racial justice. Bryan Long is the current Executive Director. Albert M. Pearson is Chair of the Board for Alliance for Better Georgia. The business address is: P.O. Box 1982, Athens, Georgia 30603. Website -- http://allianceforabettergeorgia.org/
2. Better Georgia is a 501(c)(4) organization dedicated to advocacy on a wide range of public issues, including redistricting and fair elections. Bryan Long is the current Executive Director. Amy Morton is Chair of the Board for Better Georgia. The business address is: P.O. Box 1982, Athens, Georgia 30603. Website -- http://bettergeorgia.org/. Facebook page -- https://www.facebook.com/bettergeorgia/.
3. Fair District GA is a 501(c)(4) a non-partisan organization whose focus is to fight gerrymandering by reforming the redistricting system in Georgia. It collaborates with a variety of advocacy and grassroots organizations to inform Georgians about the dangers of gerrymandering, to advocate for redistricting reform legislation, and to engage concerned citizens in this cause. Patricia Byrd is Chair of the Board. Website – (under construction).

Facebook page -- https://www.facebook.com/groups/252014951933842/?ref=bookmarks.

Twitter -- @FairDistrictGA.

This brief is submitted in support of the NAACP Motion for a Preliminary Injunction. It provides background information about (a) the legislative process culminating in the enactment of HB 566 which is under constitutional challenge and (b) the legislative process associated with HB 515, a similar bill proposed in the Georgia General Assembly two years later. The goal is to add insight into the issue of impermissible racial motivation behind both bills.

In addition, amici argue that mid-decade redistricting should be barred in circumstances where the **sole** purpose behind district boundary changes is to increase the probability that an incumbent will win reelection.

Introduction

As this case illustrates in miniature, redistricting in Georgia, as in many other states, is a taxpayer subsidized cartel through which the majority party – whether Democrat or Republican – insulates its members against the travail of political competition. The system protects the politically undeserving and the politically unfit – a form of reverse Darwinism – and fosters a corrosive tendency towards winner-take-all politics. (NAACP Memorandum of Points and Authorities,

at 10-16) ("Opening Memorandum"). The victims of this massive conflict of interest are members of the general public whose ability to resist the abuses is dwarfed by the resources at the command of legislators who draw the electoral maps. Voters are shunted around like pawns pursuant to incomprehensible statutes that the public cannot understand.

Mid-decade redistricting is the system at its worst. As the record in this case demonstrates, the boundary changes for Georgia HD 105 and 111 had nothing to do with implementation of the one person/one vote mandate or any other traditionally recognized justification for drawing district boundary lines.[1] (O'Connor Dep., 12-13-17 at 134-36, Exhibit 61; Wright Dep., 11-20-17 at 236-39). In recent years, Henry County and Gwinnett County have experienced substantial population growth and demographic change. Blacks and other minorities were migrating into both counties in large numbers. This was seen not

[1] By 2015, when HB 566 was enacted, the 2010 census data in Georgia was obsolete and getting more obsolete with each election cycle. Actions, as taken in this case to rebalance district populations, were just a guess. (Wright Dep., 11-20-17 at 220). The Supreme Court observes a legal fiction that "reapportionment plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability." League of United Latin American Citizens v. Perry, 548 U.S. 399, 421 (2006) (plurality opinion of Kennedy, J.); Georgia v. Ashcroft, 539 U.S. 461 n. 2 (2003).

as an opportunity to expand the reach of the Republican Party[2] but as an ominous trend. The Republican incumbents in HD 105 and 111 could adapt to the evolving demographics and work harder to attract minority voters or they could rearrange district boundaries to corral more white voters – in short, they could compete or they could cheat. They opted for the latter course and persuaded the General Assembly to move the goal posts. HB 566 was the legislative vehicle.

The purpose of this brief is to provide background to the enactment of HB 566 and to the attempted enactment of HB 515 two years later. The underlying motivation in both instances was racial. The attached dot plot maps, **(Exhibit 1 and 2),** show this racial pattern better than the welter of testimony, emails and charts that are part of the record in this case. While amici support the NAACP motion for preliminary injunction based on impermissible racial motivation, they also urge this Court to reject the concept of mid-decade redistricting where the **sole** purpose is incumbent self-preservation. Even if the NAACP argument prevails as it should, the structural problem will remain. The foxes will still be guarding the hen house. For reasons to be developed further, invalidating mid-decade redistricting or creating a strong presumption against its use would establish an

[2] Only two black Republicans have served in the Georgia General Assembly since Reconstruction: Willie Talton, sworn in January 10, 2005, and Melvin Everson, sworn in October 5, 2005. Neither one is currently serving in the House. No black Republicans have been elected to a statewide office.

important limitation on a power that otherwise will prove too tempting for legislators to resist.

Redistricting in Georgia: The Sausage Factory 2015

Georgia has been enmeshed in a long stream of redistricting cases dating back to the Supreme Court's one person/one vote decisions in Gray v. Sanders, 372 U.S. 368 (1963) and Wesberry v. Sanders, 376 U.S. 1 (1964). What began as a doctrine to equalize the voting power of state and congressional legislative districts has evolved into a tool unfortunately well suited for political self-dealing. Georgia's history of racial discrimination in all areas of voting rights, including redistricting, is so entrenched that several lower courts have taken judicial notice of the phenomenon. See, e.g., Georgia State Conference of the NAACP v. Fayette County Board of Commissioners, 950 F. Supp.2d 1294, 1314 (N.D. Ga. (2013); Brooks v. State Board of Elections, 848 F. Supp. 1548, 1560 (S.D. Ga. 1994). While the Democratic Party in Georgia and elsewhere in the South must bear its share of the blame for this history, the Republican Party has succumbed to the temptation to use race as a proxy for political partisanship.[3] The challenge for

[3] See, e.g., North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (2016) ("In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost **surgical** precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact,

voting rights advocates and the courts has been to penetrate the "bodyguard of lies" used to camouflage unconstitutional racial motivation.[4]

The origins of HB 566 can be traced back to the Supreme Court's ruling in Shelby County v. Holder, 570 U.S. 529 (2013). That decision gave the Georgia General Assembly a free hand to tinker with legislative districts knowing that Department of Justice preclearance was a thing of the past. In early 2015, Randall Nix, Chairman of the House Legislative and Reapportionment Committee, invited his colleagues to submit requests for changes to their districts. Nix routed inquiries to the Legislative and Congressional Reapportionment Office (LCRO). (Nix Dep., at 54-67, 83-84). The person to see was Dan O'Connor. As Nix testified,

> Dan probably knows more about the maps than any human being alive, and he was – Dan could stand right here and name every district and pretty much give you the boundaries. So he was, he was one of those people that had – knew all the stats, the statistics, and he was much deeper than I could ever be. (Nix Dep. at 93).

The incumbents for HD 105 and 111 took advantage of Nix's offer.

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impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State's true motivation.")

[4] See, e.g., Foster v. Chatman, ___ U.S. ___, 136 S, Ct. 1737, 1745-47 (2015) (death penalty case where state forcefully denied impermissible racial motivation during jury selection even when confronted with prosecutor's own internal documents to the contrary).

The drafting of HB 566 was a process, not a singular event. It involved a number of one-on-one meetings and consultations monitored by the House leadership. The process was Republican dominated and, while not officially secret, it occurred entirely outside of public view. (Nix Dep., 183-95). Representatives who wanted changes in their districts dealt directly with the LCRO, which as the record strongly suggests, is an arm of the Republican Party. At some point, they looked at maps pulled up on a computer monitor, reviewed potential boundary changes and discussed how those changes might influence their political performance. **There is no written or electronically preserved record of what transpired at any these meetings, particularly those involving Gina Wright, Executive Director of the LCRO.** This Court basically is being asked to accept the self-serving testimonial narratives of the principals involved, each of whom, despite being hazy on many details, shares a common memory: race played no role in the redrawing of any district lines in HB 566, specifically for HD 105 and 111.

However, one source of **contemporaneous documentary evidence** about this process survives: the emails and files of Dan O'Connor. As developed at length in the NAACP's Opening Memorandum, these documents tell a very different story from the Republican insider's **post hoc oral narrative.** These

documents – frank and unguarded – were prepared and circulated more than two years prior to the present lawsuit. Before, during and after the enactment of HB 566, O'Connor stressed the electoral significance of population and demographic shifts into and out of Henry and Gwinnett counties. (O'Connor Dep., 12-13-17 at 129-33). Arguably the most useful metric for understanding the Republican political dilemma was voter registration data which is maintained by a voter's race or ethnicity and by home address. (O'Connor Dep., 12-13-17, at 22). Unlike the 2010 census data, voter registration data is current. It allows politicians to generate a geographically targeted profile of eligible voters likely to participate in upcoming elections. **(Exhibits 1 and 2 are illustrative).** The danger for Republicans arises when the number of **minority registered voters** in a district approaches 40%. (O'Connor Dep.,12-13-17 at 71, 141-42, 156, 286-91; Exhibits 238 and 246). By 2015 that point was close at hand for both HD 105 and 111. According to O'Connor, if the existing district boundaries remained the same, both Republican incumbents would be in political jeopardy. For more than a year, he sounded the alarm to anyone who would listen.

Defendant Kemp, it is interesting to note, does not directly challenge O'Connor's deposition testimony or quibble over the authenticity of his many communications, reports and conversations. This is most likely because O'Connor

is remarkably well liked around the State Capitol and possesses an enviable level of professional credibility. In 2013, the Georgia House of Representatives passed a resolution honoring O'Connor on his 50th birthday, stating that "his significant organizational and leadership talents, his remarkable memory of the history of the Georgia Legislature, and his keen sense of vision have earned him the respect and admiration of his colleagues and associates." **(Exhibit 3).** O'Connor's contacts within Republican political circles are wide ranging, including key figures in the Georgia General Assembly leadership, (O'Connor Dep., 12-13-17, Exhibits 179, 187, 189 198 and 248); academics such as Dr. Charles Bullock, a noted political scientist at the University of Georgia (O'Connor Dep., 12-13-17, Exhibits 92, 213); and nationally connected political operatives such as Randy Evans who recently was nominated to be Ambassador to Luxembourg. (O'Connor Dep., 12-13-17, Exhibits 179, 187). Judging from the tone and content of the numerous email exchanges and reports in the record, it is clear that O'Connor's political insights are sought after and highly regarded. His views about the centrality of race to the Republican Party's position of power in Georgia – unchallenged by his many correspondents – are not the quirky musings of a "data junkie" to use Gina Wright's dismissive characterization of them. (Wright Dep., 10-20-17 at 210). Quite the contrary, they are a powerful reflection of the Republican preoccupation

with race, which as a matter of fact motivated and shaped the redrawing of the HD 105 and 111 district boundaries. **(Exhibit 4).**

Defendant Kemp attempts to quarantine O'Connor's testimony[5] and to redirect the Court's attention to Gina Wright who figuratively rides the white horse to save HB 566. In her affidavit, which contradicts her deposition testimony in several key respects,[6] she claims to have been the exclusive architect of the redrawn HD 105 and 111 boundaries and insists that her only concern was improving the "political performance" of her Republican clients. Indeed, she remembers redrawing the boundaries of HD 105 and 111 without peeking – even once – at the racial data in her Maptitude program even though such data would have been a mere click away. To the extent that Wright did consider race, which she had to admit given her deposition testimony, she did so after the fact only and insists that it did not infect her handiwork. Wright's purity of mind and purity of heart is calculated to serve as a kind of universal solvent cleansing the HB 566

[5] Wright acknowledges that O'Connor gave out information to many people but claims not to have known about it until her office had to respond to a subpoena in this case. "He didn't discuss it with me." (Wright Dep., 10-20-17 at 210).

[6] Exhibit 1 to the NAACP Reply Memorandum describes the evolution of Wright's testimony from her two depositions to her affidavit. For an example of her familiarity with racial demographics, see Wright Dep., 10-20-17 at 98-108.

deliberative process of any racial taint.[7] If Wright's efforts produced a reduction in black voting age population and registered black voters in both HD 105 and 111, those effects, this Court is asked to believe, were secondary, random and unintended consequences which just happened to be politically decisive for the Republican incumbents in the 2016 elections.[8]

Kemp makes much of the fact that the opportunity for the tweaking of districts was open to all House members – Democrat or Republican, black or white – and emphasizes that the changes incorporated into HB 566 were acceptable to all affected House members. The subtext of this argument is that if everyone agrees to cheat, then it can't be cheating. HB 566 passed the House by a vote of 168-0 with the support of House Minority leader Stacey Abrams. Her vote was a signal to fellow Democrats to follow suit, which they did. The question looms: how

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[7] Kemp appears to acknowledge that race may have played a minor, role in the thinking that led up to the redrawing of the HD 105 and 111 boundary lines. Wright's testimony, however, is the key to Kemp's apparent contention that because her motives were pure and her thoughts were partisan only, race could not have been the "predominant" motivation behind HB 566. Cooper v. Harris, ___ U.S.___, 137 S. Ct. 1455, 1474 (2017). In the course of reaching its decision, the Court in Cooper noted the testimony of the North Carolina redistricting guru. Like Wright, the guru claimed to have relied on political not racial data in drawing Congressional district lines. **More specifically and most implausibly, he claimed to have displayed only political not racial data on his computer screen.** Id. at 1476.

[8] As O'Connor opined, neither Republican incumbent would have won in HD 105 and 111 without the HB 566 changes. (O'Connor Dep., 12-13-17 at 76, 90)

could a bill backed by the most prominent Democrat in Georgia – an African American – be tainted by racial motivation?

One of the disquieting features of the legislative process in Georgia (and no doubt elsewhere) is that legislators often do not actually read, much less understand, the bills that they vote upon. That was the case with respect to HB 566. Quite literally, no one in the House knew or had any way of knowing what was in the bill, including possibly the House Minority Leader herself. The bill was indecipherable. As one Republican lawmaker aptly put it, the text of HB 566 looked like "computer code." **(Exhibit 5, ¶ 6).** There was no **substantive** hearing about the bill in the House. There were no maps showing the before and after of boundary changes to any affected House district, including HD 105 and 111.[9] Nor was there any document showing – in narrative or visual format – the demographics of population shifts. Chairman Nix carried the bill on the floor of the House and even he could not explain what the bill did. **(Exhibit 5, ¶ 3).** Like Marley's ghost, HB 566 had a decidedly spectral quality. Following passage in the House, it wafted over to the Senate where, according to tradition, the expectation

[9] See the dot plot maps of HD 105 and 111 showing graphically the swapping out of registered voters. **(Exhibit 1).** Unavailable in 2015, these maps tell the backstory of HB 566 as well as it can be told. As will be discussed later, the ability to generate dot plot maps in conjunction with opposition to HB 515 in 2017 was pivotal to getting the Senate to table that bill. **(Exhibit 2).**

was quick approval, without change and without independent legislative scrutiny. **(Exhibit 5, ¶ 5).**

In the Senate, however, something unusual happened. The façade of harmony cracked. Mike Crane, Republican Chairman of the Senate Reapportionment and Redistricting Committee, raised two formidable objections to HB 566 during floor debate. First, based on information that had come to his attention, he questioned the premise that all affected House representatives had agreed to the bill. Two Democrats whose districts – HD 59 and 60 – had been included in HB 566 wanted the changes affecting them removed. **(Exhibit 5, ¶ 6).** Second, he cautioned that the changes would dilute black voting strength in HD 59, a majority-minority district, from 58% to 52% -- a potential Voting Rights Act violation. **(Exhibit 5, ¶ 6).** Both Senator Crane and Senator Vincent Fort spoke on those issues. They proposed an amendment to HB 566 which would have sent the bill back to the House. **(Exhibit 5, Attachment E).** The amendment failed. HB 566 passed in the Senate on March 31, 2015 with 14 votes against. **(Exhibit 5, Attachment A).** Nonetheless, the issue of impermissible racial motivation had finally come to light.

In April of 2015, opponents of HB 566 lead by Senator Vincent Fort obtained maps and demographic information for HD 105 and 111. **(Exhibits 5,**

Attachment F, G, H and I). Both were districts that Democrats hoped to flip in 2016. Though Fort recognized it was a long shot, he campaigned against the boundary changes to HD 105 and 111 in hopes of persuading Governor Deal to veto the bill. The data available to him at that time showed a reduction of slightly more than 2% in black voting age population in both districts. In HD 105, according to a report provided by Dan O'Connor, this translated to more than a 3% reduction in black voter registration which is the more critical of the two categories of information. **(Exhibit 5, Attachment G).** Governor Deal signed HB 566 on May 12, 2015. The Republican incumbents in HD 105 and 111 won reelection in 2016 in races that they would not have won without the changes wrought by HB 566. (O'Connor Dep., 12-13-17 at 76, 90).

Redistricting in Georgia: The Sausage Factory 2017

The Republicans in the House of Representatives were so enamored with HB 566 that they repeated the drill in 2017 aiming once again to bolster the reelection hopes of vulnerable incumbents. The legislative vehicle was HB 515. Among the supplicants was Brian Strickland of HD 111, one of the beneficiaries of HB 566. As in 2015, the bill was rushed through the House passing three days after its introduction. **(Exhibit 6).** But this time the Democratic electoral radar was working. There was significant opposition to the bill in the House. Representative

Sheila Jones of HD 53 pointed out that she was not consulted about a bill which would move white voters from her district into HD 40, which at the time was held by a politically vulnerable white Republican. **(Exhibit 7).** The ostensible quid pro quo – not initially communicated to Jones – was that she would receive additional black voters from HD 40 and thus the changes would have no adverse effect on her politically. From the warped perspective of the sponsors of HB 515, why would a black member of the House complain about having more black voters packed into her district?

The opposition to HB 515 persisted in the Senate. By then, election experts had the time and the necessary resources (a) to analyze a bill that was unintelligible to the lay person not to mention virtually every member of the House and Senate and (b) to document its effects on the **population by race of registered voters** in HD 40 and HD 111. As reflected in the attached letter dated March 21, 2017 **(Exhibit 8)**, the results were stark as evidenced not only by the numbers but also by the maps showing graphically the manipulation of registered voters by race. **(Exhibit 2).** The Republican willingness to shift district boundaries to protect incumbents unwilling or incapable of reaching out to minority voters was fully on display. In this instance, the political resistance to HB 515 so shamed the Senate that the bill was tabled at the end of 2017 session. **(Exhibit 6).**

The continuity between HB 515 and HB 566 offers a telling glimpse into the political mind of the Republican Party. Race was at the heart of mid-decade redistricting in both instances. Neither bill could have been drafted without the complicity of the LCRO as its records make manifestly clear. Those records – along with the people who generated and read them – are literally drenched in commentary and analysis focusing on the relationship between race and Republican incumbent political performance. It is implausible in the extreme that Gina Wright, who was surrounded by such people and aware of their thinking, did not act as their instrument in fashioning HB 566 and 515.

The Allure of Mid-Decade Redistricting

As this case is positioned, if this Court accepts Kemp's partisanship defense of HB 566, that finding would be subject to a strong presumption of correctness. Cooper v. Harris, ___ U.S.___, 137 S. Ct. 1455, 1474 (2017). This case would be over unless one of the cases pending before the Supreme Court changes the constitutional landscape. On the other hand, if this Court finds impermissible racial motivation to have been predominant, it won't matter what the Supreme Court does. The plaintiffs would be well on their way to a remedy for the 2020, if not the 2018, election cycle. But in voting rights cases such as this one, the battle over impermissible racial motive will continue in the years ahead – a seemingly

endless war of attrition. From the challenger's perspective, winning or losing will often turn on the fortuity of finding a smoking gun document that belies solemn, straight-faced claims of good faith.[10]

Amici urge the Court to consider an alternative basis for ruling in favor of the NAACP plaintiffs. As flawed as the redistricting process is in this country, undertaking it once every ten years has a benefit. It limits incumbency protection. The majority party doing the redistricting every decennial is allowed to draw electoral maps that avoid pairing incumbents against each other. That is one of the spoils of victory. The majority party is not required to commit political suicide. But the incumbent protection prerogative should be exercised only once in the context of statewide redistricting where the interests of all incumbents have to be weighed and balanced at the same time. Over the course of the ensuing decade, elected officials – even those lavishly benefitting from the configuration of electoral districts – should adapt to changes in their constituencies and earn the right to stay in office. That is a bedrock feature of representative government. If

[10] Sometimes this can be a life or death matter. See Foster v. Chatman, ___ U.S. ___, 136 S, Ct. 1737, 1745-47 (2015) (death penalty case from Georgia where Batson challenge upheld based on discovery through an Open Records request of district attorney's file which showed that race motivated the prosecution's exercise of jury strikes. Those records did not come to light until state habeas corpus proceedings had been initiated.)

elected officials won't or can't adapt, they should not be allowed to move the goal posts or change the configuration of the playing field.[11]

Mid-decade redistricting, as undertaken in this case, short circuits that dynamic. This may seem like a small thing now, but it might not be in the future if this Court upholds HB 566. The Court in Larios v. Cox, 300 F. Supp.2d 1320, (N.D. Ga. 1320 (2004), affirmed 542 U.S. 947 (2004), recognized that the avoidance of election contests **between** incumbents was a constitutionally permissible legislative purpose. Id. at 1348. But, significantly, the Larios Court, citing several Supreme Court and lower court decisions, also said that the "general protection of incumbents" was **not** a valid redistricting goal. Id. at 1348-49. The law on that point has not changed since 2004. The principle should apply here. The only justification given for changing the boundaries of HD 105 and 111 was to protect the incumbents against the looming prospect of defeat by an electoral challenger. While a categorical ruling on this ground would not eliminate mid-decade redistricting entirely, it would eliminate one of its worst features.

[11] Currently, there does not appear to be any Supreme Court decision or any academic literature discussing the question whether the citizenry has a legally cognizable or constitutionally protected interest in **retaining** existing boundaries. One can readily imagine political activists or prospective candidates in a district investing great effort and perhaps a lot of money to organize a challenge to an incumbent only to have their supporters moved away. This is the political equivalent of "sweat equity" and there was not a single mention of that as a countervailing consideration against the enactment of HB 566.

Respectfully submitted, this April 23, 2018.

/s/Albert M. Pearson, III
Albert M. Pearson, III
Georgia Bar No. 569275

Albert M. Pearson, LLC
Box 162
2897 North Druid Hills Road, NE
Atlanta, GA 30329
404-281-4087
amp1859law@gmail.com

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document was prepared using Times New Roman, 14-point, and otherwise conforms to the requirements of Local Rule 5.1.

/s/Albert M. Pearson, III
Albert M. Pearson, III
Georgia Bar No. 569275

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on April 23, 2018, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record in this action.

/s/Albert M. Pearson, III
Albert M. Pearson, III
Georgia Bar No. 569275

Attorney for Amici Curiae