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

NAACP, *et al.*,	*	
	*	
Plaintiffs,	*	
	*	Case No. 1:17-cv-01427-TCB-WSD-BBM
v.	*	
	*	
BRIAN KEMP, in his official capacity as Secretary of State for the State of Georgia,	*	CONSOLIDATED CASES
	*	
Defendant.	*	
	*	
AUSTIN THOMPSON, *et al.*,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	
BRIAN KEMP, in his official capacity as Secretary of State of the State of Georgia,	*	
	*	
Defendant.	*	

RESPONSE TO PLAINTIFFS' OBJECTIONS TO DECLARATIONS OFFERED BY DEFENDANT IN RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Brian Kemp, in his official capacity as Secretary of State of Georgia, defendant in these consolidated actions, submits this Response to Plaintiffs'

Objections to the Declarations that Kemp submitted. For the reasons stated below, Plaintiffs' Objections should be overruled.

1. Plaintiffs' Objections to the Declaration of Gina Wright should be overruled.

Plaintiffs' objections disregard both the inapplicability of the sham affidavit rule in the context of a preliminary injunction and ignore much of Gina Wright's deposition testimony. Plaintiffs make inferences about her deposition testimony that are not supported by the testimony and then complain that the testimony in her declaration is inconsistent with their inferences.

As an initial matter Defendant notes that the sham affidavit rule is limited to affidavits or declarations submitted "for the transparent purpose of creating a genuine issue of fact where none existed previously." *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1306 (11th Cir. 2016) (citing *Tippens v. Celotex Corp.*, 805 F.2d 949, 953-54 (11th Cir. 1986); *Van T. Junkins & Assocs. v. U.S. Indus.*, 736 F.2d 656 (11th Cir. 1984)). While recognizing that the rule "is most commonly used when a party attempts to create an issue of fact to avoid summary judgment," Plaintiffs discern no reason not to apply the rule in the context of a preliminary injunction. Doc. 143-1 n. 1. The reason the sham affidavit rule applies *only* in the context of summary judgment is that a court cannot make a credibility determination

on summary judgment, leaving the only choices the exclusion of the affidavit or allowing the affidavit and, where a genuine issue of fact is created, defeat of summary judgment. The same is not true here, where a declaration is submitted in opposition to the Plaintiffs' preliminary injunction motion and the Court is free to make credibility determinations.

Moreover, even if the sham affidavit rule applies in the preliminary injunction context, the testimony must be "inherently inconsistent" for a court to disregard it. *Tippens*, 805 F.2d at 951 (holding that where the affidavit is not "inherently inconsistent with the deposition . . . any question of credibility or weight to be given to the evidence resulting from variances between an affidavit and deposition is a question of fact for the trier of fact, be it the judge or jury."). A declaration that clarifies ambiguous points in a deposition does not create a sham. *Piatti v. Bank of Am., N.A.*, 2009 U.S. Dist. LEXIS 10505, 10-13 (N.D. Ga. Feb. 11, 2009). As the Eleventh Circuit has repeatedly advised, "[a] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Santhuff v. Seitz*, 385 Fed. App'x 939, 944-945 (11th Cir. 2010) (quoting *Tippens*, 805 F.2d at 953).

Finally, a review of the full deposition of Gina Wright demonstrates that there is no conflict between her deposition testimony and her declaration, much less any inherent inconsistency.

A. Plaintiffs' objection to ¶¶ 5 and 43 of Gina Wright's Declaration (No. 137-1) rests on a nit-picking reading of deposition testimony that misses the point.

Moreover, Plaintiffs' speculation that someone other than Ms. Wright drew the district lines is just that: speculation. Nobody other than Ms. Wright has said that they drew any lines.

Ms. Wright's statement that she "worked with members of the General Assembly" doesn't change the fact that none of those members drew any lines. A review of Ms. Wright's deposition, just beyond the pages cited by the Plaintiffs, clearly states that she alone was the person that worked on the plans that were put into the bill. Wright Depo 16:13 – 17:1.

More particularly, Mr. O'Connor's deposition testimony answers Plaintiffs' suggestion that Ms. Wright cannot exclude his participation. Mr. O'Connor testified that he "wasn't involved in the ... map drawing of 111." O'Connor Dep., 140:4-5; *see also* 135:15-16 ("And again, I wasn't involved in 111."). Likewise, he had no involvement in the drawing of new lines for HD 105:

> Q So, I'm going to ask you with respect to District 105, was District 105 changed to eliminate a split precinct?

A I don't recall.

Q You don't recall that as being a primary reason; correct?

A I wasn't involved in this. No, I don't recall that.

Q Sure. But is it fair to say that the primary objective of, District 105 was to make it safer for the Republican incumbent?

A Well, again, I wasn't involved in that, so I won't speculate.

O'Connor Dep. 134:13-25.

Again, review of Ms. Wright's deposition testimony shows there is no conflict between her deposition testimony and her declaration. In the declaration, she affirmatively states that Dan O'Connor "had no responsibility for drawing any part of the redistricting plan included in HB 566," and states she did not discuss the redistricting plan with him. Doc. 137-1 ¶ 43. In her deposition, Ms. Wright states that she doesn't "recall discussing the boundary lines or the proposed boundary lines with him." Depo 193:2-7. She is then asked about "anything *else* with respect to the plan," i.e., anything *beside* the district boundaries, and she again doesn't recall anything but concedes it is possible. Plaintiffs want to paint this concession as one admitting that she might have discussed the district boundaries, i.e., the redistricting, with Dan O'Connor. However, that was not Ms. Wright's deposition testimony and as noted above O'Connor also testified that he had *no role* in the redistricting,

Accordingly, the "sham affidavit" rule does not apply to ¶¶ 5 and 43 of Ms. Wright's Declaration.

B. Plaintiffs' objection to ¶¶ 7-41 of Gina Wright's Declaration (No. 137-1) should be overruled. Plaintiffs' claim that Ms. Wright used racial data in drawing the new district lines rests on a misconstruction of her deposition testimony. It is one thing to say that she considered race in drawing the lines and quite another to say that she "eventually look[ed] at it to make sure that I did not do significant harm in that respect." Wright Dep. I:29:2 – 30:9. In the latter case, something other than race, i.e., political considerations, drove the redistricting process.

More significantly, this is completely consistent with her declaration. Ms. Wright explains that after moving precincts and blocks around to achieve her political end, she *then* "checked the racial breakdown of the districts and discovered that the African-American percentage had decreased from 36.69% to 34.69%, a decrease of 2%. I did not view the 2% decrease in African-American population as a concern since that was not a majority minority district." Doc. 137-1 ¶ 22. *See also* ¶ 40 (describing decrease in African-American percentage in HD 111).

Plaintiffs' argument about what Ms. Wright saw or didn't see in her "pending changes box" is not supported by her deposition testimony. While Ms. Wright testified that she usually keeps a variety of data in the pending changes box,

including both election data and racial population data, she never testified at her deposition that she kept racial data visible while working on the 2015 plan.

That said, awareness of race is not equivalent to racial gerrymandering. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). Rather, it is the Plaintiffs' burden to show that race was "the predominating factor motivating the legislature's decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Finally, Plaintiffs cite *another witness'* testimony (Rep. Nix) in support of their claim that Wright's declaration is a sham. Doc. 143-1 n. 2. The sham affidavit rule applies to "inherent inconsistencies" in a witnesses *own* testimony not simply because there appears to be contrary testimony from another witness.

C. There are good reasons why Ms. Wright didn't consider race in the drawing of the new district lines. Those reasons start with the fact that neither HD 105 nor HD 111 is a black-majority district. See No. 28 at 23-25. As non-majority districts, they fail to satisfy Gingles 1. *See Thornburg v. Gingles*, 478 U.S. 30, 48 (1986) ("[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact enough to constitute a majority in a single-member district.") Put differently, the African-American voters in those districts can elect the

candidates of their choice only with the help of a sufficient number of the votes of non-minority voters to generate a majority.

How many such non-minority votes the candidate of choice of a non-majority minority gets is a matter of politics. And, the Voting Rights Act says nothing about politics. *Cf. Nipper v. Smith*, 39 F. 3d 1494, 1525 (11th Cir. 1994) ("Electoral losses that are attributable to partisan politics ... do not implicate the protections of Sec. 2."). Because Section 2 was not implicated, there was no compelling reason to consider race in drawing the new district boundaries for HD 105 and HD 111.

> If a State has good reason to think that all the "*Gingles* preconditions" are met, then so too it has good reason to believe that §2 requires drawing a majority-minority district. *See Bush* v. *Vera*, 517 U. S. 952, 978, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality opinion). But if not, then not.

Cooper v. Harris, 137 S. Ct. 1455, 1470 (2017).

D. Plaintiffs' objection to ¶ 42 of Ms. Wright's Declaration as a sham is an example of Plaintiffs inferring facts from Ms. Wright's testimony that simply are not there. Ms. Wright's declaration states:

> I met with all of the legislators affected by the redistricting of HD 105 and HD 111, including Representatives Chandler and Strickland. However, to the best of my recollection, neither Representative Chandler nor Representative Strickland asked that I move any particular block(s) or precinct(s) in or out of their districts. Neither Representative Chandler nor Strickland discussed with me any desired racial effect of the redistricting. Both Representative Chandler and

> Strickland were interested in the political performance numbers (%TRepVots14) of their respective districts.

Doc. 137-1 ¶ 42. Plaintiffs contend this testimony, about the 2015 redistricting, is inconsistent with Ms. Wright's deposition testimony that in 2014 she worked on a couple of plans for HD 104 and HD 105 and shared them with Representative Chandler *and* she shared a statistical report which included the racial breakdown in the district. Doc. 143-1 at 6-7. While there is absolutely nothing inconsistent between Ms. Wright's deposition testimony and her declaration, Plaintiffs appear to infer that because the racial make-up of the districts was provided to Representative Chandler, she and Ms. Wright must have discussed a "desired racial effect of the redistricting." *Id.*

That's clearly *not* what the deposition states. In fact, Ms. Wright testified that the reports produced were not standard reports.

> The reason these reports were produced is because we don't standardly produce the political data, but since that was the objective in the maps, these custom reports are put together to show the impact of the data.

Depo 302:11-16. Far from some concession that Representative Chandler discussed a "desired racial effect," Ms. Wright's deposition testimony is that she and Rep. Chandler were focused on political data in 2014. That the 2014 report also included the racial breakdown of the district is not inconsistent with any part of Ms. Wright's declaration.

Finally, Plaintiffs note that Ms. Wright testified at her deposition that she discussed "changing demographics" in Gwinnett County with Representative Chandler in 2014. Doc. 143-1 at 7. Plaintiffs' implication is that *racial* demographics were discussed. However, when asked at the deposition what her understanding of the "changing demographics" was, Ms. Wright responded as follows:

> Well, you can look at political data. You can look at a lot of other data that shows from different election cycles that some of the areas in the county that used to vote Republican are now voting Democratic.
>
> You can see that moving across, even if you look at the most recent election data throughout the county, so that's an indicator that there's change going, you know, going on throughout the county definitely in that respect.

Depo 24:16 – 25:3. Asked if she looks at race data as well, Ms. Wright responds that she does, but adds the following:

> Well, the data that we have in our system to use for redistricting is solely from the 2010 census, so the most recent comparison we would be able to make would be from 2010 to 2000. And you can definitely see changes in that particular data from 2010 to 2000 in the changes in the demographics at that point. I don't have data on race that is newer than that.

Depo 25:9-17. Nothing in this testimony is inconsistent with Wright's declaration, much less "inherently inconsistent."

2. The Objections to Tina Lunsford's Declaration should be overruled.

A. Plaintiffs' shot gunned general objection to ¶ 4 of the Lunsford Declaration should be overruled for that reason alone.[1]

Moreover, Ms. Lunsford's Declaration is "based on [her] personal knowledge" and is sworn. Its contents are plainly relevant to the balancing of equities, given that "what is workable" is one of the legal considerations. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017). Since becoming Director of Registrations and Elections for Henry County in January 2015, she has been responsible for the conduct of general elections in November 2016 and a special election for HD 11 and SD 75 in January 2018.[2] She is plainly competent to testify to the facts and has not been offered as an expert witness.

B. Plaintiffs' objection to ¶ 6 should be overruled because Ms. Lunsford's experience provides a basis for the testimony offered.

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[1] To the extent that Plaintiffs object to Ms. Lunsford's and other Declarations on the ground of relevance, Secretary Kemp notes that Federal Rule of Evidence 401 makes evidence relevant if it has "any tendency" to make any consequential fact "more or less probable than it would be without the evidence." *Id*. That standard is not a high one, and the Ms. Lunsford's Declaration and the others filed by Secretary Kemp plainly meet it.

[2] Secretary Kemp again notes that turnout in that January 2018 stand-alone special election was only 6.99% of the registered voters involved. *See* http://results.enr.clarityelections.com/GA/72405/Web02-state/#/.

C. Plaintiffs' objection to an obvious typographical error should be overruled. The reference is obviously to paragraph 6 of Ms. Lunsford's Declaration, given that it is the preceding paragraph and the only other paragraph containing references to notice or notices.

3. The Objections to Lynn Ledford's Declaration should be overruled.

As with the Lunsford Declaration, Ms. Ledford's Declaration is relevant because it speaks to "what is workable." *North Carolina v. Covington*, 137 S. Ct. at 1625.

A. Plaintiffs' objection to ¶ 5 of Ms. Ledford's Declaration (No. 137-6) rests in part on the implicit assertion that all of the 57 or more all special elections they say have been conducted since 2010 are alike. In so doing, they overlook the fact that they propose changing district lines and moving people on short notice. A special election like the one they want is entirely different from one conducted to fill a vacancy without any change in district lines. In the latter case, there is no need to tell some voters that they will be voting in a different district

As for Ms. Ledford's assertion that special elections are not very common, she has been Director of Registration and Elections for Gwinnett County since

2001.[3] She knows how many special elections her office has had to conduct and also knows what her office has to do to secure polling places.

B. Plaintiffs' objection to ¶ 8 of Ms. Ledford's Declaration also partakes of the implicit assertion that all special elections are alike. In addition, they understate the burden on Gwinnett County, which includes translating the ballot materials into Spanish.

The Plaintiff's invocation of the January 2018 special election for HD 111 mixes an apple with an orange. Their proposed remedy would entail identifying and notifying voters in the affected portions of HDs 104 and 105 of the change, something that the January 2018 special election did not involve.

C. Plaintiffs' objection to ¶ 10 runs into the turnout results for the two stand-alone special elections conducted most recently in Georgia. *See* No. 137 at 45.

4. The Objections to Howe Taing's Declaration should be overruled.

Plaintiffs complain that the Declaration of Howe Tang (No. 137-2) is post hoc. On that basis, no forensic accounting review, accident reconstruction, or other simulation would be admissible.

[3] She is now also Directora de Elecciones for Gwinnett County. No. 137-6 at 2, ¶ 2.

As the declaration makes clear, the underlying issue involves an e-mail shown to Rep. Chandler in her deposition, which appears as Exhibit 33 (No. 103-24) to the Plaintiffs' Memorandum. The face of that exhibit shows that it consists of three pages, bates numbered GA2-001195, GA2-001197, and GA2-001198. As Taing notes, GA2-001197 and GA2-001198 were attached to GA2-1196, not to GA2-001195. But, Plaintiffs showed GA2-001995 to Rep. Chandler in her deposition, representing that it included GA2-001197 and GA2-001198 as attachments. Chandler Dep., 99:9 – 102:6. Plaintiffs then stressed not only that Representative Chandler received voter registration data by race, but that she *did not receive* any election data. *See* discussion Doc. 137 at 12-13. The implication of Plaintiffs' cross examination was that since Representative Chandler thanked Dan O'Connor for the data she received, and according to Plaintiffs all she received was registration data, that must have been the data she had sought.

Taing explains that the attachment Plaintiffs included with GA2-001995 was actually an attachment to a *different* email, GA2-001996. Taing's testimony is relevant to whether GA2-001997 and GA2-001998 where attachments to the email in GA2-001995 or not.

5. The Objections to the Declaration of Chris Harvey should be overruled.

A. Plaintiffs object to Harvey's assertion (No. 137-4, ¶ 5) that turnout is "usually considerably lower" in special elections than it is in general primary and general elections. Insofar as Harvey is the Director of Elections for the State Elections Division in the Office of the Secretary of State, and the election results are on that Office's website, Harvey is in a position to know that. *See also* Attachment A.[4] Accordingly, that objection should be overruled.

B. Plaintiffs' objection to ¶¶ 7-8 of Harvey's Declaration should be overruled. Paragraph 7 explains that county officials, like Ms. Lunsford and Ms. Ledford, not the Secretary of State determine who is eligible to vote and in which precinct. Paragraph 8 points to the difficulty of attempting to redistrict voters in the time between an election and a runoff. Given that absentee ballots are already being distributed, the election process is plainly underway.

These paragraphs speak to "what will work" and are plainly relevant. It will be up to the Court to decide what weight to give them.

[4] Plaintiffs say they looked at the website and counted the number of special elections. (No. 143-1 at 10).Having done that, they could have probed deeper to look at turnout.

6. The objection to Michael Barnes's Declaration should be overruled.

Plaintiffs complain that Barnes doesn't address the possibility that this Court could tell him to do something different on a tight timetable. That is not a valid relevance objection; it is disguised argument as to weight and should be overruled for that reason.

CONCLUSION

For the foregoing reasons, this Court should overrule each and every objection made by the Plaintiffs.

Respectfully submitted this 18th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing **RESPONSE TO PLAINTIFFS' OBJECTIONS TO DECLARATIONS OFFERED BY DEFENDANT IN RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

s/ Frank B. Strickland
Frank B. Strickland

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I served the within and foregoing **RESPONSE TO PLAINTIFFS' OBJECTIONS TO DECLARATIONS OFFERED BY DEFENDANT IN RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** 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:

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This 18th day of April, 2018.

s/ Frank B. Strickland
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Election Turnout[1]

Special Election, HD 175, February 13, 2018	9.93%
Special Election, SD 17, HD 111, January 9, 2018	6.99%
Special Election, SDs 6 and 39, HDs 60 and 89 December 5, 2017	17.11%
Special Election, SDs 6 and 39, HDs 4, 26, 60, 89, 117, and 119, November 7, 2017	18.17%
Special Election, SD 54, December 13, 2016	6.61%
Special Election Runoff, HD 162, April 26, 2016	5.65%
Special Election Primary, HD 162, March 29, 2016	12.40%
Special Election Primary (R), SD 20, December 1, 2015	9.11%
Special Election, HD 58, January 19, 2016	2.78%
Special Election Primary, SD 4, HDs 92 (D) and 122 November 3, 2015	12.75%
Special Election Runoff, HDs 80, 146, and 155, August 11, 2015	15.08%
Special Election Runoff, HDs 24 and 55, July14, 2015	8.78%
Special Election Primary, HDs 48 (D), 80, 146 (R), and HD 155 (R), July 14, 2015	12.37%
Special Election Primary, HD24 (R), HD 55 (D) June 16, 2015	9.22%
Special Election Runoff, SD 43, HD 122, Dec. 1, 2015	11.25%
Special Election Runoff (R), HDs 50, 120, Feb. 3, 2015	13.27%
Special Election, HDs 50, 120, January 6, 2015	13.32%

[1] These results can be obtained through: http://sos.ga.gov/index.php/Elections/current_and_past_elections_results.

Special Election, HDs 2 and 22, January 7, 2014	9.12%
Special Election Runoff, SD 14, HDs 104 and 127 December 3, 2013	6.69%
General Elections	
General Election 2016	76.53%
General Election 2014	50.03%
General Primary, etc., May 2014	19.56%
General Election 2012	72.19%
Congressional	
Special Election, Runoff CD6, June 2017	58.16%