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

ALPHA PHI ALPHA FRATERNITY INC., *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia, *Defendant*.	CASE NO. 1:21-CV-05337-SCJ

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Relying on this Court's previously finding in their favor on a single state House district—and ignoring the subsequent developments in discovery about the creation of that district—Plaintiffs' response brief is an effort to force this case to trial to avoid the impact of the law on their claims. While Plaintiffs are correct that summary judgment grants to *plaintiffs* are rare in the Section 2 context, summary judgment grants to *defendants* are not.

In reviewing Mr. Cooper's various explanations for his maps, Plaintiffs ignore his inability to explain his recitation of traditional principles when

pressed. They ask this Court to engage in a beauty contest over maps—which it cannot. Further, although Plaintiffs actually reviewed primary data, unlike the *Grant* and *Pendergrass* plaintiffs, that data does not support their conclusions about racial polarization. Plaintiffs then resort to several points about the totality of the circumstances, despite not moving for summary judgment themselves. Plaintiffs have not shown a dispute over any material fact necessary to this Court's decision on Defendant's motion because Plaintiffs have failed to make their threshold showing.

ADDITIONAL FACTUAL BACKGROUND

I. The map-drawing process.

While pointing out several features of the town hall meetings that were consistent with prior redistricting processes [Doc. 230-1, p. 6], Plaintiffs admit a key point: map-drawing was and is a "partisan affair." [Doc. 244, p. 11]. This Court cannot ignore the partisan nature of the claims here, especially given the political leanings of the various plans and the individual Plaintiffs in this case [Doc. 230-1, p. 8]—because if this is a partisan-gerrymandering case masquerading as a Voting Rights Act case, it is nonjusticiable. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019); *see also Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1269 (11th Cir. 2020) ("complaints of unfair partisan advantage based on ballot order present nonjusticiable political questions").

II. Plaintiffs' illustrative plans.

While Plaintiffs retell Mr. Cooper's version of map-drawing in this section of their brief, they ignore the key points raised by Defendant: Mr. Cooper used features of the software to show him where Black individuals were located and he consistently made racial splits of counties to create his new majority-Black districts. *See* [Doc. 230-1, pp. 9-14]. And while trumpeting statistics like the number of split counties on the various plans, Plaintiffs conveniently overlook Mr. Cooper's alterations in parts of the state that had nothing to do with creating majority-Black districts in order to make his overall plan metrics look better. [Doc. 230-1, pp. 11, 13-14].

This Court need not reach the list of other factors considered by Mr. Cooper in the various districts [Doc. 244, pp. 18-21], because the reliance on race invalidates Mr. Cooper's entire process. And his use of selective reductions in county splits in areas unrelated to his changes masks the significant differences in the illustrative plans and the enacted plans.

ARGUMENT AND CITATION OF AUTHORITIES

While "it is unusual to find summary judgment awarded to the plaintiffs in a vote dilution case . . . there have been cases before this Court and the Supreme Court where summary judgment was granted to the *defendants*." *Ga. State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336,

1345 (11th Cir. 2015) (emphasis original); *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (granting summary judgment to defendants in Section 2 case). As explained by all parties, a plaintiff bears the burden of first proving each of the three *Gingles* preconditions to show a Section 2 violation. *Nipper v. Smith*, 39 F.3d 1494, 1510 (11th Cir. 1994). After a plaintiff establishes the three preconditions, a court then reviews the "Senate Factors" to assess the totality of the circumstances. *Id.* at 1512; *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986); *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

This is why a grant of summary judgment to Defendant in this Section 2 case is required. For Plaintiffs to succeed, they have to show vote dilution based on an "intensely local appraisal" of the facts in the local jurisdiction. *De Grandy*, 512 U.S. at 1020-21 (no statistical shortcuts to determining vote dilution); *Gingles*, 478 U.S. at 45, 78 (stating that courts must conduct a "searching practical evaluation of the 'past and present reality'" of the challenged electoral system and whether vote dilution is present is "a question of fact"); *White v. Regester*, 412 U.S. 755, 769-70 (1983) (assessing the impact "in the light of past and present reality, political and otherwise"). But Defendant can succeed in this case by pointing out Plaintiffs' failure to establish one of the *Gingles* preconditions. *See Johnson v. DeSoto Cnty. Bd. of*

Comm'rs, 204 F.3d 1335, 1343 (11th Cir. 2000); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999); *Brooks v. Miller*, 158 F.3d 1230, 1240 (11th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567 (11th Cir. 1997). That is exactly what Defendant has done here, despite Plaintiffs' failed efforts to create areas for dispute.

I. Plaintiffs have not shown a dispute about any material fact regarding the first *Gingles* precondition.

All parties agree that illustrative plans in Section 2 cases may not subordinate traditional redistricting principles to race more than is necessary to avoid a Section 2 violation. [Doc. 244, pp. 24-25]. But this view quickly becomes a chicken-and-egg problem for Plaintiffs. How do Plaintiffs say they can show a Section 2 violation? By drawing a map using race to create new districts, so long as they do not adopt a policy of maximization. [Doc. 244, pp. 25-26]. But this oversimplifies the analysis because if the state legislature had used a similar approach, it would be accused of racial gerrymandering.[1] And while Plaintiffs repeat Mr. Cooper's recitation of principles, they ignore his inability to explain those very principles when asked. [Doc. 230-1, p. 11]. In

[1] Indeed, the State faces just such an allegation—that it used race on the enacted plans more than necessary to comply with Section 2 and that it split counties on a racial basis. *See Ga. State Conf. of the NAACP, et al. v. State of Georgia, et al.*, Case No. 21-cv-5338-SCJ-SDG-ELB (Doc. No. 59, ¶¶ 28, 201); Report of Dr. Moon Duchin, (*Ga. NAACP* Doc. 142-2, pp. 2-9).

relying on the lack of higher concentrations of Black voters from split counties being included in new majority-Black districts, Plaintiffs have apparently not reviewed Mr. Morgan's report, which is cited in Defendant's brief. [Doc. 230-1, p. 11].

In order to prevent this Court from granting summary judgment to Plaintiffs on the first *Gingles* precondition, Plaintiffs must point to evidence that the illustrative plans could be a proper remedy. *Nipper*, 39 F.3d at 1530-31; *see also Burton*, 178 F.3d at 1199 ("We have repeatedly construed the first *Gingles* factor as requiring a plaintiff to demonstrate the existence of a proper remedy."). While citing to Mr. Cooper's recitation of his plan's principles, Plaintiffs cannot point to evidence that justifies Mr. Cooper's racial focus and racial splits in the creation of those plans. A proper remedy is one the legislature could adopt or this Court could order. And this Court cannot adopt a racial gerrymander as a remedy.

II. Plaintiffs have not shown a dispute about any material fact regarding the second and third *Gingles* preconditions.

Plaintiffs' response on the question of whether they have established legally significant racially polarized voting in Georgia elections fails both on the text and the precedent they provide. First, Plaintiffs claim that Defendant's view reads some extra-textual language into the statute in an effort to create

a heightened evidentiary standard for Plaintiffs. Second, Plaintiffs baselessly charge Defendant with concocting a "new" legal standard for finding legally significant racial polarization in Section 2 cases. But this standard existed in this Circuit even before *Gingles* was handed down, *see, e.g., United States v. Marengo Cnty. Comm'n*, 731 F. 2d 1546, 1567 (11th Cir. 1984), and certainly endured after a divided court in *Gingles* produced only a bare plurality opinion on the issue. Neither of these arguments saves Plaintiffs' claims from summary judgment.

A. The text of Section 2 does not support Plaintiffs' legal argument.

Plaintiffs begin with the text of Section 2 in an effort to find refuge for their interpretation. They accuse Defendant of "rewriting" Section 2 when Defendant points out that the text clearly and unequivocally prohibits only those voting practices imposed "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*…" 52 U.S.C. § 10301(a) (emphasis added). Plaintiffs claim that because Defendant insists that the statute be applied by its terms, which is to say, only to those situations where citizens' right to vote is denied or abridged "on account of race or color," Defendant is altering the text to read "*exclusively*

on account of race or color." But the application of basic principles of statutory interpretation undermines Plaintiffs' argument.

As an initial matter, "under the doctrine of *expressio unius est exclusio alterius*, the expression of one thing implies the exclusion of others." *Alltel Commc'ns, Inc. v. City of Macon,* 345 F.3d 1219, 1222 (11th Cir. 2003). So the very fact that the statute expressly carves out measures for protected classes exposed to practices or procedures that occur "on account of race" is to deny those measures when practices or procedures occur for other reasons.[2] The wording of the statute invites this exclusionary implication because Congress added another avenue of potential relief: when a voting standard results in a denial or abridgement of the right to vote "in contravention of the guarantees set forth in [the now inoperative] section 4(f)(2)." 52 U.S.C. §10301(a). Thus, Congress deliberately defined and delimited the scope of protection afforded by Section 2 in the text of the law itself. And while subpart (b) of Section 2 most assuredly *informs* that scope by calling for a totality of circumstances analysis, it does not *expand* it.

[2] To be sure, this does not create an "intent test" that returns the state of the law to immediately after *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980), which Congress specifically sought to avoid. Rather, it carves out basic protections for jurisdictions to avoid liability under Section 2 when plaintiffs do nothing more than point out that voters of different racial backgrounds are voting differently and that white voters are the majority in the jurisdiction.

Plaintiffs' last—and ultimately unavailing—line of defense in support of their textual argument cites a single line in the Senate Report to claim that "on account of race" as used in Section 2 means something other than what it clearly says. Instead, Plaintiffs claim the Senate Report shows that, in fact, it means "with respect to race." Plaintiffs want this Court to believe that if race is somehow *involved* in the decision-making process of voters, that it is sufficient to satisfy the "on account of race" limitation of Section 2. But with this interpretation, Plaintiffs engage in exactly the kind of prohibited revisionism of statutory language of which they accuse Defendant. Indeed, Plaintiffs call upon this selection from the Senate Report, which is buried in a footnote, to suggest that it should, in effect, *override* the language Congress chose. [Doc. 244, p. 33].

Even if this Court were inclined to elevate a footnote in the Senate Report[3] to a level that allows it to supersede the statute at issue, as Plaintiffs

[3] The Senate Report, while informative to courts conducting a totality of circumstances analysis, is most decidedly *not* the voice of Congress when it comes to the issue of statutory interpretation. Rather, it is the voice of a subset of senators that does not carry the force of law. *See, e.g.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 376 (1st ed. 2012) ("As for committee reports, they are drafted by committee staff and are not voted on (and rarely even read) by the committee members, much less by the full house. And there is little reason to believe that the members of the committee reporting the bill hold views representative of the full chamber.").

urge, when that footnote is placed in its proper context, Plaintiffs' suggested interpretation makes even less sense. The footnote explicitly states it is intended to address the concerns articulated by the amendment's opponents that the text would "create a requirement of purposeful discrimination," effectively entrenching the Supreme Court's decision in *Mobile*, which the Congress sought to address in the 1982 amendments to the VRA. S. Rep. No. 97-417, at 28, n.109 (1982). *See also, id.* at 6 ("This amendment… *restores* the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden."* (emphasis added)). So, the committee was careful to point out that, "it is patently clearly [sic] that Congress has used the words 'on account of race or color' in the [Voting Rights] Act to mean 'with respect to' race or color, *and not to connote any required purpose of racial discrimination." Id.* at 28, n. 109 (emphasis added).

B. Plaintiffs' review of the relevant caselaw does not push their meager evidence over the line.

Plaintiffs point to *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) to support their position that Defendant's interpretation of Section 2 inappropriately elevates Plaintiffs' burden of proof so that they are required to "disprove 'politics' as a

cause of polarization." [Doc. 244, p. 35]. But Defendant is suggesting no such standard. Rather, Defendant merely notes that Plaintiffs must first show that their votes are being denied "on account of race," and that the perfunctory evidence presented by Plaintiffs' racial polarization expert, Dr. Handley, simply does not carry that burden. Indeed, if anything, Dr. Handley's data tends to show exactly the opposite. This is especially important because this Court "must be careful not to infer that *racial* targeting is, in fact, occurring based solely on evidence of partisanship." *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, No. 22-11143, 2023 U.S. App. LEXIS 10350, at *25 (11th Cir. Apr. 27, 2023) (emphasis original).

First, Dr. Handley agreed that her general-election data simply shows that Black voters and white voters are voting differently. [Doc. 231, ¶¶ 66, 68]. In every general-election contest Dr. Handley examined, Black voters consistently vote cohesively for the Democratic candidate, regardless of the race of that candidate, and white voters consistently vote cohesively for the Republican candidate, regardless of the race of that candidate. [Doc. 231, ¶¶ 69-73]. While Dr. Handley examined some Democratic primaries, which she said controls for party, the results showed that the cohesiveness among Black voters evaporated. [Doc. 231, ¶ 68]. Moreover, Dr. Handley claims this data was essentially irrelevant to the conclusions she made in her report because

her "conclusion that voting is polarized in Georgia is *based on the general elections*." [Doc. 231, ¶ 68] (emphasis added). And by limiting her conclusions in this way, Dr. Handley's report waves away the inconvenient truth that unlike the general-election contests she examined, "[i]n the Democratic primaries the support of Black voters for Black candidates varies widely, and does not reach into the 90% range." [Response to Statement of Additional Material Facts, ¶ 171 (Alford Rep. p. 4)]. Under the relevant standard, this paltry evidentiary showing does not establish legally significant racially polarized voting.

To establish legally significant racially polarized voting, Plaintiffs must still prove that race is the basis for voting patterns, which ordinarily would mean excluding partisan divergence, since we would expect partisan divergence to explain voting patterns. *Cf., e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J.) ("[G]ood faith [sh]ould be presumed in the absence of a showing to the contrary."). Likewise, Defendant does not assert, as Plaintiffs suggest, that Section 2 claims must fail where race and partisanship are "correlated." If race is the explanatory factor *and also* correlated with party, Section 2 can apply. The question is what happens when partisan disagreements, not race, explain voting patterns—and

this is a necessary part of Plaintiffs' burden of proof. *League of Women Voters of Fla.*, 2023 U.S. App. LEXIS 10350, at *25.

By contrast, Plaintiffs' extreme view is that mere differential voting is sufficient to establish racial polarization. [Doc. 244, pp. 34-35]. Of course, under that rule, there is racially polarized voting in every election where a minority-preferred candidate loses. And under this rule, if the majority votes against Black-preferred candidates for the entirely race-neutral reason that those candidates are not Republicans, that is still a Section 2 violation. That cannot be the rule, as it jeopardizes the constitutionality of Section 2 altogether. *See* [Doc. 230-1, pp. 27-29].

C. Plaintiffs cannot import their potential totality of the circumstances evidence to save their *Gingles* burden.

In an effort to shore up what their statistical analysis lacks, Plaintiffs veer into their proof on the Senate factors, asking this Court to reach the totality before it finds the *Gingles* preconditions are met. This Court should not consider these additional facts because it can only reach the totality *after* it concludes the three *Gingles* preconditions are present. *Nipper*, 39 F.3d at 1512; *De Grandy*, 512 U.S. at 1011. Further, these factors are immaterial to Defendant's motion, because Defendant has not moved for summary judgment on the totality of the circumstances. Thus, while this Court could consider what

weight to give the testimony of Dr. Adrienne Jones and Dr. Jason Ward at trial, it cannot consider those factors at summary judgment, nor do they create a dispute of fact because they are not material to deciding Defendant's *motion*, even if they could be material to deciding the overall *case* based on Plaintiffs' burden of proof.

Under the record as it stands, Plaintiffs have failed to carry their evidentiary burden to create an issue of material fact as to whether racial polarization exists. This Court should, therefore, grant Defendant's Motion for Summary Judgment.

CONCLUSION

Plaintiffs make significant, but irrelevant, efforts to create issues of fact in their response. The facts demonstrate that, on issues material to this Court's ruling, Plaintiffs have not shown disputes of fact that would prevent this Court from granting summary judgment to Defendant. This Court should grant summary judgment to Defendant and dismiss this case.

Respectfully submitted this 3rd day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Reply Brief has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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