

**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.

CIVIL ACTION FILE
NO. 1:21-CV-5337-SCJ

COAKLEY PENDERGRASS, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as the Georgia
Secretary of State, *et al.*,

Defendants.

CIVIL ACTION FILE
NO. 1:21-CV-5339-SCJ

ANNIE LOIS GRANT, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as the Georgia
Secretary of State, *et al.*,

Defendants.

CIVIL ACTION FILE
NO. 1:22-CV-122-SCJ

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION FOR JUDICIAL NOTICE**

INTRODUCTION

After opposing Defendants’ motion to take judicial notice of data from the U.S. Census because they said it was “‘subject to reasonable dispute’ . . . from a source whose accuracy can ‘reasonably be questioned,’” [APA Doc. 279, p. 3], *Alpha Phi Alpha* Plaintiffs (“APA Plaintiffs”) now seek to have this Court take judicial notice of an unbuilt highway—proposed nearly 20 years ago, that has not yet received any construction funding—because they say the *proposed* route “will connect communities that would share representation under the illustrative state legislative maps Plaintiffs submitted in this case.” [APA Doc. 283, p. 2]. Because “[i]ndisputability is a prerequisite’ to judicial notice,” [APA Doc. 284, p. 3] (quoting *Grayson v. Warden, Comm’r, Alabama DOC*, 869 F.3d 1204, 1225 (11th Cir. 2017)), and because the route of a theoretical highway is irrelevant to the claims and defenses in this case, this Court should deny APA Plaintiffs’ Motion.¹

¹ While Plaintiffs’ Motion was filed only in the *Alpha Phi Alpha* case, this Court directed all Defendants to respond in the other Section 2 cases. [*Grant* Doc. 249]; [*Pendergrass* Doc. 237]. Thus, the same response that was filed in *Alpha Phi Alpha* is filed in the *Grant* and *Pendergrass* cases with clarification around which Plaintiff group made the motion to ensure the record is complete on behalf of all Defendants as required by the Court.

FACTUAL BACKGROUND

APA Plaintiffs propose this Court take judicial notice of an amendment to a bill passed by Congress almost two years ago.² As APA Plaintiffs note, H.R. 3684 was signed into law on November 15, 2021.³ Despite this bill passing almost two years ago, APA Plaintiffs' mapdrawing expert never mentioned this proposed highway. Further, APA Plaintiffs listed several documents they rely on in their Motion on their exhibit list and Defendants objected to those documents based on relevance and hearsay. *See* [APA Doc. 275-1, p. 43] (Exs. 320 and 322).

The highway referenced in the Warnock-Cruz Amendment to H.R. 3684 was proposed at least as far back as 2005, when Sens. Isakson and Chambliss proposed studying an interstate "that would link Augusta, Macon, and Columbus, Georgia."⁴ During the intervening time, the highway has not been

² While not required, Defendants had no prior notice of APA Plaintiffs' attempt to judicially notice these facts, unlike the facts Defendants sought to judicially notice, which had first been proposed as stipulated facts but rejected by Plaintiffs. APA Plaintiffs also filed their motion on August 22, 2023, which would have made the response due on the first day of trial if this Court had not accelerated the response time.

³ *See* <https://www.congress.gov/bill/117th-congress/house-bill/3684/text>

⁴ Sen. Johnny Isakson, U.S. Senator for Georgia, Press Release, "Chambliss, Isakson Seek to Include Study of Two Proposed New Interstates in National Highway Funding Bill," April 28, 2005, <https://web.archive.org/web/20110927071306/http://isakson.senate.gov/press/2005/042805interstates.htm>

built, and the proposed amendment that was passed in 2021 does not provide funding.⁵

Further, the text of the legislation seems to contradict the facts APA Plaintiffs request this Court notice. APA Plaintiffs request the Court notice that the proposed highway will “*connect* Macon, Milledgeville, Wrens, and Augusta, Georgia.” [APA Doc. 283, p. 2] (emphasis added). But the text of the legislation cited by APA Plaintiffs⁶ indicates that the proposed highway route goes “*near* Milledgeville” and would “*bypass* Wrens.” *Id.* at pp. 8–9 (emphasis added). In any case, without the necessary environmental impact studies, geological studies, and other realities that could alter the expected route, APA Plaintiffs rely at most on legislative language about the potential route of a not-yet-built road.

⁵

See <http://www.gulfcoaststrategichighway.org/#:~:text=Congressional%20designa%20of%20the%20Interstate,the%202021%20bipartisan%20infrastructure%20bill> (“The IIJA does not include federal funding allocations for projects on any new interstates including the I-14 System.”).

⁶ <https://www.warnock.senate.gov/wp-content/uploads/2021/08/I-14-Warnock-Cruz-text.pdf>

ARGUMENT AND CITATION OF AUTHORITY

As this Court earlier explained when it granted judicial notice to several facts sought by Defendants:

“[T]he taking of judicial notice of facts is, as a matter of evidence law, a highly limited process . . . [and] would bypass[] the safeguards which are involved with the usual process of proving facts by competent evidence in district court.” *Carrizosa v. Chiquita Brands Int’l, Inc.*, 47 F.4th 1278, 1307 (11th Cir. 2022) (quoting *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997) (en banc)). Pursuant to Rule 201 of the Federal Rules of Civil Procedure, “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Civ. P. 201(b). “Indisputability is a prerequisite” to judicial notice. *Grayson v. Warden, Comm’r, Alabama Doc*, 869 F.3d 1204, 1225 (11th Cir. 2017) (quoting *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)).

[APA Doc. 284, pp. 2–3].

I. The proposed route of a theoretical highway is not generally known and can be reasonably questioned.

APA Plaintiffs request this Court take judicial notice of the proposed route of a theoretical highway that does not currently exist, is not funded, and has been the subject of discussion by Georgia lawmakers for nearly 20 years. While APA Plaintiffs’ Motion cites cases relating to judicial notice of maps with *existing* locations, including the Eleventh Circuit’s decision in *United States v. Proch*, 637 F.3d 1262, 1266 n.1 (11th Cir. 2011) and *Cobb*

Theatres III, LLC v. AMC Entm't Holdings, Inc., 101 F. Supp. 3d 1319, 1329 (N.D. Ga. 2015), APA Plaintiffs never identify how those cases support taking judicial notice of *unbuilt* roads.

As discussed above, the text of the legislation discusses bypassing some of the very communities APA Plaintiffs ask this Court to notice would be connected but at the very least, the final route is not yet set. Further, the road remains unbuilt and no funding was appropriated by the amendment APA Plaintiffs rely on. Thus, the accuracy of whether certain communities are in fact “connected” on this proposed highway, as APA Plaintiffs claim, can reasonably be questioned, making the proposed highway route an inappropriate topic for judicial notice.

II. APA Plaintiffs make assumptions about relevance that are not supported by their claims.

APA Plaintiffs also overstate whether the facts about which they seek notice “are relevant to a determination of the claims presented in a case.” *Dippin’ Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1204 (11th Cir. 2004). While Voting Rights Act cases must consider the totality of the circumstances, APA Plaintiffs ask this Court to *assume* a number of facts to make their claims about an unbuilt highway relevant to the case, in addition

to essentially overruling Defendants' objections to some of the documents on which they rely. [APA Doc. 275-1, p. 43] (Exs. 320 and 322).

APA Plaintiffs claim that "interests shared by communities in the eastern Black Belt of Georgia are directly relevant to this case." [APA Doc. 283, p. 4]. But reaching this question requires this Court to assume facts APA Plaintiffs' own experts did not. For example, Mr. Cooper agreed that there was no uniform definition of the Black Belt (let alone an eastern portion of it): "I mean as they make clear at outset, there is no uniform definition for the Black Belt, so I'm speaking in very general terms when I refer to eastern Black Belt and western Black Belt." [APA Doc. 221 (Cooper Dep.) at 83:21–24]. Further, Mr. Cooper relied on a number of counties that are completely unrelated to the proposed route of I-14 as being part of the Black Belt when creating his illustrative plans. *Id.* at 81:3–25 (identifying Savannah, Athens, and Brunswick as communities within his definition of the Black Belt for purposes of mapdrawing).

Thus, APA Plaintiffs' primary argument for relevance—that the proposed route shows shared interests of communities in the eastern Black Belt—requires this Court to assume a definition APA Plaintiffs' own expert did not utilize. And APA Plaintiffs' expert makes no reference to relying on this particular highway when considering the creation of his illustrative

plans, so relying on the proposed route would be a post-hoc justification for the plan that was not considered by the mapdrawer.

Thus, there is no relevance to the totality of circumstances and APA Plaintiffs' Motion is an attempt by APA Plaintiffs to have this Court judicially notice facts that their own expert did not rely on as a way to bolster their case while also avoiding Defendants' objections to some of those documents. This Court should consider the testimony at trial on relevant communities, not short-circuit that process by judicially noticing facts whose accuracy can be questioned and whose relevance to this case is non-existent or only extant if this Court assumes definitions APA Plaintiffs' own expert did not.

CONCLUSION

Because APA Plaintiffs' proposed facts are not supported by the sources on which they rely, can be reasonably questioned, and are irrelevant to the issues in this case, this Court should deny APA Plaintiffs' Motion for Judicial Notice.

Respectfully submitted this 28th day of August, 2023.

Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb

Deputy Attorney General
Georgia Bar No. 743580
Russell D. Willard
Senior Assistant Attorney General
Georgia Bar No. 760280
Elizabeth Vaughan
Assistant Attorney General
Georgia Bar No. 762715
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Bryan P. Tyson
Bryan P. Tyson
Special Assistant Attorney General
Georgia Bar No. 515411
btyson@taylorenghish.com
Frank B. Strickland
Georgia Bar No. 687600
fstrickland@taylorenghish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenghish.com
Diane Festin LaRoss
Georgia Bar No. 430830
dlaross@taylorenghish.com
Donald P. Boyle, Jr.
Georgia Bar No. 073519
dboyle@taylorenghish.com
Daniel H. Weigel
Georgia Bar No. 956419
dweigel@taylorenghish.com
Taylor English Duma LLP
1600 Parkwood Circle
Suite 200
Atlanta, GA 30339
Telephone: 678-336-7249

Counsel for Defendants

CERTIFICATE OF COMPLIANCE

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

/s/ Bryan P. Tyson
Bryan P. Tyson