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

PAMELA DWIGHT, an individual;	*	
BENJAMIN DOTSON, an individual;	*	
HUDMAN EVANS, SR., an individual;	*	
and MARION WARREN, an individual,	*	
	*	
Plaintiffs,	*	
	*	**CA No. 1:18cv02869-RWS**
v.	*	
	*	
BRIAN KEMP, in his official capacity	*	
as Secretary of State of the State of	*	
Georgia,	*	
	*	
Defendant.	*	

DEFENDANT'S BRIEF IN SUPPORT OF
MOTION TO DISMISS

Introduction

Plaintiffs, four African-American voters residing in Congressional Districts 10 (Dotson, Evans and Warren) and 12 (Dwight) have brought this suit alleging that African-American voters residing in and around Congressional District 12 (CD 12), including areas currently in Congressional District 10, have had their vote diluted by the current congressional redistricting plan. Plaintiffs bring this challenge pursuant to Section 2 of the Voting Rights Act (VRA). However, Plaintiffs do *not* allege that African-Americans can make up a majority of the

voting age population in any newly formed CD 12. For this reason, Defendant now moves to dismiss Plaintiffs' complaint.

Facts Alleged

Following the 2010 U.S. Census the State of Georgia gained one congressional representative, increasing the number of congressional districts in the state from thirteen (13) to fourteen (14). In 2011 the Georgia legislature adopted the congressional redistricting plan currently in place and now challenged by Plaintiffs. Doc. 1 ¶ 24. The plan was precleared by the United States Department of Justice on December 23, 2011. *See* Exhibit A.[1]

According to the 2010 census, Georgia's African-American population makes up 30.46% of the state's population.[2] Four (4) of the state's fourteen (14) congressional districts, i.e., 28.57% of the districts, now have an African-American

[1] "The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see also*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (explaining that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (citing 5B Wright & Miller §1357 (3d ed. 2004 and Supp. 2007)).

[2] http://censusviewer.com/state/GA (last accessed on July 5, 2018). *See also* Doc. 1 ¶ 22.

population over 50%.[3] The majority African-American districts are congressional districts 2, 4, 5, and 13. *Id.* African-Americans make up a majority of the voting age population in districts 4, 5, and 13 and 49.6% of the voting age population in district 2. *Id.*; Doc. 1 ¶ 36.

Plaintiffs fail to assert that African-Americans could make up a majority of the voting age population in any reasonably compact CD 12 configuration. *See* Doc. 1 generally. Instead, the allegations of the complaint appear to make a claim for a crossover or partisan based district. That is, Plaintiffs allege that prior to the 2011 congressional redistricting plan, CD 12 had an African-American voting age population of 41.5%. Doc. 1 ¶ 27. Plaintiffs characterize the former CD 12 as a "competitive district," but it was not a majority African-American district. Doc. 1 ¶¶ 26 and 27. Plaintiffs allege further that African-American voters in Georgia "overwhelmingly support Democratic candidates." Doc. 1 ¶ 35. Mixed in with partisan references, Plaintiffs do contend that "African-American voters in and around CD 12 are sufficiently numerous and geographically compact to comprise a majority of *eligible* voters in an additional congressional district." Doc. 1 ¶ 32

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[3] *http://www.legis.ga.gov/Joint/reapportionment/Documents/SEPT%202012/Congress12-packet.pdf* at p. 4-5 (last accessed on July 3, 2018). This court may take judicial notice of the current redistricting plan as it is both incorporated in the complaint by reference, and it is a "fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). *See also*, *Tellabs,* 551 U.S. at 322.

(emphasis added). "Eligible voters," however, is not a specific term of art in vote dilution litigation, and Plaintiffs do not define their use of it.

Plaintiffs seem to mean something other than African-American voting age population when they use the phrase "eligible voters." Plaintiffs use BVAP or "voting age population" when describing existing districts, Doc. 1 ¶¶ 4, 2, 36, while using "eligible voters" when claiming they can draw a majority African-American district.[4] Doc. 1 ¶¶ 12, 13, 14, 22 and 32.

ARGUMENT

I. Plaintiffs' complaint should be dismissed for failure to state a claim.

Federal Rule 12(b)(6) requires that a complaint allege sufficient facts to give rise to a "plausible" suggestion of unlawful conduct. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). This requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Post *Iqbal*, the Eleventh Circuit has explained that "complaints in § 1983 cases must now contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Randall v. Scott*, 610 F.3d 701, 707 n. 2 (11th Cir. 2010). The "[f]actual allegations must be enough to raise a right to relief above the speculative level. . . ." *Twombly*, 550

[4] Nor do Plaintiffs appear to be using "eligible voters" to simply mean voter registration. Plaintiffs very clearly refer to voter registration when that is the group of voters they intend to reference. *See* Doc. 1 ¶ 36 (describing CD 2 as just below 50% voting age but just above 50% voter registration).

U.S. at 555. The well-pleaded *facts* set forth in a complaint should be accepted as true. *Oxford Asset Mgmt. Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Conclusory allegations should be ignored. *Iqbal*, 556 U.S. at 664, 679. Finally, courts are to "eliminate any allegations in the complaint that are merely legal conclusions." *Amer. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010).

A. Plaintiffs have failed to sufficiently allege a violation of Section 2 of the Voting Rights Act.

Plaintiffs challenge the current congressional redistricting plan as dilutive of African-American voting strength and therefore a violation of Section 2 of the Voting Rights Act. 52 U.S.C. § 10301. *See* Doc. 1. ¶¶ 67-74. In determining whether a redistricting plan has a discriminatory effect, the Supreme Court has repeatedly reaffirmed the three prong test initially enunciated in *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) as necessary *preconditions* to bringing an action.

> First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. [*Gingles*, 478 U.S.] at 50, 106 S. Ct. 2752, 92 L. Ed. 2d 25. Second, the minority group must be "politically cohesive." *Id.*, at 51, 106 S. Ct. 2752, 92 L. Ed. 2d 25. And third, a district's white majority must "vote[ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Ibid.* Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." *Growe v. Emison*, 507 U. S. 25, 40, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993).

Cooper v. Harris, __ U.S. __, 197 L. Ed. 2d 837, 854 (May 22, 2017). While the ultimate test for vote dilution is the totality of circumstances, a court only considers the totality of circumstances *after* all three *Gingles* preconditions have been established. *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009) (plurality opinion).

B. The first *Gingles* precondition requires that Plaintiffs constitute a majority of the voting age population in a geographically compact district.

In *Bartlett v. Strickland* the Supreme Court addressed what "size minority group is sufficient to satisfy the first *Gingles* requirement." 556 U.S. at 12. The Court rejected a claim brought by Plaintiffs that constituted a numerical minority of the voting age population, but asserted that the minority was sufficient with crossover votes to constitute an effective majority. "Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." 556 U.S. at 15. The Court rejected the *Bartlett* Plaintiffs' claim that the creation of a district with a 35.33% African-American voting age population, rather than a district with an African-American voting age population of 39.36%, diluted the voting strength of African-American voters in violation of Section 2.[5] 556 U.S. at 14.

[5] *Bartlett* was a plurality opinion with three Justices agreeing that Plaintiffs must be able to constitute a majority in a single member district in order to have a vote

> Reading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.

Id. at 15. (quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1016-1017 (1994)). In other words, Plaintiffs must be a numerical majority in order to meet the first *Gingles* precondition.[6] In addition, the majority district itself must be geographically compact. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430 (2006) (explaining that "there is no § 2 right to a district that is not reasonably compact.") (opinion of Kennedy, J.).

Here, Plaintiffs never allege that it is possible to draw CD 12 in a manner that increases the African-American *voting age population* above 50%, much less that they can do so by drawing a majority district that is itself reasonably compact. Instead, they allege that the current redistricting plan "cracked politically cohesive and geographically compact African-American communities to dilute *their*

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dilution claim under Section 2. 556 U.S. at 26. Two additional justices concurred in the judgment and expressed the view that Section 2 does not prohibit *any* form of vote dilution. *Id.* (Thomas, J., concurring).

[6] Even before Bartlett, the law in this circuit has required that Plaintiffs show they can constitute a majority of the voting age population or citizen voting age population in order to meet the first *Gingles* precondition. *See Negrón v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) (holding that "the proper statistic for deciding whether a minority group is sufficiently large and geographically compact is voting age population as refined by citizenship."); *Accord Ga. State Conference of NAACP v. Kemp*, CA No. 1:17cv1427 at 27 (N.D. Ga. Aug. 25, 2017) (order granting motion to dismiss).

influence in what was originally a competitive district, CD 12." Doc. 1 ¶ 26 (emphasis added). However, CD 12 only had a 41.5% African-American voting age population under the former redistricting plan. Doc. 1 ¶ 27. As the *Bartlett* plurality noted, "[i]n LULAC, we held that although the presence of influence districts is relevant for the § 5retrogression analysis, 'the lack of such districts cannot establish a § 2 violation.'" 556 U.S. at 25 (quoting LULAC, 548 U.S. at 446) (opinion of Kennedy, J.).

Plaintiffs allege further that under the current plan "a Republican candidate defeated the African-American community's candidate of choice, Democratic incumbent John Barrow, in the 2014 congressional election, which gave Republicans the CD 12 seat for the first time since 2004." Doc. 1 ¶ 27. In other words, Plaintiffs allege that their candidate of choice won election under the current districting plan in 2012, in a district with a 33.3% African-American voting age population.[7] *Id.* (describing district and describing Barrow as incumbent in 2014).

Plaintiffs describe the current redistricting plan as diluting their voting strength in and around CD 12 because of a decrease in the African American

[7] Plaintiffs' allegation is a concession of some degree of crossover voting, at least in the 2012 election. *See Bartlett*, 556 U.S. at 24 ("States can--and in proper cases should--defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third *Gingles* factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis.").

voting age population.[8] Doc. 1 ¶¶ 4 and 27. However, when describing their ability to meet the first *Gingles* precondition Plaintiffs refer only to an ability to constitute "a majority of *eligible* voters," not a majority of the voting age population. Doc. 1 ¶¶ 4, 11, 12, 13, 14, 32, 70 (emphasis added). Read together with Plaintiffs' allegations of partisanship - that African-American voters "overwhelmingly support Democratic candidates," and that in 2014 the "African-American community's candidate of choice, Democratic incumbent John Barrow" was defeated by the Republican candidate - Plaintiffs' allegations regarding a majority of "eligible voters" asserts something less than an ability to constitute a majority of the voting age population in an alternative CD12 that is also reasonably compact. Doc. 1 ¶¶ 27, 35. For this reason, Plaintiffs have failed to sufficiently allege the first *Gingles* precondition and their complaint should be dismissed. Defendant should not be required to litigate this action and engage in discovery before Plaintiff has clearly alleged all of the necessary *Gingles* preconditions to a Section 2 claim.

[8] Plaintiffs also describe vote dilution resulting from the removal of "large swaths of African-American voters from majority-*white* districts, while importing white voters" into the district. Doc. 1 ¶ 31 (emphasis added). Plaintiffs' allegations suggest they believe their Sec. 2 claim is *not* contingent on having the ability to constitute a *majority* of the voting age population in CD 12.

C. The state cannot rely on the use of race to create a district that is more heavily African-American without a good faith basis, grounded in evidence, that all of the *Gingles* preconditions are present.

As noted above, Plaintiffs contend that their vote has been diluted because a district that was 41.5% African-American in voting age population was reduced to 33.3%. Doc. 1 ¶ 27. However, unless African-Americans can comprise a majority of the voting age population in a fifth congressional district, the State is prohibited from using race to maintain a 41.5% African-American district. *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

"Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" *Abbott v. Perez*, 2018 U.S. LEXIS 3846, *13 (2018) (quoting *Bush* v. *Vera*, 517 U. S. 952, 977 (1996) (plurality opinion)).

> 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, 137 S. Ct. at 1470. Here, the State had no "good reason to believe" that Section 2 requires drawing a fifth majority-minority district since there has been no evidence demonstrating that a reasonably compact fifth majority African-American voting age population district can be created.

Conclusion

For the reasons above, Defendant prays that Plaintiffs' complaint be dismissed.

Respectfully submitted,

CHRISTOPHER M. CARR
Attorney General 112505

ANNETTE M. COWART 191199
Deputy Attorney General

RUSSELL D. WILLARD 760280
Senior Assistant Attorney General

s/Cristina Correia
CRISTINA CORREIA 188620
Senior Assistant Attorney General

Attorneys for Defendant

Please address all
Communication to:
CRISTINA CORREIA
Senior Assistant Attorney General
40 Capitol Square SW
Atlanta, GA 30334
ccorreia@law.ga.gov
404-656-7063
404-651-9325

CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing Defendant's Brief in Support of Motion to Dismiss was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

Certificate of Service

I hereby certify that on July 5, 2018, I electronically filed this Motion to Dismiss with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

Adam Martin Sparks
Halsey G. Knapp, Jr.
Krevolin & Horst, LLC
One Atlantic Center
1201 West Peachtree Street
Suite 3250
Atlanta, GA 30309

Abha Khanna
Perkins Coie-WA
1201 Third Avenue
48th Floor
Seattle, WA 98101-3099

Marc E. Elias
Perkins Coie-DC
700 Thirteenth Street, NW
Suite 600
Washington, DC 2005-2011

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: NONE

This 5th day of July, 2018.

s/Cristina Correia
Cristina Correia 188620
Senior Assistant Attorney General