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

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*, Defendants.	CIVIL ACTION NO. 3:11-CV-00123-TCB

REPLY IN SUPPORT OF MOTION TO AMEND OR ALTER ORDER TO INCLUDE STATEMENT PRESCRIBED BY 28 U.S.C. § 1292(b) AND A STAY

COME NOW Defendants Fayette County Board of Commissioners; Steve Brown, David Barlow, Allen McCarty, Charles Oddo, and Randy Ognio, and, in their official capacities; Fayette County Board of Elections and Voter Registration; and Tom Sawyer, in his official capacity (collectively "County Defendants") and for their reply in support of County Defendants' motion to alter or amend the Court's Order to (1) include the statement prescribed by 28 U.S.C. § 1292(b) and (2) stay this case, show the Court as follows:

INTRODUCTION

Since Plaintiffs initiated this litigation almost two years ago, County Defendants have maintained a consistent legal position: that the law did not allow them simply to replace the at-large electoral system for the Board of Commissioners with the Plaintiffs' preferred district voting system. A district plan with a majority-minority district could be drawn only if race were the predominant factor used in creating the district, which would be contrary to the law. In addition, County Defendants believe that the at-large system is better public policy because it requires all Commissioners to be elected by, and thus accountable to, all citizens of the County when making decisions.

This Court reached a legal conclusion contrary to that of County Defendants, and the decision has important ramifications for the enforcement of Section 2 of the Voting Rights Act in this case and future cases. As discussed below, the Court's holding essentially shortens the analysis under the first prong of *Gingles* in an at-large voting case to a single question: "Can plaintiffs create a redistricting plan that has more than 50% minority voting age population and follows at least some traditional redistricting principles?" If yes (assuming the second and third prongs of *Gingles* are met, as they usually will be), then the case is over.

At the heart of this abbreviated analysis is the interplay between the constitutional requirement of strict scrutiny for racial classifications and the statutory requirements of Section 2, a difficult question that will be resolved by the Eleventh Circuit eventually. County Defendants' request for immediate review by that Court is intended solely to resolve those questions with the least disruption to the 100,000 citizens of the County. Contrary to Plaintiffs' continuous rhetoric and completely unjustified accusations, in asking this Court to allow an immediate appeal, County Defendants are not seeking to "perpetuate a segregated commission, "steadfastly refusing" to comply with the Court's Order or "strenuously resist[ing]" a change. County Defendants are simply asking the Court to authorize them to seek review by the Eleventh Circuit before this Court proceeds to take steps to have a new plan implemented for the Commission, which is the last matter to be resolved (a fact which Plaintiffs apparently recognize). If the Eleventh Circuit takes the appeal and affirms this Court's decision, then the only issue left for determination will be the new plan. If the Eleventh Circuit reverses, then a new plan will not be necessary.

ARGUMENT AND CITATION OF AUTHORITIES

Plaintiffs and County Defendants agree on the legal standard to be applied in determining whether the Court's Order should be certified for interlocutory appeal.

[Doc. 154, pp. 7-8]. Plaintiffs argue, however, that the standard is not met here because (1) the legal questions at issue are not relevant to any case but this one, (2) the legal questions are not the subject of substantial disagreement in this Circuit or among the circuits, and (3) an appeal now will not advance termination of the litigation. Plaintiffs also oppose a stay, asserting that the grounds for a stay are not met.

As an initial matter, contrary to Plaintiffs' assertion, the questions outlined by County Defendants do have "general relevance" to other Section 2 cases.[1] *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004). Each of the questions involves the interplay between the constitutional standards governing racial predominance in the drafting of plans and Section 2, which this Court recognized is a difficult subject, [Doc. 152, p. 28]; *U.S., ex rel. Powell v. Am. InterContinental Univ., Inc.*, 756 F. Supp. 2d 1374, 1378 (N.D. Ga. 2010) (substantial grounds for difference of opinion exist when issue is "difficult and of

[1] County Defendants do not dispute the correctness of the principle that an appeal should address a "wide spectrum" of cases. [Doc. 154, p. 11]. But this is ultimately an argument to be made to the Eleventh Circuit in determining whether it will grant an interlocutory appeal, not for this Court in determining whether to certify the appeal. The citation of a District Court case that reviewed an interlocutory appeal from a Bankruptcy Court decision does not support Plaintiffs' argument that this Court should determine that question as part of its certification decision. [Doc. 154, p. 11]; *FXM, P.C. v. Gordon*, Case No. 1:07-CV-1642-JEC, 2007 WL 3491274 (N.D. Ga. Nov. 6, 2007).

first impression"). While there is no specific finding by the Court that these issues are of first impression in the Eleventh Circuit, *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998), does not control the outcome or foreclose consideration of racial gerrymandering when evaluating whether a plaintiff meets the first *Gingles* prong. [Doc. 153-1, pp. 7-8].

A. The Questions Outlined by County Defendants Involve Controlling Questions of Law as to Which There Exist Substantial Ground for Disagreement.

In arguing against County Defendants' request for permission to seek Eleventh Circuit review, Plaintiffs first claim that every one of the questions outlined by County Defendants are "mischaracterizations" and "distortion[s]" of this Court's ruling [Doc. 154, p. 10-11]. The four questions of law outlined by County Defendants are: (1) whether the Court applied the correct standard for determining that the Illustrative Plan is not a racial gerrymander; (2) whether a plaintiff must demonstrate that a plan is not a racial gerrymander when offering that plan to meet the first prong of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); (3) whether remedying a Section 2 violation constitutes a compelling government interest sufficient to justify the use of the racially-gerrymandered plan to demonstrate a Section 2 violation; and (4) whether proof of the three *Gingles* factors plus one of the Senate factors (minority electoral

success) is sufficient to establish a Section 2 violation under *Nipper v. Smith,* 39 F.3d 1494, 1512-1513 (11th Cir. 1994).

Although Plaintiffs disagree that the Court's Order raises these questions, whether the appeal is immediate or at the end of the case, these will be the questions appealed by County Defendants. A decision on them now is not an unreasonable request. Plaintiffs' real argument appears to be that the Court should simply move ahead toward a remedial plan and let these questions be answered later because Plaintiffs want a new plan and new elections now. Plaintiffs argue—for the first time in this case—that time is of the essence, and for that reason, the Court should not allow an interlocutory appeal. But Plaintiffs never attempted to expedite this case and, in fact, extended it on multiple occasions.

While Plaintiffs attempt to claim an emergency now, they never treated this case as one and cannot attempt to avoid an interlocutory appeal by claiming there is no time for appellate review. As set forth in their initial brief and below, County Defendants have met the requirements for interlocutory appeal and a stay and respectfully reiterate their request for the same.

1. What is the Correct Standard to be Used in Determining Whether a Plan is a Racial Gerrymander?

Instead of using the standards outlined in *Miller v. Johnson*, 515 U.S. 900, 917, 115 S.C.t 2475, 2489 (1995), this Court concluded that because the

Illustrative Plan met the standard outlined in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986), race was not the predominant consideration in the design of the plan. [Doc. 152 p. 42 n.21]. This Court specifically said it "consider[ed] only the first question" of compliance with *Gingles*, which it found to be distinct from *Miller*. [Doc. 152, p. 29]. Plaintiffs confuse the question of whether traditional redistricting principles *explain* the boundaries of the plan (*Miller*) with whether some traditional redistricting principles are *reflected* in the plan (the standard used by the Court). [Doc. 154, pp. 12-13].

County Defendants assert that in order to determine whether race predominated, the law requires a reviewing court to determine the intent of the mapdrawer, not whether the plan follows traditional redistricting principles. To determine intent, a court should review whether the lines on the map are explained by traditional redistricting principles or by other means recognized as persuasive evidence by the Supreme Court, such as boundary segment analyses. *Hunt v. Cromartie*, 526 U.S. 541, 548, 119 S.Ct. 1545 (1999). In this case, County Defendants' expert offered boundary segment analysis—which is not a traditional redistricting principle—to demonstrate the racial predominance of the Illustrative Plan. Because this Court did not look beyond traditional principles, it failed to

consider that analysis, which County Defendants assert is critical to a determination of racial gerrymandering. [Doc. 108-2, pp. 12, 14].

If this Court applied an incorrect standard as part of its analysis, the answer to the question of whether race predominated in the drawing of the Illustrative Plan is different and changes the outcome of this case. This question is thus a controlling question of law, and there is a difference of opinion because of the lack of direction on the specific application of the racial gerrymandering standards of the Supreme Court to Section 2 cases. The fact that traditional redistricting principles are discussed in cases involving Section 2 does not mean that they are applied in the same way in the racial gerrymandering context.

2. What is the Plaintiffs' Burden to Demonstrate a Plan is Not a Racial Gerrymander?

The second question follows and is closely connected with the first. If the answer to the question of whether race predominates is answered simply by the analysis of the first *Gingles* prong, then no plan can ever be found to be drawn predominantly on racial grounds in a Section 2 case. The reason is that, as the undisputed evidence before this Court demonstrates, even a plan that is drawn primarily based on race will adhere to *some* traditional redistricting principles.[2]

[2] Plaintiffs' extensive use of quotes from this Court's Order regarding the traditional redistricting principles reviewed does not add light to this issue because

See, e.g., [Doc. 140, pp. 18-19]. That sweeping consequence of this Court's ruling involves a key issue of law that should be resolved by the Eleventh Circuit.

County Defendants recognize that this Court determined that the Illustrative Plan was not a racial gerrymander. However, that decision appears to be based solely on evidence that did not include a review of factors outside of the traditional redistricting principles and did not account for the long-term implications of its decision. *Hunt*, 526 U.S. at 548.

3. Can a Plan Used to Show a Section 2 Violation Be Used to Meet Strict Scrutiny?

This Court determined that even if race predominated in the drawing of the Illustrative Plan, that racial gerrymander is not unconstitutional because it meets strict scrutiny as remedying a Section 2 violation. [Doc. 152, p. 42 n.21]. Plaintiffs concede that the Supreme Court and Eleventh Circuit have not decided this question. [Doc. 154, p. 17]. This question is a without doubt a controlling question of law that would be determined on appeal and which could affect the outcome of this case, *i.e.*, it may result in a finding that Plaintiffs are unable to show a Section 2 violation with a plan drawn based on racial predominance.

4. How Must the Totality of the Circumstances Factors Be Applied?

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the question is what the principles were used to evaluate, not what the facts related to those determinations are.

The Eleventh Circuit has determined that after meeting the three prongs of *Gingles*, a plaintiff must show that the "totality of the circumstances" demonstrate "the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias *in the community* with the challenged voting scheme." *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (emphasis added). While this Court discussed all of the Senate factors, Plaintiffs dispute that the Court specifically gave "heavy weight" to the two factors of racial polarization and minority electoral success. [Doc. 152, pp. 78-79]. The three additional factors that Plaintiffs cite as the Court having weighed in their favor are not relevant to the central question of whether racial bias in the community of Fayette County, when combined with the at-large system, leads to exclusion of minority voters.[3]

In summary, this Court's decision is apparently based on the "heavy weight" of polarization (which is already a *Gingles* factor) and one additional factor: electoral success. [Doc. 152, pp. 78-79]. This conclusion is not consistent with *Nipper* and is controlling because it could determine the outcome of the case, even

[3] In fact, the Court found that because the issue of past discrimination was not present in Fayette County directly, this factor "does not weigh heavily in support" of a finding of vote dilution; and that the method of appointing board and commission positions only has "the potential to affect" minority participation. [Doc. 152, pp. 52, 78]. Thus, the only factor beyond racial polarization and electoral success of minority candidates that the Court even found had any weight in Plaintiffs' favor was the election practices currently used in the county.

if the Eleventh Circuit also concluded that the first prong of *Gingles* is met. 28 U.S.C. § 1292(b); *McFarlin*, 381 F.3d at 1257.

B. An Immediate Appeal Advances the Resolution and Termination of the Case.

Plaintiffs make the unsupported and unsupportable claim that an appeal of the Court's Order on summary judgment would be "piecemeal" and not advance the resolution of this case. [Doc. 154, pp. 19-20]. While Plaintiffs imply that a number of unresolved issues would remain if the Eleventh Circuit affirmed this Court's decision, such is not the case. In fact, although Plaintiffs appear to recognize that they should identify "additional questions that remain properly before this Court" to thwart an interlocutory appeal, they also apparently could not do so.[4] [Doc. 154, p. 20]. If the Eleventh Circuit affirmed, this Court need only impose a remedial plan. Resolution of the questions would also resolve the major issue with crafting a remedial plan—the creation of the majority-minority district—without disrupting the elections of the County prior to that point.

As noted by County Defendants, there is nearly a year before any elections are scheduled for the Commission or Board of Education. Even if the appellate

[4] On page 20 of Plaintiffs' brief, they left a space to list an item that would still remain to be resolved but did not fill in that space. County Defendants assume that omission is because Plaintiffs did not know of an issue remaining other than the remedial plan.

process takes "many months" as alleged by Plaintiffs, there is no reason to believe that the appeal would not be resolved prior to qualifying.[5] [Doc. 153-1, pp. 1-2]. Plaintiffs' contention that County Defendants would somehow get a "second bite of the appeal by appealing" a final order after an interlocutory appeal is simply not correct. [Doc. 154, p. 21]. The law of the case doctrine would be binding as to the issues decided on any interlocutory appeal; County Defendants could not obtain further review of the issues decided by the Eleventh Circuit. *Jackson v. State of Alabama State Tenure Comm'n*, 405 F.3d 1276, 1283 (11th Cir. 2005) ("both the district court and the appellate court are generally bound by a prior appellate decision of the same case").

Plaintiffs do not dispute County Defendants' assertion that there will be significant expense to the County if a remedial plan is implemented. An immediate appeal avoids those potential expenses, eliminates the inevitable confusion if an

[5] Plaintiffs' demand for a special election in 2013 will be addressed separately by County Defendants in the filing the Court directed to be made next week. At the very least, Plaintiffs would have to demonstrate that the equities would favor a special election despite the facts that Plaintiffs never sought expedited treatment of this case, they extended discovery from its original date of March 2012 [Doc. 13] to August 2012 [Doc. 89], qualifying for the District 5 position begins in April 2014 (O.C.G.A. §§ 21-2-132(d), 21-2-150(a)), and the legislature has not been given an opportunity to create a compliant plan. *Edge v. Sumter Cnty. Sch. Dist.*, 775 F.2d 1509, 1513 (11th Cir. 1985).

appeal produces a result different for the Court's Order and advances the final resolution of this case.

C. Proceedings in This Case Should be Stayed Pending the Outcome of an Appeal.

Although Plaintiffs predictably argue that County Defendants will not succeed on the merits, they do not offer any additional response to County Defendants' arguments on that point. Plaintiffs' argument that there is no irreparable injury ignores the fact that failing to stay the case will irreparably destroy the status quo. Instead, Plaintiffs appear to maintain that such injury is necessary.

The potential injury to the County is not "unsubstantiated," as alleged by Plaintiffs, but is supported by prior sworn testimony of the Elections Director, involving the expense to and effort by the County to implement any remedial plan. [Doc. 67-1, ¶¶ 11-18]. Plaintiffs cite no authority for the assertion that their injury is "current and ongoing" because a system found to be in violation of the Voting Rights Act exists.[6]

[6] Indeed, courts have allowed even unconstitutionally malapportioned voting systems to be used when the election process is underway, further undercutting Plaintiffs' contention that the injury is "current and ongoing." *See*, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1394, 12 L. Ed. 2d 506 (1964) ("under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might

Finally, Plaintiffs' accusations that, by seeking review of questions of law this Court recognized were difficult, County Defendants are "seeking to perpetuate the County's nearly 200 year tradition of maintaining a racially segregated County government" and are fighting "to remain one of the few counties in Georgia in which no Black person has ever been elected to its body" is out of bounds. [Doc. 154, pp. 6, 20]. While the Court found that the at-large system violates Section 2, the Court also made specific findings that rebut Plaintiffs' continuous accusations of racism. For example, this Court specifically found that the County's motives in maintaining the at-large system were "not tenuous" and that Plaintiffs did not proffer any evidence "relating specifically to discrimination in Fayette County." [Doc. 152, pp. 49, 75]. Multiple county commissioners testified about their support of minority candidates for the Commission, their belief that a minority candidate can win countywide, and that they would welcome a minority candidate onto the Commission. [Docs. 140, p. 53; 140-9, pp. 3-4; 140-12, p. 3]. To accuse County Defendants of attempting to perpetuate a "racially segregated County government" is unwarranted invective. When Plaintiffs engaged in similar rhetoric earlier in the case, claiming County Defendants' defense of this case was "offensive," the Court

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justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid").

noted that there is nothing "offensive about the county arguing that we've got to apply the law." [Doc. 85, p. 28].

Similarly uncalled for is Plaintiffs' attempt to remake an objective request for interlocutory review into a "steadfast reluctance to comply with the Court's Order," an effort to "strenuously resist the implementation of a non-discriminatory method of election" and a "fight to remain [a county] in Georgia where no Black person has ever been elected to its body." To ascribe such motives to County Defendants is a groundless accusation, and Plaintiffs know that.

CONCLUSION

Although Plaintiffs apparently now believe resolution of the legal issues in this case was easy, both County Defendants and this Court recognize the complex issues involved. [Doc. 152, p. 28 n.12]. By seeking an appeal prior to the final judgment, County Defendants are simply attempting to obtain ultimate resolution of this case in a manner that is the least confusing and least expensive to Fayette County voters. For these reasons, County Defendants request this Court amend its May 21 Order on summary judgment to (1) allow County Defendants to pursue an interlocutory appeal and (2) stay this case pending the interlocutory appeal process.

This 20th day of June, 2013.

s/ Anne W. Lewis
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing REPLY IN SUPPORT OF MOTION TO AMEND OR ALTER ORDER TO INCLUDE STATEMENT PRESCRIBED BY 28 U.S.C. § 1292(b) AND A STAY 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:

Natasha Korgaonkar, Esq.
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This 20th day of June, 2013.

s/ Anne W. Lewis
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