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

COMMON CAUSE, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, *Defendant*.	CIVIL ACTION FILE NO. 1:22-CV-00090-ELB-SCJ-SDG

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

"[U]ntil a claimant makes a showing sufficient to support [an] allegation [of race-based decisionmaking], the good faith of a state legislature must be presumed." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Plaintiffs' response makes abundantly clear that they lack any material facts to overcome that presumption in this case, so they have resorted to personal attacks on the legislature and its staff—but those attacks and innuendo are not enough to create any issue of material fact in this case.

After Defendant pointed out the lack of evidence to support their claims, Plaintiffs attempt to create the illusion that they have shown enough to reach trial. But they have not pointed to any evidence preventing this Court from

granting summary judgment to Defendant on their sole constitutional claim. While Plaintiffs clearly dislike the maps they challenge, they must come forward with evidence to demonstrate there is at least a triable issue of material fact for their claims. They have not and this case must be dismissed.

ADDITIONAL FACTUAL BACKGROUND

In their response, Plaintiffs choose to selectively highlight certain facts without telling the whole story. For example, Plaintiffs note that the opposition from "Black committee members" was unanimous, but fail to reference that the vote was along party lines. Defendant's Response to Statement of Additional Material Facts (RSAMF), ¶ 3. They note that "racial data was projected onto the computer screens" but fail to note Ms. Wright's testimony that political data was also displayed and she was not sure whether legislators could see the data. RSAMF, ¶ 14. And Plaintiffs accuse Ms. Wright, the state's longtime director of the Reapportionment Office, of intentionally destroying evidence—something their citations to the record do not support. RSAMF, ¶ 12.

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). Thus, while it is logical that plaintiffs often do not prevail on summary judgment in redistricting cases because of the heavy burden they face, defendants can prevail because they can point out the absence of evidence supporting a plaintiff's claim. "But bearing in mind that it was the plaintiffs' burden to produce evidence that race predominated, and also remembering the presumption in favor of legislative integrity, we cannot say that the shape and demographics of the districts here provided adequate circumstantial evidence of the predominance of race to prevent summary judgment." *Chen v. City of Houston*, 206 F.3d 502, 513 (5th Cir. 2000).

Facing precedent that stands at odds with the record they assembled, Plaintiffs attempt to create a new spin on standing, point to district shapes and demographics that are not enough to even create circumstantial evidence of racial predominance on their constitutional claims, and argue incorrect legal standards for their sole claim. Despite extensive discovery, Plaintiffs have come up short on their sole claim, and it should be dismissed because there is no issue of material fact that should be tried.

I. The organizational Plaintiffs lack standing to challenge the 2021 congressional redistricting plan.

Despite withholding sought-after evidence throughout discovery that might have established their standing to bring this action,[1] the organizational Plaintiffs Common Cause and the League of Women Voters now seek to shoehorn new facts in an attempt to establish either associational or organizational standing (or both). [Doc. 100, pp. 10-20]. This Court should grant Defendant's Motion for Summary Judgment because the organizational Plaintiffs have had their opportunity to demonstrate standing and declined to do so. And nothing about this case suggests discovery should be reopened now or that an inference about the organizational Plaintiffs' standing should be made in their favor based on equitable considerations.

[1] The organizational Plaintiffs repeatedly objected to Defendant's inquiries into the organizational Plaintiffs' membership in order to determine whether they had members residing in the appropriate districts such that the organization could bring this action on their behalf. They now seem to imply in their brief that it is Defendant's responsibility to challenge their ill-advised objections in some way to save them from their own litigation strategy. *See, e.g.* [Doc. 100, p. 13 n.7] ("The Organizational Plaintiffs objected to identification of their members based on the associational privilege because disclosure would chill associational rights for fear of retaliation… Defendant did not challenge that objection."). Standing is Plaintiffs' burden—one they must show with evidence they have prevented in discovery. It is not Defendant's obligation to procure that evidence over Plaintiffs' own objections.

In support of their argument on standing, Plaintiffs rely principally on two redistricting cases, neither of which carries the day for Plaintiffs. For associational standing, Plaintiffs point to a recent Supreme Court case in which the Court remanded an appeal from the district court's *sua sponte* finding that it lacked jurisdiction to render a decision following a full trial on the merits. *See generally*, *Ala. Legis. Black Caucus v. Alabama,* 575 U.S. 254 (2015). And for organizational standing, Plaintiffs rely primarily on a single district court case out of the Fifth Circuit that predates Defendant's principal case on standing, *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Neither of these cases are persuasive here. While Plaintiffs are free to continue this case with their individual plaintiffs, [Doc. 100, p. 7 n.2], the organizations must be dismissed.

A. The organizational Plaintiffs do not have associational standing.

In *Ala. Legis. Black Caucus,* on which Plaintiffs rely heavily, the defendants never requested information regarding the standing of the organization's individual members. 575 U.S. at 270. Instead, when the trial was complete, the district court raised the issue *sua sponte* and found that it lacked jurisdiction. *Id.* at 269-70. When the Supreme Court eventually considered that issue, it found that the facts and circumstances regarding the statewide nature of the organization *and* the complete lack of inquiry by

defendants as to their associational standing warranted an inference in the plaintiffs' favor. *Id*. Moreover, the Court held that the plaintiffs could establish (and defendants could rebut) evidence of standing on remand. *Id*. at 271. It did this because the peculiar circumstances of that case warranted it.

This case is very different. Defendant has repeatedly inquired into the associational standing of the organizational Plaintiff. RSAMF, ¶¶ 17, 19, 21-24, 26-28. And the very existence of this motion and the challenge to Plaintiffs' standing that Defendant has mounted removes it from the factual pattern that led to the Supreme Court's holding in *Ala. Legis. Black Caucus*. Moreover, Plaintiffs here are not entitled to any inference in their favor regarding standing because they had knowledge (and many opportunities) to produce evidence during discovery regarding their associational standing—and they chose instead to object to Defendant's inquiries and leave the record almost entirely silent on the issue. This Court cannot simply rely on the belated and self-serving statements of Plaintiffs' representatives that vary the 30(b)(6) testimony provided in discovery. *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984); RSAMF, ¶¶ 17, 19, 21-24, 26-28.

As this Court is aware, "[a]n association has standing to bring suit on behalf of its members ***when its members would otherwise have standing to sue in their own right***, the interests at stake are germane to the

organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 181 (2000) (emphasis added). But "under this theory, an organization must 'make specific allegations establishing that at least one identified member ha[s] suffered or [will] suffer harm.'" *Ga. Republican Party v. SEC,* 888 F.3d 1198, 1203 (11th Cir. 2018) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009)). Especially at later stages of litigation, courts "cannot accept the organization's self-descriptions of [its] membership…" *Id.* Yet that is exactly what Plaintiffs ask this Court to do when they claim that the Plaintiffs' 30(b)(6) representatives provided the requisite evidence for standing in their depositions. *See* [Doc. 100, p. 12 n.6] ("The League repeatedly affirmed in its deposition that '[they] have members in every district.'"). Plaintiffs refused to provide any testimony about how they determined they had members in each district or any process they engaged in. RSAMF, ¶¶ 17, 19, 21-24, 26-28. At this stage of litigation, Plaintiffs' mere assertions are not enough. Indeed, "[s]ince they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof,

i.e., with the manner and degree of evidence required at the successive stages of litigation." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

The remaining cases cited by Plaintiffs do not deal with redistricting and thus are of limited value here. As discussed below, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), controls, and Plaintiffs have no answer for it—they do not even cite it. Accordingly, they have failed to put forward the requisite evidence to establish associational standing such that the organizations can stand in the shoes of their members for purposes of this litigation. And given the circumstances that led to the dearth of evidence on associational standing now in the record, this Court should not reopen discovery so that the organizational Plaintiffs may have a second bite at the apple.

B. The organizational Plaintiffs have not established organizational standing.

Most of the cases relied upon by Plaintiffs in support of their organizational standing deal with the concept of organizational standing generally—which Defendant does not challenge. No one disputes that organizations may typically assert an injury for purposes of Article III by demonstrating a diversion of resources. But Plaintiffs fail to illustrate why that general rule applies in the redistricting context.

Indeed, the sole redistricting case Plaintiffs cite in support of their claim of having established organizational standing is in a district court in another circuit, which is itself highly unpersuasive under the facts of this case. In *Perez v. Abbott,* a district court in Texas declared an organization had organizational standing to challenge a local districting plan because "despite not dealing specifically with redistricting claims of the type asserted in this case, courts have consistently found standing under *Havens* [*Realty Corp. v. Coleman*, 455 U.S. 363 (1982)] for organizations to challenge alleged violations of § 2 of the VRA and the Fourteenth Amendment." 267 F. Supp. 3d 750, 772 (W.D. Tex. 2017). While that is true generally, the district court in *Perez* did not find any support for such organizational standing in other redistricting cases and instead leaned heavily on more generalized election challenges specifically under the VRA. *See id.* (noting organizational challenges under Section 2 in *Crawford v. Marion County Election Bd.,* 553 U.S. 181 (2008) (challenge to voter ID law); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (challenge to absentee ballot law); and *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 575-76 (E.D. Va. 2015) (separate voter ID challenge)).

The district court seemed cognizant that authority supporting organizational standing in the redistricting context was sparse (and probably

nonexistent), drawing its legal reasoning for its decision more from the *absence* of authority contradicting the court's view rather than any authority *supporting* it. "This Court is aware of no redistricting case in which an organizational plaintiff has based its standing on an injury to itself… Nor is it aware of any redistricting decisions rejecting such a theory." *Perez*, 267 F. Supp. 3d at 772. While that might have been enough at the time, *Gill*, which was *decided the very next year,* is the definitive answer on this question. 138 S. Ct. 1916. And in that case, the Supreme Court was unequivocal that "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Id.* at 1930. This requirement of individual, district-specific harm cannot be sidestepped merely by filing a claim as an organization. Otherwise, the requirement of individualized harm would be illusory. *See, e.g. Nat'l Treasury Emps. Union v. U.S.*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) ("Individual persons cannot obtain judicial review of otherwise non-justiciable claims simply by incorporating, drafting a mission statement, and then suing on behalf of the newly formed and extremely interested organization."). Without a district-specific injury, Plaintiffs cannot rely on generalized organizational harms in a redistricting case.

Even if Plaintiffs could show an organizational harm was sufficient in a redistricting case, the evidence they put forward only demonstrates they are serving their purpose for existence in educating voters about redistricting. *Id.* at 1430 ("the presence of a direct conflict between the defendant's conduct and the organization's mission is necessary"). As a result, Plaintiffs have not shown any reason why this Court should not dismiss both organizational plaintiffs from this case.

II. Plaintiffs cannot show a dispute over a material fact necessary to decide their sole constitutional claim.

In order to prevail on summary judgment, Defendant can cite to an absence of evidence to support Plaintiffs' claim, which requires Plaintiffs to put forward admissible evidence "showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Defendant's motion points to the *lack* of evidence that supports Plaintiffs' claims, even after discovery.

Plaintiffs agree that they can prove their racial gerrymandering claim by either direct evidence on motivation or "circumstantial evidence of a district's shape and demographics." [Doc. 100, p. 22] (quoting *Miller*, 515 U.S. at 916). Plaintiffs do not even attempt to offer direct evidence of improper racial motivation, because they cannot. They rely solely on possible circumstantial

evidence. [Doc. 100, pp. 23-29]. But none of that evidence is sufficient to demonstrate there is enough of a dispute over any material fact.

Plaintiffs first rely on Dr. Duchin's analysis of various districts. [Doc. 100, pp. 23-27]. But in so doing, they avoid the fact that Dr. Duchin specifically refused to opine that districts were drawn primarily based on race—only that some factfinder could possibly reach that conclusion. RSAMF, ¶¶ 45-46, 49, 65. As Defendant noted in his principal brief, Plaintiffs rely on core retention, racial swaps, and racial splits of counties and precincts. *Compare* [Doc. 92-1, pp. 14-15] *with* [Doc. 100, pp. 23-27]. But Dr. Duchin's analysis is not as comprehensive as Plaintiffs present, because she also acknowledged the presence of other factors were present besides core retention that she did not account for in her analysis, including politics. [Doc. 93, ¶¶ 43, 46-47]. Further, Dr. Duchin never reviewed any political data about the alleged racial splits, despite having access to that data.[2] *Id*. at ¶ 49.

Thus, the entirety of evidence on the shape and demographics of the districts presented by Plaintiffs is not enough. "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold

[2] Despite Plaintiffs' claims, while political data is not generally available below the precinct level, Ms. Wright's office used a formula to place estimates of political data at the block level, so it would also appear on the screen. Strangia Dep. 97:17-103:23.

requirement of proof, but because it may be persuasive circumstantial evidence that ***race for its own sake, and not other districting principles***, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913 (emphasis added). But the evidence Plaintiffs presented about the enacted congressional plan is far from this. Dr. Duchin does not testify that the state disregarded traditional redistricting principles in service of racial goals, such as in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller,* 515 U.S. at 913. She does not show that the General Assembly had a racial target, as in *Ala. Legislative Black Caucus*, 575 U.S. at 267. At most, Dr. Duchin has shown a *political goal* that had apparent racial impacts, but did not consider any method to rule out a political purpose—and in fact agreed that political goals were the likely cause. RSAMF, ¶¶ 45-46, 49.

Left with this reality, Plaintiffs turn to a set of 100,000 maps using an algorithmic analysis that attempted to assess partisan goals. [Doc. 100, pp. 27-30]. Not only are these maps not enough to carry Plaintiffs' case because they do not consider any traditional redistricting principle except for compactness, RSAMF, ¶¶ 67-69, they also miss the point Plaintiffs attempt to establish. The mere fact that the legislature could have achieved partisan goals in a different way ignores the reality that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats

happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (emphasis original); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts").

At this stage in the case, facing a motion that points to the lack of evidence to support their sole claim, Plaintiffs must come forward with more than Dr. Duchin's report. And "[g]iven the fact that the plaintiffs bore the burden of proof on this issue, and the presumption in favor of the [legislature's] good faith, the plaintiffs needed to undercut the hypothesis that the [State's] plans were independently substantially justified by traditional districting factors" to survive summary judgment. *Chen*, 206 F.3d at 520. As a result, "the plaintiffs' circumstantial evidence is inadequate to allow a finding that race predominated." *Id.*

CONCLUSION

Plaintiffs had significant opportunities to develop the record in this case. But at the end of discovery, their proof comes up short. The organizational Plaintiffs have not demonstrated standing to continue with this case. And all Plaintiffs have failed to show any issue of a material fact sufficient for trial. At most, they showed the legislature pursued a legitimate political goal in the

creation of Georgia's congressional districts. This Court should grant summary judgment to Defendant and dismiss this case.

Respectfully submitted this 10th 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 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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