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

KAREN FINN, DR. JILLIAN FORD, HYLAH DALY, JENNE DULCIO, GALEO LATINO COMMUNITY DEVELOPMENT FUND, INC., NEW GEORGIA PROJECT ACTION FUND, LEAGUE OF WOMEN VOTERS OF MARIETTA-COBB, and GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC.,

Plaintiffs,

-v-

COBB COUNTY SCHOOL DISTRICT, COBB COUNTY BOARD OF ELECTIONS AND REGISTRATION, and JANINE EVELER, in her official capacity as Director of the Cobb County Board of Elections and Registration,

Defendants.

Case No. 1:22-cv-2300-ELR

DEFENDANT COBB COUNTY SCHOOL DISTRICT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM OF LAW IN SUPPORT

Defendant Cobb County School District (the "District") moves for judgment on the pleadings pursuant to Rule 12(c). As explained below, Plaintiffs' cause of action, if any, lies solely and exclusively with the General Assembly who approved

the voting districts that were signed into law by Governor Brian Kemp. Yet Plaintiffs filed this action against the Cobb County Board of Elections and its director Janine Eveler ("Election Defendants") but made scurrilous allegations about the District's board members. The District was thus required to move to intervene so that it could defend itself against the racial accusations hurled by Plaintiffs. Because Plaintiffs' allegations do not support claims against any of the defendants in this case, including the Election Defendants, judgment should be entered as a matter of law.

INTRODUCTION AND PROCEDURAL HISTORY

This case arises from a purely political dispute between the three Democratic and four Republican members of the Cobb County Board of Education ("the Board of Education") and the redistricting of the seven Board districts following the 2020 census.[1] Redistricting is a quintessential political process. Plaintiffs, who consist of alleged "non-partisan" organizations that in reality promote partisan Democratic causes, and individuals they recruited who are also partisan Democrats, are upset that the effect of the redistricting process did not align with their preferred partisan outcome: a Democratic takeover of the Board of Education. Lacking the political power to effect change, Plaintiffs resort to hurling incendiary accusations of racism

[1] The Board of Education is the governing body of the District. *See* O.C.G.A. § 20-2-50.

at the Board of Education and the District in a calculated attempt to override the redistricting map voted on and approved by the General Assembly and signed by Governor Brian Kemp. This nakedly political suit should fail.

In the Amended Complaint, Plaintiffs ask this Court to declare that three of the voting districts are unconstitutional and to require redistricting by the "State authorities" or "if necessary," order "an interim redistricting plan." (Doc. 43, pp. 36-37.) Throughout the Amended Complaint and within the relief sought, Plaintiffs expressly acknowledge that it is the State of Georgia, through the General Assembly, which enacts the voting districts "as a matter of state law." (Id., ¶ 5) (alleging that "the manner in which the General Assembly debated and adopted the Redistricting Plan represented a massive departure from Georgia's long-standing practice for adopting county-level school board redistricting plans.") Curiously, though, Plaintiffs did not include the State of Georgia as a defendant nor the District whose members they accuse of racial gerrymandering. Instead, they sued the Election Defendants whose only role is to conduct elections using maps enacted by the Gen.5( )-279.6((rtv)3.1( )-7-4.5)-83.6(A)4.2(s)n.5( )mbl.s

(Docs. 54, 60 and 64.) As discussed below, however, Plaintiffs have not stated plausible grounds for the relief they seek under 42 U.S.C. § 1983.

Initially, there is no legal or factual support for the Plaintiffs' central contention that the Board of Education can be held liable merely for recommending a redistricting map to the General Assembly when only the General Assembly has the power to enact redistricting maps. This is boilerplate law, and the Plaintiffs offer no basis upon which this Court can ignore this basic principle.

The Plaintiffs' next liability theory is equally frivolous. To this end, Plaintiffs attempt to attribute the alleged racial motive of the Board of Education to the General Assembly under a "cat's paw" theory, whereby the alleged discriminatory motives of one person or entity are attributed to another, which does not apply to legislators. Plaintiffs' argument fails for two reasons. First, none of their allegations suggest any racial motivation by the Board of Education. Every circumstance alleged in the Amended Complaint are run of the mill political disputes over which Republicans and Democrats clash every day. Distilled to their essence, Plaintiffs attempt to paint every partisan disagreement as having a racial motive, when they are simply political disputes. Second, and even more importantly, the Supreme Court and every court that has confronted the issue, has made clear that whatever motives underlie a local government's recommendation

cannot be attributed to the ultimate legislative body enacting the applicable law. Here, this basic principle means that Plaintiffs cannot use a *cat's paw* theory to attribute the alleged discriminatory motives of the sponsor of the bill encompassing

and the Superintendent, the Board of Education's vote along partisan lines to ban the teaching of Critical Race Theory, and the debate and eventual vote along partisan lines to not change the longtime name of a Cobb County School. (Am. Comp. ¶¶ 70-85.) Based solely on the racial makeup of the Democrats on the Board of Education at that time, and utterly ignoring the clear partisan basis for the dispute, Plaintiffs strain to inject race as the sole reason for these voting actions.[3]

B. The Board of Education Recommends a New District Map to the General Assembly.

In a July 15, 2021 Board work session, Chairman Randy Scamihorn

Each Board member was invited to meet with Mr. Tyson alone to discuss their views and preferences for redistricting maps, including the opportunity to prepare their own maps for the Board of Education's consideration. (12/9/21 Work Session, https://www.cobbk12.org/page/8993/watch-meetings-online, at 2:54:28.)[4] Importantly, each and every Board member—from both political parties—did so. (*Id.*)

Board Chairman Scamihorn conveyed to Mr. Tyson the Board of Education's criteria, including compliance with the Federal and Georgia constitutions and the Voting Rights Act. (*Id.* at 2:54:42; 2:59:15-3:01:41.) Ultimately, after extensive consultation with Mr. Tyson, three Board of Education members submitted proposed redistricting maps for the agenda for the December 9, 2021 work session. (*Id.* at 2:54:55-2:55:15.) Two of those were submitted by Democrat Board members Charisse Davis and Leroy "Tre" Hutchins, respectively. (*Id.*) Mr. Tyson and Taylor English developed those maps based on the criteria, input, and goals provided by Ms. Davis and Mr. Hutchins. (12/9/21 Work Session at 2:56:08-2:57:18; 2:57:45-2:59:13.) The third map was labeled the "Chair's Map," which Mr. Tyson drew based on the criteria Chairman Scamihorn conveyed

[4] The video is located by clicking the "Next Page" link at the bottom of the "Related Videos" menu until reaching the 12/9/21 Work Session link. It is properly before the Court on this motion because it is central to Plaintiffs' claims and is undisputed. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002).

at the beginning of the process. (*Id.* at 2:59:15-3:01:41.)

At the meeting, Tyson stated that the new map was drawn with legal compliance as the first and most important goal. (*Id.* ¶ 118-19.) Chairman Scamihorn similarly stated that legal compliance, including with the Voting Rights Act ("VRA"), was the first goal of the new map. After Tyson's presentation, Ms. Davis proposed that the existing district map be retained rather than recommend a redistricted map.[5] (*Id.* at 3:24:25.) Her proposal failed by a 3-4 vote along partisan lines. (*Id.* at 3:25:12) The "Chair's Map" was approved the same day in a party-line vote. (Doc. 43, ¶ 104.) Afterward, the District submitted the map to the Ci4s1.3(9)-3.E n94gt n94gta f q BTo4.9(tr45 17)-245.'s D i( )-237T Q

delegation is composed of an equal number of Republican and Democrat State Senators and one more Democratic State House member than there are State House Republicans) should have had significant input on whether the recommended map was adopted in the redistricting process. (*Id.* ¶¶ 106-07.)

Representative Ginny Ehrhart, a Republican, introduced HB 1028, the bill setting forth the redistricting plan recommended by the Board of Education. (*Id.* ¶ 124.) During the bill's consideration in the various committees, Representative Ehrhart testified that legal compliance was the foremost concern used to draw the redistricting plan. (*Id.* ¶¶ 126-27, 129-134.) The General Assembly passed HB 1028, and Governor Brian Kemp signed it into law on March 2, 2022. (*Id.* at ¶¶ 44, 147.)

Despite this legitimate political process, Plaintiffs make the threadbare conclusion that race was used as the predominant factor to determine the boundaries of the challenged districts in the Board of Education's recommended map because legal compliance with the U.S. Constitution, Georgia Constitution, and the VRA were cited among the criteria for the recommended map and that their Equal Protection rights were thus violated. (*Id.*

the VRA." (Doc. 43, ¶ 156.)

ARGUMENT AND CITATION OF AUTHORITY

A. Standard for granting a motion for judgment on the pleadings.

"Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). "A motion for judgment on the pleadings is subject to the same standard as is a Rule 12(b)(6) motion to dismiss." *Provident Mut. Life Ins. Co. of Phila. v. City of Atlanta*, 864 F.

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678, and "unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

Importantly, allegations that are "merely consistent with" a violation of the law "stop[] short of the line between possibility and plausibility." *See Twombly*, 550 U.S. at 557. Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level." *Id.* at 555.

B. The District Cannot Be Liable Under § 1983 Because the Board of Education was Not the Final Decisionmaker With Respect to the Redistricting Map.

Plaintiff's fundamental contention that the Board of Education can be held liable for the actions of the General Assembly is utterly frivolous. It has no basis whatsoever in law or fact. For that to be the case the Board of Education would have to have been making decisions for the General Assembly which is an absurd proposition. It is firmly established under Section 1983 law that a governmental entity such as the District cannot be liable vicariously for acts of individuals; instead, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). "The policy or custom requirement of *Monell* applies to § 1983 claims for declaratory or injunctive relief no less than claims for damages." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (citing *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 31 (2010)).

"Ultimately, the plaintiff must show that the [government's] 'policies were the moving force behind the constitutional violation.'" *Baxter v. Roberts*, 54 F.4th 1241, 1270 (11th Cir. 2022) (quoting *City of Canton v. Harris*, 489 U.S. 378, 379 (1989). "A defendant's actions cannot be the moving force behind a violation where the actions of another, independent decisionmaker breaks the chain of causation." *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty.*, 48 F.4th 1222, 1235–36 (11th Cir. 2022).

Plaintiffs' allegations fall far short of these exacting standards for asserting liability upon the District.

In an attempt to transform a political dispute into a viable claim, Plaintiffs attribute lawmaking and map-drawing powers to the Board of Education that it simply does not possess. As discussed, it is undisputed that the 1-101Dis3(ri)3c6(x)-1.4(t)-3.2(

The Georgia legislature may take the Board of Education's recommended district map into account and has historically sought significant input from the local Cobb County delegation as well, but it is not required by law to do so. Nonetheless, the Board of Education's recommended map is fully considered by each legislator in the appropriate committees, and if those committees approve, each legislator must consider the redistricting map before a final vote. Even if the Board of Education acted with an unlawful racial motive in preparing its recommended map (which it did not), this unlawful motive may not be imputed to the only political body with the actual power to put the redistricted maps into effect: the Georgia General Assembly.

In contrast to the unsupported theory asserted by the Plaintiffs that the Board of Education is liable for the actions of the General Assembly and approval by the Governor, it is axiomatic that a plaintiff alleging racial gerrymandering must plausibly allege that the relevant actor acted with discriminatory intent and must not simply make grandiose conclusions. *See Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). To plausibly state a claim of discriminatory intent in violation of the Equal Protection Clause, Plaintiffs must meet the threshold of enough factual allegations to rise above the speculative level that race was the predominant factor motivating the decision to place a significant number of voters within or without a particular

district. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

1. The Board of Education was not the party that enacted the redrawn districts.

Instead, Plaintiffs' allegations of racial gerrymandering focus primarily upon *the Board of Education's* decision in the redistricting process. The controlling law and undisputed facts here show the Board of Education's actions are irrelevant to the only legal and factual issue, which is the Georgia legislature's motive. In other words, neither the members of the Board of Education nor the District has the lawmaking power to enact a legally binding redistricting map. Rather, it is well-established in Georgia law that the local board may merely *recommend* a map to the Georgia legislature, which then independently reviews the recommendation for enactment. This process was succinctly explained by the Eleventh Circuit Court of

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constitution confirms that *only* the General Assembly has the authority to enact

case typically seeks to hold the plaintiff's employer liable for 'the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision.'" *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (internal citations omitted). Here, again, the Plaintiffs' arguments are frivolous and fail for two fundamental reasons.

First, there is no relevant evidence alleged in the Amended Complaint from which one can infer that the Board of Education acted with any racial intent. Even if this Court wrongly applied a *cat's paw* theory, there are no facts pled of any racial motive underlying the map recommended by the Board of Education. Plaintiffs ask the Court to make unwarranted factual deductions from their allegations that cite only *political* disagreements between the Democratic and Republican members of the Board of Education over agenda setting policy, *e.g.*, whether COVID-19 could be discussed as an emergency topic at a Board meeting, the renaming of Wheeler High School, and the Board of Education's decision to

of racial motives behind the Board of Education's recommendation of a map, Plaintiffs' theory that the General Assembly's motives can be attributed to the Board of Education's alleged motives has expressly been rejected time and time again. Specifically, the Supreme Court expressly addressed the application of the *"cat's paw"* theory in the legislative context, and succinctly dismissed it as a viable liability theory, stating:

> The "cat's paw" theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is ***insulting*** to suggest that they are mere dupes or tools.

Brnovich, 141 S. Ct. at 2350. (emphasis added).

Here, the Court's holding squarely forecloses the Plaintiffs' only theory that

See Abbott v. Perez, 138 S. Ct. 2305, 2325 (2018). Thus, "[i]n assessing the sufficiency of a challenge to a districting plan," a court "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Brnovich*, 138 S. Ct. at 2324.

Ultimately, while the Plaintiffs attempt to obscure the correct legal analysis by hurling a torrent of distorted conclusions premised upon unsupported racial inuendo, they cannot deny that the redistricting statute passed by the General Assembly requires *independent* action which negates any motive the Board of Education may have had. The Board of Education's recommendation was just that: a recommendation. It did not engage in lawmaking on its own, and there is no allegation in the Amended Complaint that disputes this fact. The Georgia legislature proposed the Board of Education's map to the entire body, where it was subject to meaningful review by each legislator and was not officially enacted until a majority of the House and State Senate voted in favor of it, and the Governor decided to sign the bill into law. *See DeJulio v. Georgia*, 290 F.3d 1291, 1296 (11th Cir. 2002).

For these reasons, Plaintiffs' claim fails. Any use of race as a predominant factor could only be done by the Georgia legislature, not the Board of Education.

3. Plaintiffs plead no plausible facts that the actions of the entire General Assembly and the signing of the Act by Governor Kemp were motivated by race.

Plaintiffs, faced with the knowledge that redistricting is the sole province of

factual allegations that the General Assembly's motives were racially motivated. In the Amended Complaint, Plaintiffs cite testimony from Representative Ginny Ehrhart, sponsor of the bill, in committee hearings where she made the innocuous observation that "legal compliance" was a primary concern in drawing the HB

follows that the Georgia legislators who voted to pass HB 1028 were not agents of the Board of Education, Rep. Ehrhart or anyone else. Instead, each legislator exercised his or her duty to represent their constituents. And Plaintiffs allege no facts showing that any legislator failed to act in good faith or used race as a predominant factor for their decision to vote in favor of HB 1028. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018).

Plaintiffs' other complaint is that the Georgia legislature did not defer to the local delegation (which has a Democratic majority and likely would have favored a map that enhanced their electoral prospects to gain a majority of the Board of Education). However, in *DeJulio v. Georgia*, the Eleventh Circuit discussed the role of local delegations in the Georgia legislative process and noted that Georgia law does not "codify or require the discretionary deference to local courtesy when either the House or the Senate addresses legislation." 290 F.3d at 1296. Rather, "members of the General Assembly can contest local legislation of which they disapprove by removing it from the consent calendar and requiring the whole body to vote upon it." *Id.*

Obviously, this was not a decision by the Board of Educagi

predominant factor in the redistricting process.

Thus, Plaintiffs similarly fail to allege any plausible facts or legal claim that the Georgia legislature considered race as a predominant factor in the redistricting process, and, as a result, their suit should be dismissed.

CONCLUSION

To summarize, Plaintiffs have attempted to circumvent suing the State of Georgia by bringing this action against the Election Defendants who had no role in enacting the voting districts that they find objectionable. Adding to this scheme, Plaintiffs based their claims of racial motivations by the District's board members

Respectfully submitted,

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LOCAL RULE 7.1 CERTIFICATION

The undersigned does hereby certify that this memorandum of law has been prepared with Times New Roman 14-point font in compliance with Local Rule 5.1.

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