UNITED STATES DISTRICT COURT

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PRELIMINARY STATEMENT

This racial gerrymandering action challenges the newly redistricted voting districts for the Cobb County Board of Education ("Board of Education" or "Board") that are intended to be used in the 2024 elections. Plaintiffs' Amended Complaint ("Complaint") adequately alleges a claim of racial gerrymandering against the government body responsible for implementing the challenged districts: the Cobb County Board of Elections and Registration ("BOER") and Cobb County's Elections Director, Janine Eveler (with the BOER, the "BOER Defendants"). Intervenor-Defendant Cobb County School Dist0P156 Tw 92 (e)-.5 (12.1 (nor0.00(.)Tj50.004 Tw 4.026 0 T

voters of color from white voters to maintain the white members' slim majority on the Board." (*Id*. .)

The Complaint also alleges that race was the predominant factor in redistricting as evidenced by the Map resulting in "packing Black and Latinx voters in a manner not justified by the VRA." (*Id*. .) Further, as alleged, consideration of race was not narrowly tailored in a manner to comply with the VRA or any other compelling governmental interest.

deviations in the Map selection process were based not on race, but politics. Those are arguments the District can pursue through discovery, but they are improper at this stage of the litigation.

The deviation from past practices continued at the state legislative level, where HB 1028 was brought as a "general bill," unlike the 200-plus local redistricting bills from the prior redistricting cycle, all of which were brought as "local bills." (*Id.* 111.) That tactic prevented the local delegation (comprised predominantly of minority-preferred candidates) from approving the bill before it went to the full General Assembly for a vote. (*Id*.)

Finally, the Complaint alleges that the composition of Districts 2, 3, and 6 ("Challenged Districts") themselves reflect a map-design process that was predominated by race, and did not comply with traditional districting criteria. As detailed in the Complaint, the Map packs the largely Black and Latinx community of South Cobb into Districts 2, 3, and 6 (*id.* 157) and splits the municipalities of Smyrna and Kennesaw into different districts. (*Id.* 139.) The Motion entirely ignores Plaintiffs' well-pled allegations regarding the contours of the Map itself.

The Motion does not meaningfully engage with any of those allegations.

PROCEDURAL HISTORY

On June 9, 2022, Plaintiffs filed their Complaint against the BOER

on the pleadings when no leave given).[2] Since the Motion was filed, Plaintiffs have offered on multiple occasions to allow the District to withdraw from the case without prejudice so long as they remain subject to their discovery obligations. The District has refused those offers.

LEGAL STANDARD

A motion for judgment on the pleadings is proper only when no genuine issue of fact exists, and the moving party is entitled to judgment as a matter of law. *First-Citizens Bank & Tr. Co. v. SJ Pharms., LLC*, 2016 WL 9383313, at *3 (N.D. Ga. Dec. 21, 2016) (Ross, J.). "A motion for judgment on the pleadings is subject to the same standard as is a Rule 12(b)(6) motion to dismiss." *Solis v. Botes*, 2011 WL 13269083, at *2 (N.D. Ga. Sept. 21, 2011) (internal quotation and citation omitted). In deciding a motion for judgment on the pleadings, "the allegations contained in a complaint must be accepted as true and the facts and all inferences must be construed in the light most favorable to the nonmoving party." *Ingram v. Buford City Sch.*

[2] In addition to being untimely, the Motion is also procedurally improper because the District purports to request relief on behalf of the BOER Defendants. (Mot. at 24.) *See Reid v. Hasty*, 2008 WL 11464855, at *9 n.7 (N.D. Ga. Mar. 13, 2008) (holding that a defendant could not move on behalf of its co-defendants who did "not indicat[] that they join[ed] in [the movant's] motion to dismiss), *report and recommendation adopted as modified on other grounds*

Dist., 2018 WL 7079179, at *4 (N.D. Ga. Dec. 17, 2018). Failure to address well-pled allegations in the complaint is grounds for denial. *See, e.g.*, *Lowery v. Amguard Ins. Co.*, 2021 WL 6752234, at *4 (N.D. Ga. July 30, 2021) (denying motion because it "fail[ed] to address" a central element of a sufficiently well-pled claim).

ARGUMENT

I. THE DISTRICT RELIES ON CASE LAW INAPPLICABLE TO RACIAL GERRYMANDERING

Plaintiffs have brought a racial gerrymandering claim under 42 U.S.C. § 1983 in order to rectify violations of the Equal Protection Clause of the Fourteenth Amendment. Yet, the Motion seeks dismissal of this claim relying on legal theories and standards that have not been alleged and do not otherwise apply to racial gerrymandering cases. When utilizing the correct legal standards, the Complaint more than adequately alleges Plaintiffs' claim.

A. The District Improperly Conflates the Standard for Intentional Discrimination and Racial Gerrymandering

The Motion errs first by asserting that Plaintiffs must plead "discriminatory lJ1r

evidence" for concluding that VRA compliance required that particular voting district, it would not pass muster under strict scrutiny and would be unconstitutional. *Id.*

Racial gerrymandering claims are

by discriminatory goals. But discriminatory intent is not a *required* element of a racial gerrymandering claim; all Plaintiffs must satisfy is the two-step analysis laid out above.

Here, Plaintiffs' claim is for racial gerrymandering only, yet throughout its Motion, the District conflates the discriminatory intent standard and the racial predominance standard. (*See, e.g.*, Mot. at 20 (referring to Plaintiffs' case as both concerning ",

racial gerrymandering section of the opinion and cites only to the introductory section and the section concerning the intentional discrimination claim. (*See* Mot. at 13, 19, 23.) Indeed, it is clear that the *Abbott* Court only considered "discriminatory intent" in connection with the intentional discrimination claim. *Abbott*, 138 S. Ct. at 2325–30.

B. "Cat's Paw" Liability and *Brnovich* Are Irrelevant to Plaintiffs' Claim

The District's assertion that Plaintiffs "assert a 'cat's paw' theory of liability" is misplaced. (Mot. at 15.) The District offers this theory to support its flawed argument that the District's actions with regard to the drawing of the map are irrelevant either because either (i) the District did not "enact" the Map, or (ii) the District's actions cannot be attributed to the State. (Mot. 11-19.)

"Cat's paw" liability originated in employment discrimination cases and gets its namesake from a parable about a **monkey** tricking a **cat** to use its paw to grab chestnuts from a fire. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). In *Brnovich*, plaintiffs brought an intentional discrimination claim asserting that a ballot-collection statute ("HB 2023"), which criminalized the collection of mail-in ballots, was "enacted with discriminatory intent" under *Arlington Heights*. *Id*. at 2335. The Ninth Circuit found that the District Court erred by dismissing the claim because the lower court failed to apply a "cat's paw" theory"

of liability. *Id*. at 2350. Under the Ninth Circuit's theory, proponents of HB 2023 (*i.e*., the **monkey**) stated publicly that the intent of the bill was to curb election fraud, when in fact the true intent was to discriminate against minority voters. *Id*. at 2349. The legislators (*i.e*., the **cat**) who voted for HB 2023 based on election fraud concerns were used to carry out the proponents' discriminatory intent. *Id*. at 2335.

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in designing the map, without analyzing discriminatory intent); *Davis v. Chiles*, 139 F.3d 1414, 1424 (11th Cir. 1998) (considering "direct evidence of a district-drawer's purpose" to assess if race predominated). Thus, the District's repeated "cat's paw" argument has no application to this case. The law does not require any showing that the map-drawer's conduct be attributed to th( )]TJ 1 Tf12 -p2.2 (e)3.5w3.6 (')12.2 ((60.004 Tc

Complaint is sufficiently and plausibly alleges that race predominated in the drawing of the Map and therefore satisfies the requisite pleading standard. *See, e.g.*, *League of United Latin Am. Citizens v. Abbott*, 2022 WL 174525, at *3 (W.D. Tex. Jan. 18, 2022) ("*LULAC I*") ("Plaintiffs are not required to produce a 'smoking gun' . . . to make a plausible allegation.")

Plaintiffs can establish racial predominance through direct or circumstantial evidence. *Cooper*, 581 U.S. at 299–301; *Miller*, 515 U.S. at 9at 9gatok56 0 T-0.00Tw [(C)-.2 (e)

"judgement on the pleadings must be denied" where there is a "material dispute of fact").

A. Plaintiffs Adequately Allege Evidence of Race Predominance

Plaintiffs may establish that race was the predominant consideration in the redistricting with direct evidence of the "district-drawer's purpose." *Davis*, 139 F.3d at 1424; *Cooper*, 581 U.S. at 292 (finding legislators' statements were relevant, direct evidence).

As alleged in the Complaint, the majority white members of the Board of Education, as well as the map-drawer hired by the Board, and the sponsor of HB 1028, each stated that they used race to comply with the VRA, which was a key consideration in drawing the Map. (*See, e.g.*, Compl. 11, 125.) But, the Complaint further alleges that such purported compliance is nothing more than a pretext to pack the Challenged Districts with Black and Latinx voters in a manner "not justified by the VRA," so as to maintain the white majority on the Board. (*Id.* 9, 147.) These allegations are buttressed by specific allegations regarding the lack of analyses to support the purported attempt to comply with the VRA. (*See, e.g.*, *id.* 121, 122). *See Cooper*, 581 U.S. at 306 ("Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation

of the VRA, . . . we [will not] approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'etre* is a legal mistake.").

Additionally, the Complaint alleges a great deal of circumstantial evidence supporting the inference that race was the predominant consideration in drawing the Map. *See id.* at 292 (to prove that race was the predominant factor in a redistricting decision, the plaintiff may rely on "circumstantial evidence of a district's shape and demographics"); *see also*, *LULAC I*, 2022 WL 174525, at *3 (considering circumstantial evidence including "recent history, departures from normal procedures, and legislative history").

First, the Complaint lays out that Cobb County's demographics changed significantly between the 2010 and 2020 census, with an increase in Black and Latinx populations and a decrease in the white population. (Compl. ¶¶ 52-53.) Cobb County's growing communities of color quickly impacted election outcomes in 2012, 2016, 2018, and 2020. (*Id*. ¶¶ 54-55.) In the 2020 election, the majority of white Board members slipped from 6-1

in decades not overseen by the U.S. Department of Justice because of the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013). For example, the Board of Education considered a single bid by Taylor English instead of three, as was the past precedent (*id.* ¶¶ 97-98); the General Assembly evaluated redistricting decisions on a statewide basis

The Complaint also alleges how the alterations in the Map shore up the Board's white majority, namely by preserving their hold on District 7. (*Id*. ¶¶ 171-73.) Specifically, the Map eliminates the eastward skew of District 6 and the western and southwestern areas of District 7. In effect, the Challenged Districts track the north/south divide of Cobb County's white and Black/Latinx populations. (*Id*.) Plaintiffs allege this was accomplished by rotating each of the districts clockwise around the hub of Marietta to concentrate the Black and Latinx population in the southern districts in the county, without any northward expansions along the spokes of the wheel to the east or west. (*Id*. ¶¶ 174-77.) The Complaint further alleges how the packing of District 3 can be observed in the splitting of Kennesaw between Districts 1 and 7 which effectively prevents Black voters from attaining a majority or near-majority in District 7. (*Id*.).

Plaintiffs also allege that HB 1028 splits the municipalities of Smyrna and Kennesaw into different districts (*id*. ¶ 139) and otherwise divides communities of interest. (*Id*. ¶¶ 137-39.) The Complaint further alleges that the Plan "did not adhere to the Board's or Rep. Ehrhart's purported redistricting criteria and conflicted with the guidelines articulated by the LCRO." (*Id*. ¶¶ 140-46.) These changes were made despite the fact that the existing map, the 2012-enacted redistricting plan, met the

redistricting criteria available to the Board members without any dilutive effect on Black and Latinx voters. (*Id.* ¶ 4.)

The District's Motion does not refute or even address any of those allegations. The District's failure, on its own, is grounds to deny the District's Motion. *See Ga. Advoc. Off. v. Georgia*, 447 F. Supp. 3d 1311, 1317 n.2 (N.D. Ga. 2020) (finding "Defendants fail[ure] to address" certain allegations in their motion to dismiss, "provide[] another basis for denying Defendant's motion").

South Carolin [illegible]

clear cracking and packing of minority voters, all strongly support an inference that race predominated in designing the Map.

B. The District Argues Competing Factual Inferences

The Court must accept the Complaint's allegations as true and construe all inferences in "the light most favorable" to Plaintiffs. *Ingram*, 2018 WL 7079179, at *4. Yet, the District asks the Court to accept its characterization of the events at issue as political "disputes," "disagreements," and "issues." (Mot. at 4, 5, 12, 16-17.) This effort should be rejected.

Defendants in *Alexander* argued the plaintiffs' racial gerrymandering case was a "veiled effort to raise non-justiciable allegations of partisan gerrymandering." *Alexander*, 2022 WL 453533 at *4. The court rejected that argument, holding defendants could defend the maps as a "race-neutral partisan gerrymander" at trial, but noting they cited "no authority for the proposition that the court can forcibly recharacterize the allegations of a plaintifsT.5 (i)8./5 (c)12.(0001 Tc -0u4)8.5 (e)3.6 (ga6)8

The District also offers a competing interpretation of Rep. Ehrhart's testimony about "minority opportunity voting districts" and VRA compliance. (Mot. at 21-22.) Defendant ignores that Plaintiffs' allegations must be accepted as true at this stage and the fact that "VRA compliance is a . . . not-always-successful defense to racial-gerrymandering claims." *LULAC II*, 604 F. Supp. 3d at 510.

III. THE ACTION WAS BROUGHT AGAINST THE PROPER DEFENDANTS

The District spends the bulk of its Motion arguing that instead of suing the BOER Defendants, Plaintiffs should have named the State of Georgia the General Assembly, and/or the Governor as defendants. (Mot. at 12-13, 15, 19-20, 24.)[5] The District's position is contrary to controlling Eleventh Circuit precedent.

immunity" where plaintiff brought suit in federal court rather than "state superior court"), *cert. denied*, 2023 WL 2959398 (Apr. 17, 2023).

Similarly, the District claims the General Assembly is a proper defendant without citing any supporting case law. (Mot. at 1, 13, 19, 24.) Again, the District's position is contrary to binding Eleventh Circuit precedent. *See DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1293 (N.D. Ga. 2001) (holding that under Georgia state law or Rule 17(b) the "Georgia House of Representatives, Georgia State Senate," and "county House and Senate delegations cannot be sued"); *see also Tyson*, 2021 WL 8893039.

The District mentions Governor Brian Kemp's decision to sign HB 1028 into law quite frequently. *See, e.g.*, Mot. at 12, 22. To the extent the District suggests the Governor is a proper defendant, the District is wrong because neither the Governor (nor the Secretary of State) implements and enforces the new map. *See Trump v. Kemp*, 511 F. Supp. 3d 1325 (N.D. Ga. 2021) (Secretary of State and Governor were improper defendants).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs have adequately alleged their racial gerrymandering claim. The Motion therefore should be denied.

Respectfully submitted,

/s/ Pichaya Poy Winichakul

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CERTIFICATION OF COMPLIANCE

Pursuant to Local Rule 7.1, the undersigned counsel