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

GEORGIA STATE CONFERENCE OF THE NAACP, et al.,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	NUMBER 3:11-cv-123-TCB
FAYETTE COUNTY BOARD OF COMMISSIONERS, et al.,	)	
Defendants.	)	

ORDER

This case comes before the Court on Plaintiffs' motion to certify an interlocutory appeal [84].

I. Background

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), the Supreme Court established three preconditions to liability under § 2 of the Voting Rights Act ("VRA"), the first of which is that the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district." Subsequent cases suggested that this precondition might not be strictly enforced. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). However, the Supreme Court has since rejected that notion and held that absent allegations of intentional discrimination, "a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009).

In this case, Plaintiffs sought to establish a § 2 violation using their "illustrative" districting plan, which satisfied *Gingles* and *Bartlett* insofar as it included a majority-minority district, i.e., a district in which black voters would make up more than fifty percent of the voting population.[1] However, Plaintiffs asked the Court to remedy the alleged violation by implementing a different plan, a plan that did not include such a district.

On May 30, 2012, the Court orally denied Plaintiffs and the Board of Education Defendants' motion to approve their amended consent decree. The Court held that the amended consent decree was not a permissible remedy under § 2 of the Voting Rights Act ("VRA") because it failed to create a majority-minority district. This holding was based in part on

[1] The Court has yet to determine whether the majority-minority district in Plaintiffs' illustrative plan is "reasonably compact." *See Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997) ("As we have noted before, § 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.'").

Fairley v. Hattiesburg, Mississippi, 584 F.3d 660, 668 n.3 (5th Cir. 2009), in which the Fifth Circuit explained *Bartlett*'s impact on permissible § 2 remedies as follows:

> To the extent that the plaintiffs argue for creation of a "swing" or "equal opportunity" ward in which the black population would form a larger minority and make black candidates more competitive than they are now, the argument is foreclosed by [*Bartlett*], which held that "a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent," at least where intentional discrimination is not at issue. Thus, the VRA does not permit this court to mandate creation of swing wards, but only majority-minority ones.

The Court agreed with the Fifth Circuit's analysis and therefore held that it had no authority to approve the amended consent decree.

In addition to *Fairley*, the Court relied on *Nipper v. Smith*, 39 F.3d 1494, 1511 (11th Cir. 1994) (en banc), in which the Eleventh Circuit held that the first *Gingles* precondition "asks whether the court can fashion a remedy for a demonstrated abridgement." Therefore, "[t]he inquiries into remedy and liability . . . cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Id.* at 1530-31.

Based on *Nipper*, this Court concluded that a plan that does not satisfy the first *Gingles* precondition is not a permissible remedy under § 2.

In their motion to certify an interlocutory appeal, Plaintiffs contend that "*Bartlett* did not hold that a Section 2 violation can only be remedied through a majority-minority district."

II. Legal Standard

Under 28 U.S.C. § 1292(b), a district court may grant leave to appeal an interlocutory order if it certifies that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." However, this process should be used sparingly. "The proper division of labor between the district courts and the court of appeals and the efficiency of judicial resolution of cases are protected by the final judgment rule, and are threatened by too expansive use of the § 1292(b) exception to it." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004). Consequently, § 1292(b) should be used "only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation." *Id.* at 1256 (quoting 1958 U.S.C.C.A.N. 5255, 5260-61).

The term "question of law" does not encompass "the application of settled law to fact" or "any question the decision of which requires rooting through the record." *Id.* at 1258. Instead, the types of questions to which § 1292(b) is directed are those that "might be called [questions] of 'pure' law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'" *Id.* (quoting *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674 (7th Cir. 2000)).

A question of law is considered "controlling" if it "has the potential of substantially accelerating disposition of the litigation," even if it would not terminate the case. 19-203 GEORGE C. PRATT, MOORE'S FEDERAL PRACTICE - CIVIL § 203.31 (2012), *available at* Lexis MOORES. This "underscores the artificiality of attempting to identify a controlling question as an inquiry separate from the prediction whether appeal may materially advance the ultimate termination of the litigation." 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3930 (2d ed. 1996). Thus, the district court's primary consideration should be whether resolution of the question "would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin*, 381 F.3d at 1259.

The requirement that there be substantial ground for difference of opinion is satisfied when (1) the issue is difficult and of first impression, (2) a difference of opinion as to the issue exists within the controlling circuit, or (3) the circuits are split on the issue. *United States ex rel. Powell v. Am. InterContinental Univ., Inc.*, 756 F. Supp. 2d 1374, 1378-79 (N.D. Ga. 2010). However, the fact that the question is one of first impression, standing alone, is insufficient. *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996). Instead, the district court has a duty "to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a *substantial* ground for dispute." *Id.* (quoting *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983)).

III. Discussion

Although the Court suggested at the May 30, 2012 hearing that it would be willing to certify this issue for interlocutory appeal, upon further consideration, the Court declines to do so. There is no substantial ground for difference of opinion on this issue.

In support of their position that *Bartlett* does not require a § 2 remedy to include a majority-minority district, Plaintiffs rely on *Bartlett*'s statement that "§ 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts." 556 U.S. at 23. However, this statement does not support Plaintiffs' position. It is true that states are free to create crossover districts and that the existence of such districts may lead to the conclusion that there has been no § 2 violation. *Id.* at 23-24. However, *Bartlett* also made clear that "as a statutory matter, § 2 does not mandate creating or preserving crossover districts." *Id.* at 23. Thus, under *Bartlett*, any court-imposed remedy must include a majority-minority district.[2]

A closer look at the reasoning in *Bartlett* further reveals the flaws in Plaintiffs' position. As the Supreme Court noted, § 2 proscribes the "special wrong" that occurs "when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Id.* at 19. This "special wrong" cannot be remedied by the creation of a

[2] Plaintiffs also suggest that this case is different from *Bartlett* because their proposed remedial plan does not involve a crossover district but a "plurality district" in which they can elect their preferred candidates "on the strength of their votes alone." But they acknowledge that they can do so only if there is a disparity in voter turnout. And while they argue that such a disparity exists, the purpose of a bright-line, majority-minority requirement is to avoid such questions. *See Bartlett*, 556 U.S. at 17 (rejecting a standard that would require courts to ask, inter alia, "What are the historical turnout rates among white and minority voters and will they stay the same?").

district in which the minority group constitutes less than fifty percent of the voting population. Indeed, the Supreme Court itself seems to have rejected such an interpretation of *Bartlett*. *See Perry v. Perez*, 132 S. Ct. 934, 944 (2012) ("If the District Court did set out to create a minority coalition district, . . . it had no basis for doing so." (citing *Bartlett*, 556 U.S. at 13-15)).

In addition to making arguments based on *Bartlett* itself, Plaintiffs attack the Court's reliance on *Fairley* and *Nipper*. With respect to *Fairley*, they contend that the language on which the Court relied "is relevant to what a plaintiff must prove at the *liability* stage, but it does not suggest that *Bartlett* requires this same showing at the remedial stage." This reading of *Fairley* is indefensible. The Fifth Circuit explicitly stated that "the VRA does not permit this court to mandate creation of swing wards, but only majority-minority ones." 584 F.3d at 668 n.3. The fact that this statement was included in a discussion of § 2 liability merely confirms the validity of the Eleventh Circuit's conclusion in *Nipper* that questions of liability and remedy are inseparable in § 2 cases.

Plaintiffs further argue that *Fairley* actually supports their position because the Fifth Circuit recognized that the remedial plan need not be identical to the plan used to establish liability. *See id.* at 671 n.14 ("[I]t is sufficient that a plaintiff show that a workable plan for another minority-controlled voting district is possible; the plaintiff's plan need not be an ultimate solution."). But this Court has never suggested that the remedial plan must be identical to the plan used to establish liability. It has merely held that the remedial plan must be a permissible remedy in that it creates a majority-minority district. *Fairley* does not suggest otherwise.

Next, Plaintiffs argue that *Nipper* should not be applied outside the unique context in which it arose, i.e., judicial elections. But the Eleventh Circuit has not limited *Nipper*'s holding in this way. *See, e.g.*, *Brooks v. Miller*, 158 F.3d 1230, 1239 (11th Cir. 1998) (applying *Nipper* in the context of a challenge to Georgia's primary elections). Moreover, Plaintiffs fail to explain how the first *Gingles* precondition could be said to ask "whether the court can fashion a remedy," *Nipper*, 39 F.3d at 1511, if the remedy that is imposed need not satisfy the first *Gingles* precondition. Therefore, it is indisputable that *Nipper* refutes their position.

Apart from *Fairley* and *Nipper*, Plaintiffs contend that there is substantial ground for difference of opinion on this issue because "[t]he Northern District of Georgia, the District Court for the District of Columbia, and the Second and Eighth circuits agree with [their] position." In support of that proposition, they cite *Lowery v. Deal*, No. 1:11-cv-974-TCB, 2012 WL 1035899, at *6 (N.D. Ga. Mar. 16, 2012); *LaRoque v. Holder*, 831 F. Supp. 2d 183, 223 (D.D.C. 2011); *Pope v. County of Albany*, No. 11-439-cv, 2012 WL 1918523, at *5 (2d Cir. May 29, 2012); and *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006). However, none of these cases actually supports Plaintiffs' position.

First, Plaintiffs misrepresent this Court's decision in *Lowery*. In that case, the Court acknowledged that "[t]he essence of the first *Gingles* precondition is that '[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.'" 2012 WL 1035899, at *6 (quoting *Bartlett*, 556 U.S. at 15). Plaintiffs rip this quote from its context and latch on to the word "potential," arguing that they will have potential to elect their preferred representatives without a majority-minority district and that such a district should therefore not be required. In essence, Plaintiffs ask the Court to ignore *Bartlett*'s bright-line, majority-minority requirement and instead apply a malleable standard based on the requirement's underlying policies. However, the Supreme Court adopted a bright-line approach to give district courts an objective measure of the minority group's voting potential. *Bartlett*, 556 U.S. at 17. This Court has no authority to apply a different standard, nor did it suggest that it would be willing to do so in *Lowery*.

Plaintiffs' reliance on *LaRoque* is also misguided. In that case, the U.S. District Court for the District of Columbia examined § 5 of the VRA and concluded that "[n]othing in the phrase 'elect their preferred candidates of choice' specifies that voters must do so only from majority-minority districts." 831 F. Supp. at 223. Plaintiffs argue that since § 2 contains similar language, the same conclusion should be reached in that context. However, *LaRoque* explicitly declined to follow *Bartlett* on the ground that *Bartlett*'s holding was limited to § 2 cases. *Id.* at 223 n.6. As a result, any attempt to apply *LaRoque* in the § 2 context would be unsound. Moreover, contrary to Plaintiffs' position, *Bartlett* recognized that § 2 and § 5 are distinguishable on this issue. *See* 556 U.S. at 25 (holding that the presence of influence or crossover districts may be relevant to the § 5 retrogression analysis, but such districts are not required by § 2).[3]

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[3] The *LaRoque* opinion on which Plaintiffs rely was vacated by the D.C. Circuit because after the case went up on appeal, the Attorney General withdrew his objection to the state's proposed change, rendering the case moot. *LaRoque v. Holder*, 679 F.3d

Next, Plaintiffs argue that *Pope* supports their position because in that case the Second Circuit "identif[ied] legal error in the district court's demand for plaintiffs to show more than a simple majority of the relevant minority group at the first step of *Gingles* analysis." 2012 WL 1918523, at *5. Of course, this Court has never demanded more than a simple majority. Indeed, the Court made clear during the May 30, 2012 hearing that even a 50.000001 percent majority would be good enough. The problem is that Plaintiffs' proposed remedy does not reach that threshold.

Finally, Plaintiffs contend that *Bone Shirt* supports their position because in that case the Eighth Circuit recognized that the "ultimate end of the first *Gingles* precondition is to prove that a solution is possible, and not necessarily to present the final solution to the problem." 461 F.3d at 1019 (quoting *Cottier v. City of Martin*, 445 F.3d 1113, 1118 (8th Cir. 2006)). But again, this Court has not suggested that the remedial plan must be identical to the plan used to establish liability. It has merely held that the remedial plan must be a permissible remedy in that it creates a majority-minority district. *Bone Shirt* does not suggest otherwise; indeed, the remedial plan in that case included two such districts. Moreover, in that case the Eighth

905 (D.C. Cir. 2012). However, as discussed above, even assuming *LaRoque* were still good law, it does not support Plaintiffs' position.

Circuit noted that "[i]n formulating a remedial plan, the first and foremost obligation of the district court is to correct the Section 2 violation." *Id.* at 1022. Given that Plaintiffs' proposed remedial plan does not correct the alleged § 2 violation because it does not create a majority-minority district, there is no indication that the Eighth Circuit would approve it either.

In sum, Plaintiffs have failed to present any well-reasoned argument in support of their interpretation of *Bartlett*, to raise any doubt as to the Court's reliance on *Fairley* and *Nipper*, or to identify any other authority that supports their position. Therefore, the Court finds no substantial ground for difference of opinion on this issue. As a result, the Court will not certify the issue for interlocutory appeal, and the Court need not address the parties' arguments as to whether such an appeal would materially advance the ultimate termination of the litigation.

IV. Conclusion

Plaintiffs' motion to certify an interlocutory appeal [84] is DENIED.

IT IS SO ORDERED this 18th day of September, 2012.

Timothy C. Batten, Sr.
United States District Judge