IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JAMES FIGGS AND ROBERT JACKSON PLAINTIFFS

V. CIVIL ACTION NO. 4:14-CV-119-MPM-JMV

QUITMAN COUNTY, MISSISSIPPI ET AL. DEFENDANTS

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR ATTORNEYS' FEES AND COSTS

COME NOW Plaintiffs, James Figgs and Robert Jackson, by and through counsel of record, and respectfully submit their Memorandum of Authorities in Support of Plaintiffs' Response in Opposition to Defendants' Motion for Attorneys' Fees and Costs:

I. INTRODUCTION

Defendants have moved for attorneys' fees and costs under 52 U.S.C. § 10310(e), 42 U.S.C. § 1988 and 28 U.S.C. § 1927, as well as costs as prevailing parties pursuant to the Federal Rules of Civil Procedure. Defendants' motion repeatedly ignores, misstates, and misapplies Fifth Circuit and Supreme Court precedent governing the standards for when defendants may be entitled to fees, as well as the underlying substantive law for vote dilution claims. Defendants' motion also evinces a disregard for the serious consequences, detailed in Supreme Court decisions, of pursuing fee awards against plaintiffs and their counsel in civil rights cases.

As a threshold matter, Defendants fail to show that they were the prevailing party in the underlying litigation, such that an award of fees or costs against Plaintiffs may even be contemplated. Moreover, Defendants repeatedly assert that contested evidentiary matters are fixed in their favor, and foreclose any valid claim by Plaintiffs. In so doing, Defendants

misunderstand—if not misstate—the legal test for a valid vote dilution claim, as well as the standards for imposing fees on Plaintiffs and Plaintiffs' counsel. Finally, Defendants fail to support their claims with any evidence beyond mere conclusory statements. Therefore, Defendants' motions should be denied.

II. BACKGROUND

Plaintiffs initiated the action underlying Defendants' motion for fees to redress violations of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. Doc. 1, at 1. In their Complaint, Plaintiffs argued that the Supervisor Districts in Quitman County were drawn in such a manner as to dilute the voting power of African-American voters. Doc. 1, at 2. In particular, the Complaint alleged that district lines were drawn in order to pack African-American voters into Districts 1, 2 and 4, while keeping the African-American population in Districts 3 and 5 low enough for white bloc voting to prevent African-American voters from electing the candidates of their choice. Doc. 1, at 2. In litigating this claim, Plaintiffs' counsel submitted expert reports, made discovery requests of Defendants, and filed a Response in Opposition to Defendants' Motion for Summary Judgment. Doc. 105, at 1; Doc. 97.

In order for Plaintiffs to succeed on their vote dilution claim, they had to satisfy the three *Gingles* preconditions. Defendants did not dispute that the first two *Gingles* preconditions are met in their Motion for Summary Judgment. Doc. 98, at 8. To prove the third *Gingles* condition, Plaintiffs submitted the expert report of Dr. Allan Lichtman, which demonstrated that white bloc voting in Districts 3 and 5 is usually sufficient to prevent minorities from electing their candidate of choice. Doc. 97-11, at 4. Dr. Lichtman used the generally accepted method of ecological regression to demonstrate racially polarized voting in Quitman County and concluded that African-Americans must comprise a supermajority of the population to elect their candidate of choice in a district. *Id.* at 4. Defendants' expert report also supported Plaintiffs' claim, stating

that African-American voters in these Districts may be unable to elect their candidate of choice unless they comprise 70% of the voting-age population in the district. Doc. 88-3, at 20. Black voting age population (BVAP) in Districts 3 and 5 is nowhere near the 70% that Defendants' expert said was needed for African-American voters to elect their candidate of choice: the BVAP in District 3 is 45.8%, and in District 5 is 52.1%. Doc. 97-11, at 7. Thus, in neither District is the BVAP sufficient to create the supermajority necessary to overcome white bloc voting. This evidence is consistent with Plaintiffs' claim that packing African-American voters into three districts dilutes African-American voting strength in the two remaining districts. *Id.* at 7. Indeed, Districts 3 and 5 historically and consistently elect white supervisors. *Id.* at 7.

Defendants do not contest that within Districts 3 and 5, white bloc voting is sufficient to defeat minority candidates. Rather, Defendants argue that general African-American success in Quitman County in elections at all levels of government, including state and national elections, somehow negates a finding of the third *Gingles* precondition. Doc. 106, at 9. Defendants similarly argue that African-American presence in other electoral bodies in Quitman County negates the third *Gingles* precondition. *Id.* Defendants did not provide any reasons as to why or how some county-wide success is relevant to the third *Gingles* question of whether African-American voters are able to elect candidates of their choice *within District 3 and District 5*.

Plaintiffs chose to voluntarily dismiss their action with prejudice. Doc. 101, at 1. Defendants refused to stipulate to dismissal without a provision guaranteeing that they did not waive their claims to fees and sanctions. Doc. 106 at 4. Plaintiffs filed their motion for dismissal on January 20, 2016, Doc. 101, at 1, and the Court granted the motion on January 26, 2016, Doc. 103, at 1. Defendants proceeded to file the instant Motion for Attorneys' Fees and Costs, seeking fees not only from the individual voter Plaintiffs under 52 U.S.C. § 10310(e) and 42 U.S.C. §

1988, but also from Plaintiffs' counsel under 28 U.S.C. § 1927. Doc. 106, at 1. They also filed a motion for costs as the prevailing parties pursuant to the Federal Rules of Civil Procedure. Doc. 107. The only substantive argument Defendants advance in support of the fees motion is that general evidence of success of African-Americans in Quitman County across elected offices precluded any claim by Plaintiffs that white bloc voting exists in Districts 3 and 5. Doc. 106, at 9, 14. Defendants offer no other evidence to show that Plaintiffs' Complaint was frivolous, or that by bringing this claim Plaintiffs' counsel engaged in unreasonable and vexatious litigation.

III. ARGUMENT AND AUTHORITIES

A. DEFENDANTS ARE NOT ENTITLED TO FEES AND COSTS UNDER 52 U.S.C. § 10310(e) OR 42 U.S.C. § 1988.

1. Defendants have not, as a preliminary matter, established that they are the prevailing party.

Pursuant to 42 U.S.C. § 1988, a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" for proceedings in vindication of civil rights. 42 U.S.C. § 1988. The language of 52 U.S.C. § 10310(e) is almost identical. 52 U.S.C. § 10310(e) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."). The Supreme Court considers the similar language in fee-shifting provisions in civil rights statutes "a strong indication" that they should be interpreted alike. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989). Costs are also only available to a "prevailing party." Fed. R. Civ. P. 54(d)(1).

"A defendant is not a prevailing party within the meaning of § 1988 when a civil rights plaintiff voluntarily dismisses his claim, unless the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits." *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001). In their motion for fees, Defendants ignore—if not defy—such controlling Fifth

Circuit precedent by failing to even attempt to make this baseline showing. They chose instead to announce by fiat that they are prevailing parties simply because Plaintiffs voluntarily dismissed their claim with prejudice. Doc. 106, at 7.

The Fifth Circuit in *Dean* explicitly refused to hold that the voluntary dismissal of a plaintiff's civil rights claim, before any ruling on the merits, bestows prevailing party status on the defendant. 240 F.3d at 509. Such a harsh rule would penalize plaintiffs "for doing precisely what should be done" and create a "chilling effect" that "utterly contradict[s] Congress's intent" to encourage the enforcement of civil rights laws. *Id.* at 510. Since plaintiffs may choose to voluntarily dismiss their claims "for various possible reasons," many of which may "reveal[] nothing about the merits" of a case, *id*., Defendants bear the burden of demonstrating "that the plaintiff[s] withdrew to avoid a disfavorable judgment on the merits," *id*. at 511. Defendants did not attempt to make such a showing. Therefore, Defendants' motion for attorneys' fees, Doc. 105, as well as Defendants' motion for costs, Doc. 107, fail at the first step.

2. Attorneys' fees for "prevailing defendants" are presumptively unavailable.

Even if Defendants could establish their status as prevailing defendants (which they have not), the standard for assessing fees against civil rights plaintiffs is extraordinarily high and differs in kind, not just degree, from the motion to dismiss or motion for summary judgment standard. It is well-established that a civil rights plaintiff "should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Courts must be careful not to award fees' simply because plaintiffs' case did not (or would not) win the day in court:

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because the plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind

> of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Id. at 421-22.

The Fifth Circuit has repeatedly reiterated this extraordinarily high bar for assessing fees against civil rights plaintiffs—stating that fees for prevailing defendants are "presumptively unavailable"—and has reversed fee awards except where "plaintiff's civil rights claim lacks a basis in fact or relies on an *undisputably* meritless legal theory." *Doe v. Silsbee Independent School Dist.*, 440 Fed. Appx. 421, 425 (5th Cir. 2011) (emphasis added); *see, e.g., id.* at 428 (citation omitted) (reversing fee award where plaintiff's argument had "at least some arguable merit," even though it was unsuccessful); *Stover v. Hattiesburg Public School Dist.*, 549 F.3d 985, 998 (5th Cir. 2008) (reversing fee award because there was "plausible evidence" supporting the plaintiff's claim); *Autry v. Fort Bend Independent School Dist.*, 704 F.3d 344, 349 (5th Cir. 2013) (reversing fee award against plaintiff even where the Fifth Circuit held that there was "no competent evidence from which a reasonable juror" could find in plaintiff's favor; plaintiff's claim was "forthright" and, while ultimately inadequate, not "baseless").

3. Defendants' motion does not and cannot demonstrate that Plaintiffs' claims were frivolous, unreasonable, or groundless.

While Defendants pay lip service to the *Christiansburg* standard, their motion utterly fails to apply it. Defendants do not and cannot establish that Plaintiffs' claims were frivolous, unreasonable, or groundless.

The *only* substantive argument Defendants advance is that Plaintiffs were unable to establish evidence supporting the third *Gingles* precondition. Doc. 106 at 8-9.[1] But Defendants'

[1] Despite the high bar for frivolity under *Christiansburg*, Defendants devote less than two pages of briefing to their substantive argument that Plaintiffs' claims are frivolous.

misunderstanding and misinterpretation of the third *Gingles* precondition is foreclosed by decades of Supreme Court and Fifth Circuit precedent.

The third *Gingles* precondition requires Plaintiffs to show that the white voters in Districts 3 and 5, the challenged districts, vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidates." *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Plaintiffs have more than made a *prima facie* showing of this precondition. Plaintiffs' expert, Dr. Lichtman, submitted analysis[2] demonstrating sufficient racially polarized voting (particularly among white voters) and higher white voter turnout in Quitman County, such that African-Americans must constitute a supermajority in order to have a reasonable opportunity to elect a candidate of their choice. Doc. 97-11, at 4. Defendants' expert agreed with this conclusion. Doc. 88-3 at 20 ("[My] analysis of the historical record suggests that if Blacks constitute less than about 7 of every 10 eligible voters in a district, the Black-preferred candidate of choice may not prevail as the top vote getter.").

Since Districts 3 and 5 have BVAPs far below the supermajority level, 45.8% and 52.1% respectively, African-American voters do not have a reasonable opportunity to elect candidates of their choice in Districts 3 and 5. Doc. 97-11, at 7. In other words, "white bloc voting prevents a cohesive African American voting bloc from electing candidates of their choice in Supervisory Districts 3 and 5 under the current plan." Doc. 97-12 at 5; *see also Gingles*, 478 U.S. at 51. This finding is further supported by the fact that historically, Districts 3 and 5 have consistently elected white supervisors. Doc. 97-11, at 7.

[2] Dr. Lichtman used ecological regression analysis as a basis for the findings in his report. Ecological regression analysis has been generally accepted to demonstrate racially polarized voting since at least *Thornburg v. Gingles*, which was decided in 1986. *Gingles*, 478 U.S. at 52.

These basic facts are not contested by Defendants. Rather, Defendants incorrectly assert that Plaintiffs cannot establish the third *Gingles* precondition because their expert's analysis "showed that in seventy-four (74) elections held over ten (10) years, the African American candidate of choice prevailed a majority of the time" and "Defendants proved that there was a proportional presence of African American-supported candidates in Quitman County government offices, which directly contradicts any presence of White bloc voting rising to the level required by the third *Gingles* precondition." Doc. 106, at 9.

Not only are these assertions based on flawed methodology, *see* Doc. 97-12, at 6-9, they are also irrelevant to the third *Gingles* precondition analysis as the appropriate inquiry is whether whites vote sufficiently as a bloc *in the challenged district*, not whether African-American candidates enjoy some generalized electoral success throughout all regional elections. It is only logical that in a County that is heavily majority African-American in voting age population, African-American preferred candidates would prevail in numerous elections generally. But the real issue is whether they can prevail in Districts 3 and 5.

These types of evidentiary disagreements between experts are plainly insufficient to satisfy the strict standard of frivolity under *Christiansburg. See, e.g.*, *Stover v. Hattiesburg*, 549 F.3d 985, 998 (5th Cir. 2008) (reversing fees, despite unanimous verdict, because there was some "plausible evidence" supporting the plaintiff's claim); *Fox v. Vice*, 594 F.3d 423, 427 (5th Cir. 2010), *rev'd on other grounds*, 563 U.S. 826 (2011) (approving fee award because the claim's dismissal was "not based on evidentiary hurdles" but rather the groundless nature of the complaint itself).

But more importantly, even if Defendants' expert evidence is accepted at face value,[3] it is entirely irrelevant to the third *Gingles* precondition analysis. Defendants' argument rests upon the incorrect proposition that the general success of African-American candidates in Quitman County—across all levels of government including gubernatorial, congressional, and presidential races—defeats Plaintiffs' third *Gingles* precondition analysis. Defendants' position is itself groundless under controlling precedent. The Supreme Court and the Fifth Circuit have repeatedly explained that the third *Gingles* prong analysis is district-specific. The question under the third *Gingles* prong is not whether African-American candidates might enjoy some generalized electoral success in the region but rather whether whites vote sufficiently as a bloc *in the challenged district* to usually defeat the minority preferred candidates in the district:

> The inquiry into the existence of vote dilution caused by submergence in a multimember district is *district specific*. When considering several separate vote dilution claims in a single case, court must not rely on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district.

Gingles, 478 U.S. at 59 n.28 (emphasis added); *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 427 (2006) ("To begin the *Gingles* analysis, it is evident that the second and third *Gingles* preconditions—cohesion among the minority group and bloc voting among the majority population—are present *in District 23*." (emphasis added)); *id.* at 429 ("Considering the district in isolation, the three *Gingles* requirements are satisfied."); *see also Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1151 n.6 (5th Cir. 1993) (explaining that the second and third *Gingles* requirements "require . . . a district-specific analysis of voting behavior"); *Fairley v. Hattiesburg*, 2015 WL 4744315 at *17 (S.D. Miss. Aug. 11, 2015) ("The most

[3] Notwithstanding, the flaws in the Defendants' expert report—which utilizes a flawed methodology for analyzing racially polarized voting—are significant. Doc. 97-12, at 6-9.

probative evidence here is the election results in Wards 1, 3, and 4—Hattiesburg's majority-white districts.").

Defendants' citations in support of their flawed interpretation of *Gingles* are inapposite. In most of the cases cited by Defendants, the plaintiffs were challenging at-large electoral schemes and the probative evidence was limited to African-American electoral success in that at-large scheme (the challenged district in those cases). *See e.g., Johnson v. Hamrick*, 296 F.3d 1065 (11th Cir. 2002); *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996); *Clay v. Bd. of Educ. of City of St. Louis*, 90 F.3d 1357 (8th Cir. 1996); *Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994). In those specific cases, where African-Americans were successful more often than not in the challenged at-large elections that were at issue, plaintiffs could not establish the third *Gingles* prong with respect to the at-large elections at issue. This is entirely consistent with a district-specific approach when the challenge is to specific single or multimember districts. Defendants have not limited their third *Gingles* prong conclusions to the challenged districts; indeed, they have not even limited their third *Gingles* prong analysis to Supervisor districts in general.

The Supreme Court has explicitly rejected the idea that electoral success in other elections can make up for vote dilution elsewhere, even within the same governing body. *LULAC*, 548 U.S. at 429 ("The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others."). Thus, vote dilution in the supervisory districts certainly cannot be remedied by general electoral success in national and state-wide elections. *See* Doc. 88-3, at Table 1 (including state and national elections in its African-American electoral success analysis). Defendants make no attempt to argue that their expert's analysis demonstrates that whites do not vote as a bloc to

defeat minority-preferred candidates in Districts 3 and 5. Nor could they, since the percentage of eligible African-American voters county-wide differs drastically from their presence within Districts 3 and 5. Doc. 97-12, at 6 ("Obviously, white bloc voting that was sufficient to usually prevent African American voters from electing candidates of their choice in districts ranging from 45 percent to 52 percent voting-age African Americans would not necessarily have this effect in districts with much higher percentages of voting-age African Americans."); *Gingles,* 478 U.S. at 56 ("The amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including . . . the percentage of registered voters in the district who are members of the minority group . . . .").[4]

To the contrary, Defendants' expert explicitly conceded that African-American voters in Quitman County are not likely to be able to elect their candidate of choice with less than 7 of 10 eligible voters in the district. Doc. 88-3, at 4, 20. Thus, rather than providing probative evidence that Plaintiffs failed to meet the third *Gingles* prong, Defendants' expert report supports Plaintiffs' claim. Doc. 97-12, at 11 ("In sum, taken at face value, the ultimate conclusions of Dr. Morrison's report . . . establish all elements of the three-part *Gingles* test. . . Dr. Morrison finds that African Americans voters are cohesive in Quitman County. He further finds that these cohesive African American voters do not have a realistic opportunity to elect candidates of their choice in districts below 70 percent African American voting age population."). Defendants' faulty interpretation of the third *Gingles* prong certainly fails to establish that Plaintiffs' district-

[4] If relevant at all, Defendants' argument that African-Americans have enjoyed some electoral success elsewhere is only relevant as one factor in the totality of the circumstances analysis. *Gingles*, 478 U.S. at 79 ("[T]he trial court is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." (internal quotation marks and citations omitted)). But, of course, one factor weighing in favor of Defendants in this "searching practical evaluation of the past and present reality," *id.*, does not transform Plaintiffs' *prima facie* case into a frivolous matter.

specific analysis is frivolous, unreasonable, or groundless.[5] Indeed, Plaintiffs' district-specific analysis is the law.

4. Defendants' remaining arguments are counterintuitive and unpersuasive.

Defendants' only remaining arguments for why Plaintiffs' claims are frivolous are that Defendants have not offered to settle and Plaintiffs voluntarily dismissed their claims. Doc. 106, at 9-10. Both of these arguments are counterintuitive and unpersuasive.

First, while the Fifth Circuit has recognized that settlement offers or lack thereof might be of some limited value in evaluating frivolity, *United States v. Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991), the failure of the County to offer settlement is certainly not sufficient on its own to demonstrate that Plaintiffs' lawsuit was frivolous. Such a claim is illogical since it leaves the determination of the merits of Plaintiffs' case to the Defendants rather than to the Court. Indeed, the Fifth Circuit has since noted that "whether a defendant offers to settle a case is of questionable value" and is particularly weak evidence in cases against government entities. *Myers v. City of West Monroe*, 211 F.3d 289, 292, 292 n.3 (5th Cir. 2000) ("Whether a municipality offers to settle simply seems less indicative of the weakness of a plaintiff's case than whether the private employer offers to settle.").

Similarly, Defendants' argument that Plaintiffs' claims are frivolous simply because they chose to voluntarily dismiss them is inconsistent with Fifth Circuit case law and creates

[5] Defendants also argue that Plaintiffs' claim is frivolous because "Defendants showed through analysis of turnout and registration rolls that African American turnout was not affected by White bloc voting." Doc. 106, at 9. The issue is not whether turnout among African-American voters is adversely affected by white bloc voting. What matters ultimately is whether the white bloc vote usually defeats the African-American voters' candidate of choice. *Gingles*, 478 U.S. at 49. In any event, this, once again, is a disputed factual issue between the parties' experts. Plaintiffs' expert's ecological regression results demonstrate that "the turnout of voting age African Americans is lower than voting age whites for both Democratic primary and runoff elections and general elections." Doc. 97-11, at 5. Such disputed factual issues, with evidence on both sides, are not the proper subject of a *Christiansburg* analysis. *See supra* at 8. Moreover, Plaintiffs' expert concluded that white voters would be able to vote as a bloc to defeat the minority preferred candidate in Districts 3 and 5 even if turnout was equal. Doc. 97-11, at 7.

inefficient incentives against dismissal. The Fifth Circuit has already recognized that "[m]any circumstances may influence a plaintiff to voluntarily dismiss his claim with prejudice," some of which are entirely independent of the merits. *Dean*, 240 F.3d at 510. In *Dean*, the Fifth Circuit held that courts should not punish Plaintiffs merely for choosing to dismiss claims because that "would penalize the plaintiff for doing precisely what should be done." *Id.* Indeed, assessing fees against plaintiffs who have voluntarily dismissed their claims risks creating perverse incentives for plaintiffs, forcing them to litigate through extensive discovery to marshal evidence sufficient to prevail (and thus protect themselves against a fee award), even where they might otherwise opt to save court and party resources by dismissing their case. Thus, the Fifth Circuit concluded that the high bar of frivolousness for assessing fees against civil rights plaintiffs would appropriately "address the dilemma of encouraging civil rights plaintiffs to dismiss voluntarily nonviable claims while protecting civil rights defendants from the burdens of frivolous litigation." *Id.* at 511. Defendants' attempt to bootstrap Plaintiffs' prudent choice to dismiss this lawsuit into an argument for assessing fees is entirely foreclosed by *Dean*.

5. Granting fees under a more lax standard endangers the civil rights statutory scheme.

The high bar for fee awards against civil rights plaintiffs is a crucial element of the structure of civil rights statutes. Congress included fee-shifting provisions in the Voting Rights Act and other civil-rights laws to encourage private-attorney-general actions. *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (citing H.R.Rep. No. 94-1558, at 3 (1976)). As the Senate Report on 28 U.S.C. § 1973l(e) stated, "Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights." S.Rep. No. 295, 94th Cong., at *40, 1st Sess. (1975), 1975 WL 12400 (Leg. Hist.), (hereinafter "Senate Report"). Thus, Congress has expressly stated

that the rule for fee awards to defendants should be markedly different: "'[P]rivate attorneys general' should not be deterred from bringing meritorious actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose." Senate Report, at *40-41. Failing to limit fee awards for prevailing defendants to very narrow circumstances would, in the Supreme Court's words, "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of [civil-rights laws]." *Christiansburg*, 434 U.S. at 422; *accord Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980).

The complexity and high costs associated with bringing a Voting Rights Act case already serve as barriers to this type of private-attorney-general action, so the additional threat of awarding fees against a losing plaintiff would further chill these actions. As the Eleventh Circuit recognized, "the resolution of a voting dilution claim [such as plaintiffs' claim here] requires close analysis of unusually complex factual patterns." *Johnson v. Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999); *see also* Dale Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 682 (2014) ("Beyond the burden of proof, voting cases under Section 2 are complex affairs, rendering them more expensive and slower than ordinary civil litigation. . . . Section 2 cases are in a class of their own: [Section 2 cases] are among the most difficult cases tried in federal court."). Given the complexity of Voting Rights Act cases, the Supreme Court's caution against "hindsight logic," *Christiansburg*, 434 U.S. at 422, in awarding fees to "prevailing" defendants is particularly apt.

6. Defendants are not entitled to fees and costs under 52 U.S.C. § 10310(e) or 42 U.S.C. § 1988.

Undoubtedly, the line between claims that are groundless and simply without merit may occasionally be thin. This is not that case. As an initial matter, Defendants failed to heed Fifth Circuit precedent and establish that they are the prevailing Defendants. Moreover, Defendants'

only substantive argument regarding the "frivolousness" of Plaintiffs' claim is based upon a legal theory that is explicitly foreclosed by decades of Supreme Court and Fifth Circuit precedent. Based on a proper *Gingles* analysis, Plaintiffs have easily established a *prima facie* case. Whether Plaintiffs would have ultimately prevailed under a totality of the circumstances analysis, a fact-intensive inquiry requiring the Court to calibrate many factors, is irrelevant to the inquiry under *Christiansburg*.

Defendants' motion fails to make a good faith argument that Plaintiffs' claims were frivolous under any standard. Therefore, Defendants' motion for fees pursuant to 52 U.S.C. § 10310(e) and 42 U.S.C. § 1988 should be denied.

B. DEFENDANTS ARE NOT ENTITLED TO FEES AND COSTS UNDER 28 U.S.C. § 1927.

1. Defendants invoked the wrong standard for determining whether this litigation was vexatious and unreasonable.

Under 28 U.S.C. § 1927, sanctions may only be levied against an attorney if there is evidence that he pursued claims "in bad faith, for improper motive, or in reckless disregard of the duty owed to the court." *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 872 (5th Cir. 2014). Once again, Defendants ignore controlling Fifth Circuit precedent, relying instead on a standard from the Seventh Circuit that looks to whether the claims are "without a plausible legal or factual basis and lacking in justification." *See* Doc. 106, at 13 (citing to *Walter v. Fiorenzo*, 840 F.2d 427, 433 (7th Cir. 1988)). The Fifth Circuit has expressly rejected this standard. *See Lawyers*, 739 F.3d at 872 ("[W]hether the claims pursued had a 'basis in fact' is not the applicable standard in reviewing a [§ 1927] sanctions award . . . ."). Defendants have failed to show, as discussed above, that Plaintiffs' claims were "without plausible legal or factual basis." But even assuming *arguendo* that Defendants have made such a showing, this would not

be sufficient to show that Plaintiffs' counsel brought unreasonable and vexatious litigation. *See id.*

2. Defendants fail to provide any evidence that Plaintiffs' counsel evinced bad faith, improper motive, or reckless disregard of the duty owed to the court.

Relying solely on their unjustified claim that Plaintiffs' suit lacks merit, Defendants leap to the conclusion that Plaintiffs' counsel acted in bad faith, for improper motive, or in reckless disregard of his duty to the court. *Lawyers*, 739 F.3d at 872. Defendants improperly suggest that, by filing Plaintiffs' claim and engaging in legitimate discovery and zealous advocacy, counsel is subject to sanction simply because he ultimately withdrew the Complaint. *Cf. id.* ("[A]n unsuccessful claim is not necessarily actionable."). Before awarding fees and costs under § 1927, a court must "identify [counsel's] sanctionable conduct" separately from its evaluation of the merits of the case. *Id.* Thus, Defendants must do more than allege lack of merit to show that Plaintiffs' counsel engaged in sanctionable conduct. They have failed to do so here.

Defendants argue that Plaintiffs' counsel "unreasonably persisted in pursuing this claim" when he made more than one request for discovery, and when he entered a response to Defendants' Motion for Summary Judgment. *See* Doc. 106, at 13. Persistent prosecution occurs when counsel engages in "excessive litigiousness," such as by making repetitious filings in the face of warnings from the court. *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 525 (5th Cir. 2002). Defendants, however, have not pointed to any instance in which Plaintiffs' counsel filed duplicative or repeated claims against them, much less in the face of a Court order finding such claims to be barred or meritless, or issuing any sort of warning to Plaintiffs' counsel. *Cf. Cambridge Toxicology Grp., Inc. v. Exnicios*, 495 F.3d 169, 181 (5th Cir. 2007) (upholding § 1927 sanctions against counsel who continued to attempt to add causes of action after the court denied leave to amend); *Browning v. Kramer*, 931 F.2d 340, 345-46 (5th Cir. 1991) (finding that

sanctions under § 1927 may be appropriate where counsel continued to repeatedly assert state law claims after the court held such claims were pre-empted by federal law). In *Cambridge*, despite the fact that the court denied leave to amend four times and issued several "stern warnings" against continued attempts to add parties and causes, counsel proceeded to file a second case, and to make additional filings in the initial case. 495 F.3d at 181. The district court found that counsel's conduct "warranted a halt to the proceedings and a stern contempt warning" and imposed sanctions when counsel still failed to desist. *Id.* That is a far cry from what happened here. In this case, Defendants rely on the bare assertion that pursuing discovery and filing a response to their Motion for Summary Judgment was "unreasonable." This assertion is not enough to show that Plaintiffs' counsel engaged in the type of "excessive litigiousness" that gives rise to sanctions under § 1927. Rather, it merely supports the unremarkable proposition that the parties to the litigation had different views concerning the merits of the underlying claims.

In the Fifth Circuit, sanctions are not appropriate where counsel proceeds based on sincere belief, whether warranted or not, that a claim has merit. *See, e.g.*, *Lawyers*, 739 F.3d at 872; *Ayala v. Enerco Grp., Inc.*, 569 F. Appx. 241, 250-51 (5th Cir. 2014) (*per curiam*) (finding that conduct was not sanctionable when counsel "errantly" believed that bringing duplicative claims in state court was necessary to preserve clients claims). Here, Defendants make an unsupported argument that Plaintiffs' counsel persisted in prosecuting this claim beyond the point where he had an "objectively reasonable basis" for doing so. Doc. 106 at 14. They point to no evidence, however, that Plaintiffs' counsel pursued discovery or responded to the Motion for Summary Judgment based on anything other than good faith sincere belief that Plaintiffs' claims had merit, and that counsel's actions were necessary to effectively pursue and support those

claims with evidence. Thus, Defendants have not shown that counsel's conduct was sanctionable.

Defendants can point to no specific conduct by Plaintiffs' counsel that gives rise to a finding of bad faith, improper motive, or reckless disregard of his duty to the court. By failing to advance any argument other than alleged lack of merit, Defendants have not shown that Plaintiffs' counsel engaged in sanctionable conduct in pursuit of Plaintiffs' claim.

3. Sanctions under § 1927 should be sparingly applied.

Sanctions against counsel under § 1927 should be "sparingly applied" and are justified only if there is evidence of "serious and standard disregard for the orderly process of justice." *See Lawyers*, 739 F.3d at 872 (quoting *FDIC v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994)). Furthermore, § 1927 sanctions are "punitive in nature and require clear and convincing evidence that [the] sanctions are justified." *Bryant v. Military Dep't of Miss.*, 597 F.3d 678, 694 (5th Cir. 2010). As Defendants have failed to proffer clear and convincing evidence that sanctions are justified, and as the award of sanctions here would contravene the purpose of § 1927 by chilling legitimate advocacy, Defendants' request for fees pursuant to § 1927 should likewise be denied.[6]

IV. CONCLUSION

For the above and foregoing reasons and on the authorities cited herein and in the accompanying Plaintiffs' Response in Opposition to the Defendants' Motions for Attorneys' Fees and Costs, the Court should deny Defendants' Motions for Attorneys' Fees and Costs under § 52 U.S.C. § 10310(e), 42 U.S.C. § 1988, 28 U.S.C. § 1927, and the Federal Rules of Civil Procedure.

[6] Further, Defendants have requested fees and costs pursuant to § 1927 for the entire cost of this litigation. However, § 1927 "does not authorize the wholesale reimbursement of a party for all of its attorneys' fees or for the total costs of the litigation." *Browning*, 931 F.2d at 345. Under § 1927, "only those fees and costs associated with 'the persistent prosecution of a meritless claim' may be awarded." *Id.* (quoting *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 875 (5th Cir. 1988) (en banc)).

RESPECTFULLY SUBMITTED, this, the 2nd day of March, 2016.

BY:
/s/ Ellis Turnage
ELLIS TURNAGE, MSB# 8131
TURNAGE LAW OFFICE
108 North Pearman Avenue
Post Office Box 216
Cleveland, Mississippi 38732-01216
Tel: (601) 843-2811
Fax: (601) 843-6133
eturnage@etlawms.com

/s/ J. Gerald Hebert
J. GERALD HEBERT (*Pro Hac Vice Filed)*
DANIELLE LANG (*Pro Hac Vice Filed)*
Campaign Legal Center
1411 K St. NW, Suite 1400
Washington, DC 20005
Tel: (202) 736-2200
Fax: (202) 736-2222
GHebert@campaignlegalcenter.org
DLang@*campaignlegalcenter*.org

Attorneys for Plaintiffs

/s/ Michael T. Kirkpatrick
MICHAEL T. KIRKPATRICK (*Pro Hac Vice Filed)*
MEGHAN M. BOONE (*Pro Hac Vice Filed)*
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
Tel: (202) 662-9535
Fax: (202) 662-9634
Michael.Kirkpatrick@law.georgetown.edu
Meghan.Boone@law.georgetown.edu

Attorneys for Ellis Turnage

CERTIFICATE OF SERVICE

I, ELLIS TURNAGE, Attorney for Plaintiffs, do hereby certify that I have served a true and correct copy of the Plaintiffs' unopposed motion for admission *pro hac vice* electronically with the Clerk of the Court using the ECF systems, which sent notification of such filing to:

Hon. Benjamin E. Griffith
ben@glawms.com

Hon. Lauren Edman
lauren@glawms.com

THIS, the 2nd of March, 2016.

BY: s/ELLIS TURNAGE

ELLIS TURNAGE