UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CONGRESSWOMAN CORRINE BROWN, et al., Plaintiffs, v. KEN DETZNER, in his official capacity as Secretary of State of the State of Florida, THE FLORIDA SENATE, and THE FLORIDA HOUSE OF REPRESENTATIVES, Defendants, and THE LEAGUE OF WOMEN VOTERS OF FLORIDA, COMMON CAUSE, DEIRDRE MACNAB, LAVONNE GRAYSON, GEORGE OLIVER III, and ANGELA DEMONBREUN, Defendants-Intervenors.	CASE NO. 4:15-cv-00398-MW-CAS

INTERVENORS' MOTION FOR RULE 11 SANCTIONS AND INCORPORATED MEMORANDUM OF LAW

The League of Women Voters of Florida ("LWVF"), Common Cause, Deirdre Macnab, LaVonne Grayson, George Oliver III, and Angela DeMonbreun (collectively, "Intervenors"), pursuant to Rule 11, Federal Rules of Civil Procedure, request this Court impose sanctions, including attorneys' fees, against Plaintiffs and their counsel, and as grounds therefor state:

I. INTRODUCTION AND BACKGROUND

Led by Congresswoman Brown, Plaintiffs have pled and continue to advocate that Florida's Congressional District 5 ("Current District 5") dilutes voting strength of African Americans in violation of the Voting Rights Act ("VRA") and was drawn with discriminatory intent in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. A long history of prior litigation and utter lack of essential proof leave no room to make those claims.

In state court litigation challenging Florida's 2012 Congressional Plan (the "Earlier Action"), the Florida Supreme Court ordered District 5 to be drawn East-West to remedy a violation of the Florida Constitution, occurring when the Legislature packed rural and urban African-American voters into a single, grossly non-compact District 5 to benefit Republicans. Plaintiffs seek to resurrect that same invalidated district and, like the Legislature before them, claim vote dilution to justify the district's grossly non-compact configuration. Florida courts have already rejected that claim, and the Florida Supreme Court has twice analyzed and determined that the Current District 5 improves compactness and better preserves political boundaries without diminishing the ability of African Americans to elect candidates of choice. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402-06 (Fla. 2015) ("*Apportionment VII*"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272-73 (Fla. 2015) ("*Apportionment VIII*").

Especially with the history Plaintiffs well knew before filing this case, they should have first investigated whether they had any reasonable chance of proving the settled legal preconditions for their claims. Rule 11 requires no less. Yet, likely expecting little resistance from the Legislature, Plaintiffs proceeded despite the following law and facts:

- The first precondition to establish vote dilution requires that a minority group is "geographically compact," but Plaintiffs admit, as any objective person must, that the minority population in their proposed North-South District 5 "is not compact in geographic terms." (Doc. 35 at 17).
- The third precondition to establish vote dilution requires that the challenged district's majority population "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," but Plaintiffs had no evidentiary support, nor a likelihood of developing such support, for alleging this precondition.
- Plaintiffs' discrimination claims require proof of the above-referenced preconditions and proof that the Florida Supreme Court adopted the current plan with intent to dilute the voting strength of minorities, but Plaintiffs have no reasonable chance of establishing either element, as any meaningful pre-suit investigation would have revealed.

Since filing this case, Plaintiffs have received even more confirmation their claims are frivolousness, including their own expert's opinion showing African-American candidates won each of the elections he found pertinent in analyzing the Current District 5. (Doc. 58-1 at 15-16). Intervenors' Motion to Dismiss (Doc. 54), Response to Plaintiffs' Motion for First Amended Preliminary Injunction (Doc. 64), and supporting Expert Declaration of Allan Lichtman (Doc. 63-1), detail further grounds demonstrating that Plaintiffs have no reasonable chance of success and their claims are frivolous. Plaintiffs should therefore be sanctioned under Rule 11 for the reasons shown below.

II. MEMORANDUM OF LAW

Rule 11 requires sanctions in three circumstances:

> (1) when a party files a pleading that has no reasonable factual basis, (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law, and (3) when the party files a pleading in bad faith for an improper purpose.

Jones v. Int'l Riding Helmets, Ltd., 49 F.3d 692, 694 (11th Cir. 1995). Rule 11 is meant "to deter baseless filings in district court and thus streamline the administration and procedure of federal courts." *Peer v. Lewis*, 606 F.3d 1306, 1311 (11th Cir. 2010). Courts may impose Rule 11 sanctions "for the purpose of

deterrence, compensation and punishment." *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993).

Under Rule 11, attorneys must "make a reasonable inquiry into both the legal and factual basis of a claim *prior to filing suit.*" *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1255 (11th Cir. 1996) (emphasis added). Thus, courts must make two determinations in considering sanctions: (1) "whether the party's claims are objectively frivolous – in view of the facts or law"; and (2) "whether the person who signed the pleadings should have been aware that they were frivolous; that is, whether he would have been aware had he made a reasonable inquiry." *Jones*, 49 F.3d at 695. "If the attorney failed to make a reasonable inquiry, then the court must impose sanctions despite the attorney's good faith belief that the claims were sound." *Id.*; *see also Baker v. Alderman*, 158 F.3d 516, 527 (11th Cir. 1998) (affirming award of sanctions despite alleged lack of subjective bad faith).

Furthermore, the obligations imposed by Rule 11 are not measured solely at the time of filing; "the obligations imposed by Rule 11 continue throughout the course of litigation . . . ." *Cargile v. Viacom Int'l Inc.*, 282 F. Supp. 2d 1316, 1319 (N.D. Fla. 2003). Accordingly, sanctions are warranted when a claim is frivolous at the time of filing or when "an attorney continues 'insisting upon a position after it is no longer tenable.'" *Battles v. City of Ft. Myers*, 127 F.3d 1298, 1300 (11th Cir. 1997) (quoting FED. R. CIV. P. 11, ADVISORY COMMITTEE'S NOTE).

A. PLAINTIFFS' CLAIM THAT THE CURRENT DISTRICT 5 DILUTES MINORITY VOTING STRENGTH IS FRIVOLOUS.

According to well settled law, vote dilution claims require establishing: (1) a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group is "politically cohesive"; and (3) the majority "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *see also Bartlett v. Strickland*, 556 U.S. 1, 11 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425 (2006) ("*LULAC*"). Equally settled is that vote dilution claims require "*all* of the necessary factors"; "[i]f any one of the *Gingles* prongs is not established, there is no vote dilution." *Johnson v. Hamrick*, 296 F.3d 1065, 1073 (11th Cir. 2002) (emphasis in original).

Plaintiffs do not dispute the *Gingles* requirements must all be met. Rather, they insist each is met. (Doc. 3 at 2-5; Doc. 35 at 7-11). To that end, Plaintiffs selectively cite the record of the Earlier Action, in which the Legislature and NAACP claimed vote dilution to justify the same North-South configuration of District 5 that Plaintiffs now seek. (Doc. 34-1 ¶¶ 14-19, 21-43, 45-48, 51, 53-58, 60-63, 67, 69, 78; *see also* Doc. 31). They also rely on the opinion of the NAACP's expert from that case, Dr. Engstrom. (Doc. 3 at 5; Doc. 3-1). Thus, on essentially the same grounds, Plaintiffs seek to relitigate vote dilution claims that

were rejected in the final state court judgment and ultimately affirmed by the Florida Supreme Court. *See Apportionment VII*, 172 So. 3d at 370, 426, 436-37. In doing so, Plaintiffs heedlessly pursue claims that are untenable for reasons reflected in the Earlier Action.

1. Plaintiffs' position on the first *Gingles* requirement is frivolous.

The first *Gingles* requirement is met only where a minority group is geographically compact. *See LULAC*, 548 U.S. at 433 (finding "the first *Gingles* condition refers to the compactness of the minority population," and "the inquiry under § 2 [of the VRA] is whether 'the minority group is geographically compact'"). In the Earlier Action, the trial court held that the minority population in North Florida is not geographically compact and that the same district Plaintiffs now demand, "connects two far flung urban populations in a winding district which picks up rural black population centers along the way." *Apportionment VII*, 172 So. 3d at 436. Even Plaintiffs concede that the minority population "***is not compact in geographic terms*** . . . ." (Doc. 35 at 17) (emphasis added).

The unmistakable result is that Plaintiffs cannot meet the first *Gingles* requirement. Language in *LULAC* indicating that "§ 2 does not forbid the creation of a noncompact majority-minority district" does not make Plaintiffs' position tenable, because *LULAC* makes clear that "there is no § 2 right to a district that is not reasonably compact." 548 U.S. at 430; *see id.* at 435 (finding need for

"reasonably close proximity" to be geographically compact); *Bush v. Vera*, 517 U.S. 952, 979 (finding "[i]f, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district. . . .").

Nor can Plaintiffs cling to the notion that a geographically non-compact "community of interest" could satisfy or stand in lieu of the first *Gingles* requirement. Such a rule would vitiate the first *Gingles* requirement, disregard U.S. Supreme Court's oft-reaffirmed requirement of geographic compactness, and create a Section 2 right to districts meandering the length of states to collect far-flung population centers facing similar socioeconomic issues. No litigant, after proper pre-suit review of the law and facts, could reasonably expect adoption of such a rule, particularly with regard to the proposed North-South District 5. Indeed, as part of the judgment invalidating a prior minority-majority district in north Florida, a three-judge panel in *Johnson v. Mortham*, 926 F. Supp. 1460, 1492 (N.D. Fla. 1996), rejected common socioeconomic concerns as a "spurious" justification for piecing together geographically remote minority populations. Accordingly, Plaintiffs and their counsel have violated Rule 11(b)(2) and (b)(3) and should be sanctioned.

2. Plaintiffs' position on the third *Gingles* requirement in frivolous.

The third *Gingles* requirement is met only if racial bloc voting in a district usually defeats the minority's preferred candidate. *See Gingles*, 478 U.S. at 50-51. No fewer than three times in the last two decades have courts rejected vote dilution claims as to north Florida congressional districts, each time finding the third *Gingles* requirement was not met. *See Apportionment VII*, 172 So. 3d at 370, 426, 436-37 (trial court judgment finding the requirement was not met as to justify North-South District 5 with 50.1% black voting age population); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1307, 1323 (S.D. Fla. 2002) (finding requirement not met as to claim to invalidate District 5 predecessor with a 46.9% black voting age population); *Mortham*, 926 F. Supp. at 1475-76 (finding requirement not met as to justify majority-minority North-South District 5 predecessor). Most recently, the Florida Supreme Court set forth a basic reason the third *Gingles* factor cannot be met in challenging the Current District 5: "[w]ith a black share of registered Democrats of 66.1%, the black candidate of choice is likely to win a contested Democratic primary, and with a Democratic registration advantage of 61.1% to 23.0% over Republicans, the Democratic candidate is likely to win the general election." *Apportionment VIII*, 179 So. 3d at 272. In other words, there is no reasonable prospect that the preferred candidates of African Americans will

"usually" lose in the Current District 5, a finding required to support a vote dilution claim.

With that history before them, Plaintiffs had no reasonable chance of success. Nor could their reliance, if any, on racially polarized voting analyses here or in the Earlier Action lead them reasonably to anticipate success. Such analyses have been rejected repeatedly in prior cases involving predecessors to the Current District 5, because the degree of racially polarized voting in no way suggests the minorities' preferred candidates will *usually* lose absent a majority-minority district in North-Central Florida. *See Apportionment VII*, 172 So. 3d at 436-37; *Martinez*, 234 F. Supp. 2d at 1298-1300, 1323; *Mortham*, 926 F. Supp. at 1474-76. Before Plaintiffs even cited Dr. Engstrom's racial polarization analysis in this case (Doc. 3-1), the trial court in the Earlier Action already rejected it as immaterial, finding an utter failure to show that polarization is legally significant. *Apportionment VII*, 172 So. 3d at 436-37. Moreover, Dr. Engstrom's updated report in this case only confirms that Plaintiffs' position is frivolous, as it shows the preferred candidate of African Americans won ***every*** election Dr. Engstrom selected in analyzing racial polarization in the Current District 5. (Doc. 58-1 at 15-16). Accordingly, Plaintiffs and their counsel have violated Rule 11(b)(2) and (b)(3) and should be sanctioned for filing and continuing to advocate a legally unwarranted and factually unsupported vote dilution claim.

B. PLAINTIFFS' CLAIMS UNDER THE U.S. CONSTITUTION ARE FRIVOLOUS.

Plaintiffs' claims under the U.S. Constitution share the same premise as their VRA claim: that East-West District 5 "dilutes the voting strength and political influence of black voters." (Doc. 35 at 22). Plaintiffs have the burden to prove both dilutive effect and discriminatory intent. *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 72 F.3d 1556, 1560 n.3 (11th Cir. 1996); *Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015). To prove dilutive effect, Plaintiffs must satisfy the same *Gingles* and totality of the circumstances tests necessary to prove vote dilution under the VRA. *See Martinez*, 234 F. Supp. 2d at 1334-36); *Broward Citizens for Fair Districts v. Broward Cnty.*, No. 12-60317-Civ, 2012 WL 1110053, at *9 (S.D. Fla. Apr. 3, 2012). For reasons detailed above and in Intervenors' prior filings (Docs. 54, 64), Plaintiffs' constitutional claims are legally unwarranted and factually unsupported for lack of dilution. The added intent element, however, further illustrates the remarkable baselessness of their claims.

The intent element requires Plaintiffs to prove that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Here, the "decisionmaker" was the Florida Supreme Court, which ordered District 5 be drawn East-West and then adopted the Current District 5. Plaintiffs concede this fact, admitting that the Court directed District 5 to be drawn East-

West (Doc. 34-1 ¶ 87). Yet they simply ignore that they have no evidence, nor the prospect of developing evidence, that the Florida Supreme Court adopted the Current District 5 with intent to dilute the political influence of black voters.

Not only do the Florida Supreme Court's opinions give no inkling of intent to dilute the minority vote, the Court undertook substantive analyses that confirmed the ability of minorities to elect preferred candidates is undiminished and likely expanded. *See Apportionment VII*, 172 So. 3d at 404-05; *Apportionment VIII*, 179 So. 3d at 301 (Perry, J. concurring) ("The plan we approve today increases the number of districts where minorities, both racial and ethnic, will have the opportunity to elect the representatives of their choice."). The Florida Supreme Court's decisions also rest on federal precedent and numerous reasonable, non-discriminatory reasons not to mandate a grossly non-compact North-South District 5. *See Apportionment VII*, 172 So. 3d at 404-06. In light of federal law, which in no way requires Plaintiffs' proposed District 5, the decisions of Florida's highest court are demonstrably reasonable and leave Plaintiffs without any factual basis to claim, or expectation to prove, their theory that Florida's congressional plan was adopted to dilute the minority vote. Accordingly, Plaintiffs and their counsel have violated Rule 11(b)(2) and (b)(3) and should be sanctioned for filing and continuing to advocate factually baseless and legally unwarranted discrimination claims.

C. PLAINTIFFS AND THEIR COUNSEL SHOULD BE ORDERED TO PAY INTERVENORS' COSTS AND ATTORNEYS' FEES AS A RULE 11 SANCTION.

During the Earlier Action, Plaintiffs had a fair opportunity – indeed, the same one the NAACP actually exercised – to intervene and defend the prior North-South District 5 under the VRA. Plaintiffs nevertheless largely stood by, content to rely on the Legislature and NAACP to defend that district. Now that that effort has failed, with Florida courts having properly rejected VRA justifications and invalidated the district, Plaintiffs assert essentially the same claims, albeit facing a higher burden to invalidate a court-approved plan that is the current law of Florida. *See Miller*, 515 U.S. at 915-17 (observing the deference owed to State redistricting decisions).

This case is an egregious addition to a long and sad pattern. Alongside efforts of the Republican-led Legislature, Congresswoman Brown has repeatedly followed and launched unsuccessful attacks on Florida's redistricting reform efforts. *See, e.g., Advisory Op. to Att'y Gen. re Standards for Establishing Leg. Dist. Boundaries*, 2 So. 3d 161 (Fla. 2009) (rejecting financial impact statement for ballot initiative as misleading); *Advisory Op. to Att'y Gen. re Standards for Establishing Leg. Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009) (rejecting Legislature's challenge to ballot initiative); *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010) (rejecting challenge to ballot initiative by Legislature and Congresswoman

Brown); *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662 (Fla. 2010) (rejecting Legislature's proposed counter-amendment); *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271 (11th Cir. 2012) (rejecting Elections Clause challenge by House and Congresswoman Brown).

The chance to attack Current District 5 without meaningful opposition was likely tempting, seeing as Defendants fought to keep the invalidated North-South District 5 that Plaintiffs now seek. Congresswoman Brown and her counsel, however, had no legitimate basis to file, nor to continue advocating, their clearly deficient claims. Rule 11 sanctions are proper to deter and compensate for such unwarranted claims. FED. R. CIV. P. 11(b)(1)-(3), (c)(2). At significant expense, Intervenors have taken up the burden of detailing the law and facts that Plaintiffs (and the Legislature) would rather have ignored or left this Court to discern at great effort. It is only fair that Congresswoman Brown and Plaintiffs' counsel pay the cost incurred to bring their baseless, opportunistic misadventure to an end.

III. CONCLUSION

For the foregoing reasons, Intervenors request that the Court sanction Congresswoman Brown and Plaintiffs' counsel, order them to pay Intervenors' reasonable attorneys' fees and costs of defending the Current District 5, and award such other sanctions as appropriate to deter and compensate for the misconduct of Congresswoman Brown and Plaintiffs' counsel.

CERTIFICATE OF GOOD FAITH CONFERENCE AND COMPLIANCE WITH SAFE HARBOR REQUIREMENT

Pursuant to Rule 11(c)(2), and Local Rule 7.1(B)-(C), Intervenors certify that, on March 15, 2016, they furnished the foregoing Motion on counsel for Plaintiffs by U.S. Mail sent to Sheppard, White, Kachergus & DeMaggio, P.A., 215 Washington Street, Jacksonville, FL 32202, with separate (courtesy) electronic mail service to sheplaw@att.net. Plaintiffs failed to withdraw the claims referenced in this Motion within 21 days. On April 26, 2016, counsel for Intervenors conferred by telephone with counsel for Plaintiffs but counsel were unable to resolve the issues raised in this Motion.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

Undersigned counsel for Intervenors hereby certifies that this motion and incorporated memorandum of law contain 3150 words, excluding the case style, signature block, and certificate of service. The foregoing word count has been calculated utilizing Microsoft Word, the word processing software used to prepare this motion and incorporated memorandum of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 27, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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