IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

RENE ROMO, an individual; BENJAMIN WEAVER, an individual; *et. al*,

Plaintiffs,

vs. CASE NO. 2012-CA-00412

KEN DETZNER, in his official capacity as Florida Secretary of States, PAMELA JO BONDI, in her official capacity as Attorney General,

Defendants.
_____/

THE LEAGUE OF WOMEN VOTERS OF FLORIDA; THE NATIONAL COUNCIL OF LA RAZA; *et al.,*

Plaintiffs,

vs. CASE NO. 2012-CA-00490

KEN DETZNER, in his official capacity as Florida Secretary of State; THE FLORIDA SENATE; *et al.,*

Defendants.
_____/

LEGISLATIVE DEFENDANTS' JOINT MOTION TO DISMISS LOWV PLAINTIFFS' FIRST AMENDED COMPLAINT

Pursuant to Florida Rule of Civil Procedure 1.140(b), the Hon. Dean Cannon, in his official capacity as the Speaker of the Florida House of Representatives, the Florida House of Representatives, the Hon. Mike Haridopolos, in his official capacity as President of the Florida Senate, and the Florida Senate (the "Legislative Defendants") move to dismiss the Amended Complaint filed by Plaintiffs LOWV, *et al.*, on April 3, 2012.

BACKGROUND

The LOWV Plaintiffs initiated this action by filing their complaint on February 16.

Defendants moved to dismiss the complaint, which was legally deficient. Rather than oppose the motion to dismiss or defend their complaint, the LOWV Plaintiffs filed an amended complaint. Like its predecessor, the amended complaint ("FAC") is legally deficient and must be dismissed.

I. THE COURT SHOULD DISMISS ALL COUNTS FOR PLAINTIFFS' FAILURE TO IDENTIFY ALL CHALLENGED DISTRICTS.

Among the bases for the Legislative Defendants' motion to dismiss the original complaint was the LOWV Plaintiffs' failure to identify all districts that the LOWV Plaintiffs challenge. Rather than correct this deficiency, the LOWV Plaintiffs repeat it. Florida Rule of Civil Procedure 1.110(b) directs that a complaint contain a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief." This purpose of this fact-pleading requirement is to inform defendants of a plaintiff's claims with sufficient specificity to enable the preparation of a defense. *Horowitz v. Laske*, 855 So. 2d 169, 173 (Fla. 5th DCA 2003); *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999).

Plaintiffs' Complaint, though not short and plain, does not contain ultimate facts that show their entitlement to relief. Rather than identify the districts that Plaintiffs challenge, the Complaint identifies certain districts but notes that the list is non-exhaustive. They identify districts "including but not limited to" in each of their five counts (FAC pp. 24-25). This is not compliant with the rules, which demand the Legislature have notice of the claims against it.

II. PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION BASED ON AMENDMENT SIX'S MINORITY-PROTECTION PROVISIONS.

Count III alleges that the "Congressional Plan and individual districts . . . were drawn with the intent to diminish and/or the effect of diminishing the ability of racial and language minorities to participate in the political process and to elect candidates of their choice" in violation of Amendment Six. (FAC p. 24-25.) This Count relies on a flawed interpretation of Amendment Six's minority protections, and the facts alleged do not support any claim.

Preliminarily, Amendment Six's minority protections actually encompass two separate standards. First, districts must not "deny or abridge the equal opportunity of . . . minorities to participate in the political process." Art. III. § 20(a), Fla. Const. As the Florida Supreme Court announced, this imperative "is essentially a restatement of Section 2 of the Voting Rights Act (VRA), which prohibits redistricting plans that afford minorities 'less opportunity than other members of the electorate to participate in the political process.'" Op. at *49. Like Section 2, this prohibits dilution of minority voting strength. *Id.*; *see also Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Second, Amendment Six prohibits diminishment from the status quo of minority electoral opportunities, effectively imposing a statewide VRA Section 5 standard. *Compare* 42 U.S.C. § 1973c(b) (prohibiting districts that "diminish[] the ability of [minorities] to elect their preferred candidates of choice") *with* Art. III. § 20(a), Fla. Const. (disallowing districts that "diminish [minorities'] ability to elect representatives of their choice"). Although VRA Section 5's non-diminishment standard applies in only five Florida counties, *see* 28 C.F.R. pt. 51, app., Amendment Six effectively *extends it to all sixty-seven*. *See* Op. at *49 (Amendment Six's second imperative regarding minority protections "reflects the statement codified in Section 5 of the VRA prohibiting apportionment plans that have 'the purpose of or will have the effect of diminishing the ability of any citizens . . . on account of race or color . . . to elect their preferred candidates of choice.' 42 U.S.C. § 1973c(b) (2006).").

The Florida Supreme Court explained that Amendment Six's minority protections are properly interpreted consistent with the federal VRA:

> Consistent with the goals of Sections 2 and 5 of the VRA, Florida's corresponding state provision aims at safeguarding the voting strength of minority groups against both impermissible dilution and retrogression. Interpreting Florida's minority voting protection provision in this manner gives due allegiance to the principles of constitutional construction, under which the Court considers "the purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in our constitutional document." *In re Apportionment Law–1982*, 414 So.2d at 1048. Before its placement on the ballot and approval by the citizens of

> Florida, sponsors of this amendment, including the Florida State Conference of NAACP Branches (NAACP) and Democracia Ahora, acknowledged that Florida's provision tracked the language of Sections 2 and 5 and was perfectly consistent with both the letter and intent of federal law. See Amici Curiae Br. of Fla. State Conference of NAACP Branches & Democracia Ahora, Inc., at 3–5, *Roberts v. Brown*, 43 So.3d 673 (Fla.2010) (No. SC10-1362). Those groups further contended that viewing "the requirements of [Florida's provision as being] thoroughly consistent with the Voting Rights Act's text and [placing an] emphasis on protecting the equal opportunities of minorities" did "not require extended analysis to see." Id. at 8.
>
> Moreover, all parties to this proceeding agree that Florida's constitutional provision now embraces the principles enumerated in Sections 2 and 5 of the VRA. Because Sections 2 and 5 raise federal issues, our interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent. This approach not only corresponds to the manner in which this Court addressed Federal VRA claims in 1992, see In re Apportionment Law–1992, 597 So.2d at 280–82, but it squares with how other jurisdictions have interpreted comparable state provisions.

Op. at *21-22. It is clear that Plaintiffs have no federal claim under Section 2 (they don't even bring one), so they likewise have no claim under Amendment Six's counterpart. A successful vote-dilution claim requires a showing that minorities were denied a majority-minority district that—but for the purported dilution—would have existed. In other words, it requires a showing that minorities could have constituted a majority in an additional compact district. *See Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994) (in dilution claim, "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact [minority] districts"). The showing of a hypothetical additional minority-performing district is insufficient; "the minority population in the potential election district [must be] greater than 50 percent." *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009).

Plaintiffs do not—and cannot—allege that the Legislature should have created an *additional* majority-minority district. That precludes any claim based on Section 2 or its Florida counterpart. Plaintiffs allege only that a violation exists because the Congressional Plan "confines the influence of African-Americans to merely one district instead of providing this

group broader **influence** in neighboring districts." (FAC ¶ 58) (emphasis added). They do not even make the conclusory claim that, by allegedly failing to provide African Americans "broader influence," the Legislature failed to create an additional majority-minority district. Nor do they allege the existence of a hypothetical alternative plan that shows the ability to create such an additional district. Accordingly, the LOWV Plaintiffs simply are advancing a made-up claim that finds no support in federal or state law.

Regarding the second provision of Amendment Six's minority protections—that districts shall not diminish minorities' ability to elect representatives of their choice—Plaintiffs likewise fail to state a cause of action. Plaintiffs offer no allegation that in any individual district—or overall—minorities have a diminished ability to elect. Instead, they imply that "influence" might be somehow diminished.

The Amendment's prohibition on diminishment of *the ability to elect* rather than diminishment of *influence* was no accident. In its 2006 reauthorization of Section 5 of the VRA, Congress added the express prohibition against "diminishing the ability" of minorities "to elect their preferred candidate" in response to the Supreme Court's *Georgia v. Ashcroft* decision. *See* H.R. Rep. No. 109-478, at 94 (2006). In *Ashcroft*, the lower court rejected an apportionment in which "a lesser opportunity existed" for minorities to elect preferred candidates in several districts. 539 U.S. at 474. The Supreme Court reversed. It concluded that Section 5 allowed diminishment in some districts in exchange for minority "influence" in others. *Id.* at 482. It was up to states whether "to risk having fewer minority representatives" in exchange for other goals. *Id.* Following *Ashcroft*, Congress was concerned that "[i]f covered jurisdictions are permitted to break up districts where minorities form a clear majority of voters and replace them with vague concepts such as influence, coalition, or opportunity . . . this may actually facilitate racial discrimination against minority voters." S. Rep. No. 109-295, at 20 (2006).

Therefore, Congress overruled *Ashcroft* and expressly prohibited districts that "leave a minority group *less able* to elect a preferred candidate of choice." *See* H.R. Rep. No. 109-478, at 94 (2006). Because Amendment Five adopted substantively identical language, it includes the same prohibition, as the Florida Supreme Court concluded. Op. at *26 ("Certainly, by including the 'diminish' language of recently amended Section 5, Florida has now adopted the retrogression principle as intended by Congress in the 2006 amendment.").

Plaintiffs hope to distribute minority votes to "influence" the election of white Democrats in other areas of the state consistent with their political objectives. But that is not the basis of a proper diminishment claim. Indeed, concerned that the Florida Supreme Court would accept Plaintiffs' argument, the Florida NAACP submitted a brief imploring the Court not to interpret Amendment Five in a way that allowed minority districts to "be dismantled in order to create more Democratic, or any party, districts." NAACP Comment at 10 (available at http://www.floridasupremecourt.org/pub_info/redistricting2012/02-22-2012/Filed_02-22-2012_Comment_NAACP.pdf.) The Florida Supreme Court did nothing to undermine the NAACP's position on this point and specifically held that "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice" are invalid. Op. at *26 (quoting legislative materials). In fact, the Supreme Court specifically held that Florida's counterpart to Section 5 extends protection to "majority-minority districts" and "other historically performing minority districts"—but not "influence" districts, *id.* at *62, which, by definition, do not elect minorities' candidates of choice, *id.* at *57 ("Influence districts are districts in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected."). Notably, the NAACP has sought to intervene in this case to oppose the Plaintiffs' position.

The LOWV Plaintiffs have not alleged that minorities' ability to elect candidates of their

choice has been diminished. (They have not even alleged that they are minorities entitled to protection.) Their allegations that minorities' ability to *influence* has been diminished are immaterial. Count III must be dismissed.

III. THE COURT SHOULD STRIKE PLAINTIFFS' REQUEST FOR THIS COURT TO DRAW A REMEDIAL MAP.

Last, to the extent the LOWV Plaintiffs ask the Court to draw a new map, the Court should strike the request. This Court has no authority to regulate federal elections, which the federal constitution expressly grants to state legislative processes. The Legislative Defendants incorporate the arguments they made in their March 12, 2012 filings on this issue.

WHEREFORE, the Legislative Defendants respectfully move the Court to dismiss the LOWV Plaintiffs' Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by United States mail on April 18, 2012, to the persons listed on the attached Service List.

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