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-000412

KEN DETZNER, in his official capacity as Florida Secretary of State; 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-000490

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

Defendants.
_____/

ROMO PLAINTIFFS' OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO COMPEL

The issue in this case is whether the map Defendants enacted into law to govern Florida elections over the next decade complies with the Florida Constitution. The intent of and process used by the Romo Plaintiffs in preparing their alternative map—which is intended solely to highlight the flaws in the enacted map—is utterly irrelevant to that

question. In other words, inquiry into these subjects is not "reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280(b)(1).

Nonetheless, in their motion to compel ("Motion") Defendants demand: (a) the identity of those who helped prepare the Romo Plaintiffs' alternative map, Motion ¶¶ 11, 13; (b) draft maps reviewed by the Romo Plaintiffs or their representatives, *id.* at ¶ 14; and (c) "documents relating to their maps," *id.* at ¶ 12. Defendants' argument that these materials are relevant rests entirely on an out-of-context snippet from *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012). But the truth is that the Supreme Court in that case considered an alternative map *without ever mentioning the intent or process of those who developed it.* The obvious reason is that these issues are irrelevant to the legality of Defendants' enacted plan. And even if they were relevant, the information Defendants seek is privileged. Defendants' motion to compel discovery should be denied.

I. Plaintiffs' Intent and Process Are Irrelevant

Defendants' motion is 15 pages long, yet it cites only three cases. The first two do little to advance the ball: *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995), simply holds that discovery is allowed into any relevant topic, while *State v. Polak*, 598 So. 2d 150 (Fla. 1st DCA 1992), holds that trial courts have broad discretion in regulating discovery. Plaintiffs dispute neither point, but neither is helpful here, where the very question is whether Plaintiffs' intent and process in preparing their alternative maps are relevant at all.

The only case Defendants cite on that topic is *In re Senate Joint Resolution 1176*, 83 So. 3d 597, and, tellingly, Defendants cite only one sentence of that opinion. Their

reticence is understandable, for reading the opinion as a whole—or even just the passage from which Defendants take their quote—demonstrates that their argument is baseless.

Much like here, in *In re Senate Joint Resolution 1176*, 83 So. 3d 597, the "overarching question" was "the constitutional validity of the plans contained within the Legislature's joint resolution of apportionment" for the House and Senate. *Id.* at 604. "The validity of the joint resolution is determined by examining whether *the Legislature* has operated within the constitutional limitations placed upon it." *Id.* (emphasis added). That is, the Fair Districts Amendments "are the instructions given *to the Legislature* by the citizens, mandating how apportionment plans are to be drawn," *id.* at 684 (emphasis added), so the relevant question is *the Legislature's* compliance with those amendments.

In considering that question, "[t]he Court permitted alternative plans because alternative plans may be offered as relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent." *Id.* at 611. One party submitted such an alternative plan to the Court, *id.*, and the Court considered that plan extensively in finding the Senate reapportionment plan unconstitutional, *see, e.g.*, *id.* at 664 ("A review of the Coalition's alternative plan reveals that it was possible to draw districts in the Panhandle that are more visually compact and keep more counties together."); 669 ("[T]he Coalition's plan demonstrates that Senate District 6 violates the constitutional standards of compactness and utilizing existing political and geographical boundaries."); 678 ("[T]he Coalition's plan demonstrates that the Senate was able to draw districts in this region of the state to better comply with

Florida's compactness requirement while, at the same time, maintaining a black majority-minority district.").

Although the Court relied extensively on an alternative plan in invalidating the Senate reapportionment plan, it never discussed or even mentioned the intent behind that plan, the identity of those who developed it, or the process of developing it. If those factors were truly relevant, surely the Supreme Court would have mentioned them. Alternatively, if the Court believed these subjects relevant and believed that the nature of its facial review made it impossible to examine them, surely the Court would have refused to consider alternative plans altogether. But that is not what the Court did.

Ignoring the Supreme Court's actual approach, Defendants instead fixate on one sentence taken out of context. The Court's most extensive discussion of the role of alternative plans came in describing the tier one requirement of protecting minority voting rights. There, as here, the plaintiffs "assert[ed] that minority protection has been used as a pretext for drawing districts with the intent to favor a political party or an incumbent," which was "a troubling assertion because that would frustrate rather than further the overarching purpose of the Fair Districts Amendment[s]." *Id.* at 640. The Court acknowledged that protecting minority voting rights sometimes "may require the preservation or creation of non-compact districts or may help to explain the shape of a challenged district." *Id.* But "[w]here it can be shown that it was possible for the Legislature to comply with the tier-two constitutional criteria while, at the same time, not diminishing minorities' ability to elect representatives of choice or denying minorities an equal opportunity to participate in the political process, the Legislature's plan becomes subject to a concern that improper intent was the motivating factor for the design of the

district." *Id.* This is where alternative plans come into play, for "[i]f an alternative plan can achieve the same constitutional objectives that prevent vote dilution and retrogression . . . and also apportions the districts in accordance with tier-two principles so as not to disfavor a political party or an incumbent, this will provide circumstantial evidence of improper intent." *Id.* at 641. "That is to say, an alternative plan that achieves all of Florida's constitutional criteria without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan." *Id.*

That last sentence is the only one Defendants quote, and they argue that it requires examination of the intent of those offering alternative plans. But read in context, it is quite clear that the Court was not requiring any such inquiry. To begin with, and most importantly, the Court itself made no such inquiry, either in this passage or anywhere else. Moreover, when it comes to intent, it makes no sense to discuss "subordinating one standard to another," because "there is no acceptable level of improper intent" for the Legislature in enacting a redistricting plan. *Id.* at 617. It is thus quite clear that when the Supreme Court described the potential relevance of an alternative plan, it was not in any way requiring an inquiry into the intent underlying the plan or the process by which it was prepared.

Once Defendants' single quote is exposed as unhelpful, their argument collapses. They have not cited any case that allowed inquiry into the intent behind or process of developing an alternative redistricting plan proposed by a plaintiff, and Plaintiffs are aware of none. Instead, Defendants merely assert a false equivalence between their enacted map and Plaintiffs' proposed maps, arguing that if the Legislature's intent is

relevant, then Plaintiffs' intent must be as well. But Defendants forget that while their map has been enacted into law, Plaintiffs are not asking that their alternative maps be enacted; instead, those maps are merely intended to show that violations in the enacted map were avoidable, just as the Supreme Court used such maps in *In re Senate Joint Resolution 1176*, 83 So. 3d 597. As the Court explained there, if this Court strikes down Defendants' plan, "the Legislature is by no means required to adopt [Plaintiffs'] alternative . . . plan." *Id.* at 686.[1]

Defendants also contend that "if Plaintiffs are correct [that] only the intent of the Legislature in drawing H00[0]C9047 is at issue, then this Court must not allow Plaintiffs' maps to be used for any purpose." Motion 4. But that argument is directly refuted by the Supreme Court's approach. The Court made clear that it is, in fact, *only* the Legislature's intent that matters: "The validity of the joint resolution is determined by examining whether *the Legislature* has operated within the constitutional limitations placed upon it." *In re Senate Joint Resolution 1176*, 83 So. 3d at 604 (emphasis added). But the Court nonetheless held that "alternative plans may be offered as relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent." *Id.* at 611.

Indeed, the Legislature itself has long understood that only its own intent matters. In discussing what would happen if the Legislature adopted a plan submitted by a member of the public, legislators repeatedly discussed (and were told by Defendants'

[1] Defendants' claim of equivalence is particularly misguided given that, under the Court's scheduling order, the Romo Plaintiffs are not yet required to disclose whether they will present at trial the alternative map they used at summary judgment, a different alternative map, or no alternative map at all. And if the Romo Plaintiffs decide not to use at trial the alternative map they presented on summary judgment, Defendants' argument that the intent behind and process of developing that map are relevant obviously collapses.

counsel, Allen Winsor) that the intent of the person submitting the plan was irrelevant, and "at the end of the day, a court of law should be considering the intent of the Legislature." Fla. House Congressional Redistricting Subcommittee Meeting Tr. at 32 (Nov. 3, 2011); *see also id.* at 33 ("[I]f a member would file a [constituent's proposed] map, . . . it becomes our intent."); Fla. House Redistricting Subcommittee Meeting Tr. at 48-49 (Nov. 3, 2011) (Rep. Clarke-Reed: Q: "[I]n the maps . . . that were drawn particularly by the public, if we adopt a map or any part of the map, do we have to worry about the intent of the member of the public who drew the map, or is it only the legislator's -- legislative intent?"; House Counsel Allen Winsor: A: "[I]f you are looking at the plain language of the amendment, . . . you would be looking at the intent of the body.").[2] In other words, even as to a plan *enacted into law*, it would only be the Legislature's intent that mattered. Why, then, would it be relevant to know the intent behind a plan not even offered to be enacted into law, but solely to demonstrate flaws in the enacted map?

Defendants also imply that it is somehow unfair that they have produced more documents than Plaintiffs (even though thousands of the documents they have produced were already publicly available). But again, this case is about whether the map Defendants enacted complies with the Florida Constitution. It is Defendants, not Plaintiffs, who have documents shedding light on that subject.

Given that the subjects as to which Defendants seek discovery cannot possibly lead to any admissible evidence on the issue of "whether the Legislature has operated

[2] The relevant excerpts from these transcripts are attached to this brief as **Exhibit A** (Fla. House Congressional Redistricting Subcommittee Meeting) and **Exhibit B** (Fla. House Redistricting Subcommittee Meeting).

within the constitutional limitations placed upon it," *In re Senate Joint Resolution 1176*, 83 So. 3d at 604, these subjects are irrelevant and Defendants' Motion should be denied.

II. The Information Defendants Seek is Also Privileged

Even if any of the information Defendants seek were relevant, it would still be protected from discovery on privilege grounds.

As an initial matter, it is important to recognize that while the Legislature was constitutionally required to enact a new redistricting plan and enacted its plan to become law and to regulate Florida elections (and, in Plaintiffs' view, to benefit incumbents and Republicans), the Romo Plaintiffs' proposed alternative map was prepared at the direction of counsel, solely for purposes of this litigation, and to highlight the legal flaws in the enacted map. Documents related to the alternative map are thus classic "work product of the litigant, his attorney or agent, [which] cannot be examined, absent rare and exceptional circumstances." *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 112 (Fla. 1970) (citing *Miami Transit Co. v. Hurns*, 46 So.2d 390, 391 (Fla. 1950)). Defendants have not even alleged that such circumstances are present here.

Examining the specific information sought by Defendants confirms that the work product privilege bars the discovery Defendants request. First, Defendants demand to know the identity of those who helped prepare the Romo Plaintiffs' alternative map, but the experts who assisted counsel in preparing the map will not testify and their identity is thus protected by the work product doctrine. *See, e.g.*, *Muldrow v. State*, 787 So. 2d 159, 160 (Fla. 2d DCA 2001) ("[T]he names of experts consulted for trial but not intended to be called to testify at trial . . . is protected by work product privilege and is not subject to disclosure absent a showing of exceptional circumstances."); *Myron By & Through Brock*

v. Doctors Gen., Ltd., 573 So. 2d 34, 35 (Fla. 4th DCA 1990) ("quash[ing] so much of the order under review as requires answers which divulge the identity and/or opinion of any specially retained non-witness, work product experts"). This privilege may be overcome in exceptional cases where information held by the non-testifying expert is central to the case and can be obtained by no other means, Fla. R. Civ. P. 1.280(b)(4)(B), but that standard plainly is not met here. The process of developing the Romo Plaintiffs' map is not at issue in this case, much less central to it; indeed, the Romo Plaintiffs could have tried this case without presenting an alternative map at all. Moreover, the Romo Plaintiffs have produced their alternative map itself as well as the vast amounts of data necessary to analyze it, and Defendants are freely able to (and did at summary judgment) challenge the map using that information. Thus, "[t]his is far from a case in which the only meaningful source of data is a not-to-be-called expert engaged by one of the parties," so Defendants have "not demonstrated the necessary exceptional circumstances to justify invading the work-product immunity." *Gilmor Trading Corp. v. Lind Elec., Inc.*, 555 So. 2d 1258, 1260 (Fla. 3d DCA 1989).

The same analysis covers draft maps prepared by the Romo Plaintiffs. The alleged relevance of draft maps prepared by the Romo Plaintiffs is particularly unclear, but in any case, any such maps were prepared by consulting experts at the direction of counsel and will not be presented at trial, so they are the essence of privileged work product. *See, e.g.*, Fla. R. Civ. P. 1.280(b)(4)(B) ("A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only . . . upon a showing of exceptional circumstances under which it is

impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."); *Edwards v. Humana of Fla., Inc.*, 569 So.2d 1315, 1316 (Fla. 5th DCA 1990) ("It is clear that the intent of Rule 1.280(b)(4)(B) is to afford protection from the discovery of a 'consulting expert.'").

As to "documents relating to [the Romo Plaintiffs'] map," Motion ¶ 12, the Romo Plaintiffs have already produced their map and all of the data necessary to analyze the map, and Defendants have used the map and data to challenge the Romo Plaintiffs' map on a number of grounds. Defendants have not shown any exceptional circumstances justifying further discovery into other details about the map. Indeed, Defendants have withheld numerous documents regarding the enacted plan (and the Romo plan) based on the work product privilege, and cannot plausibly argue that the privilege applies to their documents but not those of the Romo Plaintiffs.

III. Conclusion

The issue in this case is not how the Romo Plaintiffs developed their alternative map or who played a role in doing so. Rather, the issue is "whether *the Legislature* has operated within the constitutional limitations placed upon it." *In re Senate Joint Resolution 1176*, 83 So. 3d at 604 (emphasis added). "[A]lternative plans may be offered as relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent." *Id.* at 611. The discovery Defendants seek is not "reasonably calculated to lead to the discovery of admissible evidence" as to the constitutionality of the enacted map, and thus should be rejected as irrelevant. Fla. R. Civ. P. 1.280(b)(1). And even if the Court deems

it relevant, the work product privilege protects it from discovery. Plaintiffs therefore ask that the Court deny Defendants' motion to compel discovery.

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