Filing # 14819370 Electronically Filed 06/13/2014 11:38:49 PM

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

RENE ROMO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2012-CA-00412
	)	
KEN DETZNER and PAM BONDI,	)	
	)	
Defendants.	)	
	)	
_____	)	
	)	
THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2012-CA-00490
	)	
KEN DETZNER, et al.,	)	
	)	
Defendants.	)	

POST-TRIAL BRIEF OF DEFENDANT-INTERVENOR FLORIDA NAACP

I. INTRODUCTION

This Court is being asked to apply Amendment 6 for the first time to congressional redistricting, and to weigh and balance many different, competing interests. The Florida State Conference of NAACP Branches (hereinafter, "NAACP") intervened to ensure that application of the new constitutional provisions is done based on a record that documents the impact that such interpretation will have on affected African-American voters in the state—voters who the

redistricting amendments were adopted in order to protect. In particular, the challenges in this litigation being directed at Congressional District 5, a district that offers black voters the ability to elect their candidate of choice, have been made without consideration of affected voters. As demonstrated in this brief, in much more detail in the NAACP's Proposed Findings of Fact and Conclusions of Law, and in Defendants' briefing, Congressional District 5 in the enacted plan was necessary on at least two distinct grounds: to protect against vote dilution and to avoid diminishment of African-American voting strength.

Vote Dilution

All of the threshold conditions for vote dilution are present in north central Florida, and as such, Congressional District 5 as enacted was necessary to avoid vote dilution, the prohibition of which is central in the Tier One of Amendment 6 (now Article III, Section 20 of the Florida Constitution). There are three conditions which may give rise to vote dilution. These preconditions were first articulated in the United States Supreme Court case *Thornburg v. Gingles* in 1986. 478 U.S. 30, 50 (1986). In that case, the Court directed jurisdictions on how to assess potential vote dilution.

As an overarching matter, *Gingles* established, and the rule has never been departed from, that examining potential vote dilution requires an intensely local appraisal of the social and political climate in the cities and counties where the vote dilution, or potential for it, is alleged to be. 478 U.S. at 79. This is how jurisdictions drawing redistricting plans and potential plaintiffs considering a vote dilution claim are required to conduct a vote dilution analysis.

Beyond that, the first *Gingles* precondition that must be present for vote dilution liability is that the minority group in question must be sufficiently large and geographically compact enough to constitute a majority in a single-member district. *Id.* at 50. The enacted district shows

it is possible to draw a district in which minority voters comprise a majority of the population. With regards to compactness, this is the first place where the NAACP lay testimony presented is relevant and probative. Indeed, courts have credited the probative value of lay witness testimony in regards to every element of a vote dilution inquiry. *See* NAACP Proposed Findings of Fact and Conclusions of Law, at ¶ 49.

Compactness in the vote dilution context is not the same as a compactness inquiry seen in an Equal Protection context or even under the Florida constitution now. Compactness is about the minority community encompassed by the district, and compactness in a vote dilution inquiry looks to whether the minority community has similar interests and needs. The geographic or mathematical compactness of the district does not matter if the minority population in the district is a community with common interests. *LULAC v. Perry*, 548 U.S. 399, 433 (2006).

Between the lay testimony offered to the Court, and the expert testimony of Dr. Paulson and Dr. Cassanello, this Court was presented with the same story, over and over again. Black voters in north central Florida, where the district currently exists, are bound by a shared history, and by shared concerns and interests today. Despite living in different cities and counties along the district, these voters are all faced with impediments to participating in the political process, from inadequate public services to constantly moving polling places. Black voters in this region are struggling with the lack of affordable housing, segregated housing and segregated schools, glaring disparities in the criminal justice system, lack of city services, and urban renewal encroaching on affordable housing. And significantly, they face the persistent inability to consistently elect black candidates in local elections. These challenges mean that in this area of the state, the district, as it is now, is still necessary to preserve the opportunity for black voters to participate in the political process.

The next two *Gingles* preconditions together are known racially polarized voting. The second precondition is that the minority community be politically cohesive. All of the experts in this case agree that black voters are politically cohesive. Now, despite that, Plaintiffs have suggested that 2010 U.S. Senate race is not probative because black voters were split between Kendrick Meek and Charlie Crist. But is an argument unsupported by the facts or regression analysis of actual election data.

Plaintiffs did not contest Dr. Engstrom's regression analysis of that election, nor its results, which showed very high support among black voters for the African American candidate, Kendrick Meek. Instead, Plaintiffs rely on Dr. Ansolabehere's exit polling to claim that black voters were not united in their support for the black candidate—exit polling that was conducted either statewide or by dividing the state into three enormous regions. Dr. Ansolabehere's analysis was not the intensely local appraisal required. And his analysis was contradicted by lay testimony. The indisputable fact is that black voters in north central Florida want the chance to elect candidates from their own group. They do support black candidates, and it is the white Democratic structure that does not support those candidates.

The third *Gingles* precondition is that white voters normally vote as a bloc to defeat the candidate of choice of black voters. In north central Florida, Dr. Engstrom's analysis showed that white voters do not, in significant numbers, support black candidates. This was confirmed by lay witness testimony—witnesses who shared stories of black candidates consistently drawing primary opponents in Democratic primaries and of black candidates being told to drop out of races because they cannot win.

Even after the three *Gingles* conditions are satisfied, a court should also look to whether, under the totality of circumstances, members of a racial group have less opportunity to

participate in the political process than do other members of the electorate. To assess this, one considers the so-called Senate Factors. There are at least 9 different Senate Factors, and the list is not exhaustive. These factors include: the extent of any history of official discrimination that touched the minority group members' rights to register, to vote, or otherwise to participate in the democratic process; the extent to which voting is racially polarized; the extent to which potentially discriminatory practices or procedures have been used; if there is a candidate slating process, whether minority candidates have been denied access to it; the extent of any discrimination against minorities in education, employment and health, which might hinder their ability to participate effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; the extent to which minority group members have been elected to public office (proportionality); whether there is a lack of responsiveness on the part of elected officials to the minority group's particularized needs; and whether the policy supporting the use of the voting policy or practice is tenuous. *Gingles*, 482 U.S. at 36-37 (citing S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177).

The testimony of the NAACP lay witnesses and the testimony of Dr. Paulson demonstrated conclusively that many of these Senate Factors weigh in favor of a vote dilution remedy in CD 5 region. Black voters still face substantial hurdles to full and equal participation in the political process. And putting a district in another part of the state does not remedy the conditions for vote dilution in north central Florida. The Romo Plaintiffs alternative versions of Congressional District 5—maps drawn by D.C. and Massachusetts residents, completely unfamiliar with what life is like for black voters in north central Florida—would leave tens of thousands of black voters in north central Florida out in the cold, no longer able to be represented by someone who is familiar with what life is like for them.

Diminishment

Plaintiffs want this Court to play a game of limbo with the ability of black voters to elect a candidate of their choosing—that is, to see how low the Court can go with a district's BVAP. But this is not a game to black voters in north central Florida. There is too much at stake, and black voters in the region remember what it was like to go too long without representation of their choosing. Dr. Engstrom testified about the importance of racially contested or biracial elections. Racially-contested elections reveal so much more about racially polarized voting patterns than do white-versus-white elections. White-versus-white elections may tell us how Democratic a district is, but they do not tell us anything about who black voters would choose if there was actually a choice to be made. And they do not tell us anything about what white voters would do when faced with a candidate of color on the ballot.

At time of map drawing, the legislature had only had two racially-contested elections available. We know that the presidential election, even as a racially contested election, provides limited assurances and predictive value. If the 2008 Presidential election were absolutely predictive, Congressional District 13 would have elected a candidate of choice of black voters in 2012 and in the special election. Joint Ex. 1, at 2. Instead, given the limited data available during the 2011 redistricting process, it was reasonable for the legislature to be cautious. The legislature acted prudently in responding to the requests of the NAACP, and in preserving black voting strength in the region.

Important, too, is a reminder that the burden of proof in this action is on the Plaintiffs: if neither the Obama nor Meek election is a particularly predictive election, then the burden is on Plaintiffs to produce the evidence that would prove there is no diminishment. They have produced no additional information on that front.

In a diminishment analysis, turnout matters. Going from a district in which black voters outnumber white voters to a district where white voters outnumber black voters is a huge difference, and changes the status of the district. But this is precisely what happens with the Romo plans. And that diminishment is not off-set by the increased black voting age population in Romo CD 10. Romo CD 10 is a Democratic district, and it is a white opportunity district. White voters did not support the candidates favored by minority voters. It is not a district that enables black voters to elect their candidate of choice.

When it comes to Florida redistricting, it appears that history repeats itself. After the 1990 census, when Democrats were in control of the House and Senate, the NAACP urged that majority-black districts needed to be created to remedy the harms from over a century of absolutely no representation in Congress. Democratic leadership complained that drawing majority black districts would leave the surrounding districts more white and Republican. "Trust us," they told black voters. "We have your best interests in mind." In the hands of a federal court in 1992, Democratic "concern" for African-American interests did not rule the day, and the creation of a district in which black voters could finally elect a candidate of their choice was incredibly significant to many voters. It was so significant that two of the named plaintiffs in the 1992 case were willing, 22 years later, to continue fighting for the district.

II. CONCLUSION

It simply cannot have been the intent of the voters of the state, in approving Amendment 6, to turn black voters into a pawn in endless partisan bickering, be it during the legislative process or in litigation afterward. And it cannot have been the intent of voters of the state, in approving Amendment 6, to have rendered irrelevant all redistricting input from its citizens, including those citizens explicitly protected by the amendment. Yet with respect to Congressional District 5, that

is precisely what Plaintiffs' position suggests. The Florida NAACP respectfully requests that Plaintiffs' claims with regard to Congressional District 5 be denied, and the district as enacted be upheld as a constitutional and necessary enactment to protect minority voting rights.

Dated: June 13, 2014

Respectfully submitted,

/s/ Allison J. Riggs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this, the 13th day of June, 2014, a true and correct copy of the foregoing was sent by electronic mail to the following counsel of record on the attached service list.

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