

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

WILLIAM EVERETT WARINNER and
JAMES C. MILLER, SR.,

Plaintiffs,

v.

KEN DETZNER, in his official capacity as
Secretary of State of the State of Florida,

Defendant.

No. 6:13-cv-01860-JA-DAB

FIRST AMENDED COMPLAINT

Three-Judge Court Requested

FIRST AMENDED COMPLAINT

INTRODUCTION

1. This action alleges that Florida’s Congressional District 5 is racially gerrymandered in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Ample evidence, including the unjustifiable concentration of African-American voters in Congressional District 5, the bizarre shape of Congressional District 5, and the failure of Congressional District 5 to utilize existing political and geographical boundaries, shows that race played a predominant role in the drawing of Congressional District 5. Public statements by the State of Florida further support that conclusion.

3. While Plaintiff William Everett Warinner has pursued a state constitutional challenge to Florida’s congressional redistricting plan, which is currently pending in Florida state court, both Plaintiffs are reasonably concerned that those issues of state constitutional law will

not be resolved in time to achieve effective relief before the 2014 congressional elections. The present action, by contrast, is based solely on Congressional District 5's violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

4. Thus, this action seeks a declaration that Florida's Congressional District 5 is invalid and unconstitutional, and an injunction permanently prohibiting the State of Florida from calling, holding, supervising, or taking any action with respect to congressional elections based on Congressional District 5 as it is currently drawn.

PARTIES

5. Plaintiff William Everett Warinner is a United States citizen and registered voter in the State of Florida. He currently resides in Congressional District 5.

6. Plaintiff James C. Miller, Sr. is a United States citizen and registered voter in the State of Florida. He currently resides in Congressional District 5.

7. Defendant Ken Detzner is sued in his official capacity as the Secretary of State of the State of Florida. Defendant Detzner is the chief elections officer for the State of Florida and is charged with administering Florida's election laws.

JURISDICTION AND VENUE

8. This Court has jurisdiction to hear Plaintiffs' claims under 42 U.S.C. §§ 1983 and 1988, and under 28 U.S.C. §§ 1331, 1343(a)(3), and 1357. This Court has jurisdiction to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.

9. Plaintiffs request a three-judge court under 28 U.S.C. § 2284(a), as Plaintiffs' action "challeng[es] the constitutionality of the apportionment of congressional districts" in Florida.

10. Venue is proper under 28 U.S.C. § 1391(b).

FACTUAL ALLEGATIONS

11. On November 2, 2010, Florida voters voted to amend Florida's Constitution to include a provision requiring that fair and neutral standards be used when drawing congressional district lines.

12. The congressional reapportionment provision, now contained in Article III, Section 20 of the Florida Constitution, provides:

SECTION 20. Standards for establishing congressional district boundaries.—In establishing congressional district boundaries:

- a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
- b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
- c) The order in which the standards within sub-sections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

13. On February 9, 2012, the Florida Legislature passed Substitute for Senate Bill No. 1174 (the "2012 Congressional Plan"), which establishes Florida's 27 congressional districts. Florida Governor Rick Scott signed the 2012 Congressional Plan into law on February 16, 2012.

14. The 2012 Congressional Plan establishes Congressional District 5.

15. Congressional District 5 violates multiple aspects of Article III, Section 20 of the Florida Constitution. Along with several other Florida citizens in *Romo v. Detzner*, No. 2012-CA-00412, and *League of Women Voters v. Detzner*, No. 2012-CA-00490, Plaintiff Warinner has challenged the validity of Congressional District 5, along with other districts and the 2012

Congressional Plan as a whole, under the Florida Constitution. Those cases are consolidated and pending in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida.

16. Along with his co-plaintiffs in that case, Plaintiff Warinner pursued an expedited review of the 2012 Congressional Plan shortly after commencing litigation in Circuit Court in order to obtain relief in time for the 2012 congressional election. The Circuit Court of the Second Judicial Circuit denied the plaintiffs' summary judgment motions.

17. Along with his co-plaintiffs in that case, Plaintiff Warinner has encountered many obstacles to obtaining relief, largely caused by the Florida Legislature's and third-party political consultants' continued refusal to produce relevant evidence with respect to the plaintiffs' claim that the 2012 Congressional Plan was drawn with partisan intent.

18. On November 26, 2013, the Circuit Court granted a continuance, pending resolution by the Florida Supreme Court of the Florida Legislature's refusal to produce relevant evidence based on claims of legislative privilege. That ruling had the effect of delaying the trial indefinitely, which had previously been set for January 6, 2014.

19. On December 13, 2013, the Florida Supreme Court issued its decision regarding the Florida Legislature's refusal to produce relevant evidence based on claims of legislative privilege. Rejecting the Florida Legislature's position, the Florida Supreme Court held "that there is no unbending right for legislators and legislative staff members to hide behind a broad assertion of legislative privilege to prevent the discovery of relevant evidence necessary to vindicate the explicit state constitutional prohibition against unconstitutional partisan political gerrymandering and improper discriminatory intent." *League of Women Voters of Fla. v. Fla. House of Reps.*, Nos. SC13-949, SC13-951, 2013 WL 6570903, at *1 (Fla. Dec. 13, 2013).

20. In light of the Florida Supreme Court's decision, the Circuit Court has set trial for May 19, 2014.

21. With Florida's congressional filing deadline on May 2, 2014, Plaintiffs are reasonably concerned that yet another congressional election will take place based on a constitutionally infirm map.

22. This action seeks to protect Plaintiffs' federal constitutional rights. Specifically, it challenges Congressional District 5 exclusively under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

23. Congressional District 5 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because, as established by the facts alleged below and evidence to be submitted at trial, race was a predominant factor in the creation of Congressional District 5, and the Florida Legislature's race-based redistricting was not justified by a compelling state interest.

24. ***Racial Packing.*** One method for reducing the political influence of a minority group is to "pack" many members of that group into a few voting districts, thereby stripping members of the group from districts adjacent to the "packed" districts and reducing the influence of the group in the adjacent districts.

25. African-American voters are unnecessarily packed into Congressional District 5. The Black Voting Age Population ("BVAP") of Congressional District 5 is 50.1%.

26. In contrast, the BVAPs of districts adjacent to Congressional District 5 are 13.2% (Congressional District 3), 12.9% (Congressional District 4), 9.1% (Congressional District 6), 9.0% (Congressional District 7), 11.1% (Congressional District 10), and 7.7% (Congressional District 11).

27. The BVAP of Congressional District 5's predecessor district, former Congressional District 3, was 49.9%. African-American voters were consistently able to elect their candidates of choice under former Congressional District 3. Nevertheless, the Florida Legislature chose to increase BVAP when drawing Congressional District 5.

28. One of the ways in which the Florida Legislature packed African-American voters into Congressional District 5 was by moving a significant part of the African-American population out of the town of Sanford, previously in Congressional District 7, into Congressional District 5. Then, to make up for that population loss, they moved part of Forest City, a suburb with an approximately 80% white population, into Congressional District 7.

29. The unnecessary packing of African-American voters into Congressional District 5 strips African-American voters from adjacent districts and thereby reduces the influence of African-American voters in adjacent districts.

30. The unnecessary packing of African-American voters into Congressional District 5 shows that the Florida Legislature subordinated traditional race-neutral districting principles to racial considerations when creating Congressional District 5, and indicates that race was a predominant factor in the creation of Congressional District 5.

31. ***No Functional Analysis.*** The Florida Legislature drew Congressional District 5 without a proper functional analysis of minority voting rights.

32. In drawing the 2012 Congressional Plan, the Florida Senate failed to consider evidence other than minority voting-age population in evaluating the effect of the 2012 Congressional Plan on minority voting rights. The Florida Supreme Court criticized that approach as “incorrect and incomplete.” *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 656 (Fla. 2012).

33. The Florida Senate’s failure to conduct a proper functional analysis when enacting the 2012 Congressional Plan shows traditional race-neutral districting principles were subordinated to racial considerations when creating Congressional District 5, and indicates that race was a predominant factor in the creation of Congressional District 5.

34. ***Lack of Compactness.*** Compactness is a neutral redistricting criterion recognized under both state and federal law.

35. Congressional District 5 is not compact by any measure.

36. As shown in the illustration below, Congressional District 5 winds a serpentine route from North Florida to Central Florida, reaching out to capture pockets of African-American voters along the way. On visual inspection, it exhibits all of the features that the Florida Supreme Court has referred to as “constitutionally suspect and often indicative of racial and partisan gerrymandering,” including “finger-like extensions,” “narrow and bizarrely shaped tentacles,”

and “hook-like shape[s].” *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d at 638 (internal quotation marks and citation omitted).



37. Quantitative measures confirm that Congressional District 5 is not compact. One widely used measure of compactness is the Reock score, which measures the ratio between the area of the district and the area of the smallest circle that can fit around the district. The Reock scale ranges from 0.0 to 1.0. Districts that have a lower Reock score are generally less compact than districts that have a higher Reock score.

38. Congressional District 5 has a Reock score of 0.09.

39. Former Congressional District 3, from which current Congressional District 5 draws most of its population, had a Reock score of 0.14. Thus, Congressional District 5 is 36% less compact than its predecessor district.

40. Congressional District 5's Reock score is the lowest of all congressional districts in the 2012 Congressional Plan.

41. Congressional District 5's Reock score is lower than the Reock scores for every congressional district in the 2002 Congressional Plan.

42. Congressional District 5's Reock score is also lower than seven of the eight Senate districts deemed unconstitutional by the Florida Supreme Court for, among other things, lack of compactness.

43. The Florida Legislature concedes that Congressional District 5 is not compact. The text of Substitute for Senate Bill No. 1174, which establishes the 2012 Congressional Plan, asserts that each of Florida's congressional districts *except* Congressional District 5 is compact. *See generally* Exhibit A.

44. Congressional District 5's lack of compactness shows that the Florida Legislature subordinated traditional race-neutral districting principles to racial considerations when creating Congressional District 5, and indicates that race was a predominant factor in the creation of Congressional District 5.

45. ***Failure to Use Existing Boundaries.*** The use of existing political or geographical boundaries is a neutral redistricting criterion recognized under both state and federal law.

46. Congressional District 5 does not utilize existing political or geographical boundaries when feasible.

47. Congressional District 5 cuts across no fewer than eight counties: Duval County, Clay County, Putnam County, Alachua County, Marion County, Lake County, Seminole County, and Orange County. No other congressional district in Florida cuts across eight counties; the next highest "county split" is four.

48. Congressional District 5 also cuts across six city lines, including the city lines of Orlando, Jacksonville, Gainesville, Sanford, Apopka, and Orange Park.

49. The dividing lines of Congressional District 5 follow no consistent political or geographical boundary. Instead, Congressional District 5 is defined by an unpredictable and arbitrary collection of boundaries, including the St. Johns River, Doctors Lake, various county lines, US-17, and Pine Avenue.

50. Congressional District 5's failure to utilize existing political and geographical boundaries shows that the Florida Legislature subordinated traditional race-neutral districting

principles to racial considerations when creating Congressional District 5, and indicates that race was a predominant factor in the creation of Congressional District 5.

51. **Public Statements.** The public record is replete with additional evidence that the Florida Legislature subordinated traditional race-neutral districting principles to racial considerations when creating Congressional District 5, and confirms that race was a predominant factor in the creation of Congressional District 5. For example:

52. On March 9, 2012, the Florida House of Representatives published a Final Bill Analysis for Substitute for Senate Bill No. 1174, which enacted the 2012 Congressional Plan. The Final Bill Analysis praises Substitute for Senate Bill No. 1174 for “[m]aintain[ing] elected representation for African-American and Hispanic Floridians.” Exhibit B at 1.

53. On March 13, 2012, the State of Florida sought preclearance of the 2012 Congressional Plan from the United States Department of Justice under Section 5 of the federal Voting Rights Act. The State of Florida submitted a memorandum in support of that request for preclearance (the “Submission Memorandum”). *See* Exhibit C.

54. In its Submission Memorandum, the State of Florida emphasized that the 2012 Congressional Plan was “intended to promote minority opportunities”; “very closely track[s] the recommendations for districts submitted in the NAACP’s proposed congressional map”; and “reflect[s] other suggestions expressed by Florida’s minority populations.” Exhibit C at 11, 12.

55. In the consolidated cases challenging the 2012 Congressional Plan under the Florida Constitution, *see infra* at 4, the Florida Legislature admitted that it “drew [Congressional District 5] to ensure that minorities’ ability to elect their preferred candidates was *not* diminished.” Exhibit D at 34 (Florida House of Representatives’ and Florida Senate’s Joint Response in Opposition to Plaintiffs’ Motions for Summary Judgment and Temporary Injunctive Relief).

56. Similarly, in the consolidated cases challenging the 2012 Congressional Plan under the Florida Constitution, the Florida Legislature admitted that Congressional District 5 represented an “effort[] to draw [a] minority performing district[.]” Exhibit D at 22.

57. Similarly, in the consolidated cases challenging the 2012 Congressional Plan under the Florida Constitution, the Florida Legislature admitted that the “Legislature’s specific purpose with regard to each minority district” in the 2012 Congressional Plan, Exhibit D at 23, including Congressional District 5, was to “protect minority voters,” Exhibit D at 22 (internal quotation marks omitted).

58. Public statements, including but not limited to those set forth above, show that the Florida Legislature subordinated traditional race-neutral districting principles to racial considerations when creating Congressional District 5, and indicate that race was a predominant factor in the creation of Congressional District 5.

59. There is no compelling state interest justifying the race-based redistricting of Congressional District 5.

60. Even if there was a compelling state interest for the race-based redistricting of Congressional District 5, the current configuration of Congressional District 5 is not narrowly tailored to serve that interest. There are other viable and constitutionally permissible alternatives to Congressional District 5 as it is currently drawn.

61. Absent an injunction from this Court, Defendant intends to and will conduct primary and general elections in 2014 for the United States House of Representatives on the basis of the congressional districts set forth in the 2012 Congressional Plan, including Congressional District 5.

62. Plaintiffs intend to and will vote in the primary and general elections to be held in 2014 and thereafter for candidates for the United States House of Representatives. If those elections are conducted by Defendant on the basis of an unconstitutional reapportionment plan and unconstitutional congressional districts, then Plaintiffs and all other similarly situated individuals will be further deprived of rights guaranteed by the United States Constitution.

63. Congressional District 5 must be redrawn to cure the deficiencies described above and to conform the district to the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CAUSE OF ACTION

Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

64. Plaintiffs reallege and incorporate by reference, as if fully set forth herein, the allegations in paragraphs 1-63 above.

65. Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

66. Race was the predominant factor in the creation of Congressional District 5.

67. The use of race as the predominant factor with respect to Congressional District 5 is not narrowly tailored to serve a compelling state interest.

68. Accordingly, Congressional District 5 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

69. Plaintiffs have no adequate remedy at law other than the judicial relief sought here. The failure to temporarily and permanently enjoin the conduct of elections based on Congressional District 5 will irreparably harm Plaintiffs by violating their constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

- A. Convene a court of three judges pursuant to 28 U.S.C. § 2284(a);
- B. Declare that Congressional District 5 under the 2012 Congressional Plan is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
- C. Issue a permanent injunction enjoining Defendant from enforcing or giving any effect to the boundaries of Congressional District 5 as drawn in the 2012 Congressional Plan, including an injunction barring Defendant from conducting any elections for the United States House of Representatives based on Congressional District 5;

D. Hold hearings, consider briefing and evidence, and otherwise take actions necessary to determine and order a valid plan for new congressional districts in the State of Florida; and

E. Grant such other or further relief the Court deems to be appropriate, including but not limited to an award of Plaintiffs' attorneys' fees and reasonable costs.

DATED this 16th day of January, 2014.

/s/

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**Pro hac vice motions to be filed*

*Attorneys for Plaintiffs William Everett
Warinner and James C. Miller, Sr.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed in the Court's CM/ECF System this 16th day of January, 2014 and served electronically to Ashley Davis @ Ashley.Davis@DOS.MyFlorida.com and J. Andrew Atkinson @ JAndrew.Atkinson@DOS.MyFlorida.com.

/s/

Robert J. Telfer III