IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN (LITTLE ROCK) DIVISION

Dr. JULIUS J. LARRY III **PLAINTIFF**

VS. **NO. 4:18-CV-116-KGB**

STATE OF ARKANSAS; HONORABLE ASA HUTCHINSON, In his Official Capacity as Governor of the State of Arkansas; HONORABLE LESLIE RUTLEDGE, in her Official Capacity as Attorney General of the State of Arkansas; HONORABLE MARK MARTIN, in his official capacity as Arkansas Secretary of State **DEFENDANTS**

DEFENDANT ARKANSAS SECRETARY OF STATE'S BRIEF IN SUPPORT OF HIS RESPONSE IN OPPOSITON TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND APPOINTMENT OF SPECIAL MASTER

The Court should deny the Motion. Plaintiff Larry now moves to both reconsider the Court's Order and Judgment of August 3, 2018, and for the appointment of a special master per Fed. R. Civ. P. 53. The Court's Order and Judgment of dismissal without prejudice was correct. Plaintiff's Motion should be denied in full. Plaintiff does not have standing to bring his

Complaint, and there are no new facts or evidence presented that justify the Court altering its Order and Judgment. The *pro se* Plaintiff cannot amend his Complaint; it is fatally defective.

I. There Is No Basis For Reconsidering The Court's Order and Judgment

Federal Rule of Civil Procedure 59(e) "was adopted to clarify a district court's power to correct its mistakes." *Fletcher v. Tomlinson*, No. 16-4399, *24 (8th Cir. July 13, 2018) (*citing Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998)). Motions pursuant to Fed. R. Civ. P. 59(e) "serve a limited function correcting manifest errors of law or fact or to present newly discovered evidence." *Id.* citing *id.* Rule 59(e) motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments that could have been made before entry of judgment. *Id.*

Rule 59(e) allows the district court to correct "its own mistake if it believes one has been made." *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007). These motions are successful only "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Id.*, *see also Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006); *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007), *certiorari denied* 552 U.S. 1040. Such a motion is only appropriate when "a manifest error affects 'the correctness of the judgment.'" *Norman v. Arkansas Dept. of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996) (citations omitted).

There is no "new evidence" that satisfies Rule 59. Plaintiff attempts to use his Motion to present new evidence (and to craft new legal argument as a result). For a Rule 59(e) motion to succeed based on newly discovered evidence, Plaintiff must show:

1. The evidence was discovered after the Court's order;
2. That Plaintiff exercised diligence to obtain the evidence before entry of the order;
3. That the evidence is not merely cumulative or impeaching;
4. That the evidence is material; and
5. That the evidence would probably have produced a different result.

Miller v. Baker Implement Co., 439 F.3d 407, 414 (8th Cir. 2006).

Plaintiff's "new evidence" is an alleged expert witness working on computer models. Plaintiff's Motion for Reconsideration at 2, 15-16 (Docket No. 48). The "evidence" existed prior to the entry of judgment. It does not satisfy the *Miller* standard, above.

Plaintiff has no basis to claim there should be reconsideration based upon the discovery of new evidence. Plaintiff's "evidence" of "admissions" by Defendants, while disputed entirely, still fails to meet the requirements of Rule 59 because Plaintiff himself claims he knew of the "failure to respond" to his May 3 Request (sic) for Admissions no later than June 4. This cannot serve as a basis to reconsider under Rule 59. Moreover, Defendant Secretary vigorously disputes receiving the Request for Admissions anytime before August 13, 2018 (Defendant SOS Exhibits 1, 2, and 3 to Response). Finally, Defendant Secretary has denied the Requests for Admissions (Defendant SOS Exhibit 4 to Response).

The Court previously ruled that Plaintiff Larry's Motion to Amend was futile, and thus denied, and dismissed Plaintiff's remaining Voting Rights Act of 1965 § 2 claim for lack of standing. There was no manifest error of law.

1. The Court Was Correct in Requiring Leave to Amend, and Denying It

As stated in the Court's August 3 Order, Plaintiff's ability to amend his Complaint as a matter of course expired prior to his attempt to amend per Fed. R. Civ. P. 15. Seeking leave to amend was mandatory. *Sherman v. Winco Fireworks*, 532 F.3d 709, 715 (8th Cir. 2008). The Court may also deny leave to amend if there is a compelling reason to deny, such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to non-moving parties, or futility of the amendment. *Id.* The Court may deny a motion based on futility and not being able to withstand a motion to dismiss. *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Cir. 2005); *see also Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010)).

In this case, the Court denied Plaintiff's Motion based on futility. Plaintiff failed to meet the "*Gingles* Preconditions" necessary to establish a § 2 claim. *Thornburg v. Gingles*, 478 U.S. 30 (1986). The preconditions necessary to pursue a § 2 violation include:

1. The racial group is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. The racial district is politically cohesive; and
3. The majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

Bone Shirt v. Hazeltine, 461 F.3d 1011, 1018 (8th Cir. 2006). Plaintiff cannot meet the first *Gingles* precondition to suit, even now. Only if all three preconditions are satisfied, will the Court consider the totality of the circumstances. *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009).

In the Eighth Circuit, a minority needs to make up more than 50 percent of the voting-age population in the relevant geographic area. *Cottier v. City of Martin*, 604 F.3d 553, 571 (8th Cir.

2010). The first *Gingles* condition concerns, *inter alia*, the compactness of the minority population. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006). Plaintiff fails to allege that the minority population in Arkansas is sufficiently compact to win in a majority of votes in any redrawn district. Plaintiff also fails to allege that the minority population is sufficiently numerous to win in a majority of votes in any redrawn district. As set forth in Defendant Secretary's Response, Plaintiff's purportedly "new" data shows the opposite, even is his own proposed First Congressional District (Motion Exhibit A). Plaintiff previously conceded that a majority-black district could not be drawn in Arkansas. He was correct then and has not overcome this admission.

As Defendant Secretary has previously stated, and as the Court quoted in its Order on August 3, "In setting out the first requirements for § 2 claims, the *Gingles* Court explained that '[u]nless the minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.'" *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality opinion) (alteration in original) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986)). The purpose of the first *Gingles* requirement is "'to establish that the minority has the potential to elect a representative of its own choice in some single-member district.'" *Id.* (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). In the absence of "such a showing, 'there neither has been a wrong nor can be a remedy.'" *Id.* (quoting *Growe*, 507 U.S. at 41). Plaintiff's claims must fail on the record before this Court.

Plaintiff's Exhibit A does not overcome the previous problems and fails to meet the Rule 59 standard for "new evidence." The Court previously noted Plaintiff's lack of specificity as to

whether the percentages shown in Plaintiff's map related to the voting population, total population, or another metric. Order at 8 (Docket No. 46). Neither did Plaintiff allege that African Americans would make up a majority of the effective voting age population in his proposed district. Order at 9. He still does not make that allegation (Exhibit D to Motion, Larry Affidavit asks Court to adopt "the only majority-minority coalition map.").

Plaintiff has not cured – or attempted to cure - other problems with his Complaint. The Court found that Plaintiff's proposed amended complaint failed to allege facts sufficient to satisfy the compactness requirement. Order at 9. Plaintiff's proposed districts divided multiple counties, and tended to support the idea that there isn't a compact minority in Arkansas. Order at 10. As Plaintiff failed to satisfy the first requirement, his proposed Amended Complaint would be futile. Futility of a claim is a valid reason to deny a motion to amend a complaint. *Ryan v. Ryan*, ___ F.3d ___, No. 16-3149 *7 (8th Cir. Dec. 12, 2017) (*citing United States ex rel. Raynor v. Nat'l Rural Utils. Coop. Fin., Corp.*, 690 F.3d 951, 958 (8th Cir. 2012)).

There is no new evidence meriting a change in this Court's decision. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990).

2. Plaintiff Lacked Standing to Pursue Original Complaint

Plaintiff's other claims were previously dismissed by the Court, leaving his remaining claim pursuant to § 2 of the Voting Rights Act, 42 U.S.C. § 1973; he does not challenge the previous dismissal. Plaintiff cannot meet the *Gingles* preconditions, that are prerequisites to any further court analysis as to whether there is a violation based on the totality of the circumstances.

Gingles, 478 U.S. 30 (1986); *See also Bartlett v. Strickland*, 556 U.S. 1 (2009). Meeting the *Gingles* preconditions is necessary to establish an injury for Article III standing. Plaintiff's claims, even is his new Motion and Affidavit, fail.

Plaintiff resides in the Second Congressional District, yet his Complaint regards the composition to the First Congressional District. In determining that the Plaintiff did not have standing, the court used standing requirements similar to those applied in equal protection gerrymandering cases, which is that Plaintiffs must reside in the district they challenge. *See Gill v. Whitford*, 138 S.Ct. 1916 (2018) (When the alleged harm is vote dilution, the injury is district specific. A plaintiff must live in such a district, and prove it, to maintain standing.); *see also* U.S. *v. Hays*, 515 U.S. 737 (1995).

As the Court previously set forth, Plaintiff does not meet the first precondition of Section 2 analysis; he has not shown the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district. Plaintiff does not have an injury, and lacks Article III standing; the Court lacks subject-matter jurisdiction.

Standing is a matter of jurisdiction. *Constitution Party of South Dakota v. Nelson,* 639 F.3d 417, 420 (8th Cir. 2011). Under Article III of the United States Constitution, federal courts may only adjudicate actual cases or controversies. *Id. (citing cases).* It is the Article III standing requirement that enforces this case- or-controversy requirement. *Id.* To satisfy the "irreducible constitutional minimum" of Article III standing, each Plaintiff must establish that he or she has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; that there is "a causal connection between the injury and the

conduct complained of'; and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.,* (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.E.2d 351 (1992)). Plaintiff is unable to meet the standing requirement now, as a result of his own residence in the wrong District.

Pro se Plaintiffs are required to abide by the Federal Rules of Civil Procedure. *Lindstedt v. City of Granby*, 238 F.3d 933, 937 (8th Cir. 2000); *Harmon Autoglass Intellectual Prop., LLC v. Leiferman*, 428 B.R. 850, 854 (B.A.P. 8th Cir. 2010). Pro se litigants are required to allege sufficient facts in their complaints to support a claim. *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 246 (3rd Cir. 2013). Dismissal for lack of standing is appropriate in this case. Fed. R. Civ. P. 12(b)(1), (6).

3. Plaintiff's Amended Complaint Sought to Represent Others

It is important to note that Plaintiff's proposed Amended Complaint sought to add more plaintiffs, despite the fact that Plaintiff Larry is representing himself *pro se,* and does not claim to be an attorney licensed in the State of Arkansas (nor in federal district court). No lawyer ever entered an appearance on behalf of Plaintiff Larry. Pro Se Plaintiff's cannot represent others. *Stewart v. Hall*, 129 S.W.2d 238 (Ark. 1939)). Plaintiff Julius Larry's attempt to represent others is unauthorized practice of law and results in a nullity. *Jones ex rel. Jones v. Correctional Medical Services*, 401 F.3d 950, 952 (8th Cir. 2005)); (see also *Henson v. Cradduck*, 2017 Ark.

317); Restatement (Third) of the Law Governing Lawyers § 4 cmt. D (2000) ("in general, however, a person appearing pro se cannot represent any other person or entity …")).

It is too late to amend the Complaint and Request for a three-judge panel. As the Eighth Circuit has said, an appointment of an attorney at this point cannot cure the complaint of its original defect. *Jones,* 401 F.3d at 952; *Davenport v. Lee*, 348 Ark. 148, 155, 72 S.W.3d 85, 88 (2002) (complaint was a nullity due to absence of counsel and unauthorized practice of law).

II. Appointment of a Special Master is Inappropriate and Unnecessary

Plaintiff is not entitled to appointment of a master. Appointment of a master is governed by Fed. R. Civ. P. 53. A Court may appoint a master only when there is some exceptional condition, or when there is a need to perform accounting or computing damages. Fed. R. Civ. P. 53(a)(1)(B). Plaintiff has not demonstrated any exceptional circumstances warranting the appointment of a master. Plaintiff states on page 23 of his Motion for Reconsideration that this issue is not complex, negating any need for a special master. Plaintiff's inability to demonstrate exceptional circumstances, his Complaint pursuant to 28 U.S.C. 2284, and his lack of standing to bring his Complaint in the first place moot his arguments for appointment of a master.

III. Defendant Secretary of State is an Improper Party

Defendant Secretary has consistently plead that he is an improper party to this action. The Court did not rule on this issue, as it was unnecessary due to the Court's dismissal of the Complaint. But this part of the Motion to Dismiss was outstanding all the way through the Court's entry of Judgment.

Plaintiff has also not shown how his alleged injury was in any way caused by, or traceable to, Defendant Secretary. To establish standing, a plaintiff must show that their injury is traceable to the defendant's challenged action. *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006); (see also *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991)). Defendant Secretary is not responsible for drawing the boundary lines of Congressional Districts (drawn by Acts 1241 and 1242 of 2011). Ark. Code Ann. §§ 7-2-102, *et seq*. Dismissal of the Complaint was proper. Dismissal of Defendant Secretary is also proper. Fed. R. Civ. P. 12(b)(2), 12(b)(6).

CONCLUSION

The Court's dismissal of Plaintiff's Complaint was correct, and Plaintiff's Motion for Reconsideration should be denied. Plaintiff lacks standing to raise the claims, lacks standing as a pro se litigant to argue on behalf of others, has joined improper parties, and has failed to join necessary parties. When a FRCP Rule 15 motion to amend comes *after* a judgement against Plaintiff, in the form of a Rule 59 Motion, amendment is no longer "freely allowed." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir. 2010). After entry of judgment, courts "must 'consider[] the competing interest of protecting the finality of judgments

and the expeditious termination of litigation.'" *Id.* Plaintiff seeking to amend a complaint after an adverse judgment "must shoulder a heavier burden. Instead of meeting only the modest requirements of [FRCP] Rule 15, the claimant must meet the requirements for reopening a case established by [FRCP] 59 or 60. . . . A court acts within its discretion in denying a Rule 15 and a Rule 59 motion on account of 'undue delay' – including delay resulting from a failure to incorporate 'previously []available' evidence. . . . Plaintiff cannot use a Rule 59 motion (or for that matter a post-judgment Rule 15 motion) 'to raise arguments which could, and should, have been made before judgment issued.'" *Id.; see also Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005); *Ahmed v. Dragovich*, 297 F.3d 201, 207-08 (3d Cir. 2002). Plaintiff has not met his burden. The Court should deny the Motion to Reconsider and for Appointment of a Special Master.

WHEREFORE, Defendant Secretary of State, in his Official Capacity, prays that the Court deny the Motion; that the Court deny any and all of the relief Plaintiff seeks in the Motion; that the Court deny the request to appoint a special master; and that the Court dismiss the Motion; and for such relief as is appropriate under the circumstances.

Respectfully submitted this 24th day of August, 2018,

HONORABLE MARK MARTIN
ARKANSAS SECRETARY OF STATE
In his Official Capacity, **Defendant**

/s/ AJ Kelly

By: _____
A.J. Kelly
General Counsel and

Deputy Secretary of State
AB No. 92078
PO Box 251570
Little Rock, AR 72225-1570
(501) 682-3401
Fax: (501) 682-1213
kellylawfedecf@aol.com

and

/s/ Michael Fincher
By: _____
Michael Fincher
Associate General Counsel
Arkansas Secretary of State
AB No. 2016037
500 Woodlane St., Ste 256
Little Rock, AR 72201
(501) 682-3401
Fax: (501) 682-1213

Attorneys for Defendant
Arkansas Secretary of State

CERTIFICATE OF SERVICE

I do hereby certify that on this 24th day of August, 2018, I have served the foregoing BRIEF in Support of Response via the electronic filing system to the Attorney General and the Assistant Attorney General (Vincent P. France) who has entered his appearance, and via first class mail and certified mail to the following:

Dr. Julius J. Larry III
2615 W.12th Street
Little Rock, AR 72202

/s/ Michael Fincher

_____
Michael Fincher