

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

Common Cause Florida, FairDistricts Now,
Dorothy Inman-Johnson, Brenda Holt,
Leo R. Stoney, Myrna Young, and Nancy
Ratzan,

Plaintiffs,

v.

Laurel M. Lee, in her official capacity as
Florida Secretary of State,

Defendant.

Case No.: 4:22-cv-109-AW-MAF

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT LAUREL M. LEE'S MOTION TO STAY**

Plaintiffs Common Cause Florida, FairDistricts Now, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan (collectively, “Plaintiffs”) respectfully submit this memorandum of law in opposition to the motion to stay filed by Defendant Laurel M. Lee (“Defendant” or the “Secretary”).

PRELIMINARY STATEMENT

Where there is no congressional map and an approaching election, the Supreme Court has made clear that it is this Court’s responsibility to “enter an order fixing a reasonable time within which the appropriate agencies of the State [both legislative and judicial] may validly redistrict [Florida]; provided that the same be accomplished within *ample time* to permit such plan to be utilized in the [upcoming] election.” *Scott v. Germano*, 381 U.S. 407, 409 (1965) (emphasis added). That is, the Court must “establish a deadline by which, if the [appropriate State agencies] ha[ve] not acted, the federal court would proceed.” *Grove v. Emison*, 507 U.S. 25, 36 (1993). In that event, the Court would be “justified in adopting its own plan.” *Id.* In the interim, all that matters is that this Court not “affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.” *Id.* at 34.

Time is of the essence. There is no congressional map for the State of Florida based on the 2020 census. That leaves every county Supervisor of

Elections around the State facing the impossible problem of creating ballots ready for use by the citizens of that county when those ballots cannot be created until the congressional districts are drawn. Ballot creation is an intricate and cumbersome process whose complexity differs from county to county, but Supervisors of Elections must act—and congressional districts be drawn—by late April or early May for the entire State to be ready for the primary election slated for August 23, 2022. *It is already too late to assure “ample time” to permit a new congressional plan to be adopted for use in the upcoming election.*

Despite this emergency, the State actors have produced nothing and have moved at a leisurely pace. The Legislature passed a congressional redistricting bill on March 4. That bill was inexplicably not sent to the Governor until March 29. Then, after the Governor vetoed the map on March 29, he called for a Special Legislative Session three weeks later on April 19–22, 2022. Why the State has waited more than six weeks to move this process forward is unclear, but April 22 is literally the last minute before the county Supervisors of Elections must get to work. A state court proceeding was filed on March 11, 2022, but nothing has happened in the state court, and the first status conference will not occur until April 12, 2022. If these State actors fail to produce a map by the end of April, this Court must act to protect the rights of the citizens of Florida to elect their Representatives.

Plaintiffs ask this Court to set a briefing schedule that will permit it to hold a hearing and decide upon a new map as early as the last week in April. That will give the Legislature one last chance to draw congressional lines that the Governor will accept. It will permit the state court to do whatever it may attempt to do in the interim. A briefing schedule will not impede the State actors from taking action in the next few weeks, nor will it interfere with whatever activities they may choose to undertake. But it will permit this Court to be able to perform its duties in a timely fashion in addressing this emergency that is not of its own making.

FACTUAL BACKGROUND

A. The Florida Legislature and The Governor Have Failed to Pass Redistricting Legislation

The Florida Legislature and Governor DeSantis have been at an impasse on a new congressional district plan following the delivery of the 2020 Census data to be used for the 2022 statewide elections. The Legislature enacted State legislative maps that were not challenged when they were presented to the Florida Supreme Court for facial review. *In re Senate Joint Resolution of Legislative Apportionment 100*, No. SC22-131, 2022 WL 619841, at *6 (Fla. Mar. 3, 2022). The Legislature was on a similar path with respect to congressional maps, with the Senate passing

map 8060 (S035C8060)¹ in early January. Then the Governor intervened, insisting that he would veto any map that did not meet his demands. The Legislature tried to meet him halfway and failed. The Governor eventually vetoed the Legislature's maps and has convened the Florida Legislature in a Special Legislative Session from April 19–22, 2022.

There are significant substantive differences between the Legislature and the Governor regarding compliance with State law governing congressional redistricting and whether the congressional map must include a Black opportunity district in North Florida. And there is no assurance that they will resolve these differences or that the Special Legislative Session will produce a result. That would not be the first time that the State legislative process has failed to produce a congressional map, including in special legislative sessions expressly convened for that purpose. An impasse occurred as recently as 2015, resulting in a court-ordered map that the Florida Supreme Court subsequently affirmed. *See League of Women Voters of Florida v. Detzner*, 179 So.3d 258, 261 (2015) (explaining that the Legislature “fail[ed] to enact a remedial plan in a special session held for that purpose”).

¹ See <https://redistricting.maps.arcgis.com/apps/View/index.html?appid=b2a84a6530a84caa80f8fba2a10332f5>.

B. The State Court Proceeding

On March 11, 2022, a state court action captioned *Arteaga v. Lee*, No. 2022-CA-000398 (Fla. 2d Cir. Ct. 2022) was filed, challenging Florida's current congressional districts as unconstitutionally malapportioned. To date, there have been no substantive developments in the state court action. The Secretary has stated an intention to propose a briefing schedule for the state court action, as outlined in the parties' joint status report to this Court on March 31, 2022. *See* Mot. at 6; ECF No. 61. Under the Secretary's schedule, briefing would not begin until April 29, 2022 and post-hearing briefs would not be filed until May 13, 2022. ECF No. 61 at 4. The Secretary contends that this schedule is reasonable because, she says, there is no need for a final congressional districting plan until June 13, 2022. As set forth below and in the declarations accompanying this brief, those dates are far too late for any Supervisor of Elections to be able to meet the relevant election deadlines.

C. Approaching Deadlines for the Florida Primary Election

Florida is scheduled to hold its statewide primary election on August 23, 2022. For the primary election to proceed on that date, numerous tasks must be completed and a number of interim deadlines must first be met to prepare for the election. We have submitted two declarations from the Supervisors of Elections in Leon and Polk counties, who describe these tasks in detail. Working backward

from the August 23 primary date, they have estimated the drop-dead date for them to meet their obligations of preparing ballots for the primary election. Their estimates of the time necessary to perform myriad complex tasks demonstrate the emergency that exists today in the absence of a congressional map.

Lori Edwards, the Supervisor of Elections of Polk County, concludes that for her office to have “adequate time to prepare for the election and meet the relevant election deadlines in advance of the primary” a new congressional map must be in place no later than May 13, 2022. Declaration of Supervisor Lori Edwards (“Edwards Decl.”) ¶ 19. Mark S. Earley, Supervisor of Elections of Leon County, declares that “in order to be timely implemented in Leon County, a new congressional map needs to be in place by May 27, 2022 at the absolute latest.” Declaration of Supervisor Mark S. Earley (“Earley Decl.”) ¶ 21. The relatively small differences in these estimates are not surprising. The tasks differ from county to county, and so does the sophistication of each county’s staff. As Supervisor Earley explains, “[t]he reasons for the different estimates of time needed to prepare for the election include that I have a well-trained staff with substantial experience administering prior elections, other counties are also larger and more complex than Leon County, and some smaller counties do not have a wealth of technical resources available to them.” *Id.* ¶ 22.

Supervisor Earley is particularly well-suited to offer a state-wide

perspective. He is the President-Elect of Florida Supervisors of Elections and has “spoken with many of [his] fellow Supervisors of Elections in other Florida counties.” *Id.* Those Supervisors “strongly believe that [a late May date for a congressional map] would not give them enough time to complete the work for their counties, and [they] believe the deadline for completing that work is early May or even late April. Based upon [his] knowledge of the additional complexities present with the technical processes in other, larger counties, [he] believe[s] these concerns are well-founded and should be taken into consideration when setting a deadline for a finalized Congressional map.” *Id.* In particular, Supervisor Earley has no basis for disagreeing with Supervisor Edwards’s estimate that in her county a congressional map must be available no later than May 13, 2022. *Id.* ¶ 23.

Meanwhile, both Supervisor Edwards and Supervisor Earley believe that the schedule proposed by Defendant—having a map in place by June 13, 2022—is simply unworkable. As Supervisor Earley declares, “I do not believe it will be possible for any Supervisor of Elections in Florida, whose county is impacted by uncertainty in the drawing of the Florida Congressional district boundaries, to meet the necessary deadlines [to] prepare for the August 23, 2022 primary if a new map is not finalized until June 13, 2022.” *Id.* ¶ 24; *see also* Edwards Decl. ¶ 20.

To allow time—not “ample time,” but at least some time—for the August

primary election to occur, Plaintiffs suggest that the Court should pick the most conservative deadline for there to be a map in place so as to allow Supervisors of Elections throughout the State to do their job. That deadline is May 13, 2022. That is only a month from today, but this emergency is not of the Court's making, nor is it the fault of the Supervisors of Elections.

ARGUMENT

The declarations of the Supervisors of Elections underscore the urgency of this proceeding. It is too late to create a map in “ample time” before the upcoming primary election. The best the Court can do is make the best of a bad situation by setting a deadline and imposing a schedule that will permit it to move promptly if the State's failure to act becomes manifest.

Courts have denied motions to stay federal cases in deference to state action where, as here, it appears that a congressional district plan will not be adopted in time to be implemented in an upcoming election. *See Covington v. North Carolina*, 2015 WL 13806587, at *2 (M.D.N.C. Nov. 25, 2015) (“deferral is not appropriate to the extent it appears that ‘the[] state branches will fail timely to perform [their] duty’ to ‘adopt a constitutional plan within ample time . . . to be utilized in the upcoming election’”) (quoting *Grove*, 507 U.S. at 34–35); *Brown v. Kentucky*, 2013 WL 3280003, at *2 (E.D. Ky. June 27, 2013) (Supreme Court precedent “clearly permits the simultaneous operation of these two procedures to

ensure constitutional legislative districts are in place in time for an election”).

Courts also regularly set a briefing and hearing schedule in impasse litigation even while the potential for state action remains. *See, e.g., Favors v. Cuomo*, 866 F. Supp. 2d 176, 185 (E.D.N.Y. 2012) (“beginning the work of drawing up a plan does not interfere with or displace the authority of the political branches of state government from doing their work”); *Smith v. Clark*, 189 F. Supp. 2d 503, 512 (S.D. Miss. Jan. 15, 2002) (finding it necessary to “begin the process of holding hearings to fashion a congressional reapportionment plan for the State to assure that the election process operates on schedule and without temporal change”); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992) (“The case was expedited to enable the state primary and general elections to proceed on schedule in the new districts.”).

As the attached declarations establish, a congressional district plan must be in place by no later than May 13, 2022, to allow election officials throughout the State adequate time to prepare for the election and meet necessary election deadlines in advance of the primary. Edwards Decl. ¶ 19; Earley Decl. ¶ 23. Plaintiffs propose a briefing schedule that will permit the Court to act in that time frame.

In the status report, Plaintiffs proposed three rounds of briefing. As the clock is ticking, Plaintiffs now propose two rounds of briefing. We believe that in

this impasse proceeding, the briefing should be simultaneous. Each side proposes one or more maps; neither side has the burden of proof. Simultaneous briefing is typical in impasse litigation. That has been the schedule set in recent impasse litigation in Pennsylvania, Wisconsin, and Minnesota. *See Carter v.*

Degraffenreid, No. 464 M.D. 2021 (Pa. Commw.) (scheduling order dated January 14, 2022 ordering two rounds of simultaneous briefing); *Johnson v. Wisconsin Elections Comm’n*, Appeal No. 2021AP001450 (Wis.) (scheduling order dated November 17, 2021 ordering same); *Wattson et al. v. Simon et al.*, Nos. A21-0243 and A21-0546 (Minn.) (scheduling order dated October 26, 2021 ordering same).

Opening briefs should propose one or more maps that the proponent believes the Court should consider. The briefs should be accompanied by one or more expert declarations explaining the features of the map and its compliance with state and federal law. Responding briefs should criticize the opponent’s map(s) and offer further argument and expert testimony supporting the proponent’s map(s).

We submit that the briefing stage of this matter should be completed by the time the Special Legislative Session comes to an end. That can be achieved by setting the date for simultaneous submission of opening briefs and declarations on April 15, 2022; the date for simultaneous submission of responding briefs and declarations should be April 22, 2022. If the Court sets that schedule, then this case does not interfere with the Special Session. Indeed, the Governor and the

House and Senate leaders are not even parties to this case. They were voluntarily dismissed upon their request. ECF Nos. 50, 57–58. Nor does this schedule impede the state court proceeding. The redistricting issues necessary to create a congressional map are governed by state and federal law and they will be the same in state court and in federal court. If it occurs in a timely fashion, the state court proceeding will require the exact same briefing. Moreover, this schedule imposes no burden on this Court before it is time to act, yet it leaves the Court time to hold a prompt hearing and create a map if the Special Legislative Session fails.

If an impasse continues after April 22, then the Court need only set aside two days for a hearing at its earliest convenience and allow each of the parties to take a one-day (7 hour) deposition of the opposing expert. Plaintiffs' proposed schedule permits this Court to take the maximum time possible to resolve this dispute while still enabling Florida's congressional election to proceed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Secretary's motion to stay and issue a scheduling order consistent with the schedule proposed above.

LOCAL RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that this memorandum contains 2,583 words, excluding the case style and certifications.

Date: April 6, 2022

Respectfully submitted,

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By: /s/ Gregory L. Diskant

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2022, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Gregory L. Diskant

Gregory L. Diskant