IN THE SUPREME COURT OF FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al.,
Appellants,
v.

KEN DETZNER, et al.,
Appellees.

Case No.: SC14-1905
L.T. Nos.: 1D14-3953
2012-CA-00412
2012-CA-00490

COALITION APPELLANTS' RESPONSE TO MOTION OF CONGRESSMAN DANIEL WEBSTER REPRESENTING FLORIDA'S TENTH CONGRESSIONAL DISTRICT TO INTERVENE AS PETITIONER

Appellants, The League of Women Voters of Florida, Common Cause, Brenda Ann Holt, J. Steele Olmstead, Robert Allen Schaeffer, and Roland Sanchez-Medina, Jr. (collectively, "Coalition Appellants"), oppose the Motion to Intervene filed by Congressman Daniel Webster and state as follows:

BACKGROUND

At this late stage, Congressman Webster seeks to interject an admittedly new claim not raised by the existing parties. He argues that the parties' remedial plans violate Article III, section 20 because the proposals for District 10 divide Orlando and are supposedly intended to disfavor him in that they are more Democratic than the gerrymandered district in which he was elected.

From the outset of this case, Plaintiffs argued that unwinding the overpacked North-South configuration of District 5 would naturally create a new minority

district in Central Florida. (*See*, *e.g.*, R9:1120-21, R10:1348, R11:1446-48.)[1] The alternative maps advocated by Plaintiffs at trial redrew District 10 as a minority opportunity district by placing District 5 in an East-West configuration. (SR24:3541-48.) After the trial court invalidated the 2012 enacted plan, Plaintiffs submitted remedial maps that similarly redrew District 10 as a compact minority opportunity district. (Leg. 12/19/14 S.A. 5-16; *see also* SR16:2189-90, 2194-95, 2198.) When the trial court approved the Legislature's minimal changes to Districts 5 and 10, Plaintiffs appealed to this Court and again argued that a constitutionally compliant East-West version of District 5 would allow for a new minority opportunity district in Central Florida. (Pltf. Corr. I.B. 76-78.)

In response to this Court's directive to redraw District 5 in an East-West configuration, the House and the Senate passed competing remedial plans in special session that both included versions of District 10 with significant African-American and Hispanic populations, but they could not agree on which plan to adopt. In the ensuing remedial hearing, the parties offered plans that, with only one exception, incorporated the House proposal for District 10. Plan 9071 (submitted by the House), Plan 9066 (submitted by the Senate), CP-1 through CP-3 (submitted by Coalition Plaintiffs), and the Romo Plan (submitted by Romo Plaintiffs) each

[1] Citations follow the same format as in Coalition Plaintiffs' Supplemental Brief dated October 23, 2015.

contain an identical version of District 10 that is a minority opportunity district based entirely within Orange County with a BVAP of 27.1% and an HVAP of 22.9%. (J.A. 39, 51, 57, 63, 69, 75.) Plan 9062 (submitted by the Senate) includes a different version of District 10 that protrudes from Orange County into Lake County with a BVAP of 27.1% and an HVAP of 19.8%. (J.A. 45.)

At no time from the inception of the case through the *Apportionment VII* decision – a period of nearly **three and a half years** – did Congressman Webster attempt to intervene to advance his purported interest. He first emerged on August 11, 2015 during the special session to claim that he was being disfavored because it would be "impossible" to win reelection in a redrawn District 10. (R. Ex. CP-13 at 111-15.) Even then, Congressman Webster did not seek to intervene. It was only on September 23, 2015, two days before the remedial hearing, that Congressman Webster moved to intervene in the trial court. (SR58:8427-37.)

The trial court orally denied intervention because it was "late" in the proceedings, "the issues were framed," and Congressman Webster "would be raising different issues." (J.A. 86.) Congressman Webster never even requested a written ruling so that he could appeal. Nor did he take further action before the October 16, 2015 deadline established by this Court for the Legislature's initial supplemental briefs. Instead, roughly a week before oral argument and the day before Coalition Plaintiffs' brief was due, he has again requested leave to raise

challenges that no party to this proceeding has ever asserted. For the reasons stated below, this Court should deny Congressman Webster's belated efforts to disrupt these proceedings and salvage his formerly gerrymandered district.

ARGUMENT

As Congressman Webster concedes, "[i]ntervention is not authorized at the appellate level." *Tallahassee Democrat, Inc. v. O'Grady*, 421 So. 2d 58, 58 (Fla. 1st DCA 1982); *see also Castelo Developments, LLC v. Rawls*, 118 So. 3d 831, 832-33 (Fla. 3d DCA 2012) (recognizing that person who was not party to trial court proceedings cannot intervene at appellate level). If Congressman Webster believed that he was wrongly denied intervention, he could have easily obtained a written order and appealed, but elected not to do so. He cannot simply renew his motion before this Court as a substitute for proper appellate procedure.

Although Congressman Webster asks this Court to fashion an exception to the rule prohibiting intervention at the appellate level because "this is an extraordinary case" (Mot. at 1), he cites no authority for such an exception. Congressman Webster points out that, in *Tallahassee Democrat*, the First District "considered . . . the petitions" of a proposed intervenor in deciding a motion for reconsideration. 421 So. 2d at 58. There, the trial court in a criminal case entered a "gag order" that the petitioner and proposed intervenor, both of which were newspapers, sought to quash. *Id.* After the trial court quashed the initial order on its

own and entered a replacement order that only barred grand jury participants from discussing the grand jury proceedings, the First District dismissed the case as moot. *Id.* at 58-59. The two newspapers moved for reconsideration, claiming that "the issues raised by them have not been resolved" because "they are still under a gag order." *Id.* at 59. The First District disagreed and denied reconsideration. *Id.*

In *Tallahassee Democrat,* the proposed intervenor did not seek relief that differed from the main petition, and the First District did not take any action based on the proposed intervenor's arguments. Thus, the proposed intervenor was more akin to an *amicus curiae*, and consideration of its position did not prejudice any party or have any substantive impact on the outcome of the proceeding.

Here, by contrast, Congressman Webster requests relief sought by no other party that threatens to disrupt these proceedings and the related action involving the state senate plan. Specifically, Congressman Webster asks for leave to file a brief challenging District 10 in the proposed remedial plans and to argue his position at oral argument. Coalition Plaintiffs have already filed their supplemental brief, and oral argument is set for November 10, 2015. Accordingly, if Congressman Webster is allowed to file a brief at this late hour, there will likely be inadequate time for the parties to respond unless oral argument is delayed.

But delaying oral argument creates its own problems. The expedited proceedings in this case allow for swift imposition of a remedy without unduly

interfering with the similarly expedited proceedings in the senate case. In the parallel senate action, the Legislature must file a remedial plan no later than November 9, 2015, and Coalition Plaintiffs must file alternative plans, a memorandum with objections to the enacted plan, expert witness disclosures, and exhibit and witness lists within two weeks after enactment of the remedial plan. (**Ex. A** at 1-3.) Other pretrial deadlines follow shortly thereafter, and the remedial hearing in the senate case is scheduled to commence on December 14, 2015. (*Id.* at 3-4.) If Coalition Plaintiffs must prepare further briefing and participate in oral argument at a later time in November, it will disrupt the senate proceedings.

Meanwhile, Congressman Webster offers no justification for waiting roughly three and a half years to seek intervention. It was clear from the outset of this case that Plaintiffs challenged Districts 5 and 10, in part, to allow for creation of a new minority district in the Orlando area. If Congressman Webster feared that the loss of a gerrymandered district would "disfavor" him, it was incumbent upon him to promptly intervene. Particularly in a case where the stakes are so high and delay is so harmful, Congressman Webster could not sit on the sidelines for several years to take a "wait-and-see" approach. *See* Fla. R. Civ. P. 1.230, Author's Comment (1967) (recognizing that courts may take into account "the time of the application" and "other factors" in denying intervention).

Finally, Congressman Webster's claims are frivolous and would therefore add nothing to this proceeding. The creation of a new minority district in Central Florida was not the result of decisions made to intentionally favor or disfavor any particular incumbent. It was, instead, the natural consequence of reversing the Legislature's Republican gerrymander. Congressman Webster initially benefitted from the attachment of an appendage that reached upward like a bicep to improve Republican performance and capture population that had been in benchmark District 8. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 445 (Fla. 2015) ("*Apportionment VII*"). But the larger problem with District 10 in both the 2012 and 2014 plans was that the North-South version of District 5 drew in so much African-American population in the Orlando area that District 10 became an artificially Republican-performing district. (J.A. 24-25, 28-29.) Now that District 5 has been redrawn in a constitutionally compliant East-West orientation, District 10 in all parties' proposed remedial plans has naturally become a more compact coalition district in which African American and Hispanics can elect candidates of their choice. (J.A. 38-39, 44-45, 50-51, 56-57, 61-62, 68-69, 74-75.)

To be sure, an incumbent is "disfavored" in a general sense when his election to Congress resulted solely because of partisan gerrymandering, and the district is then redrawn to eliminate the gerrymander. Article III, section 20(a), however, only prohibits legislative efforts to **intentionally** favor or disfavor

incumbents. Congressman Webster has not proffered a shred of evidence that the Legislature or anyone else acted with the intent to disfavor him in particular. It was this Court's invalidation of the North-South District 5 and its surrounding districts – not malice towards Congressman Webster – that naturally created a minority opportunity district in Central Florida while improving District 10's compactness scores from 0.39 (Reock), 0.73 (Convex Hull), and 0.20 (Polsby-Popper) in the 2012 plan to 0.49 (Reock), 0.89 (Convex Hull), and 0.49 (Polsby-Popper) in CP-1, Plan 9071, Plan 9066, and the challengers' other proposed plans. (J.A. 25, 39, 51, 57, 63, 69, 75.) If there were a constitutional violation simply because Congressman Webster finds reelection more difficult now that this Court has invalidated districts drawn to benefit him and his political party, it would turn the FairDistricts Amendments on their head.

Congressman Webster's observation that the versions of District 10 in the proposed remedial plans divide Orlando likewise does not establish a constitutional violation. As this Court has recognized, "certainly not every split of a municipality will violate [the FairDistricts Amendments]" because "the constitutional directive is only that existing political and geographical boundaries should be used where feasible." *In re Senate Joint Resolution of Leg. Apportionment 1176*, 83 So. 3d 597, 638 (Fla. 2012) ("*Apportionment I*"). No party has argued that the split of Orlando in the proposed remedial plans is somehow gratuitous. Even Congressman

Webster does not claim that Orlando can be kept whole without deviating from another constitutional requirement. He simply requests that Orlando be kept "intact," without ever explaining how it is feasible to do so. That does not begin to show a violation of Article III, section 20(b).[2]

CONCLUSION

Congressman Webster may well believe that it is "impossible" for him to prevail in a district free of partisan gerrymandering. (R. Ex. CP-13 at 113.) Regardless of his personal interest in being reelected, however, Congressman Webster does not have a right to disrupt this case after staying silent for over three years, and he certainly does not have a constitutional right to a gerrymandered district. Accordingly, this Court should deny the motion to intervene.

Respectfully submitted,

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[2] Congressman Webster's objection that the remedial proposals for District 10 divide a single city, Orlando, is also surprising, considering that the 2012 version of District 10 split both Orlando and Winter Haven, while the 2014 version split Orlando, Ocoee, and Winter Haven. (J.A. 27, 31.) One wonders why he was not doubly and triply concerned about municipal divisions in 2012 and 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 26, 2015, a copy of the foregoing has been furnished by email to all counsel on the attached service list.

/s/ John S. Mills
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

THE LEAGUE OF WOMEN VOTERS
OF FLORIDA, *et al.*,

Plaintiffs,

vs. Case No. 2012-CA-002842

KENNETH W. DETZNER, *et al.*,

Defendants.
_____/

AGREED SCHEDULING ORDER

On July 28, 2015, this Court entered a Consent Judgment which directs the Legislative Parties to file with the Court and serve on Plaintiffs a remedial apportionment plan for Florida's Senate districts (the "Remedial Senate Plan") no later than November 9, 2015. On July 29, 2015, this Court entered an Order Setting Case Management Conference that directed the parties to confer and, if possible, submit to the Court an agreed scheduling order for the remedial proceedings. The parties having conferred and submitted an agreed scheduling order, and the Court, having reviewed and approved the parties' proposal, enters this Order.

1. The Legislative Parties anticipate that the Legislature will enact the Remedial Senate Plan by November 9, 2015. The Legislative Parties reserve the right to seek relief from this Agreed Scheduling Order should unanticipated contingencies arise during the legislative process which prevent the Legislature from enacting the Remedial Senate Plan by November 9, 2015, and Plaintiffs reserve their right to contest any such relief.

Exhibit A

2. Within **one business day** after enactment of the Remedial Senate Plan, the Legislative Parties shall make all submissions required of them by paragraph b. of the Consent Judgment.

3. Within **fourteen (14) days** after enactment of the Remedial Senate Plan, Plaintiffs shall:

a. File and serve their response to the Remedial Senate Plan, which, at a minimum, and subject to ongoing discovery, shall identify (i) any districts in the Remedial Senate Plan that Plaintiffs challenge; (ii) each constitutional standard that each challenged district allegedly violates; and (iii) the factual bases of each alleged violation;

b. File and serve any alternative maps that Plaintiffs wish to introduce in support of their claims in this proceeding in the manner set forth in the Consent Judgment (or, if Plaintiffs have already filed and served in this action the alternative maps that they wish to introduce, Plaintiffs shall identify the specific alternative maps they intend to introduce in support of their claims);

c. Serve any expert disclosures, which shall include the identities and qualifications of all experts on whose opinions Plaintiffs intend to rely, as well as a complete statement of their opinions and the production of all materials on which the experts relied in forming their opinions; and

d. Subject to ongoing discovery, serve a list of all fact witnesses, including known impeachment and rebuttal witnesses whom Plaintiffs might call at the evidentiary hearing, and of all exhibits that Plaintiffs might offer to introduce. The witness list shall contain the name, address, and telephone number of each witness and

segregate all witnesses into three groups: (a) witnesses whom the party in good faith intends to call; (b) witnesses whom the party might or might not call, depending upon what witnesses the opposing parties call or other unanticipated matters; and (c) witnesses whom the party does not intend to call, but who are listed from an abundance of caution in light of their knowledge of the facts or the issues in dispute.

4. Within **fourteen (14) days** after Plaintiffs make all disclosures required by Paragraph 3 of this Order, the Legislative Parties shall:

a. File and serve their reply to Plaintiffs' response to the Remedial Senate Plan, which, at a minimum, and subject to ongoing discovery, shall reply to each challenge identified in Plaintiffs' response;

b. Serve any expert disclosures, which shall include the identities and qualifications of all experts on whose opinions the Legislative Parties intend to rely, as well as a complete statement of their opinions and the production of all materials on which the experts relied in forming their opinions; and

c. Subject to ongoing discovery, serve a list of all fact witnesses, including known impeachment and rebuttal witnesses whom the Legislative Parties might call at the evidentiary hearing, and of all exhibits that the Legislative Parties might offer to introduce. The witness list shall contain the name, address, and telephone number of each witness and segregate all witnesses into three groups: (a) witnesses whom the party in good faith intends to call; (b) witnesses whom the party might or might not call, depending upon what witnesses the opposing parties call or other unanticipated matters; and (c) witnesses whom the party does

Exhibit A

not intend to call, but who are listed from an abundance of caution in light of their knowledge of the facts or the issues in dispute.

5. To the extent that a party identifies any witnesses or exhibits after service of the parties' witness and exhibit disclosures as set forth above, the witnesses or exhibits so identified shall be disclosed immediately (but no later than **noon on December 10, 2015**) in a supplemental witness and exhibit disclosure that conforms to the requirements of Paragraphs 3 and 4 above.

6. Discovery shall conclude by **December 11, 2015**. The Court anticipates that the parties will serve and respond to requests for discovery in good faith and as promptly as circumstances permit. The parties may take discovery after the discovery deadline only by leave of court granted upon a showing of good cause or by the agreement of all parties.

7. Any Defendant other than the Legislative Parties that wishes to present argument or evidence at the evidentiary hearing referenced in Paragraph 8 below shall comply with the disclosure requirements set forth in Paragraphs 4 and 5 above.

8. The parties may file a motion seeking an extension from the Court of the deadlines set forth in this Scheduling Order, but such extension will be granted only for good cause shown.

9. The Court will conduct an initial pretrial conference on December 1, 2015, beginning at 1:00 p.m. The Court will conduct a second pretrial conference, if necessary, on December 10, 2015 beginning at 1:00 p.m.

10. The evidentiary hearing shall begin at 9:30 a.m. on **December 14, 2015**, in Courtroom TBD. The hearing shall continue from day to day as necessary, but conclude no later than **December 18, 2015**.

Exhibit A

11. It is the understanding of the Court that in the event Plaintiffs are successful in any challenge presented at the evidentiary hearing, the Court will set out its factual and legal bases for such a ruling and refer the matter back to the Legislature to redraw the map.

12. Any party may move for reconsideration of any part of this order for good cause shown.

DONE AND ORDERED this 19 day of August, 2015.

George S. Reynolds, III
Circuit Judge

Copies to all counsel of record

Exhibit A