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, Wilton Simpson, in his official capacity as the President of the Florida State Senate, Chris Sprowls, in his official capacity as the Speaker of the Florida House of Representatives, Ray Wesley Rodrigues, in his official capacity as the Chair of the Florida Senate Reapportionment Committee, Jennifer Bradley, in her official capacity as the Chair of the Florida Senate Select Subcommittee on Congressional Reapportionment, Thomas J. Leek, in his official capacity as the Chair of the Florida House of Representatives Redistricting Committee, Tyler I. Sirois, in his capacity as the Chair of the Florida House of Representatives Congressional Redistricting Subcommittee, and Ron DeSantis, in his official capacity as Governor of Florida,

Defendants.

Case No.: 4:22-cv-109

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECUSE JUDGE WINSOR

Pursuant to Local Rule 7.1(E), Plaintiffs Common Cause Florida, FairDistricts Now, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan, file this Memorandum in Support of their Motion to Recuse Judge Winsor pursuant to 28 U.S.C. § 455 and Canon 3(C)(1) of the Code of Conduct for United States Judges.

INTRODUCTION

The standard for determining whether a judge should disqualify himself or herself under 28 U.S.C. § 455 is "whether an objective, disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *United States v. Scrushy*, 721 F.3d 1288, 1303 (11th Cir. 2013).

Since joining the bench, Judge Winsor has taken seriously his obligation to recuse himself when his impartiality might reasonably be questioned. Plaintiffs respectfully suggest such impartiality may reasonably be questioned in this action. Irrespective of his ability to remain evenhanded, Judge Winsor's extensive advocacy and litigation efforts in Florida's last redistricting cycle on behalf of the Florida House of Representatives, whose failure to enact new congressional maps now lies at the heart of this case, raise legitimate questions about his role in deciding Florida's congressional district plans in this redistricting cycle. To avoid

any doubt that this case is decided impartially, and to preserve the perception of impartiality, Plaintiffs respectfully suggest that Judge Winsor recuse himself.

BACKGROUND

Prior to joining the bench, Judge Allen Winsor had direct and extensive involvement in the redistricting process in Florida, as evidenced by the record and by Judge Winsor's written answers to questions from the Senate Judiciary Committee, which he submitted in April 2018 in connection with his nomination to the United States District Court (hereinafter "SJQ") (available at https://www.judiciary.senate.gov/download/winsor-sjq). This advocacy and representation was on behalf of the Florida House of Representatives and occurred during his employment at the private firm GrayRobinson, P.A. from 2005 to 2013. (SJQ at 2). That firm continues its work on behalf of the House in this redistricting cycle.

Judge Winsor's role in representing the Florida House in redistricting matters went beyond serving as litigation counsel. As Judge Winsor explained to the U.S. Senate, "Beginning in 2009, my firm and I were retained to represent the Florida House of Representatives in the decennial redistricting process. Our representation of the House was broader than litigation. Leading up to the enactment of the maps, we worked with and advised House leaders and staff and coordinated with experts." (SJQ at 38–39). Judge Winsor's involvement began

before passage of the citizen initiative that established Article III, Section 20, and continued after passage through enactment of the 2012 congressional map and the initiation of the litigation challenging it. (SJQ at 38–39.) Plaintiffs briefly summarize some of this work below to demonstrate that Judge Winsor's impartiality might reasonably be questioned.

A. Representation Concerning Proposed Amendments to the Florida Constitution

Judge Winsor's involvement in Florida's last congressional redistricting cycle began in 2005. At that time, Judge Winsor and his colleagues at GrayRobinson represented the Speaker of the Florida House of Representatives in a successful bid to prevent the inclusion of a proposed amendment to the Florida Constitution on the 2006 general election ballot.[1] This amendment would have entrusted congressional redistricting to a citizens' commission rather than the Florida Legislature. During the same redistricting cycle, Judge Winsor represented the Florida House in opposing other similar amendments proposed by the

[1] *See* Br. of the Honorable Allan G. Bense, Speaker of the Florida House of Representatives, *In Re: Advisory Opinion to Attorney Gen. re Indep. Nonpartisan Com'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 2005 WL 7860294 (Fla. Oct. 2005); Answer Br. of the Honorable Allan G. Bense, Speaker of the Florida House of Representatives, *In re: Advisory Opinion To Attorney Gen. re Indep. Nonpartisa Com'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 2005 WL 3451355 (Fla. Nov. 2005).

Committee for Fair Elections that aimed to reduce the partisan bias in Florida's congressional districts.[2]

While at GrayRobinson, Judge Winsor also represented the Florida House in litigation challenging constitutional amendments that substantively affected redistricting standards—the standards that now control in Florida's redistricting. In a lawsuit challenging two proposed constitutional amendments, the Florida House—represented by Judge Winsor—intervened as plaintiff.[3] Of note, FairDistrictsFlorida.org ("FairDistricts FL"), the sponsor of the amendments, was a predecessor of current Plaintiff FairDistricts Now.

The proposed constitutional amendments at issue, Amendment 5 and Amendment 6, were intended to reduce or eliminate political favoritism in drawing legislative and congressional districts by adding carefully prioritized standards to the Florida Constitution. The Florida House, represented by Judge Winsor,

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[2] *See* Br. of the Honorable Allan G. Bense, Speaker of the Florida House of Representatives, *In Re: Advisory Opinion to the Attorney Gen. Re Implementation of Apportionment and Districting Com'n in 2007*, 2005 WL 7860299 (Fla. Oct. 21, 2005); Answer Br. of the Honorable Allan G. Bense, Speaker of the Florida House of Representatives, *In Re: Advisory Opinion to the Attorney Gen. Re Implementation of Apportionment and Districting Com'n in 2007*, 2005 WL 3451357 (Fla. Nov. 2005) (Appellate Brief).

[3] *See* Florida House of Representatives' Response to the Secretary's Motion to Dismiss, *Brown v. Roberts*, 2006 WL 6760532 (Fla. Cir. Ct. 2010); Florida House of Representatives' Response to Motion of Bob Graham to Intervene as Defendant, *Brown v. Roberts*, 2010 WL 6435993 (Fla. Cir. Ct. filed June 16, 2010).

attempted to remove those amendments from the ballot, but that attempt was unsuccessful. *Roberts v. Brown*, 43 So. 3d 673, 675 (Fla. 2010); *see also Brown v. Roberts*, No. 2010-CA-1824, 2010 WL 6331984 (Fla. Cir. Ct. Sept. 3, 2010).

In an attempt to counteract the anticipated effects of Amendments 5 and 6, the Florida Legislature proposed an additional constitutional amendment, referred to as "Amendment 7." This proposed amendment was drafted and passed during the time Judge Winsor was advising the Florida House on redistricting matters. In response, the Florida State Conference of NAACP Branches ("FL NAACP") sued the Department of State and the Secretary of State, arguing that Amendment 7 would unlawfully mislead voters and blunt the impact of Amendments 5 and 6, which were intended to reduce partisanship in redistricting. Specifically, the FL NAACP argued that the ballot language of Amendment 7 was misleading because its title was almost identical to the titles of Amendments 5 and 6, and its substance undercut the purposes of Amendments 5 and 6 without explaining that to the voters.[4] The House (with Judge Winsor as counsel) intervened to defend Amendment 7's ballot placement and language.[5] The trial court ordered Amendment 7 stricken from the ballot.

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[4] *See* Complaint, *Fla. State Conf. of NAACP Branches v. Roberts*, No. 2010-CA-1803, 2010 WL 8749250 (Fla. Cir. Ct. filed May 21, 2010).

[5] *See* Florida House of Representatives' Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, *Fla. State Conf. of NAACP*

Judge Winsor represented the Florida House in the subsequent appeal.[6] The Florida Supreme Court affirmed the circuit court, and struck Amendment 7 from the ballot, holding "the ballot summary fails to explain its chief purpose and the title misleadingly sets forth" its impact. *Fl. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 664 (Fla. 2010).

Amendments 5 and 6 were subsequently approved by 63% of Florida voters in the November 2010 general election and were codified in Article III (Sections 20 and 21) of the Florida Constitution. Thereafter, members of the United States House of Representatives brought a federal challenge to Article III, Section 20 of the Florida State Constitution under the Elections Clause of the United States Constitution. The Florida House, again represented by Judge Winsor, intervened to support the challenge.[7] The Florida House's Elections Clause challenge failed

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Branches v. Roberts, No. 2010-CA-1803, 2010 WL 6435992 (Fla. Cir. Ct. filed June 25, 2010) (Trial Motion, Memorandum and Affidavit); Florida House of Representatives Reply in Support of Its Motion for Summary Judgment, *Fla. State Conf. of NAACP Branches v. Roberts*, No. 2010-CA-1803, 2010 WL 8749257 (Fla. Cir. Ct. July 2, 2010).

[6] *See* Initial Br. of Appellants, *Fl. Dep't of State v. Fla. State Conf. of NAACP Branches*, No. SC10-1375, 2010 WL 10827319 (Fla. filed July 28, 2010); Reply Br. of Appellants, *Fl. Dep't of State v. Fla. State Conf. of NAACP Branches*, No. SC10-1375, 2010 WL 10873404 (Fla. filed Aug. 11, 2010).

[7] *See* Fla. House of Representatives' Proposed Complaint in Intervention for Declaratory Relief, *Diaz-Balart v. Florida*, No. 10-cv-23968, 2011 WL 1188335 (S.D. Fla. filed Jan. 14, 2011).

in federal district court, and that ruling was affirmed on appeal by the 11th Circuit Court of Appeals. *See Brown v. Sec'y of State of Florida*, 668 F.3d 1271 (11th Cir. 2012).

In short, in this period, Judge Winsor was repeatedly engaged in litigation on behalf of the Florida House that challenged, in one way or another, the addition of what is now Article III, Section 20, to the Florida Constitution.

B. Representation Concerning Florida's 2012 State Legislative Maps

Judge Winsor also represented the Florida House when the Florida Supreme Court conducted its mandatory facial review of the newly passed legislative maps in 2012. The Court held that the Florida Senate map did not pass constitutional muster. *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) ("*Apportionment I*") (finding the plan apportioning districts for the Florida Senate to be facially invalid under the Florida Constitution and ordering the Legislature to redraw it, but approving the House map). The Legislature submitted a redrawn Senate plan, which the Florida Supreme Court ultimately approved based on a facial review. *See In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872 (Fla. 2012) ("*Apportionment II*").

After the state legislative maps were approved on facial review, the Legislature attempted to argue that any further review was barred. When Common Cause (the parent organization of Plaintiff Common Cause Florida) and others

brought an as-applied challenge in the state trial court, Judge Winsor again represented the Florida House in moving to dismiss on the ground that an as-applied, fact-based challenge was barred.[8] The motion was denied and the Florida Supreme court later affirmed (after Judge Winsor left GrayRobinson). *Florida House of Representatives v. League of Women Voters of Florida*, 118 So. 3d 198, 199 (Fla. 2013) ("*Apportionment III*").

C. Representation Concerning Florida's Current Congressional District Map

Florida's 2012 congressional district map also was the subject of extensive litigation. Until he left GrayRobinson in January 2013, Judge Winsor again represented the Florida House in that litigation and defended the constitutionality of the congressional plan.[9] As part of that defense, Judge Winsor presented the

[8] *See* The Legislative Parties' Motion to Dismiss, *League of Women Voters of Florida v. Detzner*, No. 2012-CA-2842, 2012 WL 11829081 (Fla. Cir. Ct. filed Oct. 22, 2012); The Legislative Parties' Reply in Support of Motion to Dismiss, *League of Women Voters of Florida v. Detzner*, No. 2012-CA-2842, 2012 WL 11829080 (Fla. Cir. Ct. filed Dec. 18, 2012).

[9] *See* Fla. House of Representatives and Fla. Senate's Joint Response in Opp. to Plaintiffs' Motions for Summary Judgment and Temporary Injunctive Relief, *Romo v. Detzner*, No. 2012-CA-412, 2012 WL 10731693 (Fla. Cir. Ct. filed Apr. 5, 2012); Legislative Defendants' Joint Motion to Dismiss LOWV Plaintiffs' First Amended Complaint, *Romo v. Detzner*, No. 2012-CA-412, 2012 WL 3195520 (Fla. Cir. Ct. filed Apr. 19, 2012); Legislative Defendants' Joint Motion to Dismiss Romo Plaintiffs' Second Amended Complaint, *Romo v. Detzner*, No. 2012-CA-412, 2012 WL 10731687 (Fla. Cir. Ct. filed Apr. 19, 2012).

House's position that legislative privilege barred discovery from legislators or staff about redistricting.[10] The Florida Supreme Court rejected that position (after Judge Winsor had left GrayRobinson). *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 137 (Fla. 2013) ("*Apportionment IV*"). In *Romo v. Detzner*, No. 2012-CA-2842, 2014 WL 3797315 (Fla. Cir. Ct. July 10, 2014), also after Judge Winsor had left GrayRobinson, the Circuit Court of Florida held that the 2012 congressional district map violated Article III, Section 20, because it was drawn with partisan intent.

After the Legislature failed to agree on a redrawing of a new congressional districting plan, the Florida Supreme Court affirmed the trial court's selection of a remedial map on December 2, 2015. *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015) ("*Apportionment VIII*"). That plan was in place in the 2016, 2018, and 2020 elections.

All of this history reasonably calls into question whether a reasonable lay observer informed of these facts would entertain significant doubts about the judge's impartiality in this very public high-profile case that will necessarily involve the actions of the House and the constitutional amendment whose

[10] Legislative Defendants' Motion for Protective Order Based On Legislative Privilege, *Romo v. Detzner*, No. 2012-CA-412, 2012 WL 10731692 (Fla. Cir. Ct. filed July 12, 2012).

enactment, validity and interpretation Judge Winsor actively challenged while in private practice.

D. Florida's 2020-Cycle Redistricting and Plaintiffs' Suit

The impasse in the current redistricting cycle stems from Governor DeSantis's request for a new interpretation of the same amendments that were at issue in the last cycle. On February 1, 2022, Governor DeSantis petitioned the Florida Supreme Court for an advisory opinion on whether and to what extent Florida's Fair District Amendments required the retention of CD 5, an existing congressional district that connects the Black populations of Tallahassee and Jacksonville. *See Governor DeSantis Letter, Re: Whether Article III, Section 20(A) of the Florida Constitution Requires the Retention of a District in Northern Florida, Etc.*, No. SC22-139 (Fla. filed February 1, 2022). Subsequently, the Florida Supreme Court invited interested parties to submit briefing on whether jurisdiction was proper. The Florida Legislature filed a brief in support of jurisdiction. GrayRobinson—Judge Winsor's former firm—served as counsel for the Florida House in this briefing. *See In Re Advisory Opinion to the Governor Re: Whether Article III, Section 20(A) of the Florida Constitution Requires the Retention of a District in Northern Florida, Etc.*, No. SC22-139 (Fla. filed February 7, 2022). The Florida Supreme Court ultimately declined to provide an advisory opinion. *Advisory Opinion to the Governor Re: Whether Article III,*

Section 20(A) of the Florida Constitution Requires the Retention of a District in Northern Florida, Etc., No. SC22-139, 2022 WL 405381 (Fla. February 10, 2022) (per curiam).

On January 16, 2022 and February 14, 2022, Governor DeSantis submitted two of his own proposed congressional redistricting maps, even though it is the Legislature's job to draw congressional maps. (P000C0079 and P000C0094.)[11] Shortly thereafter, Governor DeSantis informed the Florida House that he believed that the non-diminishment standard of Section 20(A) lacks a "compelling interest sufficient to withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause." Letter from Governor DeSantis to Rep. Sirois, Feb. 18, 2022. The House responded by passing two maps, neither of which the Governor had proposed. It enacted H000C8019 as the primary map, and H000C8015 as a secondary map if the primary map was rejected by any court. This unusual action in enacting two congressional maps suggested that the House recognized that there were constitutional issues both with its primary map and with the Governor's proposal. Both the House and Senate voted to approve H000C8019 as the primary map, and H000C8015 as a fallback map. (*See* Compl. ¶¶ 43–44.)

[11] *See* https://redistricting.maps.arcgis.com/apps/View/index.html?appid=675244fabc9646fca158adca4a487db8; https://redistricting.maps.arcgis.com/apps/View/index.html?appid=8d3ed79b33ee400b9260ac63d73d8a2a.

On March 29, 2022, Governor DeSantis vetoed the bill presenting H000C8019 as the primary map, and H000C8015 as a secondary map, arguing Congressional District 5 in both maps violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See* Letter from Governor DeSantis to Sec. of State Laurel Lee, Mar. 29, 2022. As a result, and as Plaintiffs have alleged, there is a significant likelihood that Florida's political branches will fail to reach consensus to enact a lawful congressional district plan in time to be used in the upcoming 2022 elections. Therein lies the impasse, of which the House is a part, that is the basis for this action.

This action was filed by Plaintiffs, including Plaintiff FairDistricts Now. The primary relief sought in this action is for the Court to adopt and implement a new, constitutionally sound congressional district plan. Implementation of a congressional plan necessarily implicates the validity of the House's actions and the rules for congressional redistricting in Florida as set forth in Section 20.

LEGAL STANDARD

28 U.S.C. § 455 mandates that a judge must be disqualified based on the appearance of partiality, which shall occur "in any proceeding in which [the judge's] impartiality might reasonably be questioned" (§ 455(a)). The standard for determining whether a judge should disqualify himself or herself under 28 U.S.C. § 455 is "whether an objective, disinterested lay observer fully informed of the

facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *United States v. Scrushy*, 721 F.3d 1288, 1303 (11th Cir. 2013). "The standard is thus an objective one, 'designed to promote the public's confidence in the impartiality and integrity of the judicial process.'" *Id.* (quoting *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1263 (11th Cir. 2009)). This standard is mirrored in Canon 3(C)(1) of the Code of Conduct for United States Judges ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.")

ARGUMENT

"[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Here, Plaintiffs respectfully suggest that a reasonable lay observer informed of the facts would likely doubt Judge Winsor's impartiality. This is because Florida's constitutional redistricting standards will necessarily be implicated in this case should a remedial map be drawn or chosen, and the current actions of the House in purporting to apply those standards will likely be closely reviewed. Judge Winsor's work as the long-standing Florida House's legal counsel, and his efforts to defeat those redistricting standards, would make it difficult for an informed lay observer to have confidence in his fair resolution of this matter. Moreover, lawyers from Judge Winsor's prior

firm, GrayRobinson, continue their representation of the Florida House in redistricting matters and have entered notices of appearance in this case. Finally, Plaintiff FairDistricts Now (through its predecessor organization FairDistricts FL) advocated passage of the constitutional amendments that the Florida House opposed, and Plaintiff Common Cause Florida (through its parent Common Cause) was adverse to the Florida House in some of the prior redistricting litigation handled by Judge Winsor. In sum, all of this could create a reasonable question as to Judge Winsor's impartiality in this important and high-profile case. Plaintiffs therefore respectfully request that Judge Winsor recuse himself from this case.

Judge Winsor has recognized the importance of his work in shaping the legal standards for redistricting in Florida. The seminal decision from the Florida Supreme Court interpreting and applying the new constitutional amendments was *Apportionment I,* 83 So. 3d 597 (Fla. 2012) (discussed *supra*). In that case, Judge Winsor "contributed significantly to the briefing and motions practice, and presented oral argument defending the maps in the Florida Supreme Court." (SJQ at 30.) As he acknowledged, that "redistricting cycle was unique because it was the first following the voters' approval of new constitutional provisions adding redistricting standards. The case therefore involved disputes about both how the amendments should be interpreted and whether the adopted maps complied." (*Id*.) This is the second redistricting cycle following the voters' approval of the new

constitutional provisions adding redistricting standards. The application of Section 20 (Amendment 6) to any new congressional district map that is approved by this Court could be central to the resolution of this case.

While serving both on the state court and in this Court, Judge Winsor has conscientiously recused himself from matters when circumstances warranted. On the state bench, he explained to the U.S. Senate that he recused himself when he "had some involvement (or might have had some involvement) in the litigation that led to the appeal or because of my relationship with one of the attorneys or firms involved." (*Id.* at 23–24.) Another reason for recusal was Judge Winsor's "personal involvement as an attorney in a related case." (*Id.* at 24.) He also noted prospectively, "If confirmed, I would recuse from any matter in which I had (or might have had) personal involvement, either as a lawyer or judge. In all other cases, I would evaluate any potential real or perceived conflict, including any relationships that could give rise to the appearance of impropriety, on a case-by-case basis, and I would recuse where necessary." (*Id.* at 41.) Plaintiffs respectfully request that these standards should lead him to recuse himself here.

CONCLUSION

Public confidence in the judicial system is essential to democracy. This is especially true in this case, which will undoubtedly be highly publicized and closely watched. Irrespective of his ability to remain evenhanded, Judge Winsor's

previous efforts in this state's redistricting processes raise legitimate questions about his role in this case. To avoid any doubt, and to preserve the perception of impartiality, Plaintiffs respectfully request that Judge Winsor consider that reasonable citizens might question his impartiality in this case and recuse himself on that ground.

LOCAL RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that this memorandum contains 3,562 words, excluding the case style and certifications.

Date: March 29, 2022

Respectfully submitted,

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By: /s/ Gregory L. Diskant

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 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
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