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' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiffs Common Cause Florida, FairDistricts Now, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan (collectively, "Plaintiffs") respectfully submit this response to the Court's April 25, 2022 Order to Show Cause why the Court should not dismiss this action as moot, and move pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to file an amended complaint in the form attached hereto as Exhibit A.

INTRODUCTION

The Court should grant Plaintiffs leave to file an amended complaint to challenge the constitutionality of Florida's new congressional district plan, which will obviate the need to act on Defendant's suggestion of mootness. Until last week, the Florida Legislature and Governor DeSantis were at an impasse in the process of adopting a new congressional district plan for use in the 2022 statewide primary elections. After months of being urged by Governor DeSantis to adopt a map infected by racial discrimination against Black Floridians, the Florida Legislature recently acquiesced to the Governor's demands at the special legislative session.

Although the new congressional district plan moots the malapportionment claims in Plaintiffs' original complaint, Plaintiffs now seek to amend their complaint to add claims for intentional discrimination challenging the constitutionality of the new map. By supplementing the factual allegations in the original complaint, Plaintiffs' proposed amended complaint details how Defendant's congressional district plan violates the Fourteenth and Fifteenth Amendments to the United States Constitution by intentionally destroying Black opportunity districts in Florida and splintering Black communities of interest throughout the State. *See* Ex. A.

Permitting Plaintiffs to file their amended complaint is the most efficient path forward: it would serve judicial economy to adjudicate the entire controversy between the parties in one action, and proceeding in this way would not prejudice Defendant because this case is still in its early stages. Alternatively, if the Court is not inclined to permit Plaintiffs to amend their complaint, Plaintiffs intend to file their proposed amended complaint as a new action and designate the new action as similar to the instant proceeding under Local Rule 5.6(A).

FACTUAL BACKGROUND

Plaintiffs initiated this action on March 11, 2022 to challenge Florida's then-existing congressional districts, which were rendered unconstitutionally malapportioned by a decade of population shifts. Dkt. No. 1. Following the delivery of the 2020 Census data to be used for the 2022 statewide elections, the Florida Legislature and Governor DeSantis reached an impasse on the new congressional district plan. Dkt. No. 1 at ¶ 3.

Plaintiffs' original complaint contained detailed allegations concerning the Florida Legislature's process after it was tasked with drawing a new congressional map. *See, e.g.*, Dkt. No. 1 at ¶¶ 32–36. Plaintiffs also explained how Governor DeSantis interfered in the redistricting process, proposing his own, constitutionally noncompliant map, which veered the Legislature off its course. *Id.* at ¶¶ 37–45. The original complaint alleged that Governor DeSantis was intent on eliminating

congressional districts where Black voters have historically exercised voting power to elect representatives of their choice, and that the Governor made repeated public statements leaving no doubt that he would veto any congressional redistricting bill that would preserve such districts. *Id*. at ¶ 42. Given Florida's malapportioned congressional districts at the time and the impasse between the Governor and the Legislature, Plaintiffs brought claims for violations of Article I, Section 2 of the U.S. Constitution and 2 U.S.C. § 2c. *Id*. at ¶¶ 62–71. Pursuant to 28 U.S.C. § 2284(a), a three-judge panel was convened to adjudicate this lawsuit. Dkt. No. 6.

When Plaintiffs filed their complaint, Plaintiffs named as Defendants Secretary Lee, members of the Florida House and Senate (the "Legislator Defendants"), as well as Governor DeSantis, assuming that these defendants would be interested in participating in a case that could lead to new Florida congressional maps. However, after the Legislator Defendants moved to dismiss the complaint, Plaintiffs voluntarily dismissed the Legislator Defendants without conceding the validity of their motion to avoid unnecessary motion practice that would unduly delay the proceedings. Dkt. Nos. 50, 57. Governor DeSantis did not move to dismiss, but Plaintiffs voluntarily dismissed Governor DeSantis at his request. Dkt. No. 58. The proposed amended complaint re-names the Governor as a defendant.

Since this complaint was filed, the redistricting process in Florida continued to be dominated by the Governor's desire to destroy congressional districts where Black voters have historically elected representatives of their choice. Although the Florida Legislature attempted to redraw maps that would partially meet the Governor's demands, while attempting to preserve some Black opportunity districts, the Governor vetoed the Legislature's maps and convened a Special Legislative Session from April 19–22, 2022.

During the Special Legislative Session, the Florida Legislature acquiesced to the Governor's demands. Over the protest of the chamber's Black representatives, the Florida Legislature accepted the Governor's congressional district plan (the "Enacted Plan") without making a single change to it. The Enacted Plan followed through on the Governor's repeated statements of his intention to, among other things, destroy Congressional District 5, which has consistently elected a Black representative to Congress since 2016 and which was a court-approved successor to a district that had performed for North Florida Black voters since 1992.

On April 22, 2022, Defendant Lee suggested that this action is now moot because the Enacted Plan resolved Plaintiffs' allegations of malapportionment and there is no longer any live controversy to be adjudicated. Dkt. No. 86. On April 25, 2022, the Court entered an Order to Show Cause why the Court should not

dismiss the case without prejudice as moot and ordered Plaintiffs to file a response to the Order to Show Cause by April 29, 2022. Dkt. No. 87.

ARGUMENT

This action has always concerned the constitutionality of Florida's congressional district plan. Although Plaintiffs' original claims under Article I, Section 2 of the U.S. Constitution and 2 U.S.C. § 2c are now moot, the Court should grant Plaintiffs leave to amend their complaint to assert updated claims based on intervening facts challenging the constitutionality of the new congressional district plan.

I. Leave to Amend Should Be Freely Given.

Where, as here, a deadline for amending the complaint has not passed, Rule 15(a)(2) provides that courts should "freely give leave" to amend the complaint. Fed. R. Civ. P. 15(a)(2); *see Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared [improper] reason [for amendment] . . . the leave sought should, as the rules require, be 'freely given.'"); *Sosa v. Airprint Sys.*, 133 F.3d 1417, 1419 (11th Cir. 1998) (explaining the "liberal amendment standard" of Rule 15(a)). Pursuant to Rule 15(a)(2), "the discretion of the District Court is not broad enough to permit denial" unless "a substantial reason exists to deny leave to amend." *Fla. Evergreen Foliage v. E.I. DuPont De Nemours & Co.*,

470 F.3d 1036, 1041 (11th Cir. 2006) (quoting *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989)).

Amendment to add new claims is proper where, as here, initial claims are rendered moot by events subsequent to the filing of the original complaint. *See, e.g., McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11th Cir. 1999) (reversing district court's denial of motion for leave to amend complaint after original claims were moot, and noting there is "nothing illegitimate about a plaintiff seeking a new type of relief when intervening events occur during the pendency of litigation that makes the originally sought relief impossible."); *In re Adler, Coleman Clearing Corp.*, No. 06-80157-CIV, 2008 WL 11411962, at *3 (S.D. Fla. Aug. 13, 2008) (granting leave to amend complaint to add new claim after claims became moot, even where the court did "not agree that the new claim relates to the original complaint.").

II. Plaintiffs Should Be Permitted to Amend Their Complaint to Re-Name the Governor, Add One Co-Plaintiff, and Allege New Claims.

Plaintiffs should be permitted to amend their complaint to re-name the Governor as a defendant and to allege new claims of intentional discrimination in violation of the Fourteenth and Fifteenth Amendments. Barring exceptional circumstances inapplicable here, "the Federal Rules of Civil Procedure liberally allow a plaintiff to join a new defendant." *Dever v. Family Dollar Stores of Ga., LLC*, 755 F. App'x 866, 869 (11th Cir. 2018). Here, the Governor was a party to

the original complaint and never moved to be dismissed from that case. He will suffer no unfair surprise by being named in an amended complaint challenging the new congressional district plan that he endorsed. The proposed amended complaint describes the Governor's conduct giving rise to the claims, including, where relevant, his role and participation in the violations of the Fourteenth and Fifteenth Amendments. *See* Ex A, ¶¶ 49–74. It also explains his responsibility for enforcing the Enacting Plan that Plaintiffs seek to enjoin. Ex A, ¶¶ 7, 58.

Ex parte Young provides for federal jurisdiction against a state actor who is responsible for enforcing a law that is unconstitutional. *See Papasan v. Allain,* 478 U.S. 265, 276–277 (1986) (citing *Ex Parte Young*, 209 U.S. 123 (1908)); *Luckey v. Harris*, 860 F.2d 1012, 1014 (11th Cir. 1988). The Governor is a proper defendant where, as here, the Governor has enforcement authority over challenged legislation (and also the obligation to defend it in court). *See, e.g.*, *Dream Defenders v. DeSantis*, 553 F. Supp. 3d 1052, 1079–81 (N.D. Fla. 2021) (denying in part Governor's motion to dismiss and rejecting argument that the Governor was not a proper party where the Governor had power to enforce the challenged law). Governor DeSantis has acknowledged his authority over the Secretary of State and highlighted his responsibility for the administration of Florida's election laws. For example, in his petition to the Florida Supreme Court for an advisory opinion concerning the constitutionality of a congressional redistricting bill that retained a

performing district for Black Florida voters, the Governor explained that the executive power vested in him by the Florida Constitution includes the power of "direct supervision" over the "administration" of the Department of State. For this proposition, he cited Fla. Const. Art. IV, § 6; *see also* Fla. Stat. § 20.02(3) (providing that "[t]he administration of any executive branch department … placed under the direct supervision of an officer … appointed by and serving at the pleasure of the Governor shall remain at all times under the constitutional executive authority of the Governor"); Fla. Stat. § 20.10 (creating the Department of State, which is headed by the Secretary of State, who is appointed by and serves at the pleasure of the Governor). In his request for an advisory opinion, the Governor continued:

> The Secretary of State, whom I direct and oversee, is the chief election officer of the State, § 97.012, Fla. Stat., and is responsible for, among many things, "[o]btain[ing] and maintain[ing] uniformity in the interpretation and implementation of the election laws," *id.* § 97.012, Fla. Stat …. The Department of State will also be responsible for defending any legal challenges to the new congressional redistricting map.[1]

[1] *Advisory Opinion to Governor re: Whether Article III, Section 20(a) of the Florida Constitution Requires the Retention of a District in Northern Florida*, No. SC22-139, Petition at 2 (Fla. Feb. 1, 2022), available at https://efactssc-public.flcourts.org/casedocuments/2022/139/2022-139_petition_79511_request2dadvisory20opinion2028governor29.pdf

Given the Governor's acknowledgment of his enforcement authority over the Florida congressional district plan that Plaintiffs challenge in their proposed amended complaint and supervision of the defense of that map, he is a proper defendant here.

Plaintiffs should also be permitted to amend to add one co-plaintiff, the Florida State Conference of the National Association for the Advancement of Colored People Branches (the "Florida NAACP"), a nonpartisan civil rights organization in Florida. The Florida NAACP has encouraged civic and electoral participation among its members and other voters. Unfair and discriminatory redistricting at the Congressional level frustrates the Florida NAACP's core missions by diluting the votes of citizens the Florida NAACP works to engage in civic participation and by obstructing the ability of their members to elect candidates of choice. Ex. A at ¶ 5. Defendants will not be prejudiced by the addition of the Florida NAACP as a co-plaintiff. *See, e.g., United States v. Space Coast Med. Assocs., L.L.P.*, No. 613CV1068ORL22TBS, 2014 WL 12616950, at *1 (M.D. Fla. Oct. 22, 2014) (granting leave to amend and rejecting argument that the "marginal burden of defending against one additional plaintiff in the same case" would be prejudicial).

The proposed amended complaint also seeks to add intentional discrimination claims under the Fourteenth and Fifteenth Amendments to

challenge the new congressional map, which continues a lengthy history of discrimination against Black Floridians by Florida officials, including by Governor DeSantis. As detailed in the proposed amended complaint, the Enacted Plan was adopted, at least in part, for the purpose of discriminating against Black Florida voters. Ex. A. at ¶¶ 92–103. Defendants are alleged to have acted with invidious intent to disadvantage Black voters in the Enacted Plan, which was designed to dismantle two otherwise effective crossover district and to diminish Black Floridians' ability to elect candidates of their choice. Ex. A at ¶¶ 78–91, 95. The Enacted Plan will disproportionately burden Black voters in Florida, an entirely foreseeable result that Defendants were well aware of when they passed the new map. Ex. A at ¶ 102. These allegations overlap with and supplement the core allegations in the original complaint. *Compare* Dkt. No. 1 at ¶¶ 32–47, *with* Ex. A at ¶¶ 43–91.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution forbids states from enacting laws which produce discriminatory results and for which a racially discriminatory intent or purpose is a motivating factor. To establish a Fourteenth Amendment violation, a plaintiff need only show that discriminatory purpose was a motivating factor. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Plaintiffs' proposed amended complaint adequately alleges claims for intentional discrimination under

Arlington Heights. Plaintiffs' proposed amended complaint also adequately alleges that the Enacted Plan violates the Fifteenth Amendment's promise that the right to vote shall not be denied or abridged on account of race.

III. Allowing Plaintiffs to Amend Will Not Cause Delay or Prejudice Defendants.

Other factors that courts consider in deciding motions for leave to amend—whether the amendment will unduly delay the proceedings or prejudice the opposing party—also weigh in favor of granting leave to amend. *See Taylor v. Florida State Fair Authority*, 875 F. Supp. 812, 815 (M.D. Fla. 1995) (considering undue delay and prejudice to the opposing party). First, Plaintiffs have not unduly delayed in filing this motion. To the contrary, Plaintiffs promptly filed this motion within the deadline set by the Court for a response to the April 25, 2022 Order to Show Cause and about a week after the Enacted Plan became law.

Second, Defendants will not be prejudiced by the amendment to the complaint. A three-judge panel will still adjudicate the claims, which continue to challenge the constitutionality of the apportionment of congressional districts. *See* 28 U.S.C. § 2284(a). The proceedings are also at an early stage. No discovery has been taken, and no dispositive motions have been filed by the remaining Defendants. *See Taylor*, 875 F. Supp. at 815 (rejecting argument that amendment that raised "a new legal theory" warranted denial of motion for leave to amend

complaint because "that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant them leave to file their proposed amended complaint. In the alternative, Plaintiffs intend to file their proposed amended complaint as a new lawsuit designated as similar to the instant proceeding under Local Rule 5.6(A).

LOCAL RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that this memorandum contains 2,603 words, excluding the case style and certifications.

Date: April 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 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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