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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al.,

Plaintiffs,

v.

CORD BYRD, in his official capacity as Florida Secretary of State, et al.,

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' MOTION TO DENY OR DEFER CONSIDERATION OF DEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT

Eight months before the close of discovery, five months before the Plaintiffs' deadline for expert disclosures, and before even fully answering Plaintiffs' first set of interrogatories and document requests, Defendants have moved for partial summary judgment on Plaintiffs' compactness and political and geographical boundary claims ("Tier Two claims") relating to the congressional redistricting plan (the "DeSantis Plan") that is the subject of this action. Defendants insist that those claims can be resolved by "eyeball[ing]" the challenged districts and reviewing the State's own calculations. They are wrong. As proceedings from the last redistricting cycle make plain, resolution of Plaintiffs' Tier Two claims requires both expert and fact discovery. And Plaintiffs' Tier Two claims are legally intertwined with and cannot be neatly divorced from Plaintiffs' "Tier One" claims, which require their own expert analysis and discovery.

Plaintiffs have been diligently pursuing discovery, but with the better part of a year remaining before the discovery cutoff, Defendants' motion is premature. Plaintiffs are entitled to an adequate opportunity to engage in discovery before responding to a motion for summary judgment. Accordingly, Plaintiffs respectfully request that the Court deny summary judgment

under Florida Rule of Civil Procedure 1.510(d), or in the alternative postpone the summary judgment hearing scheduled for November 21 and defer resolution of Defendants' motion until the close of discovery.

BACKGROUND

The Constitution's redistricting criteria are split into two tiers. Tier One prohibits intentional partisan gerrymandering and discrimination against racial and language minorities and demands that districts are contiguous. *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 615-38 (Fla. 2012) ("*Apportionment I*"). Tier Two instructs lawmakers to create compact districts of nearly equal population that hew to political and geographical boundaries where feasible. *Id.* at 639.

Plaintiffs allege both Tier One and Tier Two violations in their complaint. They assert that the DeSantis Plan violates Tier One criteria by: (1) diminishing the ability for Black voters to elect their candidates of choice; (2) intentionally discriminating against minority voters by restricting their ability to equally participate in the state's political processes; and (3) intentionally configuring districts to favor the Republican Party. Plaintiffs further allege that the DeSantis Plan violates Tier Two criteria by failing to draw compact districts and respect political and geographical boundaries.[1] Plaintiffs' Tier Two claims are not limited to individual districts, but the DeSantis Plan as a whole. *See* Compl. ¶¶ 141, 143.

On August 24, 2022, the parties agreed to a case management schedule that calendars Plaintiffs' expert disclosures for January 27, 2023, Plaintiffs' rebuttal expert disclosures for March

[1] Defendants' suggestion that Plaintiffs' Tier Two claims are limited to only certain districts in the DeSantis Plan, Defs.' Mot. for Partial Summ. J. ("Mot.") at 1, 5, 8 (Aug. 25, 2022), misreads the complaint, which alleges that Plaintiffs' Tier Two claims "include but [are] not limited to" to the few districts Defendants identify.

31, 2023, and the close of discovery for April 28, 2023. One day later, after submitting the joint schedule to the Court, Defendants moved for partial summary judgment on Plaintiffs' Tier Two claims, demanding that the Court adjudicate those claims by simply reviewing "the face of the districts" before Plaintiffs obtain discovery to dispute Defendants' arguments. Mot. at 2.

Discovery is in its earliest stages. Plaintiffs have served one round of discovery requests, none of which has been fully answered by Defendants. And with nearly half a year before their expert disclosure deadline, the vast majority of discovery is still left to be completed.

LEGAL STANDARD

In 2021, the Florida Supreme Court amended the state's summary judgment rules to "adopt the federal summary judgment standard." *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 74 (Fla. 2021). Accordingly, Florida Rule of Civil Procedure 1.510(d) now mirrors Federal Rule of Civil Procedure 56(d), and expressly provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fla. R. Civ. P. 1.510(d).

Under the federal analogue of this rule, "summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Bindner v. Traub*, No. 21-492 GBW/SCY, 2022 WL 2157112, at *1 (D.N.M. June 15, 2022) (quotation omitted). "Consistent with this core purpose, district courts should construe motions that invoke the rule generously. . . ." *Emigrant Residential LLC v. Pinti*, 37 F.4th 717, 724 (1st Cir. 2022) (internal quotation marks omitted). That means "unless all parties have had a full opportunity to conduct discovery. . .'requesting time for additional discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of

the evidence.'" *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 865-66 (7th Cir. 2019) (citing *Convertino v. United States Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012) (cleaned up); *see also In re PHC, Inc. v. S'holder Litig.*, 762 F.3d 138, 145 (1st Cir. 2014) (holding that it was premature for district court to consider summary judgment motion when plaintiffs' pending discovery requests had not been answered); *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004) ("[S]ummary judgment in the face of requests for additional discovery is appropriate only where such discovery would be 'fruitless' with respect to the proof of a viable claim."); *Aragon v. Coolings*, No. 2:18-cv-00620, 2022 WL 1693785, at *2 (D. Utah Apr. 25, 2022) ("Summary judgment motions filed prior to discovery are rarely granted and are disfavored." (cleaned up)), *report and recommendation adopted*, 2022 WL 1688811 (D. Utah May 26, 2022).

Consistent with this approach, the Florida Supreme Court recently emphasized that, "before being subjected to summary judgment because of the absence of evidence, the nonmovant must have been afforded 'adequate time for discovery.'" *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d at 77 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

ARGUMENT

I. Plaintiffs cannot respond to Defendants' motion for partial summary judgment on their Tier Two claims without crucial expert and fact discovery.

A. Plaintiffs' Tier Two claims cannot be adjudicated without expert and fact discovery.

Plaintiffs' Tier Two claims require complex expert and fact discovery. Examining a map's compactness and respect for political and geographical boundaries is hardly a box-checking exercise. For instance, while experts generally agree upon acceptable measures of compactness (like the Reock and Polsby-Popper tests), those measures are the product of myriad computational decisions that affect the compactness scores they ultimately reach. Before an expert can calculate

the compactness of a given state's districting plan, that state's three-dimensional curved geometry must be projected on to a two-dimensional flat surface. Ansolabehere Aff. ¶¶ 7-8. There are quite literally thousands of methods for completing that process, each of which will result in a different compactness score for the same map. This is no academic concern. For instance, Dave's Redistricting, a widely respected mapmaking tool, calculates different compactness scores for the DeSantis Plan than those pressed by Defendants. *Id.* ¶ 8. Plaintiffs must be allowed to complete their own compactness analysis, and probe Defendants' calculations, to meaningfully evaluate Defendants' claims.

Nor can the compactness of any one district be considered in a vacuum. Rather, a complete compactness analysis will also require consideration of surrounding districts. *Id.* ¶ 9. Defendants' contention that the Court can simply "eyeball" a handful of isolated districts, *see* Mot. at 2, 10, grossly misunderstands both the nature of Plaintiffs' claims, *see supra* n.1, and the nature of the legal inquiry, *see League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 406 (Fla. 2015) ("*Apportionment VII*") (explaining that altering a district may cause "as few as four and as many as seven other districts" to be "drawn in a more compact manner"); *Apportionment I*, 83 So. 3d at 635 ("Given Florida's unique shape, some of Florida's districts have geographical constraints.").

The analysis required to measure the DeSantis Plan's respect for political and geographical boundaries is similarly complex. The DeSantis Plan contains 17 county splits (with 29 total county crossings), 71 municipal boundary splits, and 308 precinct/VTD splits, every one of which will need to be examined through expert analysis for compliance with constitutional criteria. Ansolabehere Aff. ¶ 15 (explaining "it is difficult to make meaningful observations about the necessity of such boundary crossings or conclude that they are constitutional or not without using the discovery process").

Evaluating alternative plans is one means of reviewing those splits. The Florida Supreme Court explained last cycle that its review of a districting plan's respect for key boundaries—and compactness for that matter—is assisted by the consideration of alternative plans. *See Apportionment I*, 83 So. 3d at 641. Heeding this guidance, plaintiffs in *League of Women Voters of Fla. v. Detzner* ("*Apportionment VIII*") submitted alternative plans to the court, which were considered in evaluating both their Tier One and Tier Two claims. 179 So. 3d 258, 279 (Fla. 2015). The development and analysis of alternative plans, however, is an expert-intensive and time-consuming process. Ansolabehere Aff. ¶¶ 4, 11.[2] The discovery timeline agreed upon by the parties here appropriately contemplates several months for that process to take place.

It is unsurprising then that prior redistricting cases have involved robust expert discovery. Last cycle, Professor Steve Ansolabehere, just one of many experts, wrote five expert reports, totaling 147 pages and reflecting "hundreds of hours of research to prepare," to support his analysis of whether Florida's congressional maps complied with both Tier One and Tier Two constitutional requirements. *Id.* ¶ 4. His analysis also required reviewing wide-ranging data sets such as block assignment files, shapefiles, statistical reports on the state's population and demographic composition, and election results and voter registration data down to the precinct level. *Id.* ¶ 12. There is no reason to believe this proceeding will require anything less. *See* Wermuth Aff. ¶¶ 12-13.

[2] For example, congressional redistricting plans originally passed by the Florida House and Senate in this redistricting cycle had meaningfully different configurations of congressional districts like CD-7, CD-13, and CD-14 (the very districts Defendants highlight in their motion). Ansolabehere Aff. ¶ 11.

History and precedent therefore strongly belie Defendants' suggestion that Plaintiffs' Tier Two claims can be resolved by simply eyeballing the DeSantis Plan and reviewing "undisputed" compactness scores provided by the state. *See* Mot. at 2.[3]

B. Plaintiffs' Tier Two claims cannot be adjudicated without first considering Plaintiffs' Tier One claims.

As an additional basis for denying or deferring Defendants' motion, Plaintiffs' Tier Two claims cannot be adjudicated without considering constraints imposed by Tier One requirements, which demand their own factual and expert support. *See* Ansolabehere Aff. ¶ 10. The constitution contemplates "a natural relation and connection" between the tiered redistricting criteria. *Apportionment I*, 83 So. 3d at 639 (quotation omitted). Because "Tier [Two] requirements must yield when necessary to comply with" Tier One criteria, the Court must "remain cognizant" that a plan's compactness and respect for political boundaries is defined by the requirements imposed in Tier One. *Id.* at 640.

To remedy a Tier One violation last cycle, for example, the Florida Supreme Court ordered the adoption of an east-west configuration of CD-5 over the state's objection that the new configuration was insufficiently compact. *Apportionment VII*, 172 So. 3d at 402-06. The Court reasoned that any compactness concerns triggered by its chosen configuration were justified in part by factors like "geography and abiding by other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted). It also observed that the east-west configuration allowed "as

[3] The State notes that the Florida Supreme Court approved its 2022 legislative districting plan which contains districts with similar compactness scores to the congressional plan at issue here. Mot. at 8. But unlike this case, the legislative plan's compliance with constitutional districting criteria was not challenged and therefore provides little guidance here.

few as four and as many as seven other districts" to be "drawn in a more compact manner." *Id.* In other words, the Court's view of the plan's compactness turned on its understanding of what Tier One required.

Plaintiffs' Tier One claims similarly exemplify the interrelated nature of the Tier One and Tier Two inquiries. In Count I, Plaintiffs allege that the DeSantis Plan's reconfiguration of CD-5, for instance, from the east-west configuration adopted by the Florida Supreme Court violates the constitution's prohibition against diminishing minority voters "ability to elect representatives of their choice." *Apportionment I*, 83 So. 3d at 619. The configuration of CD-5 and its surrounding districts both informs and is informed by the districts' compliance with Tier One. *See, e.g.*, *Apportionment VII*, 172 So. 3d at 402-06. Without determining what those Tier One requirements demand in the first instance, the Court's analysis of the Tier Two criteria that are required to yield to those requirements is a fruitless endeavor. *Apportionment I*, 83 So. 3d at 641 (evaluating plan using a "global approach" that involves considering Tier One and Tier Two criteria simultaneously); *see also* Ansolabehere Aff. ¶ 10. Considering Tier Two criteria in a vacuum is thus antithetical to the required constitutional analysis; the Court cannot evaluate Plaintiffs' Tier Two claims without at the same time examining whether Defendants complied with Tier One criteria.

Adjudicating Plaintiffs' Tier One claims, moreover, requires time-intensive fact and expert discovery. Plaintiffs' non-diminishment claim, for instance, demands a holistic functional analysis of districts across the state that entails examining: "(1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history." *Apportionment I*, 83 So. 3d at 627. Their intentional discrimination and partisanship claims require robust fact discovery into the Legislature's intent. *See Apportionment VII*, 172 So. 3d at 401-13

(examining evidence of unconstitutional intent). And the interrelated nature of Tier One and Tier Two criteria require Plaintiffs to depose those responsible for the DeSantis Plan to understand whether its sacrifices with respect to one criterion were made in an effort to comply with another. *See Apportionment I*, 83 So. 3d at 640 (observing that "the reason for drawing lines a certain way may be the result of legitimate efforts by the Legislature to comply with . . . Florida's tier-one imperative"). Defendants do not (and cannot) claim that the evidence necessary to complete those analyses has been subject to full discovery.

Because Plaintiffs' Tier Two claims cannot be resolved without first considering their Tier One claims, Defendants' attempt to isolate the Tier Two analysis from the rest of the case lacks both a legal and a practical foundation, as the Tier One claims are closely linked to the Tier Two analysis and remain the subject of robust discovery.

II. The discovery Plaintiffs require to support their claims is currently unavailable.

The expert and factual evidence described above is currently unavailable to Plaintiffs despite their diligence. Wermuth Aff. ¶ 15. Plaintiffs have assiduously pressed discovery forward: They have served interrogatories and requests for document production and have timely responded to Defendants' discovery requests. This is therefore not a case in which evidence is unavailable because of Plaintiffs' dilatory behavior. *See OSF HealthCare Sys.*, 933 F.3d at 865. Instead, Plaintiffs lack expert testimony and factual evidence to support their claims for the unextraordinary reason that discovery has just begun and expert deadlines and the close of discovery are still the better part of a year away. Plaintiffs simply require that this case proceed over the normal course so that they may develop the discovery necessary to fully support their claims and oppose summary judgment.

CONCLUSION

Plaintiffs' Tier Two claims demand complex expert analysis and fact discovery that is currently unavailable to Plaintiffs. Under Rule 1.510(d), this renders Defendants' motion for summary judgment premature. Plaintiffs therefore respectfully request that this Court exercise its broad discretion to deny Defendants' motion or, in the alternative, postpone the November 21 summary judgment hearing and defer judgment on the motion until the close of discovery.

Dated: September 9, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 9, 2022 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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