UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:22-cv-24066-KMM

GRACE, INC.; ENGAGE MIAMI, INC.; SOUTH DADE BRANCH OF THE NAACP; MIAMI-DADE BRACH OF THE NAACP; CLARICE COOPER; YANELIS VALDES; JARED JOHNSON; and ALEXANDER CONTRERAS,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Pursuant to S.D. Local Rule 7.1 Defendant, City of Miami (the "City"), files this Reply Memorandum of Law in Support of its Motion to Dismiss [DE 34] the First Amended Complaint (the "Motion") of Plaintiffs, Grace, Inc. ("Grace"), Engage Miami, Inc. ("Engage Miami"), South Dade Branch Of The NAACP ("South Dade NAACP"), Miami-Dade Branch Of The NAACP ("Miami-Dade NAACP"), Clarice Cooper, Yanelis Valdes, Jared Johnson, Alexandra Contreras and Steven Miro (collectively, the "Plaintiffs"), and in Reply to Plaintiffs' Response in Opposition to the Motion (the "Response") [DE 37]. As grounds, the Defendant states:

I. Introduction

Plaintiffs allege a single claim for racial gerrymandering with respect to a redistricting process without pointing out any actual gerrymandering that impacts each Plaintiff on a district-by-district basis. Moreover, Plaintiffs claim *every voter* in the City of Miami was racially

gerrymandered. This bald assertion defies logic, is unsupported by any factual allegations, and is refuted by the City's patently obvious adherence to traditional redistricting principles. If significant numbers of a race are not being moved during redistricting, then there is no racial gerrymander about which to complain. Plaintiffs must allege "race was the predominant factor motivating the legislature's decision to place *a significant number of voters* within or without a particular district." *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (quoting *Miller v. Johnson*, 515 U.. 900, 916 (1995)) (emphasis added). Other than District 5, designed to allow Black voters to elect the candidate of their choice, Plaintiffs point to no actual gerrymander. Rather Plaintiffs attempt a kitchen sink approach, laying out the entire redistricting process step-by-step, discussing every move, without tying those moves to any racial effect.[1] They simply hoped that somewhere in there would be a racial gerrymandering claim.

II. Plaintiffs' single unified claim against five districts does not state a cognizable claim for any Plaintiff, and certainly not each Plaintiff.

Plaintiffs repeatedly emphasize they are pursuing a unified claim for all Plaintiffs--"a single claim," their "sole claim," their "one claim," their "singular claim"—that "every voter" in the City was racially gerrymandered five city districts. DE 37 pp.1, 3, 4, 6 & 8. Given that there are only five districts and they assert "every voter in the City of Miami was placed within or without their City Commission district based on their race, (*id*. at 8), this is nothing short of a whole map challenge. However, the case law is clear that a plaintiff making a gerrymandering claim that does not reside in the allegedly gerrymandered district lacks standing. *See United States v. Hays*, 515 U.S. 737, 745, (1995) (concluding "where a plaintiff does not live in [a

[1] Plaintiffs also concede that they are not challenging districting decisions made in 1997, 2003, or 2013. DE 37 p.8 n.4.

racially gerrymandered] district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference."); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015); *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000); *Bush v. Vera*, 517 U.S. 952, 957 (1996); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996). Plaintiffs identify nothing but generalized grievances in their challenge to all the districts. That is insufficient for a racial gerrymandering claim.

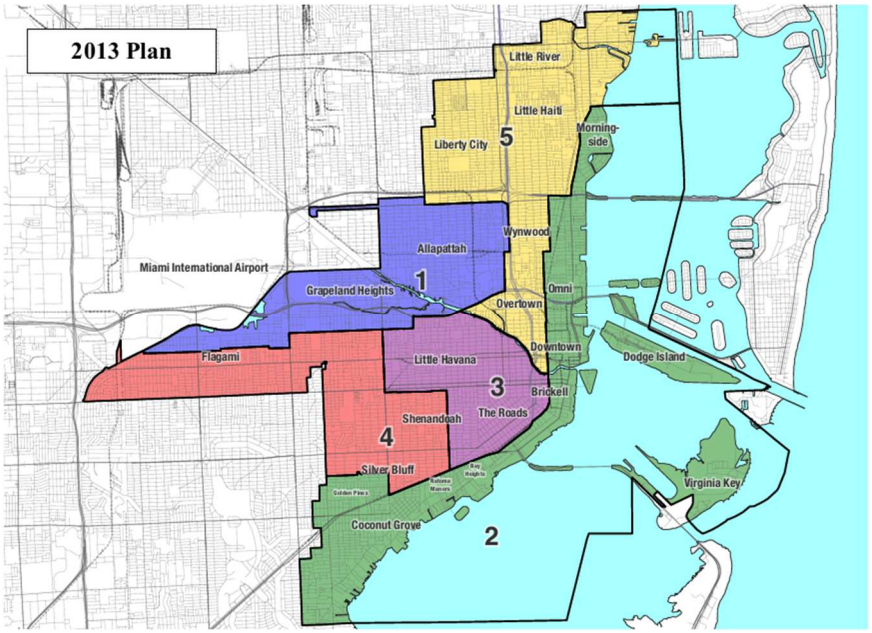
Plaintiffs cite *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015), for the premise that the harms of racial gerrymandering are "personal" which include being "subjected to a racial classification, as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." DE 37 p.3. Plaintiffs ignore that: "A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" 575 U.S. at 1265. For example, Plaintiffs' single claim does not addresses how any Individual Plaintiff residing in a district has suffered a personal harm due to racial gerrymandering in their own district or another district. Nor do they articulate how the drawing of any particular boundary specifically harmed any particular Plaintiff. In short, the singular claim challenging all districts is simply a challenge to the City map as a whole. But the Supreme Court has expressly rejected such generalized claims, requiring a plaintiff to live in the district they are challenging. *See Gill*, 138 S. Ct. at 1930; *Alabama Legislative Black Caucus*, 575 U.S. at 262 (2015); *Sinkfield*, 531 U.S. at 30; *Bush v. Vera*, 517 U.S. at 957; *Shaw*, 517 U.S. at 904; and *Hays*, 515 U.S. at 745. Plaintiffs' unified claim asserting the same type of

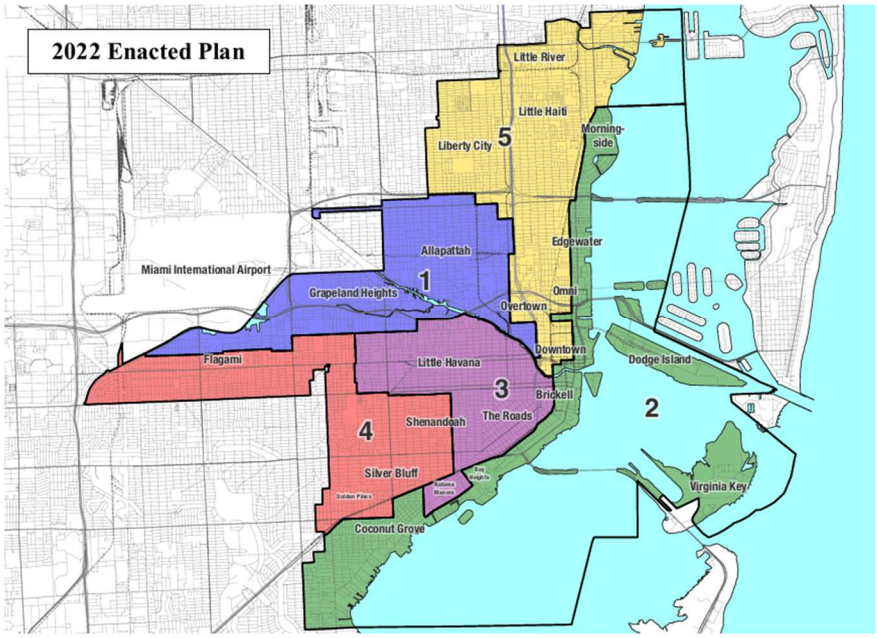
generalized, undifferentiated grievances on behalf of every Plaintiff against every district must be dismissed.

III. Plaintiffs' assertion that ever voter was gerrymandered is refuted by their other allegations and attachments to the Amended Complaint.

Plaintiffs assert that "*every voter* in the City of Miami was placed within or without their City Commission district based on their race." DE 37 p.8. They also allege, in conclusory fashion, that the City sacrificed or departed from traditional redistricting criteria. This is false. Nor do they identify those traditional redistricting principles that were sacrificed. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 190 (2017) ("As a practical matter, in many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria.").

A common sense review of the adopted plan reflects strict adherence to traditional redistricting principles, not a departure from them. *See Alabama*, 575 U.S. at 272 (identifying traditional redistricting principles to include compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation). For example, a review of 2013 Benchmark Plan and the 2022 Enacted Plan reveal that the two maps are substantially the same maps. *Compare* DE 24-82 & 24-83.





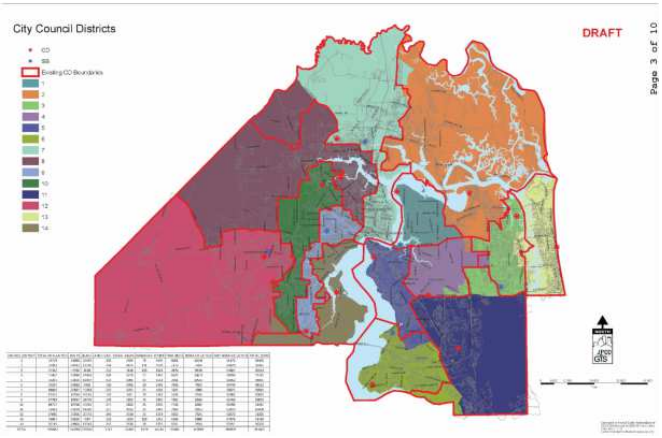
It is plain that substantial portions of the districts remain unchanged, maintaining the core of each of the districts—a feature that would serve to advance incumbent interests. Moreover, as Plaintiffs also acknowledge, District 2 was substantially over the ideal district population of 88,448, while Districts 1, 3 4, and 5 were all underpopulated. DE 23 p.11; DE 24-31 p.23.

District	2022 Population in Bench Mark Plan	2022 Population in Enacted Plan
1	80,863	88,108
2	116,742	93,300
3	79,309	87,658
4	81,800	86,597
5	83,716	86,578

Even a cursory examination of the districts' population numbers demonstrate that districts 1, 3, 4, and 5 only gained small portions of population to meet the one person, one vote requirements of the Equal Protection Clause. Plaintiffs have yet to explain how such minor adjustments to existing districts equates to racial gerrymanders of *every voter* in the City of Miami.

IV. Plaintiffs' reliance on *Jacksonville Branch of the NAACP v. City of Jacksonville* is misplaced.

Plaintiffs rely heavily on *Jacksonville Branch of the NAACP v. City of Jacksonville*, 2022 WL 7089087 (N.D. Fla. Oct. 12, 2022). In *Jacksonville*, where Black residents are a minority, the Black residents were stripped from some districts (Districts 2, 12 & 14) and packed into four districts (Districts 7, 8, 9 & 10) with concentrations from 56.3% to 67.2%, which diminished their influence in the other districts. *Id*. at *2, *28.



Id. at *55.

Districts 7 through 10 had obviously gerrymandered shapes that are non-compact:

In *Jacksonville*, the defendant denied that race predominated in the redistricting process, therefore the Court merely was determining whether racial criteria predominated in the creation of those Black majority districts. *Id*. at *5. Contrast that with this case where the districts are facially compact. The one district that was created to connect together a racial population so they can elect the candidate of their choice is District 5. Unlike *Jacksonville*, there is no supermajority of Black residents; there is no packing, and District 5 does not possess the exceptionally bizarre shapes like those at issue in *Jacksonville*. The majority barely exceed 50%. In their Response, Plaintiffs do not even contend that there was packing. They also do not dispute that the City had good reason to believe that that it had to use race as a factor to satisfy the Voting Rights Act ("VRA"). "The Parties agree the VRA requires a district in which Black voters have an opportunity to elect candidates of their choice." DE 26 p.33. Plaintiffs instead advance a novel theory: that District 5 cannot survive strict scrutiny because 50.3% was too great a majority to be narrowly tailored. They contend that "narrow tailoring" meant that the percentage of Black residents needed to be shrunk to a mathematically precise number based on the citizen voting age population, that is, to reduce the Black population to the smallest number that will still elect their candidate of choice. No case supports this theory. First, legislatures are not required to draw boundaries by citizenship rather than total population. *Evenwel v. Abbott*, 578 U.S. 54, 64, 74 (2016). Second, as the Supreme Court pointed out in *Bethune-Hill v. Va.*

State Bd. of Elections (Bethune-Hill I), 580 U.S. 178, 195-96 (2017), that there is no requirement for mathematical precision because it would create an impossible dilemma for legislatures, rendering them liable if they erred slightly either way. Plaintiffs have no response to that. The Motion pointed out the City's strong basis for believing it needed to maintain a 50% majority is set forth on the face of the Amended Complaint.[2] DE 34 p.13. Plaintiffs have no response to that. The Motion also pointed out that the Amended Complaint does not set forth any allegation of dilution of the Black vote anywhere else. Plaintiffs have no response to that either. The Motion pointed out that expanding District 5, which is smaller than the surrounding Districts, would lower the percentage of Black voters without increasing their influence anywhere else. Thus the district could not be more narrowly tailored. Plaintiffs have no answer to that.

V. Plaintiffs' allegations fail to support a claim of racial gerrymandering.

Plaintiffs' other novel theory is that in a city with a 72% Hispanic population, where Hispanics are the majority of three districts and the largest group and near majority in a fourth district, they were racially gerrymandered. Plaintiffs alleged that the three Hispanic districts packed each other, a mathematical and statistical impossibility. The Motion pointed out the absurdity of the "packing" allegations, and Plaintiffs have elected not to respond or defend the allegations. DE 7 p.6. The Motion pointed out that the only district in which one could argue that Hispanic influence was diluted is District 5, which Plaintiffs concede needed to be a district where Black residents could elect a candidate of their choice. Plaintiffs have set the Black and Hispanic populations at odds in their Amended Complaint and essentially seek incompatible relief. Plaintiffs have no response to this other than to call it a rhetorical question and assert it's inappropriate to consider at this stage. It is not a "rhetorical question." It's a critically important

[2] In fact, the two NAACP plaintiffs requested that the Black vote not be diluted in District 5 as part of the redistricting process. DE 24-14 p.14.

question that would have to be answered in the next couple of months if they wish to obtain a preliminary injunction. It also demonstrates the fatal flaw of their shotgun pleadings. Not every plaintiff has standing to challenge every redistricting choice for every district.

Plaintiffs cite *Shaw v. Reno*, 509 U.S. 630 (1993), for the proposition that segregating races for the purpose of voting states a claim. The Motion pointed out that alleging "segregation" occurred between the three Hispanic districts does not state a claim. Miami has three compact Hispanic districts where the percentage of Hispanics are more highly concentrated.[3] There is nothing inherently wrong with having a district with lopsided racial demographics if that is the natural result of residential segregation. *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

The Motion addressed the redistricting choices and pointed out that, with the exception of District 5 with its 50.3% Black voting age population, there is no basis in the Complaint for claiming that they was any other racial gerrymandering. Plaintiffs want to simply rest on race being discussed at the meeting without justifying a challenge to any particular districting choice. In their Response, Plaintiffs have elected not to answer the central question: who was racially divided from whom in which particular redistricting choice? Plaintiffs' attempt to rely solely

[3] The Plaintiffs spent much of their Motion for Preliminary Injunction addressing a "foot" off of District 3 that extends into District 2 to show non-compactness, then conceded that that it was not drawn for racial reasons: "Secondly, while Area 13 does not differ markedly from the surrounding areas in terms of Black VAP, it has considerably lower Hispanic VAP than both the surrounding areas of District 2 and – by quite a bit – of the receiving District 3…. Area 13 was moved from District 2 to 3 for reasons that appear to be unmotivated by race as the precinct splits are not substantively distinct across district line." DE 24-31 pp.10-11.

upon statements made at meetings that look like people are being divided on the basis of race without showing any actual racial effect in terms of packing or vote dilution, and without challenging any specific redistricting decision as having any racial effect. Plaintiffs rely on the unspecified and conclusory assertion that their harm is living in Districts that racially classify and the redress is to live in districts that "do not classify them based on their race, or otherwise do so in a way that is narrowly tailored to a compelling governmental interest." DE 37 p.4. Even if that were a valid claim, it would yield a peculiar, nominal result. Assuming that District 5 is sufficiently narrowly tailored,[4] the City could resubmit the exact same districts without making any statements about race, and Plaintiffs would have no basis for complaint.

Finally, Plaintiffs do not deny the obvious conflict in the relief sought on behalf of the Plaintiffs concerning whether District 5 should be Black or Hispanic. They have chosen to cast it as Plaintiffs' counsels' conflict of interest issue, and it may be, but that was not the reason it was raised in the Motion. The question goes to the relief they are seeking. Do they seek to make District 5 a majority Hispanic district and, if not, then why are they bringing the claim at all if that is the one district where their influence can be said to be diluted based on the redistricting?

WHEREFORE, Defendant respectfully requests that the Court dismiss Plaintiffs' Amended Complaint.

[4] If District 5 isn't narrowly tailored enough, then to satisfy Plaintiffs, the City would merely have to sweep in more of the surrounding districts, and dilute the Black vote below 50%

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ *Christopher N. Johnson*
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