Filing # 180518584 E-Filed 08/25/2023 11:21:31 AM

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

Black Voters Matter Capacity
Building Institute, Inc., et al.,

Plaintiffs, Case No. 2022-ca-000666

v.

Cord Byrd, in his official capacity as
Florida's Secretary of State, et al.,

Defendants.
_____/

FLORIDA SENATE'S MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES

The Florida Senate moves under Florida Rule of Civil Procedure 1.190(a) and (b) to amend its affirmative defenses to conform to the parties' express joint stipulation to try the issue of "[w]hether the non-diminishment provision's application to North Florida violates the Equal Protection Clause to the U.S. Constitution."

Background

1. On August 11, 2023, after sixteen months of litigation, the parties filed with the Court a Joint Stipulation to Narrow Issues for Resolution. As a part of that Joint Stipulation, each of the parties agreed to withdraw or dismiss certain claims or defenses and to stipulate to four "Remaining Legal Issues for Trial Court's Resolution."

2. The second of the four "remaining legal disputes" stipulated by the parties was "[w]hether the non-diminishment provision's application to North Florida violates

the Equal Protection Clause to the U.S. Constitution."

3. The parties' Joint Stipulation further provided for the submission of "simultaneous tailored briefing on the outstanding legal issues" on Wednesday, August 16, with responses submitted by Monday, August 21.

4. The Florida House of Representatives and Florida Senate filed a joint trial brief and a joint response brief in accordance with the stipulated schedule. The Legislature's joint briefs specifically addressed the second of the four "remaining legal disputes" stipulated by the parties as a remaining issue for the Court's resolution: whether the application of the Florida Constitution's non-diminishment provision to Benchmark Congressional District 5 in North Florida would violate the Equal Protection Clause of the United States Constitution.

5. Notwithstanding the parties' stipulation as to the remaining legal issues, Plaintiffs' counsel asserted at the final hearing on August 24 that the Florida Senate should be prohibited from addressing this stipulated issue because it was not pleaded in the Senate's answer and affirmative defenses to the amended complaint.

6. In response to Plaintiffs' objection, and in an abundance of caution, counsel for the Florida Senate made an *ore tenus* motion to amend its pleadings to conform to the issues the parties had expressly agreed would be "resolved at a final hearing" by the Court. The Court deferred ruling and requested that the Florida Senate submit a written motion no later than noon on August 25.

Argument

The parties' Joint Stipulation included an express agreement that "[w]hether the non-diminishment provision's application to North Florida violates the Equal Protection Clause to the U.S. Constitution" was a "Remaining Legal Issue[]" to be resolved by the Court at a final hearing. Given the parties' express agreement to try this stipulated issue, the Court should treat the issue as though it had been raised in the Florida Senate's pleadings as required by Florida Rule of Civil Procedure 1.190(b). In the alternative, and to the extent necessary, the Court should grant leave to amend the Florida Senate's affirmative defenses to raise this stipulated issue.

Rule 1.190(b) provides that, when issues not raised by the pleadings are tried by express or implied consent of the parties, "they shall be treated in all respects as if they had been raised in the pleadings." Although a party may seek amendment of the pleadings under these circumstances "at any time, even after judgment," the "failure to so amend shall not affect the result of the trial of these issues." *Id.*

The parties' Joint Stipulation here constitutes express consent by the Plaintiffs to try the issue of "[w]hether the non-diminishment provision's application to North Florida violates the Equal Protection Clause to the U.S. Constitution." Under these circumstances, Rule 1.190(b) requires that issue to be treated "in all respects as if [it] had been raised in the pleadings." *See, e.g.*, *Aburoumi v. Espinosa*, 305 So. 3d 825, 826 (Fla. 5th DCA 2020) (concluding trial court erred by concluding that it lacked authority to consider an issue tried by consent); *Griffin v. Griffin*, 463 So. 2d 569, 573 (Fla. 1st DCA

1985) (noting that issues fixed by the pleadings may be changed by "stipulation of the parties" or "amendment express or implied to conform to the evidence"). The issues stipulated by the parties as "legal disputes . . . that will be resolved at a final hearing" are therefore tried by express consent and should be treated "in all respects as if they had been raised in the pleadings." Fla. R. Civ. P. 1.190(b).

To the extent amendment of the Florida Senate's affirmative defenses is necessary, Florida law provides that leave to amend a pleading "shall be given freely when justice so requires." Fla. R. Civ. P. 1.190(a). "As a general rule, refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." *Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Co-op. Bank*, 592 So. 2d 302, 305 (Fla. 1st DCA 1991).

Amendment of the Florida Senate's affirmative defenses to conform to the parties' Joint Stipulation would not prejudice any party, which is "[t]he primary consideration in determining whether a motion for leave to amend should be granted." *Hutson v. Plantation Open MRI, LLC*, 66 So. 3d 1042, 1045 (Fla. 4th DCA 2011) (internal quotation marks and citation omitted). Amendment would not introduce new facts or legal theories unknown to Plaintiffs, but would merely ensure that the Florida Senate may argue the same issues that Plaintiffs concede may be addressed by the other parties. Because the Florida Senate and Florida House of Representatives filed a joint trial brief, the Plaintiffs were not even required to respond separately to the written arguments of

each house of the Legislature. Plaintiffs would not be prejudiced in any way by trying the legal issues they consented to try in the Joint Stipulation.

Nor would amendment of the Florida Senate's affirmative defenses to conform to the issues in the Joint Stipulation be futile. The facts and law supporting the Florida Senate's arguments on this stipulated issue are set out at length in the Legislature's Trial Brief and Response Brief. In its opinion declining to grant an advisory opinion on this issue, the Florida Supreme Court nevertheless acknowledged the "importance" of the question presented by the Governor and the "complex federal and state constitutional issues implicated by the Governor's request." *Adv. Op. to Gov. re Whether Art. III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Florida*, 333 So. 3d 1106, 1108 (Fla. 2022). Plaintiffs' disagreement with the Defendants' arguments does not demonstrate that amendment *to assert them* would be futile.[1]

WHEREFORE, the Florida Senate requests that the Court treat the "as-applied" issue identified by the parties as a "Remaining Legal Issue" for resolution by the trial court in the parties' Joint Stipulation as though it had been raised in the Florida Senate's pleadings. In the alternative, and to the extent necessary, the Florida Senate seeks leave to amend its affirmative defenses to raise this stipulated issue.

[1] The Florida Senate has plainly not abused the privilege of amendment, as it has not previously sought to amend a pleading.

Respectfully submitted,

/s/ Daniel Nordby
DANIEL E. NORDBY (FBN 14588)
GEORGE N. MEROS, JR. (FBN 263321)
TARA R. PRICE (FBN 98073)
SHUTTS & BOWEN LLP
215 South Monroe Street,
Suite 804
Tallahassee, Florida 32301
(850) 241-1717
DNordby@shutts.com
GMeros@shutts.com
TPrice@shutts.com
CHill@shutts.com

CARLOS REY (FBN 11648)
KYLE GRAY (FBN 1039497)
FLORIDA SENATE
404 South Monroe Street
Tallahassee, Florida 32399
(850) 487-5855
Rey.Carlos@flsenate.gov
Gray.Kyle@flsenate.gov

Counsel for the Florida Senate

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal on August 25, 2023.

/s/ Daniel Nordby