SUPREME COURT OF FLORIDA

RE: THE FLORIDA SENATE, ET AL. vs. CHARLES R. FORMAN, ET AL.

CASE NUMBER: SC02-1813
Lower Tribunal Case Number: 5D02-2325
Lower Tribunal Filing Date: 8/16/02

APPELLEES, CHARLES R. FORMAN'S AND MICHAEL A. FINN'S, INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARION COUNTY

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PRELIMINARY STATEMENT

CHARLES R. FORMAN and MICHAEL A. FINN, Plaintiffs below and Appellees here, shall be referred to as "APPELLEES." SECRETARY OF STATE, KATHERINE HARRIS; PRESIDENT OF THE SENATE, JOHN MCKAY; SPEAKER OF THE HOUSE OF REPRESENTATIVES, TOM FEENEY; ATTORNEY GENERAL, ROBERT A. BUTTERWORTH; and SUPERVISOR OF ELECTIONS FOR MARION COUNTY, DEE BROWN, the Defendants below and Appellants here, shall be collectively referred to as "APPELLANTS."

As the Court is well aware, the briefing of this case is not in accordance with the standard appellate practice. Appellees have not had the benefit of Appellants' brief in order to frame their responsive pleading. Appellees shall attempt to address those matters which they anticipate Appellants might raise as points on appeal.

Citations to the July 23, 2002 and July 24, 2002 transcript of Judge Singbush's hearings shall be indicated parenthetically as "T" with the appropriate page number(s). Appellees shall have the index of the record and shall refer to all other portions of the record in accordance with the volume and page number of the index as "RV.___P. __." Evidence Exhibits shall be indicated as "PL. Ex ___ " with the number of the exhibit and page number if the exhibit is a transcript. Appellees shall include reduced copies of large exhibits as part of the Appendix to this brief.

As to the organization of Appellees' brief, Appellees shall provide a statement

of facts with citations to the record as denoted above. Then, Appellees shall address the elements of Appellees' political gerrymandering claim, as set out by the United States Supreme Court in Davis v. Bandemer, 478 US 109 (1986). Appellees shall address the elements of the claim, the facts presented below which satisfied each element of the claim and the trial court's findings of fact and conclusions of law.

STATEMENT OF THE CASE AND FACTS

Charles R. Forman and Michael A. Finn, Plaintiffs below and Appellees here, sought a declaratory judgment in the Circuit Court of Marion County to determine the constitutionality of House Joint Resolution 1987 as it pertained to the redistricting of Florida's Senate districts in Marion County.[1] The Appellees filed suit on May 24, 2002, pursuant to this Court's holding in In Re: Constitutionality of House Joint Resolution, 1987, 817 So.2d 819 (Fla. 2002) that claims of racial or political gerrymandering needed to be presented to a court of competent jurisdiction for an evidentiary hearing. It is the contention of Appellees that, as applied to the facts of this case, House Joint Resolution 1987's Senate redistricting plan violates Appellees' Equal Protection rights under Article I, §2 of the Florida Constitution, in that districts 3, 7, 14 and 20 are politically gerrymandered so as to discriminate against Appellees as citizens of Marion County, Florida. (R.V.I. P. 5)

It is Appellees' contention that the citizens of Marion County constitute a discernable political group whose geographical distribution is sufficiently ascertainable so that it could be used in drawing electoral lines. (R.V.I P. 7)

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[1]Appellees also challenged the renumbering of the districts as a violation of the constitutional term limit provisions of Florida's Constitution. The lower court determined that the issue was not ripe for adjudication. Appellees do not challenge the court's finding in the matter and will not address that issue in this appeal.

Furthermore, the Appellees contend that in 1992 the Florida Legislature intended to discriminate against the citizens of Marion County when it passed Senate Joint Resolution 2G redistricting Marion County's Senate representation from three districts to four districts so as to prohibit Marion County from electing a Republican resident Senator. (T. 166) Prior to 1992, Marion County had a long history of senatorial representation because it was not yet divided in such a manner that prevented a reasonable opportunity to elect a resident Senator. (T. 96, T. 110) In 1992, the Democratic Legislature divided Marion County with the Senate redistricting map in order to prevent the emerging Republican population from electing a Republican Senator. (T. 166)

At the August 7, 2001 Reapportionment Public Hearing, former Representative for Marion County, George J. Albright, III, described how the legislature intended to discriminate against Marion County: "I ran in '86 against Mr. Mefford (phonetic), a very popular, very nice, very good state Representative and got 47 percent of the vote in a 33 percent district. He retired, I got 52 percent in a 37 percent district. As you-all recall of course the Democratic party ran both houses at that point and they saw the growth of the Republican party in this county. When reapportionment came, Randy MacKey (phonetic) was in charge of House reapportionment. He called me in and said, I've got good news and bad news for you, George. The good news is we like

you and we don't think we can beat you, so we're going to pack all the Republicans as best we can into your seat and we're going to take Marion County and spoke it off like a wheel with the rest of the counties coming in. And that is how the Florida House was drawn." (PL. Ex 7 P. 39)

As is facially evident, this same anti-Republican sentiment was behind the construction of the Senate Map of 1992. (PL Ex 15) Under the 1992 map, Marion County went from three Senate districts to four. The citizens of Marion County were divided so that their largest percentage of population in any of the four districts was 31%. In 2000, Leslie Scales attempted to run for District 11 and was resoundingly-defeated. (T. 207) Since that time, no other candidate from Marion County has attempted to run for any of the four seats. (T. 167)

Appellees provided the Court below with testimony from a City Council member for the City of Ocala, (T. 95) a legislative assistant who represented the resident House of Representatives member from Marion County from 1988 to present, (T. 101) a County Commissioner for Marion County from 1994 to present (T. 130) and the Plaintiff, Charles R. Forman. (T. 160)

Using data obtained from the Senate Budget, The Community Budget Issue Request 2002, and Conference Report 27-E (the General Appropriations Act) (T. 110, PL Ex. 10, 11), the Appellees submitted evidence that demonstrated gross funding

disparities between Marion County and the other district counties which have resident senators. (T. 117, PL Ex 15) The testimony showed that during the 2001 legislative session the four senators who represented Marion County's interest requested $141,936,612.00 in special funding district wide, yet only requested $1,810,723.00 for Marion County, a nominal amount equivalent to only 1.27% of the total requests made by those senators. (T. 113-115, PL Ex 15) Of the 131 projects filed by these senators, only five were requested for Marion County - - 0.38% of the total projects requested. (PL Ex 15)

The witnesses testified this was consistent with the prior ten years (T. 117, 118). Furthermore, the testimony was that prior to 1992, Marion County was able to participate in the political process and, as a result, was fairly treated in the budgeting process. (T. 110) The testimony also demonstrated that under the current Senate Districting Map as contested by Appellees, Marion County's participation in the political process will be reduced further still. (T. 167) In 1992, the largest percentage of Senate district population enjoyed by Marion County citizens was 31%. Under the contested map, that population is reduced to 27.4%. (T. 167, Ex 2 and PL Ex 3)

Finally, it was the testimony of all the witnesses before the trial court that under the current map, the discriminatory effect will be as bad or worse than it has been in

the past. (T. 148, T. 167, T. 123) All the witnesses were experienced political professionals, extremely familiar with the political process. Appellee Finn was a City Council member for the City of Ocala for 16 years. (T. 95) Sharon Nehring was the staff assistant for the sole representative of Marion County since 1990 and had worked at that same position since 1988 when Marion County last had senatorial representation. (T. 101-102) Commissioner Harris has been a County Commissioner for Marion County since 1994. (T. 130) He testified at several public hearings regarding reapportionment. (T. 131) His testimony at trial also detailed the difficulties experienced by average Marion County citizens in requesting an audience with their senatorial representatives, much less in actually getting them to do something. (T. 134) Commissioner Harris testified that conditions had deteriorated to the level that Marion County was forced to hire a lobbyist. (T. 151) In 1980, Appellee Forman worked on several campaigns, including that of Senator George Kirkpatrick when his seat included Marion County. (T. 165) Forman was in Tallahassee in 1992 during redistricting and at that time testified to the issues that affected Marion County citizens. (T. 166) In order to show that a satisfactory plan could be devised, Appellees submitted a plan prepared using the FREDS program. (T 170-174, PL Ex 16)

Based upon the evidence presented, the court determined the following:

Appellees were part of an identifiable political group. In 1992, Appellants had the intent to discriminate against this political group. From 1992 to the present, the Appellees have suffered a history of discrimination such that Appellees and the citizens of Marion County had been deprived of a voice in their government. The court found that the voters of Marion County have been completely and utterly disenfranchised. Based upon the unrebutted factual evidence of the history of discrimination and the intended maintenance of the "status quo" the trial court found that the citizens of Marion County were a mere "borrow pit" of voters, incapable of influencing a state senatorial election race. Indeed, the effect of their individual and collective votes has been completely negated. Accordingly, the trial court held that, as applied to the facts of this particular case, the Senatorial Redistricting Plan for Districts 3, 7, 14 and 20 was unconstitutional and in violation of the Equal Protection Clause of the Florida Constitution. (R.V.2 P. 319-334)

The Appellants timely appealed to the District Court of Appeal for the Fifth Judicial District. (R.V. 4 P. 429-457) On August 15, 2002, the district court certified the issue decided by the trial court "as an issue of great public importance and one that will have a great effect on the proper administration of justice through the state" and requested this Court accept jurisdiction. (R.V. 4 P. 458-459)

SUMMARY OF ARGUMENT

On May 3, 2002, this Court rendered its constitutionally mandated opinion of the facial validity of House Joint Resolution 1987. In doing so, it stated its opinion was without prejudice to the right of any protestor to file an as applied challenge. On May 24, 2002, Appellees filed their as applied challenge contending that senatorial districts 3,7, 14 and 20 were unconstitutional because these districts violated Appellees' constitutional Equal Protection rights under the Florida Constitution. Specifically, Appellees contend that these districts were politically gerrymandered in the manner set out in Davis v. Bandemer, 478 US 109 (1986).

This Court recognized the political gerrymandering claim set out in Bandemer as a claim which would require an evidentiary hearing in order to establish a showing of intentional discrimination against an identifiable political group and an actual discriminatory effect on that political group. Appellees contend that the citizens of Marion County constitute an identifiable political group as contemplated by Bandemer. The Appellants do not believe the citizens of a county can constitute a political group. Appellants' argument appears to confuse the concept of protecting boundaries with the concept of affording Equal Protection to the citizens inside those boundaries.

The trial court had competent substantial evidence to support its conclusion that

Appellees were part of a political group. Appellants put nothing in evidence to refute this.

While there are no cases which hold that a political group cannot be the electors of a county or municipality, one state Supreme Court has held that the citizens of the City of Anchorage do constitute a political group under Bandemer. Kenai Peninsula Borough v. State of Alaska, 743 p 2nd 1352 (AK 1987). The political structure that exists in this state poses financial responsibilities upon the citizens of each county to provide the means to pay for the mandates imposed upon counties by the Legislature. It is incongruous for the Legislature, which creates the county, extracts tax revenue based upon county boundaries, imposes tax burdens upon the citizens of that county and then so fractures the voting strength of that county so as to prevent the citizens from participating in the political process that taxes it and burdens it, to say that those citizens are not a political group entitled to an opportunity to participate in the process. Clearly in Florida, the electors of a county are constitutionally a political group. (Article VII, §2, Florida Const.)

After concluding that the citizens of Marion County constitute a political group, the next step in the analysis is to determine if the court decision on discriminatory intent and discriminatory effect was clearly erroneous.

While the Bandemer court, and other courts reviewing a political

gerrymandering claim have as much as presumed intent, Appellees have fully addressed this issue. In support of their position that the Appellants demonstrated the requisite intent, Appellees placed into evidence: The 1982 map depicting Marion County divided into three districts; testimony about how Marion County was then adequately represented in the political process; testimony regarding the democratic intent to discriminate against Marion County citizens in adopting the 1992 map; statistical budget analysis showing the discriminatory effect the 1992 senatorial districts had on Marion County citizens; evidence on how the contested map not only perpetrates the same discriminatory division, but actually further prohibits the citizens of Marion County from having a voice in the process; evidence of the Appellants intent to protect incumbents and maintain the status quo; and an acknowledgment by Senator Daryl Jones at the Senate redistricting hearing that under the contested map, Marion County projects probably will not be funded.

The most difficult prong of the Bandemer analysis is actually the Appellees' most persuasive point. Appellees are not faced with the difficult evidentiary issue of trying to predict how the contested redistricting map will have a discriminatory effect in the future. Here Appellees have a ten-year history under a discriminatory Senate Redistricting Plan which was adopted in 1992. The Appellees placed into evidence statistical budget information showing how the four Senators representing Marion

County requested funding for the citizens of Marion County which amounted to only 1.27% of their total budgetary requests in 2002. The unrefutted evidence was that this funding was typical for the prior ten-year period. Further, the testimony showed that the contested plan further diminished the voice of the citizens of Marion County.

The discriminatory effect was made clearer by comparing the actual funds allocated to Marion County with those of the home counties of the senators representing Marion County. Marion County received 5.8% of the funding obtained by the four other counties where Marion County's senators reside. This was again typical of the funding Marion County experienced over the last ten years. It is evidence of disparate treatment because Marion County's population exceeds the population of Lake and Alachua Counties as much as 40% and has a significantly higher population than Hamilton County. Yet, these counties obtained more funding then Marion County.

In addition to discriminatory treatment in terms of annual funding, Appellees also presented evidence of how Marion County voters are discriminated against at the polls. Only one citizen from Marion County ran for office after 1992 and the court found that she was resoundingly defeated. Yet, prior to 1992, Marion County had a long history of senatorial representation. The way the Senate has drawn and quartered the citizens of Marion County and divided the City of Ocala into thirds has

completely cut the citizens of Marion County out of the political process. As was testified by Appellees, the citizens of Marion County are not looking to be a Senate district unto themselves, the citizens just want a fighting chance. As long as the citizens of Marion County constitute enough of a district so that a Senator running for that district cannot ignore the voting strength of that district, then Appellees' representation would not violate the Equal Protection Clause. All Appellants needed to do was to put on some evidence to justify their conduct as necessary to promote a compelling governmental interest. Shapiro v. Thompson, 394 US 618 (1969). Instead, Appellants rested. They put on no testimony or evidence which could meet this burden.

POINT ON APPEAL

The trial court was correct when it found the Senatorial Reapportionment Plan for Districts 3, 7, 14 and 20 unconstitutional and in violation of the Equal Protection Clause of Florida's Constitution.

The essence of this case is whether there is substantial competent evidence to support the trial court's finding of political gerrymandering as established in Davis v. Bandemer, 478 US 109 (1986).

In their Petition for Declaratory Judgment, the Appellees claimed "the plan violates Article I, §2 Equal Protection provisions by diluting Plaintiffs' ability to elect a resident Senator whereas other similarly situated citizens from counties which share populations and demographic statuses similar to Marion County, have a real opportunity to elect a resident Senator thus constituting political gerrymandering." (R.V.1 P. 6) Appellants' arguments missed the point of Appellees' claim regarding political gerrymandering. Appellees' claim is not that redistricting had to apportion districts along county lines or that a district be located entirely within Marion County. Rather, the Appellees' claim is that the plan violated Equal Protection by diluting their ability to elect a resident Senator in the same manner as similarly situated citizens from demographically analogous counties.

At the trial, Appellee Finn testified that Appellees were not seeking a district that consisted solely of Marion County: "I don't believe that I'm up here trying to say

that Marion County needs to be its own district within the county lines. That's not the question. The question is we don't have fair representation by the way they've cut the state up." (T. P. 100). Or, as Mr. Forman testified: "Where you have a big county, you have a 200,000, 300,000, 400,000-person county, they need to be given a fighting chance with their neighbor to elect somebody. And that way the Senator will watch both counties." (T 169) Contrary to Appellants' assertions, Appellees were not seeking protection of Marion County's geographic boundaries, but rather protection of the political group which consists of Marion County's citizens.

This Court in its decision determining the facial validity of the redistricting plan specifically stated:

> We acknowledge that any interested person should have the opportunity to attempt to raise a race-based equal protection claim, a Section 2 claim, or a political gerrymandering claim in a court of competent jurisdiction. Therefore, our holding is without prejudice to the right of any protestor to file an as applied challenge to the validity of the plan for these reasons. (Emphasis supplied) In Re: Constitutionality of House Joint Resolution 1987, 817 So.2d 819 at 832 (Fla. 2002).

This court went on to explain the necessary showing under Bandemer:

> Under the Bandemer test, a Plaintiff raising a political gerrymandering claim must establish that there was (1) intentional discrimination against an identifiable political group and (2) an actual discriminatory effect on that group... In order to establish that there has been an actual discriminatory effect, the Plaintiff must show that: (1) the identifiable group has been, or is projected to be disadvantaged at the polls; and (2) by being disadvantaged at the polls, the identifiable political group will lack political power and be denied fair representation. In Re:

Constitutionality of House Joint Resolution 1987, 817 So.2d 819 at 830 (Fla. 2002).

In its decision below, the trial court correctly applied the Bandemer decision in three separate parts: (1) identifiable political group, (2) discriminatory intent and (3) discriminatory effect. (R. V. 2 P. 319-334) Appellees shall address each of these elements in this brief separately and then show how the interplay of these elements results in a political gerrymandering violation.

A. POLITICAL GROUP

The trial court correctly concluded that the citizens of Marion County constitute a political group under the Bandemer test. (R V.2 P. 323). The political group in Bandemer consisted of a political party and the court found that discriminatory intent could be inferred. Appellees contend that a "political group" is not limited to a "political party." Had the Bandemer Court intended such a limitation it would have stated as much. At least one state supreme court has recognized that the citizens of a political subdivision can constitute a political group under the Bandemer analysis. Kenai Peninsula Borough et al. v. State of Alaska, 743 P.2d 1352 (AK 1987).

Appellees are voters of Marion County. They have the right to run for the state Senate. Their right to vote is a fundamental right. Baker v. Carr, 369 US 186 (1962). Baker was a voting rights case dealing with the one person one vote concept. Its underlying analysis was later relied upon as the basis for the Court's Bandemer

decision. "Voters who allege facts showing disadvantage to themselves as individuals have standing to sue." Baker at 206. "Their injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties. A citizen's right to vote free of arbitrary impairment by State action has been judicially recognized as a right secured by the Constitution." Baker at 207.

Counties are created by the Legislature, not the Constitution. The authority is found in Article VIII, §1, which provides in part that "the State shall be divided by law into political subdivisions called counties." (Article VIII, §1 Fla. Constitution) The political subdivision of the State of Florida called "Marion County" is created by § 7.42 Florida Statutes (2001). Thus, it is the Legislature which determines what lands comprise each county. This is important because it is the same Legislature which mandates growth management by that same county and which determines the boundaries of the state Senate districts. Understanding this relationship is essential to a full appreciation of the discriminatory intent and effect of slicing Marion County voters into four unequal pools in order to "re-elect incumbents" and "maintain the status quo."

Once the Legislature draws the boundaries of a Florida county, the County's

citizens take on the Constitutional significance of a political group. The Constitution specifically divides electors by County not by Senate or House voting district:

> Article VII, § 2. Electors. Every citizen of the United States who is at least 18 years of age and who is a permanent resident of the State, if registered as provided by law, shall be an elector of **the County** where registered. (Emphasis supplied.)

Appellants have argued that the voters of Marion County are not a political group because the Legislature can lawfully change the boundaries of Marion County or merge its territory into other adjoining counties. (R.V. 1 P. 3) Appellees do not dispute this. Assuming such changes were made, the Constitution would make Appellees part of the new political group, i.e., the "electors" of the new county where they were registered to vote.

During trial, counsel for the Senate argued that it was not proper for courts to review legislative decision-making when it comes to redistricting or reapportionment. (T p.196). Additionally, counsel argued, "The proper forum for one who believes that Marion County or any other county has been unfairly treated in terms of them splitting the County into districts is the legislature itself." (T P. 49) Counsel did, however, recognize that there was an important exception: "The legislature can be unfair or inequitable in somebody's eyes, unless they transgress upon a clear provision of the Constitution that stops them from doing that." (T P. 46.)

Appellants' claim that these matters were political and therefore beyond the

jurisdiction of the court is equally without merit. "The objection that the subject matter of the suit is political is little more than a play on words." Nixon v. Herndon, 273 US 536 at 650 (1927). A statute which is alleged to have worked unconstitutional deprivations of Appellees' rights is not immune to attack simply because the mechanism employed by the Legislature is a redefinition of boundaries. Gomillion v. Lightfoot, 364 US 339 at 347 (1960).

Appellees assert that there is a constitutional provision that stops the Legislature in this instance, namely, the Equal Protection Clause of Article I, § 2 of the Florida Constitution. Despite Appellants' claim that the Legislature is authorized to abolish the county, it has not done so and until it does, the citizens of Marion County constitute a political group. "It has long been recognized in cases which have prohibited a state from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an unconstitutional condition." Gomillion v. Lightfoot, 364 US 339 at 347 (1960). Gomillion involved the validity of a law passed by the Alabama legislature redefining the boundaries of the City of Tuskegee. The effect of this redefinition was to remove all but five of the four hundred black voters from the city limits.

Much like the Appellants here, the State of Alabama argued in Gomillion that the State was free to abolish the City if it so desired. In analyzing the line of cases

relied on by the State for this proposition, the United States Supreme Court held, "This line of authority conclusively shows that the court has never acknowledged that the states have power to do as they will with municipal corporations regardless of consequences." Gomillion at 344. The Supreme Court held that such actions are limited by the relevant restraints imposed by the Constitution. The Appellants here, as the State of Alabama in Gomillion, may not assert their powers to affect an unconstitutional result. In reversing the district court, the Supreme Court held that: "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." Gomillion at 345.

What Appellants' argument also fails to consider is the evolving nature of the State/County relationship under Florida's Constitution. In Alachua County v. Adams, 702 So.2d 1253 (Fla. 1997), this Court noted that prior decisions interpreting previous constitutional amendments relating to a county's taxation powers could not be relied on to interpret the amended Constitutional provision. This Court held that the Legislature was without power to enact a special law relating only to Alachua County which allowed Alachua County to spend funds differently from all other counties.

Recent constitutional amendments limit how the Legislature may impose unfunded mandates on counties. Article VII, § 18, added in 1990, was designed to

prevent the Legislature from imposing requirements on local governments without providing a means to pay for such requirements.

Over the past 25 years, the Florida Legislature has mandated dramatic regulatory requirements for counties and most of these have gone unfunded; the most significant being the Local Government Comprehensive Planning and Land Development Regulation Act, contained in Part 2 of Chapter 163, Florida Statutes (2001). Pursuant to this Act each county, "shall have the power and responsibility:

> a. To plan for the future development and growth.
>
> b. To adopt and amend comprehensive plans or elements or portions thereof to guide their future developments and growth.
>
> c. To implement, adopt or amend comprehensive plans by the adoption of appropriate land development regulations or elements thereof.
>
> d. To establish, support and maintain the administrative instruments and procedures to carry out the provisions and purposes Act. §163.3167, Fla. Stats. (2001)."

Marion County was required to adopt a comprehensive plan "of the type and the manner set out in this act." §163.3167 (2), Fla. Stats. (2001). A required portion of each plan is a capital improvements component. Section 163.3177 (3) (a), Fla. Stats. (2001). The net result of this legislation has been to require the county to bring its infrastructure current in order to meet the needs of its citizens and to build

additional infrastructure to plan for future growth. The mandated costs of these requirements are borne by the citizens and owners of property in Marion County.

Local taxes as set forth in Article VII, §9 include ad valorem taxes. The Legislature is prohibited from levying ad valorem taxes. (Article VII, §1 Fla. Constitution) These taxes are all levied and collected pursuant to a county-wide process. Absolutely no local revenue or tax is paid or collected based on a state Senate district. Furthermore, property appraisers serve a county. Tax collectors serve a county. Clerks, Sheriffs and even Supervisors of Elections are county-wide officers. Government is not dispatched through Senate districts.

One of the things that senators do decide, however, is where and when to spend state tax revenues through the passage of "member bills." Unfortunately, these decisions are almost entirely a matter of political largesse. This leads to the "dog eat dog" scenario abundantly described by the witnesses who testified at the trial below. (T. 176)

For ten years the citizens of Marion County have been without a "dog" in the Senate and have been denied their return of a "fair share" of their state tax monies. The difference has predominantly been made up through higher county-wide taxes.

Appellees recognize that there is no constitutional requirement that the boundaries of Marion County be preserved in the redistricting process. It is not their

contention that 100% of Marion County needs to be contained within a single senatorial district. A redistricting plan which divides Marion County, yet still allows the citizens of Marion County an opportunity to fully participate in the political process, would not violate the Equal Protection Clause of the Constitution. Appellees' contention is that members of an identifiable political group, whose boundaries coincide with that of the boundaries of Marion County, are constitutionally protected from a redistricting plan that essentially shuts them out of the political process. Taking a political group that has 65% of the population in a single member district and dividing it four ways so it does not exceed 27.4% in any given district is simply converting that political group into a "borrow pit" for voters. In finding political gerrymandering justiciable, the Bandemer Court looked to its earlier decision in Reynolds v. Sims, 377 US 533 (1964):

> Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. Sims at 565-566.

The Court then noted that the issue in Bandemer was different from that in Sims: "The claims are that each political group in a state should have the same chance to elect representatives of its choice as any other political group." Bandemer at 124.

The Bandemer Court never limited the term "political group" to the concept of political parties but rather wrote in terms of individual voters with a common interest being considered a group.

> As in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of voters or effective denial to a minority of voters a fair chance to influence the political process. Bandemer at 133.

The "political group" designation has recently been analyzed by the Federal District Court for Pennsylvania. In Vieth v. Commonwealth of Pennsylvania, 188 F. Supp 2d 532 (M.D. Penn. 2002), the Federal Court held that "Bandemer indicates that Plaintiffs must allege only that they are members of an identifiable political group whose geographical distribution is sufficiently ascertainable that it could be used in drawing electoral lines."

"Political Group" has been specifically defined by the Supreme Court of Alaska to be voters of a municipal subdivision of Anchorage. In Kenai Peninsula Borough v. State of Alaska, 743 p 2nd 1352 (AK 1987), the Alaskan Supreme Court analyzed the decision in Bandemer (Supra.) and held that the Constitutional interest impaired is the interest of the individual members of a geographic group or community in having their votes protected from a disproportionate dilution by the votes of another

geographic group or community. Kenai at 1371.

Appellees placed an abundance of evidence into the record to support the trial court's determination that the citizens of Marion County constitute a political group. Commissioner Harris testified about how commercial businesses and residents of Marion County share the burden of generating revenue to pay for capital expenditures. (T.136) Appellee Forman testified to the environmental amenities which differentiate Marion County from surrounding counties. (T. 184)

Numerous exhibits were placed into evidence further characterizing Marion County as a political group. Appellees placed into evidence budget information which demonstrated that taxes and revenues are collected and distributed based upon county lines. (Exhibit 12). A Resolution of the Marion County Board of County Commissioners, O2-R-27, contained in Exhibit 14 entered into evidence, resolved "Whereas Marion County is 'One Community of Interest' with unique environmental, economical and sociological issues, which are concerns shared by all its citizens and a common desire to resolve those issues." (PL Ex 14). A letter from the Marion County property appraiser also supported the concept of Marion County's citizens constituting a political group. "Many problems facing Marion County today are problems unique to this county. Whether it's conserving our water resources, administering to our diversified agricultural community or working with state and

federal agencies with their vast land holding and projects." (PL Ex 14) Gail Cross from Marion County Senior Services wrote, "Of Marion County's population of nearly 265,000 citizens nearly 32% are Seniors -- above the State average of 23% and well above the percentages of most of our surrounding state district counties. Such demographics truly define a unique community of interest in Marion County that deserves to be recognized with local representation." (PL. Ex 14)

There was competent substantial evidence for the court to conclude that Marion County constituted a political group. Absolutely no evidence was offered by Appellants to prove otherwise. The trial court's holding should be affirmed.

B. DISCRIMINATORY EFFECT

The most difficult prong of the Bandemer test to satisfy is discriminatory effect. This is because it requires a showing of "a history of disproportionate results in conjunction with strong indicia of lack of political power and the denial of fair representation." Davis v. Bandemer, 478 US 109 at 139 (1986).

What distinguishes this unique case from other political gerrymandering cases is the fact that the contested redistricting plan is nearly identical to the plan that the Appellants adopted in 1992. In order to show that the plan will have a discriminatory effect, Appellees do not have to project possible scenarios of what the future may hold. Appellees have already endured ten years of discrimination and provided the

court with statistical data from Appellants' own budgetary documents clearly proving their disparate treatment. Furthermore, affirming the decision of the trial court will not "open the floodgates" of litigation. Fortunately, for the citizens of other counties, none have been treated like the citizens of Marion County.

Sharon E. Nehring, the former Legislative Assistant to Representative Albright and the current Senior Legislative Assistant to State Representative Dennis Baxley for House District 24 in Marion County, testified to budget disparities suffered by Marion County during the past ten years. In analyzing the budget disparities, Ms. Nehring relied upon Plaintiffs' exhibits 10 and 11, the Community Budget Issue Request 2002 and Conference Report 27-E, the General Appropriations Act. (T 110, 111) Ms. Nehring described how the four senators representing Marion County combined in 2001 to file for 131 special project requests. Of the 131 requests, only five were for Marion County. (T 113 to 115)

This information was further analyzed by Commissioner Harris, who converted it into spectacular graphs admitted as Exhibit 15. (T 139) (See reductions contained in Appendix.) The total dollar amount of the 131 requests filed by the four senators was $141,936,612.00 Of this $141,936,612.00 only $1,810,723.00 or 1.27%, was requested for Marion County projects. Commissioner Harris testified this disparity was typical of the prior ten years. (T 110).

The actual funding disparity was not much better. Ms. Nehring testified to analyses she made regarding the comparison of actual funding. Senator Mitchel, who represented Senate District Four, resided in Hamilton County. In 2002, Hamilton County had six projects funded totaling $12,269,517.00. Senator Smith, who represented Senate District Five, resided in Alachua County. In 2002, Alachua County had fourteen projects funded totaling $25,187,235.00. Senator Cowin, who represented District Eleven, resided in Lake County. In 2002, Lake County had twenty-three projects funded totaling $23,329,968.00. Senator King represented District Two and resided in Duval County. In 2002, Duval County had forty-eight projects funded totaling $92,957,202.00. In 2002, Marion County had merely ten projects funded totaling only $9,049,349. (T. 116-117). Actual funding included both member projects and agency projects. Without agency projects the comparision is even worse. Ms. Nehring further testified that this was typical of the prior ten years and that this would likely continue under the contested redistricting plan. (T 113-118)

Commissioner Harris also had graphs prepared depicting the actual funding disparity suffered by Marion County citizens (T 139). These charts were also part of Exhibit 15 and reproductions are included in the Appendix. After reviewing the funding disparity depicted on the exhibits, Commissioner Harris explained the impact of this treatment from the Legislature.

> I would submit to the Court that Marion County has roughly 260,000 experts; and that we've been the recipients of the type of treatment that has been depicted in these type of charts today. The lack of funding coming in Marion County, when you reconcile it with the type of funding going into the home counties of the senators that are supposed to represent us, speaks to the dismal fact that we have inadequate representation. I believe it's the direct result of the way that these maps have been drawn. I have no reason to believe whatsoever that we will experience different results in the future than what we've experienced in the past. And the history would speak to that. It doesn't take an expert to answer that question. (T 148).
>
> . . .
>
> I have no reason to believe that the experience of the past will change by incorporating the same exact Senate redistricting that we've had in the past. The results would be the same: Carved up into fourths; no representations; small percentage of population from Marion County that isn't going to ever be sufficient enough to elect a senator that can adequately represent the interests and concerns of Marion County. (T 153, 154)

Commissioner Harris' concern regarding the continuing discrimination was shared by Senator Daryl Jones. Speaking to the March 12, 2002 Senate Committee on Reapportionment, Senator Jones said:

> I just want to commend you for coming here and expressing your mind about this particular plan and the detriment that it would have in your community. I think that you are correct, that your projects probably will not be funded, that it'll be very difficult for you to get a lot out of this legislature... (PL Ex 9 P 101)

Mr. Forman also testified to the discriminatory impact of the contested Senate District Map:

> It's discriminatory in the sense that the county electors - - the same body, the Legislature drew a map, and they said: "Here is the county."

> And they chose where the county was going to go. Then they passed a bunch of laws, and they said: "here are all the things you have to do. You have to, you know, build these roads. You have to bring back to current standards the past effects of not putting in your infrastructure. Here are these other unfunded mandates and studies that we want you to do." And they stuck all that in. The same legislature gave you no money for that, don't put in place system like Commissioner Harris is talking about where the county has got the same proportionate share back that they sent up. So they throw you into the dog patch to see how much you can come back with to offset your ad valorem taxes, your impact fees, special assessments. And then the same Legislature splits your county four ways so you don't have a fighting chance to elect anybody.
>
> And people would say to me in '92: "Well, you know, it might not work out that way. You might elect somebody." you know, or: "Four senators could be better than one. You would have four up there fighting for you." Okay. We've got ten years of history and you've heard the testimony today. That's the problem. We're worse under the new plan than we were under the old. So we're going to have ten more years of at least as bad a situation. (T p. 175-176).

After hearing the unrefuted testimony regarding the ten year history of disparate funding treatment, the testimony regarding the difficulty in simply meeting with the senators, and the election history which only looks more difficult to surmount under the contested plan the court found:

> The fragmentation and splintering of Marion County clearly has had a substantial impact on the citizens of Marion County. Both, Senior Legislative Assistant, Sharon E. Nehring, and County Commissioner Randall Harris, testified to the near insurmountable hurdles placed in the paths of the residents of Marion County... The statistical information presented by Nehring regarding the gross funding disparities between Marion County and the counties with resident Senators substantiated Nehring's and Harris' testimony.
>
> ...

> It is clear, that the fragmentation of Marion County by Senatorial Reapportionment Plan weakens the political voice of the voters of Marion County and the City of Ocala to the point of virtual silence by preventing them from acting as a group to promote their mutual interests. (R.V. 2 P. 325)

The court had an abundance of uncontested evidence to show a discriminatory effect.

> The Court: "And your argument is that for ten years past and predictably for the next ten years, there will be no accountability?"
>
> Mr. Forman: "Right. We'll be back in here in ten years or my kids will and they will be showing your graphs like that or worse, in my opinion." (T. 185,186)

This Court should uphold the trial court's decision.

C. DISCRIMINATORY INTENT

To prove discriminatory intent Appellees relied on the traditional Equal Protection analysis employed in discrimination cases where a protected class has been denied their right to equal municipal services. These cases rely on the principle that disparate expenditures of discretionary public funds (i.e. "pork") can result in an equal protection violation. The Supreme Court of the United States has recognized that discriminatory intent can be shown by proof that discriminatory impact is the reasonable, foreseeable consequence of the challenged action. Dobson v. Dade City, 594 F. Supp. 1274 (M.D. F 1984). Thus, evidence of "actions having foreseeable and anticipated disparate impact is relevant to prove the ultimate fact, forbidden purpose."

Columbus Board of Education v. Penick, 443 US 449 (1979). Sometimes a clear pattern, unexplainable on grounds other than discrimination, emerges from the effect of the state action which otherwise appears neutral on its face. Village of Arlington Heights v. Metropolitan Housing Dev. Corp. 429 US 252 at 266 (1976). "The most effective way to determine whether a body intended to discriminate is to look at what it has done." United States v. Texas Education Agency, 579 F2d 910 at 914 (5th Cir. 1978). It is important to note that proof of subjective personal bias, motive or ill-will is irrelevant to the inquiry of whether intentional discrimination exists. Dowdell v. City of Apopka, 698 F 2d. 1181 at 1186 (11th Cir. 1983).

To prove discriminatory intent, Appellees entered evidence regarding the purpose of the 1992 redistricting map; the history of disparity of funding that has occurred over the last ten years (see discussions supra 29-34); knowledge on the part of senators that the disparate treatment would continue for the next ten years; a stated criteria of maintaining the status quo and protecting incumbents in adopting the current map; and testimony that the population disparity under the current map was worse than under the prior map. The trial court held that "although the evidence of intent is circumstantial, it can also be derived from history and the enunciated intent to maintain the status quo and assist incumbents in maintaining their seats." (Order on Appeal). Proof of intentional discrimination can be and, indeed, often is

developed through circumstantial evidence. Washington v. Davis, 426 US 229 at 241 (1976). Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R.R. Co., 352 US 500 at 508 (1957).

Mr. Forman, testified as to what happened in 1992 when Marion County's senatorial districts went from three to four:

> Well, I was there and in Tallahassee and I was in the middle of that. And, you know, it was Democratic-- it was the last deal the Democrats had going. Marion County at the time was about 62 or 64 percent Democrat, but was electing Republican county commissioners. And the obvious --- with the influx of immigration we had from upstate New York and from the areas of south Florida, we were getting – our Republican numbers were increasing, the changes from Democrat to Republican were increasing. And it was obvious if they left it alone, if the Democrats had left it like it was before, giving us a reasonable chance, there would be a good chance that we might have elected a Republican senator. I think – you know, we would have elected a senator and, you know, I don't mean to point that out. We would have continued to have a senator, but we might have elected a Republican one. And so ten years ago we got the hammer, as it is. (T 166).

Mr. Forman's testimony about how the Legislature remapped the Marion County Senate districts was corroborated by the testimony of former Representative George J. Albright, III at the August 7, 2001 Reapportionment Public Hearing. Albright described how the legislature intended to discriminate against Marion County:

> I ran in '86 against Mr. Mefford (phonetic), a very popular, very nice,

> very good state Representative and got 47 percent of the vote in a 33 percent district. He retired, I got 52 percent in a 37 percent district. As you-all recall of course the Democratic party ran both houses at that point and they saw the growth of the Republican party in this county. When reapportionment came, Randy MacKey (phonetic) was in charge of House reapportionment. He called me in and said, I've got good news and bad news for you, George. The good news is we like you and we don't think we can beat you, so we're going to pack all the Republicans as best we can into your seat and we're going to take Marion County and spoke it off like a wheel with the rest of the counties coming in. And that is how the Florida House was drawn." (PL Ex 7 P. 39)

Appellees also proved the disparity of state discriminatory funding received during the past ten years (See discussion Supra 30-32). Last year, Marion County's senators submitted less than two percent of their member bills on behalf of Marion County. Even including agency funding, Marion County received less than 6% of the funding in its Senate districts.

As Mr. Forman testified:

> When you're unlucky enough historically, but from a court suit, lucky enough to have ten years of what you've gone through, you bring it in, and you say that: they did it to us for ten years. Now that they've voted to do it again, we have an improper intent and improper motive. (T 181)

Appellees next demonstrated an intent to discriminate based upon the comments of the senators in adopting the plan. Senator Laurent, sponsor of the Senate district map ultimately adopted, testified at the Senate Committee hearing on reapportionment. When presenting his plan, he addressed concerns used in drafting the map: "In general, the three most widely shared concerns of most communities

was the preservation of incumbents, maintaining the status quo of district lines, protecting communities of interest." (PL Ex P.7). This sentiment was echoed by Senator Webster when he testified: "I attended all 24 of the hearings and that is what was expressed at those hearings, that we protect incumbents, that we protect the communities of interest and we keep the status quo." (PL Ex 9 P.41)

Commissioner Harris explained how this history influenced the concern Marion County had to participate in the redistricting process:

> We wanted the ability in redistricting to elect a Senator from Marion County. And we knew that the population break-out in the previous maps or those that existed at the time made it virtually impossible for that to happen with those small percentages. By carving the county into fourths, any reasonable person would agree it's virtually impossible to elect anyone from Marion County because our population had intentionally been carved up and I used the verbiage in the testimony before the Senate redistricting committee, had been used as a pool or a bank of population in order to prop up or justify the Senate districts that we have within Marion County. (T 133).

Mr. Forman testified regarding the danger of applying this criteria to the citizens of Marion County:

> In this year's proceedings and in the transcripts the senators pointed out that one of their two avowed goals, one was to keep the incumbents; the second was to maintain the status quo. Status quo would have killed us. But it's even worse. We're down from 30 percentile into the 20 percentiles. I was involved when Scales ran and, you know, you can theoretically talk about what somebody could do in a district. But, statistically, the numbers are predictable and they just don't work out. And we're not going to elect anybody ... This isn't a state-wide problem. This is a Marion County problem. We're the ones that have

> suffered for ten years. Maintaining the status quo, in and of itself, isn't necessarily a bad thing. But it carries on the same pattern we had before. (T 167-168).

The Appellees placed into the record substantial evidence covering the elements of discriminatory intent as required by law. As the court stated in Brown v. Board of School Commissioners, 706 F.2d 1103 (11th Cir 1983), "the present effects of a discriminatorily motivated act further demonstrates the intent behind the passage and maintenance of the act.

The trial court's factual findings and conclusions of law are presumed correct and will not be reversed unless its decision is manifestly against the weight of the evidence, contrary to the legal effect of the evidence or unsupported by competent substantial evidence. The City of Cocoa v. Leffler, 803 So.2d 869 (Fla. 5th DCA 2002). Appellants called no witnesses, put nothing in the record and only cross-examined one witness, Ms. Nehring. This Court should uphold the trial court's decision.

CONCLUSION

The Appellees have met each element of the Bandemer test for finding political gerrymandering. There was substantial competent evidence presented by Appellees as to each element. There was no evidence or testimony put into the record by Appellants. The Court's findings of fact and conclusions of law are not clearly erroneous. The Appellees have established a violation of the Equal Protection Clause of Florida's Constitution.

This Court should affirm the trial court's order finding districts 3, 7, 14 and 20 unconstitutional, in violation of Appellees' Equal Protection rights under the Florida Constitution. By proclamation, the Governor should reconvene the Legislature within five days hereafter in an extraordinary apportionment session which shall not exceed fifteen days, during which the Legislature shall adopt a Joint Resolution of Apportionment conforming to the judgment of this Court. Should an extraordinary apportionment session fail to adopt a resolution of apportionment, or should this Court determine that the apportionment made is invalid or should the Legislature refuse to reconvene, then this Court should file an order making such apportionment with the Secretary of State.

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Secretary of State Katherine Harris, c/o Deborah K. Kearney, General Counsel, Florida Department of State, PL 02 The Capitol, Tallahassee, FL 32399-0250; Secretary of State Katherine Harris, c/o Joseph P. Klock, Jr., Esquire, John W. Little, III, Esquire, Gabriel Nieto, Esquire and Arthur R. Lewis, Jr., Esquire, Steel Hector & Davis, LLP, 200 South Biscayne Blvd., Ste. 4000, Miami, FL 33131-2398; John McKay, President of the Senate, c/o Barry Richard, Esquire, Greenberg Traurig, P.A., 101 East College Avenue, P.O. Drawer 1838, Tallahassee, FL 32302; Tom Feeney, Speaker of the House of Representatives, c/o R. Dean Cannon, Jr., Esquire and John M. Brennan, Esquire, Gray, Harris & Robinson, P.A., 301 E. Pine Street, Ste. 1400, P.O. Box 3068, Orlando, FL 32802-3068; Tom Feeney, Speaker of the House of Representatives, c/o Jason L. Unger, Esquire and George N. Meros, Jr., Esquire, Gray, Harris & Robinson, P.A., 301 South Bronough Street, Ste. 600, P.O. Box 11189, Tallahassee, FL 32302-3189; Attorney General Robert A. Butterworth, c/o George Waas, Senior Assistant Attorney General and Gerald B.Curington, Assistant Deputy Attorney General, Office of the Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050 and Dee Brown Supervisor of Elections for Marion County, c/o Carol A. Falvey, Esquire and John M. Green, Jr., Esquire, Green, Kaster & Falvey, P.A., P.O. Box 2720, Ocala, FL 34478-9252 on this 28th day of August, 2002.

_____
Joseph M. Hanratty
Forman, Hanratty & Montgomery

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing computer-generated brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210 (a) (2), and specifically, that it is printed in Times New Roman 14-point font. Done this 28th day of August, 2002.

_____

Joseph M. Hanratty
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