SUPREME COURT OF FLORIDA

Case No. SC02-1813
DCA Case No. 5D02-2325
Circuit Court Case No. 02-1064-CA-G

THE FLORIDA SENATE, et al.	v.	CHARLES R. FORMAN et al.
Appellants		Appellees

BRIEF OF TOM FEENEY, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES

Miguel De Grandy
Florida Bar No. 332331
Miguel De Grandy, P.A.
201 South Biscayne Boulevard
Suite 2900
Miami, Florida 33131
Telephone (305) 374-6565
Facsimile (305) 374-8743

George N. Meros, Jr.
Florida Bar No. 0263321
Jason L. Unger
Florida Bar No. 0991562
Gray, Harris, & Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311

Attorneys for Tom Feeney,
Speaker of the Florida House of Representatives

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PRELIMINARY STATEMENT

On behalf of the Florida House of Representatives, the Speaker respectfully submits this brief in support of the Florida Senate in its efforts to reverse the Final Order of the Circuit Court for Marion County.

While the Final Order makes no adjudication against the House Redistricting Plan, the Speaker and the House have an abiding interest in preserving the Separation of Powers and the Legislature's prerogatives in state redistricting - prerogatives wholly ignored by the trial judge and the order under review.

STATEMENT OF CASE AND FACTS

To avoid duplication, the Speaker adopts and specifically incorporates the Senate's statement of the case and facts, as well as its arguments on the merits.

SUMMARY OF ARGUMENT

The Final Order holds that Marion County has a constitutional right to elect a resident state senator. That holding is legally and factually indefensible, for at least the following reasons:

The order erroneously grants standing to Plaintiffs as representatives of Marion County, despite years of case law to the contrary;

It violates the Separation of Powers doctrine and treads upon the Legislature's prerogatives in redistricting;

It ignores Florida Supreme Court decisions rejecting similar, if not identical, claims;

Plaintiffs failed to establish any of the requisite elements of a political gerrymandering claim under Davis v. Bandemer, 478 US 109 (1986), because Marion County is not a "political group," and Marion County has not been subject to actual discrimination, intentional or otherwise;

The proof at trial was insufficient to sustain any of Bandemer's exacting standards.

The order under review represents a frontal assault on the Separation of Powers. It must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

Florida's Joint Resolution of Apportionment is presumptively valid. In re: Constitutionality of House Joint Resolution 1987, 817 So. 2d 819 (Fla. 2002). In this instance, Plaintiffs must demonstrate beyond any reasonable doubt that the Joint Resolution violates either the Florida or Federal Constitutions. See id. at 825. Failing proof beyond a reasonable doubt, this Court must reverse. See State v. Canova, 94 So. 2d 181, 184 (Fla. 1957).

II. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIMS.

According to the Complaint, Plaintiffs bring this claim on behalf of Marion County (or on behalf of the residents of Marion County as a whole), alleging that "Marion County has not had a resident senator since 1992 and the current redistricting plan insures it will be another 10 years before Marion County would have an opportunity to elect a resident senator." R. 1-7. Plaintiffs have no standing to sue on behalf of Marion County, and Marion County has no associational standing.

In a recent opinion addressing a similar claim, a three judge federal panel held that a municipality lacks standing to bring constitutional claims against Florida's redistricting plan. Appendix A, Memorandum Opinion Concerning the Motions for Judgment on the Pleadings Against the City of Pembroke Pines, nos.

02-20244 and 02-10028, slip op. at 1 (July 12, 2002) ("Memorandum"). The federal panel noted:

> We are not convinced, however, that the City of Pembroke Pines - a pure municipality - is 'the type of association or organization envisioned by the concept of associational standing.' Board of Supervisors of Warren County, 731 F. Supp. at 742 (holding that a county, a board of elected officials who represented the political body of the county and managed the ordinary affairs of the county, and county agencies authorized by state statute, lacked representational standing to sue for constitutional torts because they were not voluntary membership organizations, nor entities so closely akin to such organizations, and were no more than creatures of the state with no special role as advocates for their citizens as to injuries arising from such torts.)

Appendix A at 4.

Marion County, like a municipality, lacks the organizational characteristics and uniformity of interest necessary for organizational standing. The federal panel articulated these reasons succinctly:

> In our view, the City's voters and residents do not possess 'all of the indicia of membership in an organization'. Residents of a city or municipality are unlike members of an organization or a specialized group of primary beneficiaries of a state agency that functions as a traditional trade association. The City's voters alone do not finance the City's activities, as municipalities receive federal and state funding in addition to tax revenue from its own residents. Moreover, the City's voters do not necessarily expect that the City will represent them in this type of litigation. In particular, while the majority of Pembroke Pines' residents and voters may wish for the City to remain within one congressional district, others may support (or be indifferent about) the division of the City into four congressional districts.

Appendix A at 5 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 US 333, 344 (1977)).

Just as Pembroke Pines and its elected City officials lack standing as a group to bring claims for alleged constitutional torts, so do Marion County and Plaintiffs here lack standing to assert such a claim.

III. THE FINAL ORDER VIOLATES FLORIDA'S SEPARATION OF POWERS.

This Court has traditionally applied a strict separation of powers doctrine, following the rule that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other two branches." Avatar Development Corp. v. State, 723 So. 2d 199 (Fla. 1998) (referring to Article III, section 3 of the Florida Constitution); State v. Cotton, 769 So. 2d 345, 352 (Fla. 2000) (same). This Court has long recognized that, particularly in the area of legislative reapportionment, the doctrine of Separation of Powers requires judicial restraint, with the primary responsibility for reapportionment resting with the Legislature:

> At the outset, we emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination. Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites. If these requisites are met, we must refrain, at this time, from injecting our personal views into the proposed reapportionment plan. Even though we may disagree with the legislative policy in certain areas, the fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we

> act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.

In re: Apportionment Law Senate Joint Resolution 1305, 1972 Regular Session, 263 So. 2d 797, 799-800 (Fla.1972). The Court reaffirmed this approach in its most recent review of the legislative redistricting plans. See In re: Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 824 (Fla. 2002) (citing the 1972 review).

The legislative power to conduct state redistricting is found in Article III, section 16, in pertinent part:

> Senatorial and representative districts. The Legislature, by Joint Resolution, shall apportion the state in accordance with the constitution of the state and of the United States and to not less than thirty (30) though no more than forty (40) consecutively numbered senatorial districts or either contiguous, overlapping or identical territory,…

Less than three months after this Court's latest reaffirmation of Legislative authority over redistricting, however, Judge Singbush attempts to appropriate that Legislative power to himself. The Final Order squarely conflicts with the Separation of Powers Doctrine.

In adopting their constitution, the People of Florida could have - but did not - require the Legislature to keep political subdivisions intact or preserve "communities of interest." Rather, the People left to the Legislature the difficult task of balancing competing interests and determining how to treat political

subdivisions, such as counties, in electoral districts. This Court has expressly recognized that "there is no requirement that district lines follow precinct or county lines, for the constitutional mandate . . . is that the state be apportioned into 'districts of either contiguous, overlapping or identical territory.'" In re Apportionment Law Senate Joint Resolution 1305, 1972 Regular Session, 263 So.2d 797, 801 (Fla.1972). This Court also recently confirmed that "neither the United States nor the Florida Constitution require that the Florida Legislature apportion legislative districts in a compact manner or the Legislature preserve communities of interest." In re: Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 831 (Fla. 2002).

Whether the Senate's allocation of senatorial districts in Marion County was wise or unwise, that decision is a legislative prerogative, not a judicial one. Nevertheless, the circuit court, in determining that Marion County must be able to elect its own senator, has replaced its judgment for that of the Legislature. In fact, the circuit court's decision was based in part on a uniquely legislative task – – finding that Marion County was a "community of interest" requiring its own senatorial representation. R. 2-323. (finding that Marion County has a "clear community of interest" based on the fact that "the residents of Marion County possess a unique set of ecological and economic concerns…").

The circuit court's ruling is an unprecedented and corrosive intrusion into the powers of a coordinate branch, and contrasts sharply with this Court's redistricting case law.

IV. FLORIDA SUPREME COURT PRECEDENT EXPRESSLY REJECTS PLAINTIFFS' CLAIMS.

In 1973, this Court rendered two decisions rejecting the essence of these plaintiffs' claims. These decisions compel summary reversal of the Final Order.

In In re: Apportionment Law v. Tohari, 279 So. 2d 14 (Fla. 1973), the petitioner asserted that the 1972 Apportionment Joint Resolution was unconstitutional because it deprived Lee County residents of meaningful senatorial representation, because no candidate from Lee County ran for the senatorial seats representing Lee County. This Court rejected that claim:

> The allegation that Lee County is unrepresented in the Florida Senate because no candidate from Lee County entered the race is totally insufficient to demonstrate an unconstitutional result in the application of the apportionment law.

Tohari, 279 So. 2d at 15.

Similarly, in In re: Apportionment Law v. Stone, 281 So. 2d 484 (Fla. 1973), residents of Neptune Beach and Jacksonville Beach challenged the 1972 reapportionment law, alleging that the Legislature's decision to place those political subdivisions in a senate district which included multiple counties outside of Duval "left the voters of Neptune Beach and Jacksonville Beach without an effective

voice in the local legislation that will affect all of the citizens of Jacksonville, but no one else." Id. at 485. This Court rejected that claim, noting that Florida's adoption of broad home rule powers provided municipalities with substantial authority over local issues. Id. at 486. Because Florida's counties also enjoy home rule powers, this Court should reject plaintiffs' current claim as to Marion County. See Art. VIII, § 6(e), Fla. Const. and Ch. 125, Fla. Stat. (2002).

These decisions foreclose Plaintiffs' claims.

V. AS A MATTER OF LAW AND FACT, THIS CLAIM FAILS UNDER DAVIS V. BANDEMER.

Even if Marion County had associational standing (which it does not), and even if the Final Order did not violate Florida's Separation of Powers Doctrine and Florida Supreme Court decisions (which it does), Plaintiffs' claim fails under each and every requirement of Davis v. Bandemer, 478 U.S. 109 (1986). As the circuit court recognized, the Bandemer standard requires a showing of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." Id. at 127. Plaintiffs did not prove any of these requisite elements. At least one federal three-judge court has addressed and resoundingly rejected, in an opinion summarily affirmed by the Supreme Court, a nearly identical claim to Plaintiffs' claim here. See Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws, 781 F. Supp. 394

(D. Md. 1991), aff'd by, 504 U.S. 938 (1992), rehg. denied, 505 U.S. 1231(1992). See also, Duckworth v. State Bd. of Elections, 2002 WL 1805676 (D. Md. Aug. 5, 2002).

A. Marion County is not a "political group" within the contemplation of Bandemer.

A county is not a "political group" contemplated by the Court in Bandemer. To the contrary, the Bandemer decision is limited to cases involving partisan bias. See Bandemer, 478 U.S. at 124 ("[E]ach political group in a State should have the same chance to elect representatives of its choice as any other political group"); Anne Arundel County, 781 F. Supp. at 399 ("The Court in [Bandemer] limited its holding--that political gerrymanders are justiciable--to cases involving partisan bias.")

The distinction is a critical one. A political party is comprised of voluntary members who share political and ideological affinities. If such a unified group has its similar interests intentionally subjugated over a sustained period of time, Bandemer recognizes the possibility of an equal protection claim. A county, in marked contrast, is an involuntary group of citizens aggregated by geographical chance, with widely divergent political and ideological beliefs. The beliefs of such a "group" cannot be intentionally and systematically subjugated, precisely because those beliefs are widely divergent. As the three-judge panel noted in the federal

litigation, "while the majority of Pembroke Pines residents and voters may wish for the City to remain within one congressional district, other may support (or be indifferent about) the division of the City into four congressional districts." Appendix A at 5. Here, similarly, many Marion County residents may want the representation of only one state senator, but many others might welcome representation by multiple senators. The Bandemer Court's definition of a "political group" does not include the multifarious interests of a county.

Among the lower court's errors is its apparent wholesale acceptance of Plaintiffs' argument that Veith v. Commonwealth of Pennsylvania, 188 F. Supp. 2d 532 (M.D. Penn. 2002) and Kenai Peninsula Borough v. State of Alaska, 743 P. 2d 1352 (Al. 1987) support the contention that a County may constitute a "political group" under Bandemer. See R. 2-256-7. Those cases do not support such a contention.

In Veith, the plaintiffs, registered Democrats and Pennsylvania citizens, alleged, inter alia, that Pennsylvania's congressional redistricting plan resulted in partisan gerrymandering against the state's Democrats. See Veith, 188 F. Supp. 2d at 536 and 539. In accepting the plaintiffs' standing as members of the Democratic Party, the court expressly recognized that it was analyzing the standing requisites of a "partisan gerrymandering claim." Id. at 540. Further, the district court's dicta that a plaintiff "must allege only that they are members of an identifiable political

group whose geographical distribution is sufficiently ascertainable that it could have been used in drawing electoral district lines," does not suggest that a county is an identifiable group". See R. 2-256. Rather, the court was clearly referring to a political group as a partisan affiliation. See Veith, 188 F. 2d at 544 ("Clearly, by alleging that they are Pennsylvanian citizens who vote for Democrats, Plaintiffs have satisfied this requirement.")[1]

The Kenai decision of the Alaska Supreme Court is equally inapposite. In Kenai, plaintiffs claimed that the inclusion of South Anchorage in a certain state senate district violated equal protection because it disfavored votes from a particular geographical area. See Kenai, 743 P.2d at 1366. Most important, the Court premised its analysis on the fact that Alaska's equal protection standard is stricter than the federal standard. See id. at 1371. This Court has held that the Florida constitutional requirements with respect to redistricting are no more stringent than the federal standard. See In re: Apportionment Law Senate Joint Resolution 1305, 1972 Regular Session, 263 So. 2d 797, 807 (Fla. 1972). The Kenai court applied its stricter state standard and found an equal protection

[1] In addition, Plaintiffs failed to inform the circuit court that the Pennsylvania district court initially articulated this standing requirement in response to concerns expressed by the defendants that accepting standing for Democrats would endow nationwide standing on all individual members of major political parties. See Veith, 188 F. Supp. 2d at 540.

violation. Critically, the court did not find a Bandemer violation under the federal standard.

In short, the Kenai decision to which Plaintiffs refer was dependent upon Alaskan constitutional law. The decision, therefore, has no bearing on federal or Florida law.

B. Plaintiffs have failed to show actual discrimination.

1. Including Marion County within four Senate districts does not discriminate against the residents of Marion County.

Providing four senators to represent the interests of Marion County does not discriminate against Marion County or its residents. Judge Singbush's concern that Marion County might not be able to secure as much "pork" as adjoining areas is not an adequate touchstone to determine "actual discrimination" as required by Bandemer. Stated more simply, Bandemer did not create a constitutional right to special appropriations projects; rather, it addresses only the opportunity of individuals and political parties to participate effectively in legislative elections.

In Anne Arundel County, plaintiffs claimed, inter alia, that a congressional redistricting plan that divided the county into four congressional districts resulted in political gerrymandering under Bandemer. See Anne Arundel County, 781 F. Supp. at 399. Similar to the Plaintiffs' claim here, the plaintiffs in Anne Arundel County claimed that the discrimination against them stemmed "from the effect that

the division of Anne Arundel County has on the plaintiffs' ability to 'effectively participate as a [group] and thereby influence the elective process and to secure the attention of the winning candidate.'" Id. at 399. There, as here, the plaintiffs claimed that the county residents formed a "constitutionally significant community of interest." Id. at 399.

The federal district court rejected these claims, noting that dividing a county among four congressional districts does not constitute the type of discrimination contemplated by Bandemer:

> Furthermore the plaintiffs have not shown any discriminatory vote dilution . . . . Nothing the plaintiffs here have presented to this Court indicates that their vote will necessarily be any less powerful in any of the four congressional districts in which they will now reside. Nothing prevents the plaintiffs from joining the local organizations of the political parties of their choice and having whatever power they had previously to influence the political process. Thus, assuming *arguendo* that they present a justiciable issue, the plaintiffs fail to make a [Bandemer] showing of vote dilution.

Anne Arundel County, 781 F. Supp. at 401.

As the federal district court recognized in Anne Arundel County, and the Supreme Court affirmed, the division of a particular county into multiple districts in a plan of reapportionment is outside the scope of "actual discrimination" as contemplated by Bandemer. Even if it were not, plaintiffs here failed to show any "actual discrimination" because they may still choose to actively participate in influencing the political process in not one, but four, senatorial districts.

2. A Bandemer claim is premature since no elections have been held under the challenged plan.

Under any circumstances, a Bandemer claim is not justiciable until the challenged redistricting plan has been tested at the ballot box. The plurality opinion of Bandemer notes that "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory." Bandemer, 478 U.S. at 135. No elections have been held under House Joint Resolution 1987.

It is not enough to assert that the new redistricting plan is "like" the old redistricting plan, and therefore history will dictate the future. The district lines in House Joint Resolution 1987 are not the same as drawn in 1992. No one knows who will be elected to the senatorial districts covering Marion County until the People decide in November.

Courts following Bandemer have either ruled, or clearly presumed, that elections under the challenged plan are necessary for adjudicating Bandemer - based claims. See, e.g., White v. Alabama, 867 F. Supp. 1571, 1576 (M.D. Ala. 1994); Marylanders for Fair Representation, Inc. v. Shaeffer, 849 F. Supp 1022, 1041 (D.Md. 1994); Republican Party of Virginia v. Wilder, 774 F. Supp. 400, 404-405 (W.D. Va. 1991); But see Pope v. Blue, 809 F. Supp. at 392, 396-7 (W.D. N.C. 1992).

Because no election has been held under the challenged senate plan, a Bandemer claim is premature.

III. THE EVIDENCE AT TRIAL FAILED TO SUSTAIN BANDEMER'S EXACTING STANDARDS.

Even if Bandemer could apply to Plaintiffs' claim (and it cannot), the record evidence does not come close to sustaining the elements of that claim.

Plaintiffs were first required to prove that the Legislature intentionally discriminated against Marion County as an "identifiable political group." There is no evidence - none - that any individual legislator - much less the Florida Legislature as a whole - intended to discriminate against Marion County. These Plaintiffs do not assert that the Legislature sought to disadvantage Marion County Democrats or Marion County Republicans, but rather the entire county. There is no such proof in this record, and such discrimination cannot be presumed.

Similarly, Plaintiff failed to present any credible proof that the redistricting plan presents a substantial and continuing interference with any person's "opportunity to elect a representative of one's choice." Bandemer, 478 US 109. As noted above, Plaintiffs do not claim that Marion County residents are deprived of an opportunity to elect senators of their choice. Rather, Plaintiffs' real complaint is that, once elected, their senators will not be sufficiently productive in bringing home special projects to Marion County. That is not a cognizable claim under

Bandemer or under the Florida Constitution. Even if it were, the evidence at trial did not sustain that claim.

CONCLUSION

For the reasons set forth above, Speaker Feeney respectfully requests that this Court reverse the Final Order of the Circuit Court for Marion County. Plaintiffs lack standing to bring their claim and failed to establish any of the requisite elements of a political gerrymandering claim. Further, the circuit court's opinion disregards Florida Supreme Court precedent, violates Florida's Separation of Powers Doctrine and unilaterally adds constitutional requirements to legislative redistricting.

Respectfully submitted,

_____

George N. Meros, Jr.
Florida Bar No. 0263321
Jason L. Unger
Florida Bar No. 0991562
Gray, Harris & Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311

Attorneys for Tom Feeney,
Speaker of the Florida House
of Representatives

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by U.S. Mail on September 6, 2002, to the following:

Joseph M. Hanratty
Forman, Hanratty & Montgomery
Post Office Box 159
Ocala, Florida 34478-0159

James A. Scott
Tripp Scott, P.A.
Post Office Box 14245
Ft. Lauderdale, Florida 33302

Barry Richard
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Box 1838
Tallahassee, Florida 32302

Carol A. Falvey
John M. Green, Jr.
125 NE 1st Avenue, Suite 2
Ocala, Florida 34471

Deborah K. Kearney
Department of State
PL 02, The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0250

George Waas
Office of the Attorney General
Department of Legal Affairs
PL 01, The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-1050

Joseph P. Klock, Jr.
John W. Little, III
Steel Hector & Davis, LLP
200 S. Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Dean Cannon, Jr.
John Brennan
Gray Harris & Robinson, P.A.
301 East Pine Street, Suite 1400
Post Office Box 3068
Orlando, Florida 32802-3068

Miguel De Grandy
Florida Bar No. 332331
Miguel De Grandy, P.A.
201 South Biscayne Boulevard
Suite 2900
Miami, Florida 33131
Telephone (305) 374-6565
Facsimile (305) 374-8743

George N. Meros, Jr.
Florida Bar No. 0263321
Jason L. Unger
Florida Bar No. 0991562
Gray, Harris, & Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311

Attorneys for Tom Feeney, Speaker of

the Florida House of Representatives

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

_____

George N. Meros, Jr.
Florida Bar No. 0263321