IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1813

THE FLORIDA SENATE, *et al.,*

Appellants,

vs.

CHARLES R. FORMAN, *et al.,*

Appellees.

BRIEF OF JOHN McKAY AS PRESIDENT OF THE FLORIDA SENATE

On Appeal From The Circuit Court For The Fifth Judicial Circuit

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STATEMENT OF THE CASE AND FACTS

This case arises out of a final judgment by the Circuit Court for the Fifth Judicial Circuit of Florida declaring Florida's 2002 legislative redistricting plan unconstitutional with respect to Senate districts 3, 7, 14, and 20.

On May 3, 2002, this Court held House Joint Resolution 1987 (2002), the decennial redistricting plan, facially constitutional in all respects. *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819 (Fla. 2002). On May 24, 2002, separate but identical complaints were filed in the Circuit Court for the Fifth Judicial Circuit by Charles Forman and Michael Finn. [App. 1] The court consolidated the cases by order dated May 30, 2002.

The complaints allege that the redistricting plan violates the Equal Protection clause of the Florida Constitution due to political gerrymandering with respect to Senate districts 3, 7, 14, and 20, and that the plan further violates Article VI, Section 4 of the Florida Constitution, which establishes term limits for certain public officers.

The defendants filed various dispositive motions asserting lack of subject matter jurisdiction and failure to state a cause of action. Upon stipulation of the parties, the court held a final evidentiary hearing on all

pending motions and on the merits on July 23, 2002. [App. 2] A written final order was entered on July 24, 2002. [App. 3] The order denied all motions to dismiss and for judgment on the pleadings, held that the petitions asserting violation of the term limit provision of Article VI, Section 4 were not ripe for review, and declared the redistricting plan to be in violation of the Equal Protection clause of the Florida Constitution as it applied to Senate Districts 3, 7, 14, and 20. [App. 3, p. 7, 9] The court concluded, however, that it had no authority to fashion a remedy. [App. 3, p. 8-9]

SUMMARY OF ARGUMENT

The Florida Constitution does not require that legislative district lines follow county lines and is no more restrictive than the United States Constitution with respect to equal protection.

Neither the United States Supreme Court nor this Court has ever recognized the existence of a constitutional right to equal political influence based upon county of residence, and such a legal principle would be irreconcilable with established equal protection law.

Even if such a legal principle were established, there is insufficient evidence in the record of political gerrymandering relating to Marion County to meet the threshold necessary for invalidation of the Senate plan.

ARGUMENT

I
THE FAILURE TO PRESERVE COUNTY LINES IN REDISTRICTING DOES NOT IMPLICATE EQUAL PROTECTION RIGHTS.

The trial court held that, by dividing Marion County into four Senate districts, the Florida Legislature violated the rights of the plaintiffs in their capacities as county residents as guaranteed by the Equal Protection clause of the Florida Constitution. The decision was erroneous. Neither this Court nor the United States Supreme Court has ever recognized a constitutional right to equal representation in a state legislature based upon county of residence. To the contrary, decisions of both courts lead to the inescapable conclusion that no such constitutional right exists.

This Court reaffirmed this year that, "there is no requirement that district lines follow precinct or county lines." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 828 (Fla. 2002). The court further reiterated its 1972 holding that the requirements under the Florida Constitution with respect to redistricting are no more stringent than the requirements under the United States Constitution. *Id.* at 824; *In re Apportionment Law*, 263 So. 2d 797 (Fla. 1972).

In *Davis v. Bandemer*, 478 U.S. 109 (1986), a plurality of the Supreme Court held that a claim of partisan political gerrymandering is

justiciable.[1] The Supreme Court has not revisited the issue of political gerrymandering since its decision in *Bandemer*, and the decision remains the source of authority for any political gerrymandering claim under the federal constitution. The discussion of political gerrymandering by the United States Supreme Court in *Bandemer* and by this Court in the 2002 redistricting case addressed claims of discrimination against political parties. Neither the *Bandemer* decision nor this Court's 2002 redistricting decision includes anything to suggest that the Equal Protection clause guarantees voting equality based upon county of residence.[2] This is not surprising since such a holding would be irreconcilable with the established constitutional principles that dictate the parameters of legislative districting.

One of the foundations of the plurality opinion in *Bandemer* was the Supreme Court's landmark decision in *Reynolds v. Sims,* 377 U.S. 533 (1964), in which the Court set forth the one person-one vote standard. In *Reynolds,* the Supreme Court considered a proposed districting plan in which Alabama's bicameral legislature would have been modeled after the

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[1] The Court used the terms "partisan gerrymandering" and "political gerrymandering" interchangeably.

[2] Membership in a political party and residence in a county are not analogous for equal protection purposes. Unlike party membership, residence in a county defines no common political or ideological agenda and enjoys no First Amendment protection. It simply defines geographical proximity.

United States Congress. The senate would have been composed of the same number of senators from each county, regardless of population, and the house would have been composed of representatives apportioned by population, with each county receiving not less than one representative. The Supreme Court rejected the plan, holding that both chambers of a bicameral legislature must be apportioned according to population on a one person-one vote basis. In holding the federal analogy inapposite, the Court stated

> Political subdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178, 28 S.Ct. 40, 46, 52 L.Ed. 151, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon (them) *** and the territory over which they shall be exercised rests in the absolute discretion of the State.'

Reynolds, 377 U.S. at 575.[3]

Any effort to craft a rule recognizing an equal protection right in the context of county residence would be entirely unworkable. The trial court's

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[3] Florida's counties fall within the Supreme Court's description. Article VIII, Section 1 of the Florida Constitution refers to counties as "political subdivisions" and empowers the Legislature to create, abolish, or change counties.

decision rested upon its finding that, by dividing Marion County into four Senate districts, the Legislature unconstitutionally impaired the ability of the residents of Marion County to elect a senator from Marion County or to influence legislation favorable to Marion County.[4] Assuming for purposes of argument that a county's proportion of a district's population has an impact on electability of residents, and that having a resident senator equates with legislative influence, the only way to guarantee equality of influence to Florida's less populous counties would be to allocate a senator to every county, regardless of population.[5] This is precisely what was declared unconstitutional in *Reynolds v. Sims, supra.*

[4] As will be illustrated below, there was a complete absence of evidence in the record to support this conclusion.

[5] Forty-six counties presently do not have a resident senator. Fourteen counties have fewer people than the number of Marion County residents in District 20, the senatorial district in which Marion County has the smallest share of population, and 34 counties have fewer people than the number of Marion County residents in District 3, the district in which Marion County has the largest share.

The trial court failed to cite a single case supporting the legal proposition upon which its decision rested because there are no such cases.[6] The court postulated a constitutional right that simply does not exist under the Florida or United States constitutions.

[6] The Alaska Supreme Court held a legislative plan which discriminated against the residents of the city of Anchorage to be in violation of the Alaska Constitution. The court found that the plaintiffs had failed to satisfy the *Bandemer* criteria for establishing a violation of the federal Equal Protection clause, but held that the equal protection clause of the Alaska Constitution, unlike Florida's constitution, imposes a stricter standard than its federal counterpart. *Kanai Peninsula Borough v. State of Alaska,* 743 P.2d 1352 (1987).

II

THE RECORD WAS UTTERLY DEVOID OF EVIDENCE TO SUPPORT THE FACTUAL FINDINGS AND LEGAL CONCLUSIONS OF THE TRIAL COURT.

In its 2002 redistricting decision, this Court described the standard of proof set forth in *Davis v. 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.
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> * * * * *
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> 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 group will lack political power and be denied fair representation. As the *Bandemer* plurality explained, "The mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." This conclusion is premised on the assumption that "the power to influence the political process is not limited to winning elections" because the elected candidate will still be responsive to the voters in his or her district. "Without specific supporting evidence, a court cannot presume … that those who are elected will disregard the disproportionately under-represented group." The discriminatory effect of political gerrymandering would only be found "when the electoral system is arranged in a manner

> that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." As the plurality opinion explained, the plaintiff must establish that the discriminated-against group has "essentially been shut out of the political process."

In re Constitutionality of House Joint Resolution 1987, 817 So. 2d at 830.

The threshold set by *Bandemer* for a plaintiff to make a prima facie case of political gerrymandering is extremely high. The heavy burden on a plaintiff was noted by this Court in the foregoing opinion when it quoted the observation of the Pennsylvania Supreme Court that "this is unquestionably an onerous standard, difficult for a plaintiff to meet." *Id.* at n. 16; *Erfer v. Commonwealth*, 794 A.2d 325, 333 (Pa. 2002). In the case at bar, the plaintiffs completely failed to meet that heavy burden. Other than the unsubstantiated opinions of a plaintiff and two Marion County elected officials, the trial court record contains no evidence of intentional discrimination by the Legislature against Marion County residents, no evidence of actual discriminatory effect upon such residents, and no evidence that such residents have been shut out of the political process.

Plaintiffs called four witnesses, an Ocala city councilman, a legislative assistant to a Marion County state representative, a Marion County commissioner, and plaintiff Forman. With the exception of the legislative assistant, the testimony consisted primarily of the opinions of the witnesses

that, because Marion County residents composed a minority of the population in each of the four senatorial districts of which it has been a part since 1992, it has been unable to elect a senator and consequently has received less legislative largesse than it should have. [Tr. 3-10, 39-66, 69-87]

The legislative assistant testified that there had not been a Marion County resident serving in the Senate since 1992, [Tr. 19] and that more legislative items had been introduced and more money appropriated that benefited other counties in the four districts than benefited Marion County. [Tr. 20-27] Under cross-examination, the legislative assistant admitted that she had not done an analysis of the number of Marion County residents who had run for the legislature during the periods of time she had been discussing, had not done an analysis of factors other than residence that may have affected the ability of Marion County residents to get elected, and had not done an analysis of the significance of a candidate's county of residence to the voting population in the districts in which Marion County was situated. [Tr. 34] She also admitted that all legislative projects requested by Marion County of which she was aware were introduced and funded. [Tr. 34-35, 37-39] That was the sum and substance of evidence presented by the

plaintiffs. Standing alone, it was altogether insufficient and essentially irrelevant to a *Bandemer* analysis.

Key to the plaintiffs' case was the unsubstantiated assumption that voters in the four Marion County districts will vote only for residents of their own counties and, consequently, by splitting the Marion County into four districts in which it accounts for minorities of the population, the Legislature made it "virtually impossible to elect anyone from Marion County." [Tr. 43] A review of the actual makeup of the four districts in which Marion County has been situated under H.J.R. 1987 and of historic election results discloses that the assumptions are fallacious.

To state that Marion County residents are a minority of the districts in which they reside is to present a partial and misleading picture. Marion County shares each district with a number of other counties, and in three of the four districts, Marion County actually has among the largest populations of all of the counties making up such districts.[7] The failure of a Marion County resident to get elected to the Senate during the past ten years was

[7] In District 3, with 27.4% of the population, based on the 2000 Census, Marion County has the largest share of the 13 counties in the district. In District 7, with 20.1%, it has the second largest share among four counties. In District 14, with 12.2%, it has the second largest share among eight counties. Only in District 20, with 5.1%, is Marion County at the lower end of the scale with the fourth largest population among five counties.

apparently unrelated to the county's share of district population since it enjoyed percentages almost as favorable under the 1992 plan.[8]

Moreover, the history of Senate elections in the Marion County districts over the past decade confirms that a county's percentage of district population is not determinative of a resident's ability to win election. The incumbent senator for District 4 is a resident of Hamilton County. Hamilton County, with 3.3% of the population of District 4, based on the 2000 Census, has a smaller share than Marion County and ranks 13th among the 18 counties in the district. From 1992 through 1996, the senator representing District 11 was a resident of Citrus County, which accounted for only 13.8% of the district's population, based on the 2000 Census, compared to 30.3% for Marion County and 46.5% for Lake County.[9]

The case presented by the plaintiffs to the trial court and the opinion contained in the trial court's final judgment are basically the same as the

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[8] In District 11, with 30.3% of the population based on the 2000 Census (31.8% based on the 1990 Census), Marion County had the second largest share among five counties. In District 8, with 10.1% (11.4% based on the 1990 Census), Marion County had the fourth largest share among five counties (third largest based on the 1990 Census). In District 4, with 10.6% (8.8% based on the 1990 Census), Marion County had the fourth largest share among 18 counties. In District 5, with 8.1% (8.3% based on the 1990 Census), Marion County had the fourth largest share among 9 counties.

[9] The comparable population shares for District 11, based on the 1990 Census were: 15.4% for Citrus County, 31.8% for Marion County, and 47.0% for Lake County.

submission made by Marion County to this Court in opposition to the 2002 Senate plan. The Court found the submission insufficient to invalidate the plan on its face, and the plaintiffs have failed to offer any legal or factual justification for a departure from that decision.

CONCLUSION

The Court is respectfully urged to reverse the decision of the trial court.

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The undersigned hereby certifies that this brief was written in Times New Roman 14-point face and complies with the type-volume limitation of FRAP Rule 32.

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