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

RENE ROMO, an individual; BENJAMIN WEAVER, an individual; *et. al*,

Plaintiffs,

vs. CASE NO. 2012-CA-00412

KEN DETZNER, in his official capacity as Florida Secretary of States, PAMELA JO BONDI, in her official capacity as Attorney General,

Defendants.
_____/

THE LEAGUE OF WOMEN VOTERS OF FLORIDA; THE NATIONAL COUNCIL OF LA RAZA; *et al.*,

Plaintiffs,

vs. CASE NO. 2012-CA-00490

KEN DETZNER, in his official capacity as Florida Secretary of State; THE FLORIDA SENATE; *et al.*,

Defendants.
_____/

ORDER DENYING MOTION TO DISMISS

THIS CASE is before me on a motion to dismiss with prejudice filed by the legislative defendants (The House and Senate) and adopted by the Secretary of State. The defendants argue that the Florida Supreme Court has exclusive jurisdiction to consider challenges to legislative redistricting plans and that the Circuit Court thus lacks subject matter jurisdiction to hear the plaintiff's claims. Alternatively, they argue that, even if this court has jurisdiction, the plaintiffs' claims have already been decided by the Florida Supreme Court, and they are therefore precluded from bringing the same claims here. I

have considered the motion, their response thereto, the oral arguments of counsel and the authorities relied upon by each. For the reasons set forth below, I deny the motion.

The defendants' jurisdictional argument may be summarized as follows: Because the Florida Constitution mandates a specific procedure for the Attorney General to file a petition for declaratory judgment with the Florida Supreme Court and for that court to determine the constitutional validity of legislative redistricting plans, and because the constitution provides that the court's judgment on such review is "binding on all the citizens of the state," such determination is intended to be final and jurisdiction to consider any challenges to such plans therefore rests exclusively with the Florida Supreme Court.

The problem with this argument is that it flies in the face of the case law. In the 40 plus years this method of review has been in the Florida Constitution, and despite the several opinions on redistricting, including the two most recent opinions in 2012, the Florida Supreme Court has never held that it has exclusive jurisdiction over challenges to legislative redistricting plans. To the contrary, it has repeatedly stated that it was limited to a "facial" review and that consideration of more fact intensive "as-applied" claims were "better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings based upon the evidence presented." *See In Re Constitutionality of House Joint Resolution 1987,* 817 So. 2d 819, 828 (Fla. 2002).

In *Brown v Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002), the court explained the difference between a facial review and an as-applied challenge to a legislative redistricting plan, and why the latter came within the jurisdiction of the Circuit Court.

> "It is important to differentiate among redistricting cases. There are two general classes of challenges to a redistricting plan. First, there is the facial challenge, in which a party seeks to show that, as written, the plan explicitly violate some constitutional principle. Second, there is an as applied challenge, in which a party seeks to establish that, based on facts existing outside the plan, and as applied to one or more districts, the plan violates the federal or state constitutions, or the Voting Rights Act of 1965."

Id. at 686.

This decision from the Fourth District Court of Appeal came only months after the Florida Supreme Court's opinion in the case of *Florida Senate v. Foreman,* 826 So. 2d 279 (Fla. 2002). In that case, two Marion County residents brought a suit in Marion County Circuit Court claiming that the 2002 Senate redistricting plan violated the equal protection clause of the Florida Constitution. The case was resolved on the merits without any sort of jurisdictional challenge in the Circuit Court or in the Supreme Court. Indeed the Florida Supreme Court reiterated its previous holding that trial courts had jurisdiction in such cases:

> "Earlier this year, this court issued its opinion in *In Re Constitutionality of House Joint Resolution 1987,* 817 So. 2d 819 (Fla. 2002), wherein we found the Florida legislature's 2002 reapportionment plan to be facially valid. We left open the opportunity for parties to raise as-applied challenges alleging "a race based equal protection claim, a section 2 of the Voting Rights Act claim or a political gerrymandering claim in a court of competent jurisdiction."

Foreman, 826 So. 2d at 280 (*quoting In Re Constitutionality of House Joint Resolution 1987,* 817 So. 2d at 832.)

In its most recent reviews pursuant to Article III, *In re Senate Joint Resolution of Legislative Apportionment 1176,* 83 So.3d 597 (Fla. 2012) ("Apportionment I") and *In re Senate Joint Resolution of Legislative Apportionment 2-B,* 89 So. 3d 872 (Fla. 2012) ("Apportionment II"), the Florida Supreme Court had many opportunities to declare that

its jurisdiction on the subject was exclusive. It did not, and I will not presume by its silence that the court meant to overturn its previous pronouncements that as-applied claims are properly brought in circuit court.

The defendants have cited no Florida redistricting case in support of their argument that exclusive jurisdiction rests in the Supreme Court relative to challenges to redistricting plans. The principal case relied upon by the defendants, *Roberts v. Brown,* 43 So. 3d 673, (Fla. 2010), is distinguishable. First, the case does not involve a challenge to a legislative redistricting plan, but rather the giving of advisory opinions as to the validity of ballot summaries of citizen-initiated amendments to the Constitution. Article III specifically states that such advisory opinions are within the jurisdiction of the Florida Supreme Court. There is no similar jurisdictional statement as to the court's review of redistricting plans.

Secondly, the giving of advisory opinions, on any subject, is not within the jurisdiction of the circuit courts. As the Supreme Court noted in *Brown:*

> "Further, there is no jurisdiction in any circuit court to render in the form of a declaratory judgment a determination with regard to the impact of a citizen initiative, which pre-election would be an advisory opinion addressing merely the possibility of legal injury based on purely hypothetical facts which have not arisen and are only contingent, uncertain and rest entirely on future possible facts."

43 So. 3d at 681.

The defendants argue alternatively that, because of the Florida Supreme Court considered factual matters in Apportionment I and Apportionment II, and considered the same issues that are presented in the plaintiffs' claims in this court, those claims are now precluded to the plaintiffs. They assert that the as-applied challenges of the plaintiffs are

nothing more than a rehash of the facial challenges they advanced before the Supreme Court, or that could have been advanced there but were not.

It is apparent from the questions and comments of the justices during oral argument that they had some concern or question about the preclusive effect of their review, and it would have been helpful had the Supreme Court specifically addressed this issue and given clear guidance as to what is and is not precluded from consideration.

We do know, however, from Apportionment II, that the doctrine of res judicata does not apply because of the unique nature of the proceedings before the Supreme Court. Although the justices declined to consider an argument advanced by the plaintiffs after the opinion in Apportionment I, that was based upon considerations of fundamental fairness. Specifically, the court noted that raising the objections after the initial review by the court would foreclose the legislative defendants from responding and correcting any deficiencies found by the court in Apportionment I.

We also know, from the previous opinions of the court that a clear distinction is made between a "facial" review of redistricting plans, which is conducted by the Supreme Court, and an "as-applied" challenge, which is better suited for the Circuit Court. The plaintiffs say their claims in this case are as-applied challenges. The defendants say they are the same facial claims considered by the Florida Supreme Court. It is impossible for me to make that determination from the pleadings themselves.

Although the issues may be the same, the allegations of constitutional infirmity the same, the difference between a facial challenge and an as-applied challenge speaks to the way the challenges are determined rather than the constitutional principles alleged to have been violated. As the Fourth DCA noted in *Brown v. Butterworth, supra*, in a facial

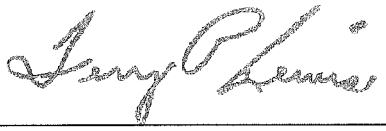
challenge the argument is that the plan, as written, explicitly violates some constitutional principle. In an as-applied challenge, the argument is that, based on facts that are not apparent on the face of the plan, and as applied to one or more specific districts, the plan violates one or more constitutional principles.

Certainly, I do not intend to enter any judgment in this case that is contradictory to, or inconsistent with, the opinions of the Florida Supreme Court in Apportionment I or Apportionment II. To the extent that the plaintiffs seek only a rehash of facial arguments made before the Florida Supreme Court, they will be disappointed. But to the extent their claims are as-applied challenges to the plans, they are entitled to develop and to present relevant evidence to support their claims. The defendants likewise are entitled to prepare and present contrary evidence in defense.

Accordingly, for the above reasons, I find dismissal of the complaint on any of the grounds urged by the defendants to be unwarranted, and therefore it is

ORDERED and adjudged that the motion to dismiss with prejudice is hereby **DENIED.**

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 17 day of January, 2013.



TERRY P. LEWIS, Circuit Judge

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Counsel of Record