UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

TIM NORRIS
and RANDY MAGGARD,

Plaintiffs,

v.

CASE NO. 3:15cv343-MCR/EMT

KEN DETZNER
SECRETARY OF STATE IN HIS
OFFICIAL CAPACITY,

Defendant.
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ORDER

In this lawsuit, Plaintiffs Tim Norris and Randy Maggard[1] have brought an as-applied challenge to the 2010 Fair Districts Amendments to the Florida Constitution ("the Amendments") under the First and Fourteenth Amendments to the United States Constitution. Specifically, they claim that the first clause of each Amendment, Fla. Const., art. III, §§ 20(a), 21(a), prohibiting the Florida Legislature from drawing district maps with a partisan intent, has been interpreted by the Florida Supreme Court and the Florida Legislature in a manner that violates their rights to free speech, to petition their government, and to due process.[2] Plaintiffs seek declaratory and injunctive relief against Defendant Ken Detzner, Florida's Secretary of State ("the Secretary") to prohibit enforcement of the Amendments in an upcoming special redistricting session of the

[1] Norris is the Walton County Republican Executive Committee Chairman and a registered voter who resides in Congressional District 1 and in Florida Senate District 1; and Maggard is the Pasco County Republican Executive Committee Chairman and a registered voter who resides in Congressional District 12 and Florida Senate District 17.

[2] The four-count Complaint asserts that the challenged clause of each Amendment is unconstitutionally vague (Count I); chills the Plaintiffs' free speech rights based on the content of the speech (Count II); prohibits Plaintiffs from talking to their representatives about partisan impacts of redistricting (Count III); and discriminates against speech on the basis of the identity of the speaker (Count IV).

Legislature. *See* 28 U.S.C. § 2201; 42 U.S.C. § 1983. Pending before the Court is Plaintiffs' Motion for Preliminary Injunction (doc. 2), and the Secretary's Motion to Dismiss (doc. 17). The Court heard oral arguments on the motions on September 25, 2015, and is prepared to rule.[3]

Background

Historical Context

Florida's Fair Districts Amendments, codified in Fla. Const. art. III, §§ 20 & 21, were proposed in 2007 and adopted by a general election ballot in 2010. The Amendments "establish[ed] stringent new standards for the once-in-a-decade apportionment of legislative districts." *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 597 (Fla. 2012) (*Apportionment I*). These Amendments and the Legislature's most recent redistricting efforts have been the subject of much litigation, the history of which will be recounted here briefly.

In general, the legislative apportionment process in Florida requires the Legislature to draft district maps by joint resolution "at its regular session in the second year following each decennial census." Fla. Const. art. III, § 16(a). The state attorney general has 15 days following passage of the joint resolution to petition the Florida Supreme Court for review of the legislative apportionment plans to determine their validity. Fla. Const. art. III, § 16(c). The Florida Supreme Court must permit "adversary interests" to present their views and then, within 30 days of the filing of the petition, must enter its judgment as to the plans' validity. *See id.*

On November 2, 2010, Florida voters approved Fair Districts Amendment 5 (§ 21), which governs the drawing of state legislative districts, and Fair Districts Amendment 6 (§ 20), which governs the drawing of congressional districts. The first clause of each Amendment prohibits the drawing of apportionment plans or district maps based on

[3] The Court has also considered the amicus curiae brief of the League of Women Voters of Florida, Deirdre Macnab, Judith Byrne Riley, and Common Cause.

partisan intent or an intent to favor or disfavor an incumbent office holder.[4] On November 3, 2010, several members of the United States House of Representatives challenged the constitutionality of Fair Districts Amendment 6 (Fla. Const. art. III, § 20)[5] under the Elections Clause of the United States Constitution, which grants regulatory power to the states to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl.1. The challengers claimed Amendment 6 was unconstitutional because it was enacted by a citizens' ballot instead of through the state's legislative process and argued that the language effectively dictated electoral outcomes and favored a class of candidates, in violation of the Elections Clause. The district court rejected the challenge, and the Eleventh Circuit affirmed. *See Brown v. Sec. of State of Fla.*, 668 F.3d 1271 (11th Cir. 2012). The Eleventh Circuit determined first that Florida citizens have the power to amend the state constitution by initiative and thus the manner in which the Amendments had been enacted was proper. *See id.* at 1279 (recognizing that the citizen initiative was "every bit a part of the state's lawmaking function" as is a legislative enactment; the people's initiative "constitutes an integral part of the state's lawmaking power").[6] The court concluded further that the Amendment's language prohibiting the drawing of district lines "with the intent to favor or disfavor a political party

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[4] Only the first clause of each section (in bold below) is challenged:

> **(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent**; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

Fla. Const. art. III, §§ 20(a), 21(a) (emphasis added). Section 20(a) applies to congressional districts and Section 21(a) applies to legislative districts, otherwise, each section is identical except for one word: Section 21(a) omits the word "individual" before "district" in the first clause–a distinction that is not material in this case. Subsection (b) of each Amendment states that, unless it conflicts with subsection (a), the districts must be nearly equal in population, compact, and use existing political and geographical boundaries where feasible.

[5] Amendment 5, which applies to drawing state legislative districts, was not challenged.

[6] This conclusion is consistent with a recent United States Supreme Court decision. *See Ariz. State Legisl. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (Elections Clause did not prohibit a state ballot initiative creating an independent commission to direct redistricting).

or an incumbent" (the phrase at issue in the present dispute) is not an impermissible attempt to exclude a class of candidates from federal office and thus does not exceed the scope of the state's Elections Clause power to regulate the manner of congressional elections; in other words, it does not improperly "dictate" electoral outcomes. *Id.* at 1284-85. According to the court, the Amendment appropriately "require[s] the legislature to account for some particular standards when conducting the complex task of drawing congressional district lines." *Id.*

On February 9, 2012, the Florida Legislature passed its joint resolution apportioning the state into districts based on the new census. The attorney general timely petitioned the Florida Supreme Court for review, and on March 9, 2012, the court issued its judgment, applying the new constitutional standards. *See In re Senate Joint Resolution of Legisl. Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) (*Apportionment I*). The court noted that the "driving force" behind the Fair Districts Amendments was "the goal of minimizing opportunities for political favoritism." *Id.* at 639. The court acknowledged that the Fair Districts Amendments impose "more stringent requirements as to apportionment than the United States Constitution" and "clearly act as a restraint on legislative discretion in drawing apportionment plans." *Id.* at 598-99. Applying these new standards, the court conducted a facial review of the apportionment plan within the 30-day time limit and found that while the Florida House of Representatives' apportionment of districts was valid under the Florida Constitution, the Florida Senate's was not. *See id.* at 597-98. As a result, the court required the Legislature to adopt a new joint apportionment resolution, which it did. In late April 2012, the Florida Supreme Court reviewed the redrawn Senate districts and found them constitutionally valid. *In re State Joint Resolution of Legisl. Apportionment 2-B*, 89 So. 3d 872 (Fla. 2012) (*Apportionment II)*.

In September 2012, the League of Women Voters and others filed a legal challenge to the validity of the revised Senate map, arguing that the apportionment continued to favor incumbents and reflected "partisan gamesmanship" in violation of the standards articulated in § 21 of the Fair Districts Amendments. The Legislature immediately petitioned the Florida Supreme Court for a writ of prohibition, arguing that the Florida Supreme Court has

exclusive jurisdiction over redistricting challenges based on the Amendments. In July 2013, the Florida Supreme Court rejected that argument and determined that the state circuit court had subject matter jurisdiction over the challenge and also decided that the challenge would not interfere with the court's prior facial review of the plan. *See Fla. House of Reps. v. League of Women Voters of Fla.*, 118 So. 3d 198 (Fla. 2013) (*Apportionment III*).

The litigation continued, and discovery disputes arose when the challengers sought information from legislators and third party political consultants regarding the reapportionment process in order to discern the legislative intent underlying the district maps. The trial court recognized a limited legislative privilege. In December 2013, the Florida Supreme Court agreed and ruled that Florida's legislators do not have an *absolute* privilege against discovery of their communications when faced with a challenge to the redistricting process based on partisan intent. *See League of Women Voters of Fla. v. Fla. House of Reps.*, 132 So. 3d 135 (Fla. 2013) (*Apportionment IV*). The court explained that in this circumstance, the absolute privilege gives way to the compelling public interest in prohibiting "unconstitutional partisan political gerrymandering" and requires that the challengers of a redistricting plan "be given the opportunity to discover information that may prove any potentially unconstitutional intent." *Id.* at 148. Recalling that, in *Apportionment I*, it had commended the Legislature for engaging in extensive public hearings, the court in *Apportionment IV* cautioned:

> However, if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.

132 So. 3d at 149. The court found that legislators could assert a limited privilege protecting them from discovery as to questions or document requests that would reveal their subjective thoughts or impressions but not against discovery "concerning any other information or communications pertaining to the 2012 reapportionment process." *Id.* at 154. Also, the court rejected a claim that this discovery would "chill" discussions of

legislators regarding future apportionment plans, observing that "this type of 'chilling effect' was the explicit purpose of the constitutional amendment"–that is, "to prevent partisan political gerrymandering and improper discriminatory intent." *Id.* at 151.

Two subsequent appeals brought additional pretrial issues before the Florida Supreme Court. S*ee League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510 (Fla. 2014) (*Apportionment V*) (issuing a writ to preclude disclosure of certain documents to be filed under seal at trial); *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115 (Fla. 2014) (*Apportionment V*I) (compelling discovery from nonparties). In *Bainter*, the court affirmed the trial court's order compelling the production of relevant documents from nonparties, specifically, a political consulting firm and its president. The court noted that the nonparties had refused to produce documents in spite of the trial court's repeated rulings that they were relevant. Also, the court found that although the nonparties had been given a reasonable opportunity to raise any claim of First Amendment privilege, they failed to do so and thus had waived the challenge. *See id.* at 1126-33.

The case culminated in a 12-day bench trial. The trial court found that the Florida Legislature had acted with impermissible partisan intent based on evidence that the Legislature had conducted separate nonpublic meetings with political consultants of one party and destroyed records of their meetings as well as communications regarding the redistricting process. *See, e.g., League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 376-77 (Fla. 2015) (*Apportionment VII*). The finding of partisan intent was based in large part on evidence from staff members and political consultants showing that secret meetings were held and that political consultants had conspired to influence the process. Specifically, the trial court found that a group of political consultants had conspired to manipulate and influence the redistricting process and were successful, making "a mockery of the Legislature's proclaimed transparent and open process of redistricting."[7] *Id.* at 377.

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[7] The trial court found that the circumstantial evidence as a whole led to an unmistakable conclusion that political consultants from one party had "managed to taint the redistricting process and the resulting map with improper partisan intent." *Apportionment VII*, 172 So. 3d at 377. Nonetheless, no political consultant was sued or punished.

The trial court concluded that Districts 5 and 10 were drawn in violation of the Fair Districts Amendments based on the finding of partisan intent but rejected challenges to seven other districts, giving the Legislature's drafting choices a presumption of validity.

On review, the Florida Supreme Court affirmed the trial court's finding that the Legislature had acted with partisan intent in violation of the Fair Districts Amendments, *see Apportionment VII*, 172 So. 3d at 393, but determined that the trial court had erred by not giving effect to that finding when analyzing the whole plan, *see id.* at 393-396, and erred by giving deference to legislative drafting choices in individual districts after finding partisan intent, *see id.* at 396-401. After conducting a thorough review of the plan, the Florida Supreme Court ruled that the Legislature had to redraw Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected by that redrawing. The court "urged" the Legislature, in redrawing the districts, "to consider making all decisions on the redrawn map in public view" and to "conduct itself in a manner that will fulfill the purpose of the Fair Districts Amendments, including the need for transparency and neutrality in drawing the state's congressional districts." *Id.* at 416. The court remanded the case for a limited period of 100 days, retaining jurisdiction and urging the Legislature to expedite the process.[8]

The Legislature acted quickly to comply with the Florida Supreme Court's timeframe, scheduling two Special Legislative Sessions (convening August 10 and October 19) to draw a new map in compliance with the Fair Districts Amendments' prohibition on partisan intent. The President of the Senate and Speaker of the House jointly authored a memorandum to the members of the Florida Legislature on July 20, 2015, outlining the procedures for the special sessions. According to the memo, the redistricting staff would develop a base map that complied with the Florida Supreme Court's recent ruling in *Apportionment VII*. Staff was instructed to avoid political considerations and to have no interaction with others concerning their work until the map was simultaneously provided to members of the Legislature and the public. Members of the Legislature were cautioned

[8] The court entered a separate order, instructing the Legislature regarding filing of the final plan and transcripts with the trial court and simultaneously with Florida Supreme Court to expedite the review process. *See League of Women Voters of Fla. v. Detzner*, 170 So. 3d 800 (Mem.) (Jul. 9, 2015).

to recognize every citizen's right to petition the government while avoiding communications that might reflect a partisan intent on their part.[9] Noting that the Florida Supreme Court had "asked" members to retain all e-mails and other documents related to the redrawing,[10] the memo "respectfully request[ed]" members to compile all communications related to redistricting.

Current Dispute

Plaintiffs assert that, as interpreted by the Florida Supreme Court and implemented by the Legislature through the legislative memo, which Plaintiffs refer to as a "gag memo," the first clause of Florida's Fair Districts Amendments chills their First Amendment rights to free speech and to petition their government for redress, and is also unconstitutionally vague. Each Plaintiff fears communicating with his elected representatives about the soon-to-be-proposed redistricting maps "for fear of entanglement in the inevitable litigation to follow;" "fear of having his speech invalidate an otherwise legitimate state law" because of uncertainty as to what can be said; and fear that his speech will be identified with a particular political party and treated differently as a result. At oral argument, Plaintiffs' counsel clarified that Plaintiffs are not seeking to declare the Fair Districts Amendments facially unconstitutional but rather are bringing an as-applied challenge to how the Amendments' first clause is being interpreted by the Florida Supreme Court and the Legislature.[11]

Plaintiffs' Motion for Preliminary Injunction seeks to prohibit the Secretary of State and all state officials from taking any action to enforce the Amendments, as interpreted. The Secretary opposes the injunction and moves to dismiss the Complaint on Eleventh

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[9] The memo states: "While every citizen of Florida has a guaranteed constitutional right to petition their government, we encourage members to be circumspect and to avoid all communications that reflect or might be construed to reflect an intent to favor or disfavor a political party or an incumbent." (Doc. 1-1, at 3).

[10] In setting forth its guidelines to the Legislature for avoiding improper intent, the Supreme Court stated, "the Legislature should preserve all emails and other documents related to the redrawing of the maps." *Apportionment VII*, 172 So. 3d at 415.

[11] The Plaintiffs' arguments appear to conflate "interpretation" of the Amendments with an alleged unconstitutional "application." They have not alleged any "application" of the Amendments to them at all.

Amendment grounds. Plaintiffs respond that Eleventh Amendment immunity does not apply, insisting that the Secretary may be sued as a state official because he has a sufficient connection to the challenged clauses. Alternatively, Plaintiffs request leave to amend.[12]

Discussion

The First and Fourteenth Amendments of the United States Constitution protect freedom of speech, the right to petition the government for redress of grievances, and the right to due process. U.S. Const. amend. I, XIV. A law violates due process if it forbids an act "in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Wollschlaeger v. Gov. of Fla.*, 797 F.3d 859, 878-79 (11th Cir. 2015) (internal marks omitted).

Standing

As a threshold matter, the Court must determine whether the Plaintiffs have standing to sue. Article III of the United States Constitution gives federal courts authority over "cases only where there is a justiciable case or controversy," and standing is "[p]erhaps the most fundamental doctrine that has emerged from the case-or-controversy requirement." *Women's Emergency Network v. Bush*, 323 F.3d 937, 942 (11th Cir. 2003) (citing U.S. Const., art. III, § 2, cl. 1). "It is by now axiomatic that a plaintiff must have standing to invoke the jurisdiction of the federal courts." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1266 (11th Cir. 2006). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), the Supreme Court established a three-part test for deciding whether a party has standing to sue, requiring a plaintiff to show: (1) injury in fact that is (a) "concrete and particularized" and (b) "actual or imminent;" (2) "traceable to the challenged action of the defendant;" and (3) likely to be "redressed by a favorable decision." *See also Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1308 (11th Cir.

[12] Following oral argument, Plaintiffs filed a Motion for Leave to Amend Complaint (doc. 40), seeking to substitute two different plaintiffs and to add the President of the Senate and Speaker of the House as defendants. The motion is opposed. Having carefully reviewed the motion, the Court notes that adding these new parties would not alter the decision below on standing.

2002). "[I]n First Amendment challenges, the actual injury requirement is most loosely applied in order to provide broad protection for speech." *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1253 (11th Cir. 2009) (internal marks omitted). Self-censorship may be an actual injury where First Amendment free speech or expression rights are chilled if a plaintiff shows: "(1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution." *Wollschlaeger*, 797 F.3d at 874-75. In the Eleventh Circuit, a plaintiff proceeding under the "credible-threat-of-prosecution prong" must demonstrate: (1) "that he seriously wishes to engage in expression that is at least arguably forbidden by the pertinent law," and (2) "that there is at least some minimal probability" that the law or rule challenged will be enforced. *Id.* at 875 (internal marks omitted); *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (noting that there must be "at least a minimal probability the [challenged] rules will be enforced" against the plaintiff). When a credible enforcement threat exists, the plaintiff "does not have to expose himself to enforcement by engaging in the conduct before challenging the law;" impending injury is enough. *Am. Civil Liberties Union v. The Fla. Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993); *see also Va. v. Am. Booksellers Assen, Inc.*, 484 U.S. 383 (1988) (pre-enforcement challenge).

Plaintiffs maintain they have standing to bring a pre-enforcement challenge to the Amendments–as interpreted by the Florida Supreme Court and Legislature–because they are engaging in self censorship to avoid becoming "embroiled" in future litigation, and they also believe their right to petition the government has been chilled. The problem with Plaintiffs' position is that they have not shown that their speech or conduct is prohibited or even "arguably forbidden" by the Fair Districts Amendments on their face or as applied. *See Wollschlaeger*, 797 F.3d at 875. The challenged clauses are directed at the Florida *Legislature*, no one else. Moreover, neither the Florida Supreme Court's interpretation of the Amendments nor the legislative memo addresses citizen speech, places any limits on citizen political speech, or erects any barriers to citizens' access to their legislators. The Florida Supreme Court urged *legislators* to conduct the redistricting proceedings publicly and with transparency, in accordance with Florida's strong public policy favoring

transparency in government.[13] Similarly, the legislative memo expressly recognized the citizens' First Amendment rights and encouraged the Legislature to preserve communications and to avoid communications reflecting partisan intent. Indeed, notwithstanding the *Apportionment* cases and the legislative memo, citizens remain free to contact their legislators and state their political views, either openly or anonymously. Only improper partisan intent by the Legislature is forbidden and will invalidate the maps, not the partisan speech of citizens.[14] Thus, under the Amendments, as interpreted, citizen

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[13] The Florida Supreme Court outlined the following "guidelines and parameters" which it "urged" and "encouraged" the Legislature to consider:

> (1) "[C]onduct all meetings in which it makes decisions on the new map in public and to record any non-public meetings for preservation;"
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> (2) "[P]rovide a mechanism for the challengers and others to submit alternative maps and any testimony regarding those maps for consideration," to "allow debate on the merits of the alternative maps," and offer citizens an opportunity "to review and offer feedback regarding any proposed legislative map before the map is finalized;"
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> (3) "[P]reserve all e-mails and documents related to the redrawing of the map;" and "[i]n order to avoid additional, protracted discovery and litigation, the Legislature should also provide a copy of those documents to the challengers on a proper request;" and also
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> (4) "[P]ublicly document the justifications for its chosen configurations."

See Apportionment VII, 172 So. 3d at 414-15.

[14] Plaintiffs also argue that their speech is chilled because, as members of a political party, they fear their speech will be used to invalidate a map. This makes no sense. Plaintiffs have no First Amendment right to a partisan map. Also, the Court knows of no First Amendment guarantee that speech will carry any particular "influence." Justice Kennedy has stated in a concurring opinion that "[t]he First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association," *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring), but representational rights in redistricting are not at issue here. The Fair Districts Amendments place no burdens on citizen speech, regardless of the citizens' identity. Because the Florida Supreme Court previously found improper legislative intent based on a conspiracy by Republican consultants, *see Apportionment VII*, 172 So. 3d 390-93, which is the reason for the present redistricting process, the Legislature may well be more circumspect in the future as to its own communications and more vigilant in preserving all communications, Republican and Democrat. But, the First Amendment does not guarantee a right to political success of any party or the right to any given amount of political "influence."

Plaintiffs also attempt to state an equal protection claim under the guise of the First Amendment, arguing their speech is chilled because they fear that, as a result of their identity and viewpoint as members of the Republican party, their speech will be treated differently and less favorably than non-Republican speech. This also makes no sense. As far as the Court knows, neither Republicans nor Democrats are a suspect class for purposes of Equal Protection under the Fourteenth Amendment, and in any event, the Amendments target neither.

speech is not "arguably forbidden," *Wollschlaeger*, 797 F.3d at 875, but rather is preserved.

Because the Plaintiffs' speech is not forbidden by the Amendments, even as interpreted, Plaintiffs' fear of a chill on their speech by becoming embroiled in litigation is not objectively reasonable. A chill on First Amendment rights arises only when there is "at least some minimal probability" that the law will be enforced against the plaintiff. *Id.* Self censorship that results from a subjective fear of enforcement with no objectively reasonable basis does not satisfy the actual injury requirement of standing; there must be a real threat of enforcement consequences. *See Pitman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998) (subjective fear of prosecution is only an "injury" if the fear is objectively reasonable). Although Plaintiffs fear becoming embroiled in litigation like the third parties in the *Apportionment* cases who were required to testify or produce documents, that discovery was not a consequence of "enforcement" of the Fair Districts Amendments against the nonparties. Rather, it was a result of the Legislature's failure to operate transparently in the redistricting process, as required by Florida's strong public policy, which in turn left the challengers no means of determining legislative intent absent discovering the communications through a lawful legal process.[15] The Florida Supreme Court expressly noted in *Apportionment VI* that the nonparties could have raised any First Amendment privileges or defenses against discovery that were available to them. *See Apportionment VI*, 150 So. 3d at 1133 (noting that the nonparties had waived any assertion to a qualified First Amendment privilege by not raising it). Also, its interpretation of the Fair Districts Amendments as requiring the Legislature to preserve communications seemingly would reduce, not increase, the potential for future litigation. Even after finding improper "partisan intent" in *Apportionment VII* based on evidence that the legislators had been manipulated and influenced into acting on that intent during the redistricting process, s*ee Apportionment*

[15] "Nowhere is the will of the people expressed more strongly than in the Florida Constitution. In the matter before the Court, the people have spoken through their amendment limiting the ability of their elected representatives to carry out legislative redistricting with any partisan or discriminatory intent." *Apportionment IV*, 132 So. 3d at 155 (Labarga, J. concurring).

VII, 172 So. 3d at 376, the political consultants' speech was not prosecuted, punished, or restricted in any way. Transparency in government is not a penalty against the citizenry. *See Citizens United v. Fed. Elec. Commc'ns*, 558 U.S. 310, 371 (2010) (recognizing that "transparency" in government and in political speech "enables the electorate to make informed decisions"). Because no citizen conduct is prohibited or threatened under the Amendments as interpreted, there is no objectively reasonable basis for self censorship, and Plaintiffs cannot demonstrate an injury for purposes of standing.

Moreover, even assuming Plaintiffs met the injury prong of standing, they have not alleged or demonstrated an injury traceable to any act of the Secretary. The Secretary, as a member of the Executive branch, is the chief election officer for the state responsible for obtaining and maintaining "uniformity in the interpretation and implementation of the election laws."[16] *See* Fla. Stat. § 97.012. The Secretary's responsibilities include adopting rules for the proper interpretation and implementation of Florida's Election Code, bringing an action to enforce compliance with its rules or to enforce the performance of duties of any elections official, and conducting investigations into voter registration or candidate issues. *See id.* The Amendments at issue are not part of Florida's Election Code. They are codified instead within Article III of the Florida Constitution, which governs the Legislature. The Secretary did not draft or adopt the Amendments, and the Secretary's role in their adoption was limited to the ministerial task of including the Amendments on the ballot. There is no allegation that the Secretary has taken any steps to restrict partisan citizen speech or has threatened penalties against citizens for partisan speech related to redistricting. Also, because the Secretary has no enforcement authority over the Legislature's Article III powers and responsibilities, an injunction against the Secretary

[16] The Secretary also ensures that the state's election officials and procedures are in compliance with the Voting Rights Act, the National Voter Registration Act, and other federal election laws. *See* Fla. Stat. § 97.012. This suit is not a Voting Rights Act suit or a challenge to the validity of the maps, which the Secretary would have the responsibility to implement. Instead, Plaintiffs claim violations of private First Amendment rights.

would not redress the alleged harm and, moreover, would be improper.[17]

In sum, the Complaint lacks any allegation of a concrete or imminent threat of injury due to a "chill" of First Amendment rights that is redressable by the relief requested or traceable to the Secretary. Therefore, Plaintiffs lack standing to bring their claims, and the case must be dismissed for lack of subject matter jurisdiction.

Motion to Dismiss

Alternatively, the Court briefly addresses the motion to dismiss. The Secretary asserts that the case should be dismissed based on sovereign immunity, *see* Fed. R. Civ. P. 12(b)(1), and Plaintiffs argue that the *Ex parte Young*[18] exception to sovereign immunity applies. Eleventh Amendment sovereign immunity protects a state from suit absent its consent, *see* U.S. Const. amend. XI; *Va. Off. for Protec. and Advoc. v. Stewart*, 131 S. Ct. 1632, 1637 (2011), and prohibits suit against a state official "where the state is, in fact, the real party in interest," *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336-37 (11th Cir. 1999) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). The case of *Ex parte Young*, 209 U.S. 123 (1908), is an exception to sovereign immunity, allowing suit against a state official engaged in an ongoing violation of federal law if the plaintiff is seeking prospective injunctive relief. *See Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997); *Alabama v. PCI Gaming Auth.*, No. 14-12004, 2015 WL 5157426, at *5 (11th Cir. Sept. 3, 2015). This exception is based on the legal fiction that "when a federal court commands a state official to do nothing more than refrain from violating federal law, [the state official] is not the State for sovereign-immunity purposes." *Stewart*, 131 S. Ct. at 1638; *PCI Gaming Auth.*, 2015 WL 5157426, at *5; *Summit Med. Assocs.,* 180 F.3d at 1336-37 (also noting that the *Ex parte Young* doctrine itself is not without limitations). A state officer is subject to suit under *Ex parte Young* only if it can be

[17] Even if the Secretary had such power over the Legislature, the requested injunction prohibiting enforcement of a ban against legislative partisan intent in redistricting is far wide of the mark necessary to redress Plaintiffs' alleged "chill" on First Amendment speech and petition rights. At oral argument, the Plaintiffs conceded that they were not requesting the Court declare the clauses unconstitutional on their face, and yet, that is the broad remedy they appear to request.

[18] *Ex parte Young*, 209 U.S. 123 (1908).

said that the official "is responsible for the challenged action" and, because of his office, has "some connection with the unconstitutional act or conduct complained of." *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988).

The Secretary insists that the *Ex parte Young* exception does not apply because he is not responsible for, or connected to, the challenged action in this case. Plaintiffs maintain that the Secretary, as the chief election officer with enforcement power over elections and the Election Code, *see* Fla. Stat. § 97.012, has "some connection" to the challenged Amendments. Plaintiffs rely on the Eleventh Circuit's cases of *Luckey*, 860 F.2d at 1015-16 (finding that the Governor of Georgia had some connection to the state's failure to provide indigent defendants with attorneys), and *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011) (finding that Georgia's Secretary of State had a connection to a dispute over local school board candidates). In each of those cases, the court found "some connection" by virtue of the official's office. In *Luckey*, the Eleventh Circuit determined that *Ex parte Young* applied because the governor was responsible for enforcing the law and commencing criminal prosecutions, and thus, he had "some connection" to the state's challenged conduct of failing to provide indigent defendants with an attorney. 860 F.2d at 1015-16. Similarly, in *Grizzle*, the Eleventh Circuit concluded that the Georgia Secretary of State had a sufficient connection with the alleged unconstitutional disqualification of local school board candidates by virtue of the Secretary's enforcement power over state election laws and his authority to ensure that the local entities in charge of the challenged actions complied with the state's election laws. 634 F.3d at 1319. Here, by contrast, there is no indication that the Secretary is responsible for policing the Florida Legislature, which would create separation of powers concerns, or has any authority over the Legislature's conduct as it draws or redraws the maps. Again, no map is challenged in this suit, and there is no issue regarding compliance with a federal election law.[19]

[19] Plaintiffs argue that the Secretary was a defendant in the *Brown* case, in which members of the Legislature challenged the constitutionality of the Fair Districts Amendments under the Elections Clause. *See* 668 F.3d at 1271. The particular question in *Brown*, however, was whether the Amendments contravened the United States Constitution's Elections Clause. Because the Secretary has responsibility to ensure that Florida elections comply with federal law, "some connection" may have existed. However, the *Brown* opinion

Absent any allegation showing a connection between the Secretary and the challenged clauses, or that the Secretary has some authority over the Legislature or the map-drawing process, this case is factually distinct from *Luckey* and *Grizzle.*

Instead, the Court finds this case more akin to *Women's Emergency Network*, 323 F.3d at 949, in which the Eleventh Circuit concluded, as an alternative holding, that the Governor of Florida was not a proper party under *Ex parte Young* because he was not responsible for the challenged action of distributing funds under a license plate program, and his general executive power was too attenuated for a sufficient connection to distributing funds under the program where the cabinet had enforcement responsibility over the law at issue. *See id.* The facts here present an even more compelling case that *Ex parte Young* does not apply because the Amendments at issue are plainly within Article III of Florida's Constitution, and there is not even a tenuous connection between an action of the Secretary and the alleged chill to Plaintiffs' free speech and petition rights. Therefore, the Court finds that *Ex parte Young* does not apply, and the Secretary is entitled to dismissal on sovereign immunity grounds.

Accordingly, the Complaint is **DISMISSED** for lack of standing, and alternatively, Defendant's Motion to Dismiss (doc. 17) is **GRANTED**. Plaintiffs' Motion for Preliminary Injunction (doc. 2) is **DENIED as MOOT**, and Plaintiffs' Motion for Leave to Amend the Complaint (doc. 40) is **DENIED** as futile for lack of standing.

DONE AND ORDERED on this 13th day of October, 2015.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE

gives no indication that the Secretary ever asserted the sovereign immunity defense, and thus the Court finds the case inapposite.