Filing # 19494707 Electronically Filed 10/16/2014 06:22:27 PM

RECEIVED, 10/16/2014 18:23:44, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1905

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, *et al.*,

Appellants,

L.T. Case No. 1D14-3953

vs.

KEN DETZNER, *et al.*,

Appellees.
_____/

ON DISCRETIONARY REVIEW OF AN ORDER OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA, CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL AS PASSING UPON A QUESTION OF GREAT PUBLIC IMPORTANCE

THE LEGISLATIVE PARTIES' BRIEF ON JURISDICTION

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INTRODUCTION

On October 1, 2014, the First DCA issued an opinion certifying for direct review by this Court a circuit court judgment approving the Legislature's remedial congressional plan (the "Opinion"). The court found that intermediate appellate proceedings "could potentially" prevent resolution of this case in time for the 2016 congressional elections. Because those elections are two years away, however, no "immediate resolution" by this Court is necessary.

STATEMENT OF THE CASE AND FACTS

After the Florida Legislature enacted new congressional districts for the state in 2012, two groups of plaintiffs (the "Romo Plaintiffs" and the "LOWV Plaintiffs") filed separate complaints challenging the new districts. The two cases were consolidated. Ultimately, Plaintiffs challenged ten districts. After a twelve-day trial, the circuit court found that two districts (5 and 10) violated Florida Constitutional requirements, but approved the remaining eight. The Legislature then convened in special session to enact a remedial plan, which was submitted to the circuit court on August 15. Plaintiffs asserted that the remedial plan cured none of the constitutional deficiencies the circuit court had identified. The court disagreed and approved the remedial plan.

The LOWV Plaintiffs filed a notice of appeal to the First DCA, stating that they would appeal both the August 22, 2014 order approving the remedial plan and

the original judgment (Notice of Appeal at 2).[1] The notice stated that they "will not be seeking in this appeal to alter the 2014 congressional elections" (*id*. at 2). The Romo Plaintiffs joined in the appeal. Plaintiffs later filed a suggestion for certification under Florida Rule of Appellate Procedure 9.125, stating that "while the primaries for the 2016 elections are just under two years away, immediate supreme court review is still crucial" (Suggestion for Certification at 5). On October 1, a panel of the First DCA certified the judgment for this Court's immediate review (Opinion at 1). Judge Makar dissented, stating that "this case does not 'require immediate resolution' by our supreme court" (*id*. at 7).

SUMMARY OF ARGUMENT

The First DCA's decision to certify the judgment for direct review by this Court is inconsistent with Article V, Section 3(b)(5) of the Florida Constitution and Rule 9.125 of the Florida Rules of Appellate Procedure, which permit pass-through jurisdiction only when a judgment presents an issue that "require[s] immediate resolution" by this Court. Here, the issues do not require "immediate resolution," as the 2016 congressional elections are two years away.

[1] Plaintiffs claim that the July 10, 2014 judgment is "not in fact a final judgment because it only ruled on the merits of their claim and did not address the remedy [ ] requested in their complaint" (Suggestion for Certification at 2 n.1). Alternatively, they claim that the July 10, 2014 judgment was rendered on August 1, 2014, when the circuit court denied the Legislative Parties' motion to amend the judgment (*id*.). Plaintiffs characterize the August 22, 2014 order as "either the only final judgment in this case or a final judgment entered after a prior final judgment" (*id*.).

ARGUMENT

I. PASS-THROUGH JURISDICTION IS APPROPRIATE ONLY WHEN A TRIAL COURT ORDER PRESENTS AN ISSUE REQUIRING IMMEDIATE RESOLUTION BY THIS COURT

Under Florida Rule of Appellate Procedure 9.030(a)(2)(B), this Court may accept jurisdiction over "orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the supreme court." *See also* Art. V, § 3(b)(5), Fla. Const. (conferring jurisdiction on the Supreme Court to review orders "certified to require immediate resolution by the supreme court").[2]

This Court has "admonish[ed] the district courts . . . to discharge their responsibility to initially address the questions presented in a given case. Article V, section 3(b)(5) is not to be used as a device for avoiding difficult issues by passing them through to this Court. The constitution confines this provision to those matters that 'require immediate resolution by the supreme court.'" *Carawan v. State*, 515 So. 2d 161, 162 (Fla. 1987), *superseded by statute on other grounds as stated in State v. Smith*, 547 So. 2d 613 (Fla. 1989).

Indeed, all district courts "consider countless questions of great public importance. A select few of those questions we certify to the supreme court *after* we have issued a reasoned decision. We pass through these questions only when

[2] The Legislative Parties agree that this appeal is "of great public importance." They dispute only that it "requires immediate resolution" by this Court.

they have a level of statewide urgency." *Shaw v. Shaw*, __ So. 3d __, 39 Fla. L. Weekly D1813 (Fla. 2d DCA Aug. 27, 2014) (Altenbernd, J., dissenting), *cited with approval*, *Shaw v. Shaw*, 39 Fla. L. Weekly S561 (Fla. Sept. 5, 2014) ("We decline at this time to accept jurisdiction of the appeal under article V, section 3(b)(5), for the reasons set forth in Judge Altenbernd's dissent.").

II. NO ISSUE ON APPEAL REQUIRES IMMEDIATE RESOLUTION BY THIS COURT

In certifying the judgment for immediate resolution by this Court, the First DCA acknowledged that "the remedy afforded by the final judgment will not go into effect until the election in 2016" (Opinion at 3-4). It also acknowledged that "the cases in which courts have employed the pass-through procedure all presented a need for resolution within a matter of weeks or months" (*id*. at 4). The court nevertheless found that "there *may not* be sufficient time for intermediate appellate review" and that "[t]o allow the appellate process to take its full course . . . *could potentially* put the supreme court in the position of having to delay the remedy yet again" (*id*. at 4-5) (emphasis added). The court thus based its certification on mere conjecture about the state of these proceedings *two years* from now.

This case is unlike any one of the many election-related cases this Court found required immediate resolution. In those cases, decisions were required

within days, weeks, or perhaps a few months.[3] The First DCA cites no case construing the immediacy requirement as broadly and expansively as it did here. Rather than permit courts to speculate about the status of proceedings two years hence, the Constitution has consistently been construed to require courts, absent an issue requiring immediate resolution, to allow the "normal appellate process to run its course." *Harris v. Coal. to Reduce Class Size*, 824 So. 2d 245, 246-47 (Fla. 1st

[3] *See Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694 (Fla. 2010) (certified September 16, 2010; decided October 7, 2010); *Fla. Dep't of State v. Fla. State Conference of NAACP Branches*, 43 So. 3d 662 (Fla. 2010) (certified July 14, 2014; decided August 31, 2014); *Roberts v. Doyle*, 43 So. 3d 654, 656 (Fla. 2010) (certified July 30, 2010; decided August 31, 2010); *Fla. Dep't of State v. Mangat*, 43 So. 3d 642 (Fla. 2010) (certified August 3, 2014; decided August 31, 2014); *Fla. Dep't of State v. Slough*, 992 So. 2d 142 (Fla. 2008) (certified August 19, 2008; decided September 15, 2008); *Am. Fed. of Labor & Congress of Indus. Orgs. v. Hood*, 885 So. 2d 373 (Fla. 2004) (certified October 1, 2004; decided October 18, 2004); *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004) (certified September 13, 2004; decided September 17, 2004); *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959 (Fla. 2002) (certified July 26, 2002; decided September 13, 2002); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000) (certified March 31, 2000; decided September 7, 2000); *Smith v. Am. Airlines, Inc*., 606 So. 2d 618 (Fla. 1992) (certified September 4, 1992; decided October 13, 1992); *State by Butterworth v. Republican Party of Fla*., 604 So. 2d 477 (Fla. 1992) (certified April 14, 1992; decided August 27, 1992); *Askew v. Firestone*, 421 So. 2d 151, 152 (Fla. 1982) (certified October 7, 1982; decided October 21, 1982).

Certification was also appropriate during the 2000 presidential election, when this Court, recognizing that questions of great moment required immediate decision, accepted jurisdiction of several certified appeals. *See Taylor v. Martin Cnty. Canvassing Bd.*, 773 So. 2d 517 (Fla. 2000); *Jacobs v. Seminole Cnty. Canvassing Bd.*, 773 So. 2d 519 (Fla. 2000); *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000); *Fladell v. Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000); *Palm Beach Cnty. Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

DCA 2002). The First DCA's certification here represents a significant departure from the immediacy requirement.

Indeed, the 2016 elections are 25 months away, and qualifying for them is about 18 months away, which is more than enough time for the First DCA *and* this Court to consider the appeal, and for any potential subsequent proceedings.[4] The First DCA suggests, however, that such time may be insufficient because "[t]he time needed in the trial court to consider the validity of the districts as they were originally drawn and then to review them again as they were redrawn in the special session has already caused a delay of two years in the implementation of the remedy" (Opinion at 4). But the First DCA overlooks the cause of the delay below. Plaintiffs sought continuances of trial to allow them time to pursue unprecedented discovery from legislators and legislative staff, which postponed trial from June 2013 to May 2014.[5] The Legislative Parties argued that the legislative privilege barred such discovery; Plaintiffs argued that the privilege did

[4] The Legislature has shown that it can quickly adopt remedial districts. When this Court invalidated eight state legislative districts on March 9, 2012, the Legislature enacted a remedial plan (which the Court later upheld) in 18 days. And on August 1, 2014, when the circuit court asked the Legislature to enact a remedial plan within 15 days, the Legislature passed a remedial plan ten days later, which the Governor signed into law two days after that.

[5] In their requests for continuances, Plaintiffs also cited the need for additional discovery from non-parties. The Legislative Parties took no position regarding the discovery disputes between Plaintiffs and those non-parties. Moreover, those disputes—which remain outstanding—did not prevent the circuit court from holding a trial and issuing a final judgment.

not exist in Florida. *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 143 (Fla. 2013). After this Court held in December 2013 that a qualified legislative privilege does exist, *id*. at 154, the pace quickened dramatically: the parties completed discovery of legislators and legislative staff by April 2014, the trial concluded on June 4, and the circuit court issued its judgment on July 10. The proceedings on the remedial map were even more expeditious, as the circuit court ruled on the plan's validity on August 22—just eleven days after the Legislature adopted it. Obviously, the appellate process will not be slowed by discovery disputes and will proceed according to the time periods established in the Florida Rules of Appellate Procedure. Thus, no basis exists for the First DCA's speculation that the time required for trial proceedings will translate to a lengthy appeal.

The First DCA also stated that "any doubts about the need for immediate review by the supreme court should be resolved in favor of certification" because "[t]his court has already certified a prior order in this case for review" (Opinion at 5). But the First DCA's 5-4 *en banc* opinion in *Non-Parties v. League of Women Voters of Florida*, __ So. 3d __, 39 Fla. L. Weekly D1300 (Fla. 1st DCA June 19, 2014), addressed a much different situation. There, the First DCA held that the three-judge panel should have certified an appeal challenging the use of allegedly privileged documents at an ongoing trial. The panel rendered its decision on May

22, 2014—the fourth day of a trial in progress—and barred any use of the disputed documents. Because it involved the use of documents at an ongoing trial, the issue in *Non-Parties* required immediate resolution. No such exigencies exist here.

The First DCA relied on the fact that *Non-Parties* remains pending before this Court, stating that "[i]t makes better sense to keep the appeals together and to certify the final judgment for direct review by the supreme court so that the entire case can be decided by that court" (Opinion at 5). But while it might be desirable to keep the two appeals together, the constitutional question is whether this appeal requires immediate resolution by this Court. The pendency of a related appeal in this Court in no way creates a need for immediate resolution of this appeal.

Moreover, while the two appeals may arise from the same case, they involve different issues. The issue in *Non-Parties* is the confidentiality of certain records and political consultants' First Amendment rights. The issue here is whether the Legislature's congressional redistricting plans comply with the Florida Constitution. While the First DCA found that pass-through certification "serves the interests of judicial economy and avoids the time and expense of piecemeal litigation" (Opinion at 5), as Judge Makar's dissent notes, "basing certification on administrative convenience or judicial economy is . . . beyond the operative language of section 3(b)(5)" (Opinion at 11). And the benefits of consolidation at this stage are dubious; *Non-Parties* has been fully briefed and argued. Moreover,

as Plaintiffs concede, "this Court's resolution of the pending discovery appeal 'has no apparent effect on the issues in this case.'" (br. at 3).

III. PLAINTIFFS' CRITICISMS OF JUDGE MAKAR'S DISSENTING OPINION ARE UNAVAILING

Plaintiffs' jurisdictional brief asserts that Judge Makar's opinion dissenting from certification is "persuasive on its face" but is "based on three faulty premises" (br. at 1). The Legislative Parties agree that Judge Makar's dissent is persuasive, but none of the alleged "mistakes" justifies pass-through certification.

First, Plaintiffs argue that the "main factual premise of the dissent is that '[t]his case involves only the question of the validity of the legislatively-redrawn districts that would apply in the 2016 election cycle'" rather than the original redistricting plan (br. at 2). But the constitutionality of the original redistricting plan—assuming it remains at issue—does not "require immediate resolution" by this Court any more than the constitutionality of the remedial districts does.[6] Plaintiffs' notice of appeal conceded that it was too late to change the original plan in time for next month's election. And Legislature's remedial plan will apply only to congressional elections held *after* the 2014 general election. § 8.088, Fla. Stat. (2014). Therefore, no need exists for immediate review of that plan.

[6] It is arguable that by failing to appeal the circuit court's judgment approving eight of the ten contested districts before the Legislature redrew the congressional map, Plaintiffs have waived any challenge to those districts.

Second, Plaintiffs claim that "the eve of the election process is actually only eighteen months away," noting that on April 2, 2016, the Department of State must publish notice of a general election (br. at 5). But this is the first time in this case that Plaintiffs have argued that a statutory deadline is sacrosanct. In the circuit court, Plaintiffs consistently argued the exact opposite, and even argued as late as August 20—more than four months after the same deadline—that there remained time to implement a remedy for the 2014 elections. In any event, as noted above, even 18 months is more than enough time for the "normal appellate process to run its course," *Harris*, 824 So. 2d at 246-47, and for any potential subsequent proceedings. Neither the First DCA nor Plaintiffs cite any precedent for certifying an appeal 18 months before a final resolution is required.

Third, while Plaintiffs concede that "this Court benefits from the opinions of lower courts," they argue that "the legislative privilege appeal demonstrates the price of that delay" (br. at 6). Plaintiffs note that "it took the First District over five months after briefing was complete to issue its decision" (*id*.). But even if the First DCA operated on a similar schedule here, an opinion issued in early 2015 would still leave ample time for subsequent proceedings.

CONCLUSION

For the reasons stated above, this Court should decline to accept jurisdiction.

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I certify that on October 16, 2014, a copy of this brief was served by e-mail to all counsel on the attached service list.

By: */s/ Raoul G. Cantero*
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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