IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC12-1

IN RE: JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT

RESPONSE OF ATTORNEY GENERAL PAM BONDI TO THE COALITION'S REPLY BRIEF

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RESPONSE TO REPLY BRIEF

The Reply Brief filed by the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida (together "the Coalition") urges this Court to abandon the well-established parameters that it has employed in article III, section 16(c), 30-day reviews for the last forty years and to replace them with a "much different" and "much expanded" inquiry. They further invite this Court, in the absence of typical evidentiary processes or a trial, to discern the veracity and relevance of a mountain of untested statistics and to choose between competing versions of the legislative history of SJR 1176. The Coalition's views should not be accepted for the reasons detailed in this brief rebuttal.

1. Article III, Section 21 Does Not Require a "Much Expanded" 30-day Review In This Court.

The Coalition claims that a "much different" and "much expanded" inquiry is called for in this 30-day review with the advent of article III, section 21, of the Florida Constitution. Reply at 2, 4. They proceed to invite this Court to embrace their untested statistical analysis in which they purport to show "incontrovertibly" such things as "overwhelming" biases, "unnecessarily" safe minority districts, and a better way to draw "practicable," "feasible," and "compact" plans. *Id.* at 6-11.

There are two basic problems with the Coalition's claims. First, they misstate the impact of article III, section 21, on the parameters of this Court's reviews under

section 16(c). To be sure, section 21 ushers in a new era of standards that legislative apportionment plans must meet.[1] But, whereas section 21 introduces substantial complexity into plan standards and increases the likelihood of challenges, the Coalition is wrong that it addresses and alters how this Court must conduct 30-day review proceedings. *Cf. Advisory Op. to Attorney General re Standards For Establishing Legislative District Boundaries*, 2 So. 3d 175, 183 (Fla. 2009) ("The proposed amendments do not alter the functions of the judiciary"). Section 21 does *nothing* to alter this Court's well-established practice of undertaking only an "extremely limited … facial" review of SJR 1176 within the 30-day period. *In re Constitutionality of House Joint Resolution 1987* ("*2002 Apportionment*"), 817 So. 2d 819, 824-25 (Fla. 2002).

No part of section 21 addresses or requires anything different than the "extremely limited, facial" review of plans that this Court has always conducted. Nor does this provision aid, adjust, or alleviate the severe time and structural

[1] For instance, article III, section 21(a) requires of legislative apportionment plans that districts: (1) may not be drawn with the intent to favor or disfavor a political party or incumbent; (2) may 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; (3) may not be drawn to diminish the ability of racial or language minorities to elect representatives of their choice; and (4) must be contiguous. Section 21(b) requires that districts (1) be as nearly equal in population as practicable; (2) be compact; and (3) where feasible, utilize existing political and geographical boundaries.

limitations imposed on this Court in 30-day reviews. Nothing has changed, for instance, since this Court recognized in 2002, that "[t]he juxtaposition of [highly complex] claims onto this Court's article III, section 16(c) review is *highly problematic*," *2002 Apportionment*, 817 So. 2d at 829 n.13 (emphasis added), or since four Justices concluded that section 16(c)'s drafters did not expect "this Court to engage in the acceptance and adversarial testing of evidence, fact finding, or any other significant factual examinations of reapportionment plans." *Id.* at 835-36 (Lewis, J. concurring). In sum, section 21 offered no change to this Court's section 16(c) role or limitations such that a "different, much expanded" review is now required.

The second problem with the Coalition's argument is that its self-serving, fact-based claims cannot be fully and fairly adjudicated within this limited 30-day proceeding. Though the Coalition's Reply counts the ways that it believes its factual presentation to be "incontrovertibly" superior, its statistics, methods, and conclusions are wholly untested.[2] To prove the claims that the Coalition makes vis-à-vis other plans will require fact-intensive scrutiny of multiple plans across numerous, interacting variables—an analysis that is certainly complex and not the breezy, single-track undertaking contemplated in the Reply. Furthermore, "[t]he

parameters of [this Court's] review simply do not allow [it] to competently test the depth and complexity of the factual assertions presented by the opponents." *Id.* at 836.

Similarly, this Court's resolution of the Coalition's claim that "the legislative history is replete with examples of self-dealing and incumbency protection" (Reply at 13), will plainly involve assertions, counter-assertions, and defenses that will take time and require careful weighing of the evidence by the fact-finder. Claims like these "are 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 on the evidence." *Id.* at 829. Directing claims like the Coalition's to other courts of competent jurisdiction will also satisfy this Court's concern that "the Legislature and other proponents of the redistricting plan *must be afforded* an opportunity to respond." *Id.* at 831 (emphasis added).

2. <u>The Coalition's Claim that Its Plan "Better" Complies with Constitutional Standards Is Irrelevant in this Review.</u>

Moreover, it makes no difference in this proceeding that the Coalition believes that "a visual examination of the plans conducted in tandem with the statistical analysis shows that the Coalition *was better able to comply* with the

[2] In fact, the Coalition's earlier-filed motion concedes that its alternative House plan contains errors.

constitutional criteria." Reply at 12 (emphasis added). As noted in this Court's Order just yesterday: "At this stage of the original proceeding currently before the Court, alternative plans are not to be used to determine whether the Legislature has adopted the 'best plan.'" Order at 2 (Pariente, J. dissenting); *see also In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 285 (Fla. 1992) ("In fact, there may be a better plan. However, [the Court's] job is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.").

The Coalition's Reply also demonstrates the severe complexity of resolving competing claims of "better" or "best" plans. The Coalition defensively acknowledges that the districts drawn in its own plan may "appear less compact than those in the Legislature's House plan." Reply at 12. However, it proceeds to blame the defects on having to account for other constitutional requirements and Florida's jagged municipal boundaries. *Id.* at 12-13. Whether the Coalition's map is a lawful one or not, or whether its excuse in this instance is legitimate or not, is immaterial. The larger point is that such arguments and plan comparisons cannot be easily resolved without a careful, fact-intensive, and multi-factored analysis that weighs the impact of various constitutional factors. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to

balance competing interests."). Such inquiries simply cannot be fully and fairly resolved within the current 30-day proceeding before this Court.

For this reason, the Court should refuse the Coalition's invitation to conduct statistical and visual comparisons of the various plans and altogether avoid the need to sort through the various rationales, excuses, and defenses for why plans appear to be "better" or "best." Instead, the validity of SJR 1176's plans should be judged simply on their face without regard to the lawfulness or merits of competing plans.

3. The Coalition Is Wrongly Dismissive of the Need for a Fair Review Process.

Finally, the Coalition was wrong to criticize the Legislature's position that fact-based challenges to the plans should be litigated in full and fair proceedings. Reply at 5 n.1 (claiming that the House and Senate need not be afforded the ability "to respond to [] 'fact-based' evidence"). This Court has always demanded fair processes when plans are challenged in apportionment proceedings. This commitment should not be abandoned now. In supporting fair processes in 2002, for instance, the Court stated that "the Legislature and other proponents of the redistricting plan *must be afforded* an opportunity to respond to any evidence of discriminatory effect." *2002 Apportionment*, 817 So. 2d at 831 (emphasis added). In 1972, the Court considered a fact-based challenge to plans and concluded that "[f]or a *proper* determination of these contentions, it *would be necessary* for testimony to

be taken and additional evidence presented." *See In re Apportionment Law SJR 1305*, 263 So. 2d 797, 808 (Fla. 1972) (emphasis added).

Likewise, now, this Court should not lower its standards. It should demand "a proper determination" of fact-intensive issues in an appropriate court and not short-circuit the Legislature's ability to defend against fact-based claims in some novel summary process before this Court.

CONCLUSION

For these reasons, this Court should not deviate from its well-established manner of reviewing apportionment plans under section 16(c), or adopt the Coalition's vision of a "much expanded" inquiry. A judgment of validity should encompass an "extremely limited, facial" review of SJR 1176, which should be presumed valid and upheld absent some obvious constitutional flaw. Fact-intensive challenges to SJR 1176, including any made pursuant to article III, section 21, of the Florida Constitution, should not be entertained or resolved within this review.

Respectfully submitted,

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