Supreme Court of Florida

IN RE: JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT

Case No. SC12-1

RESPONSE OF THE FLORIDA HOUSE OF REPRESENTATIVES TO REPLY BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA, THE NATIONAL COUNCIL OF LA RAZA, AND COMMON CAUSE

Miguel De Grandy (FBN 332331)
800 Douglas Road, Suite 850
Coral Gables, Florida 33134
(305) 444-7737
Facsimile (305) 443-2616
mad@degrandylaw.com

George T. Levesque (FBN 555541)
General Counsel
Florida House of Representatives
422 The Capitol
Tallahassee, Florida 32399-1300
(850) 410-0451
George.Levesque@myfloridahouse.gov

Charles T. Wells (FBN 086265)
George N. Meros, Jr. (FBN 263321)
Jason L. Unger (FBN 0991562)
Allen Winsor (FBN 016295)
Charles B. Upton II (FBN 0037241)
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
(850) 577-9090
Facsimile (850) 577-3311
Charles.Wells@gray-robinson.com
George.Meros@gray-robinson.com
Jason.Unger@gray-robinson.com
Allen.Winsor@gray-robinson.com
CB.Upton@gray-robinson.com

Attorneys for the Florida House of Representatives

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PRELIMINARY STATEMENT

The League of Women Voters of Florida, the National Council of La Raza, and Common Cause will be referred to together as "LOWV." The Florida Democratic Party will be referred to as "FDP." The Florida Chapter of the NAACP will be referred to as "NAACP." This brief cites to the Appendix to the Attorney General's Petition as "Pet. App. X at Y") with X representing the appendix tab and Y being the page number. All emphasis in this brief is added, except as otherwise specified. The Appendix to the LOWV's Brief is cited as "LOWV App. at X," with X being the page number.

ARGUMENT

As the briefing in this case reveals, the parties' disagreement is less about what the map should look like and more about who should draw it. Forty years ago, after explaining that "legislative reapportionment is primarily a matter for legislative consideration and determination," the Court cautioned that it must "act with judicial restraint so as not to usurp the primary responsibility for reapportionment." *1972 Opinion*, 263 So. 2d 797 (Fla. 1972). It is now clear, though, that a usurpation of legislative authority is the Objectors' true purpose.

To further their purpose, the Objectors advance an interpretation of Amendment Five that would invalidate any proposal, even the LOWV's own. That interpretation would completely deprive the Legislature of its legislative redistricting authority, without any notice to—much less consent of—the people of this State. The Court should reject this effort altogether.

I. THE COURT CANNOT FIND IMPROPER INTENT ON THE FACE OF THE MAP.

The Legislature opposed Amendment Five's ballot placement, concerned that, because any plan has a political result, opponents would challenge *any* plan and effectively remove the Legislature from redistricting, without notice to the voters. *Adv. Op. to the Att'y Gen. re: Stds. For Estab. Legis. Dist. Bounds.*, Case No. SC08-986 (Fla. 2008) (Br. of Legis. at 19) ("Because . . . legislative redistricting cannot be politically neutral or devoid of political intentions, any

plan . . . necessarily will be subject to challenge . . . .”). The Legislature feared—presciently—that opponents would assign improper political intent to *any* legislative plan. *Id.* But in upholding the ballot summary, Justice Lewis dismissed the Legislature’s concerns that “results” would be confused with “intent”: “The text clearly highlights that for a redistricting plan to run afoul of [Amendment Five], the conduct by the Legislature must be *intentional*.” *Adv. Op. to Att’y Gen. re Stds. For Estab. Legis. Dist. Bounds*., 2 So.3d 175, 186 (Fla. 2009) (plurality). The plurality then equated the political intent inquiry to existing gerrymandering claims: “Disproportionate effects alone will not establish a claim . . . . Proof of a discriminatory effect is not sufficient.” *Id.* (marks and citation omitted).

Notwithstanding this Court’s opinion, Objectors’ primary argument is this: (1) the House Map will favor Republicans; (2) the Legislature must know that; (3) the Legislature therefore intended it; (4) the House Map therefore must be invalid. The Court should reject this argument out of hand not just because of what it said in 2009, but because that argument would invalidate *every* potential map—including the LOWV Map and any map this Court might draw.

Every map will have a political effect, and the House Map is no exception. “It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena.” *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). If

the House Map is invalid because it has a political effect, than so too is any other map.

First, notwithstanding the LOWV's blind insistence that Florida voters are evenly split, the exact opposite is true. In fact, Republicans have won twelve of the last thirteen (92.3%) elections for statewide office by an average margin of nearly ten percent.[1] This is the result of voters' choices—not partisan line-drawing. Moreover, even if the voters statewide were narrowly divided—and electoral results show they are not—there would not be 120 evenly divided House districts. This results not from biased line drawing, but from "partisan asymmetry in voters' residential patterns." *See* Jowei Chen & Jonathan Rodden, *Tobler's Law, Urbanization, and Electoral Bias: Why Compact, Contiguous Districts are Bad for the Democrats* (2009), at 27.

> Florida[] partisans are arranged in geographic space in such a way that virtually any districting scheme favoring contiguity and compactness will generate substantial electoral bias in favor of the Republican Party. . . . Democrats have tended to live in dense, homogenous neighborhoods that aggregate into landslide Democratic districts,

[1] In 2010, Gov. Scott (R) won by 1.2%; AG Bondi (R) won by 13.4%, Comm'r Putnam (R) won by 17.8%, and CFO Atwater (R) won by 18.4%. In 2006, Gov. Crist (R) won by 7.1%, Comm'r Bronson (R) won by 6.0%, and AG McCollum won by 5.4%. In 2002, Gov. Bush (R) won by 12.8%, AG Crist (R) won by 6.8%, and Comm'r Bronson (R) won by 14.8%. In 2000, Treas. Gallagher (R) won by 18.0%, and Comm'r of Education Crist won by 9.3%. The Democrats' lone victory during this stretch was CFO Sink's victory in 2006 by 7.0%. *See* Department of State website, http://election.dos.state.fl.us/elections/resultsarchive/.

> while Republicans live in more sparsely populated neighborhoods that aggregate into geographically larger and more politically heterogeneous districts.

Id.

Because of this reality, even the LOWV Map—according to the LOWV's own analysis—would substantially favor Republicans. (*See* LOWV App. at F-2.)[2] **Indeed, while they complain that the House Map would elect 75 Republicans, their own analysis shows that the LOWV Map would elect 73.** (*Id.*) If the LOWV's logic is accepted, then the LOWV must have intended to favor Republicans to nearly the same extent they claim the House Map did.[3]

If the LOWV's position is correct, it is difficult to see how the House could comply with Amendment Five. The House certainly could not have adopted the LOWV Map, which, in addition to diminishing minority rights, *see infra*, favors Republicans nearly as much as the House Map (according to the LOWV). The House could not have adopted the FDP's Map, because it remains under wraps.

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[2] Using a four-race average, the LOWV concluded that the House Map would provide 35 "safe democratic" seats, 10 "lean democratic," 19 "lean republican," and 56 "safe republican." (LOWV App. at F-2.) The LOWV Map would provide 36, 11, 19, and 54, respectively. (*Id.*)

[3] LOWV's acknowledgement that its Map would substantially favor Republicans exposes the false argument that performance should follow statewide voter registration. The FDP argued that "if registration is evenly divided, the number of districts in which each party is a majority should be roughly evenly divided, absent improper gerrymandering." (FDP Br. at 13.) They offer no map, though, accomplishing that.

Indeed, the House could not have *any* plan at all, because "any seemingly apolitical districting process that requires legislative districts to be geographically compact and contiguous will produce a significant pro-Republican bias in the overall distribution of legislative seats." Chen & Rodden, *supra*, at 2.

Worse still, the paralysis the Objectors' theory would cause is not limited to drawing entire plans: Amendment Five prohibits plans "*or districts*" drawn with intent to favor political parties. Consider Broward County, whose registered Democrats outnumber registered Republicans more than two to one and whose voters favored CFO Sink over Governor Scott 64% to 33%. *See* http://www.browardsoe.org. If knowledge proves intent, which proves illegality, how could the House draw *any* Broward County district? Compliance with Amendment Five would be impossible, and the Legislature's sole option would be to watch this Court assume legislative authority and draw the map.

This is not the law. If the Amendment precluded the drawing of any lawful district—and removed the redistricting authority from the legislature—the voters would have been entitled to know that.

II. AMENDMENT FIVE DID NOT CHANGE THE DEFERENCE OWED THE LEGISLATURE OR THE FACIAL REVIEW.

Nothing in Amendment Five changed the deference due the Legislature. It did not eliminate the strong presumption of constitutionality, which can be overcome only with a finding of invalidity "beyond reasonable doubt." *Crist v.*

Fla. Ass'n of Criminal Defense Lawyers, 978 So. 2d 134, 139 (Fla. 2008). Similarly, Amendment Five did not change the fact that the Court's "job is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid." *1992 Opinion,* 597 So. 2d 276, 285 (Fla. 1992) . But ignoring this precedent, and citing no authority, the LOWV says that whether the House Map is constitutional and whether the House Map is the best map are now "inquiries [that] are in large part one and the same." (LOWV Rep. at 11.) If that were true—if the Court's job now is "to select the best plan," then the Legislature's constitutional role would disappear entirely. The LOWV's wishes aside, Amendment Five did not do this.

Last, no party contends that Amendment Five changed this Court's structure. *See Adv. Op. to the Atty' Gen.*, 2 So. 3d at 183 ("The proposed amendments do not alter the functions of the judiciary."). Therefore, the Court still has "not been afforded a structure to competently address claims that cannot be determined from the plan itself." *2002 Opinion,* 817 So. 2d 819, 836 (Fla. 2002)

III. THE COURT CANNOT INVALIDATE THE HOUSE MAP BASED ON STATISTICS OR VISUAL INSPECTION ALONE.

This Court cannot find the House Map invalid beyond reasonable doubt by a simple visual examination. (*See* House Br. at 34-35.) Even the LOWV acknowledges that their own Map's districts "may appear less compact than those in the Legislature's House Plan," a fact they falsely attribute to their adherence to

political and geographical boundaries. (LOWV Rep. at 12.) Their concession proves the point—there is a balance of factors that cannot be appreciated on a mere visual inspection. Regardless, as the LOWV acknowledges, their House districts are decidedly less visually compact than the House Map's. (*Id; see also* House Br. App.)

Next, statistics cannot be dispositive for the reasons articulated in the House's brief. But it is nonetheless noteworthy what the statistics reveal: The House Map splits fewer counties than the LOWV Map, is substantially superior in nearly every mathematical compactness score, and protects more majority-minority Black and Hispanic VAP districts. The LOWV disputes none of this.

Statistics, though, say little about intent. First, as explained above, by the LOWV's analysis, the House Map would elect only two more Republicans than the LOWV Map. But more importantly, to the extent results are probative of intent, they are only one factor. *See Village of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 266 (1977) (listing practical "impact" as one of numerous factors in determining intent). As this Court said, "[p]roof of a discriminatory effect is not sufficient." *Adv. Op. to Att'y Gen.*, 2 So. 3d at 186.[4] Simply stated, any statistical

[4] Finally, the LOWV seeks to introduce more than just statistics. They (and the FDP) submitted affidavits offering far more than undisputed numbers.

disparity in partisan performance does nothing to indicate improper intent, without further fact-intensive inquiry and analysis to provide context for the result.

IV. THE LOWV HAS IDENTIFIED NO MATERIAL DEFECT IN THE HOUSE PLAN.

Even if this Court could cast aside separation-of-powers principles and ignore its own admonition to uphold legislative acts unless invalidity is established "beyond reasonable doubt," *Crist,* 978 So. 2d at 139, there is no credible basis on which to invalidate the House Map.

A. The Incumbency-Protection Attacks Are Baseless.

After the LOWV broadly accused the House Map of favoring incumbents (LOWV Br. at 44), the Court instructed them to identify the incumbents purportedly favored. The LOWV submitted the names of two House members; they now contend that only one was favored and only one was disfavored.

First, they contend that the House Map unlawfully intended to protect Representative Weatherford because 98.48% of the district's new constituents were his old constituents. (LOWV Rep. at 8.) But they ignore the fact that his district was the second-most overpopulated of all 120 districts after the 2012 census—with 154.7% of the ideal population, thus requiring removal of more than one third of the current constituents. *See* http://bit.ly/k2baGP. And, incredibly, under the LOWV Map (which presumably was *not* designed to unlawfully protect

Republican incumbents) Representative Weatherford would have 98.05% continuity—nearly the same amount. (LOWV App. G-13.)

The only other House incumbent the LOWV identified in its supplemental filing was Representative Thurston. According to the LOWV, the Legislature *intended* to disadvantage Rep. Thurston by drawing him out of his existing minority district. (LOWV Br. at 45-46.)[5] But, again, the LOWV Map does the same thing. Based on the address the LOWV submitted for him, the LOWV Map places his residence in District 103, which has a Black VAP of 16.97%. Under the House Map, his residence is in District 99, which has a Black VAP of 12.91%.

Obviously, not all incumbents could remain in the districts most like their current districts—if they had, the LOWV would have attacked that result. According to the LOWV, if the House Map keeps incumbents in their districts, it illegally favors, and if the House Map does not, it illegally disfavors. If this were valid, then the Legislature could never draw any map—precisely the Objectors' wish.[6] The impossibility of satisfying the Objectors is highlighted by these facts:

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[5] As "evidence" of the purported animus against Rep. Thurston, the LOWV cites exclusively newspaper articles. (LOWV Br. at 46.) This Court cannot find beyond reasonable doubt that the entire Legislature acted illegally based on what a newspaper reported. *See, e.g.*, § 90.802, Fla. Stat. (2011).

[6] The FDP complains that "[t]he House Plan also treats Republican incumbents differently than Democrats." (FDP Br. at 22.) Having submitted the names of zero House Republicans to support their argument, *see supra*, they have abandoned this argument. Nonetheless, it bears noting that their experts' statement on this point

- The LOWV accuses the House Map of intentionally ***favoring*** Representative Pafford (LOWV App. at K-15), and

- The FDP accuses the House Map of intentionally ***disfavoring*** Representative Pafford. (FDP Resp. to Order of Feb. 21, 2012).

The House could not have done both. It did neither.

B. Unlike the LOWV Map, The House Map Does Not Diminish Voting Strength of African Americans and Hispanics.

First, the LOWV's allegation that the Legislature "did not undertake" a retrogression analysis (LOWV Rep. at 9) is patently false. The House thoroughly analyzed its map to ensure compliance with the VRA and Amendment Five. Contrary to the LOWV's contention that the House "focused solely on keeping minority voting age percentages the same as in the benchmark districts," (LOWV Rep. at 8), the House Map *actually reduces* Black VAP (but maintains majorities) in a number of Benchmark Districts, which allowed for an additional majority-Black VAP district. (House Br. at 17.) It did so only after a thorough analysis, including review of voter registration and performance data, to ensure that the majority-minority districts would continue to perform for minorities.[7] And, unlike

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demonstrated that Democrat pairings were in densely populated urban areas. Districts 47, 69, 96, and 107—all cited by the FDP expert—are in Orange, Pinellas, Broward, Miami-Dade and Palm Beach Counties.

[7] Indeed, as a result of this analysis, the House Map was amended to address Hispanic performance issues and to preserve a performing Hispanic district in Miami-Dade County. For example, on January 9, 2012, the House Redistricting Subcommittee adopted amendments to House Map districts 112, 113 and 114 to preserve the ability to elect of both districts 113 and 114. The changes were of

the LOWV, the House ensured that no majority-minority district would be eliminated. (*Id*. at 18-19.)

1. The House Map, Unlike the LOWV Map, Does Not Diminish the Voting Rights of African Americans.

Displeased with the fact that the House Map maintains majority-minority districts, the LOWV now suggests that the House Plan creates districts "where the minority population is so high as to be unnecessarily safe and thereby ensure that the minority influence will be siphoned off from other districts." (LOWV Rep. at 8, quoting *1992 Opinion*). The 1992 Opinion they quote, though, evaluates a claim that more majority-minority districts could have been created—a necessary component of any "packing" claim. (*See* House Br. at 15-16.) By offering substantially fewer majority-Black and majority-Hispanic districts in its Map, the LOWV cannot make any such showing. (*Id.*)

The House Map, like the map proposed by the NAACP, establishes twelve majority-Black VAP districts—one more than the Benchmark. (*Id*. at 17.) The LOWV Map, on the other hand, *reduces* Black-majority districts, establishing only ten. *Id.* Although they claim this helps African Americans by allowing their "influence" elsewhere, the NAACP flatly rejects that concept. In a comment filed just yesterday, the NAACP wrote that "majority-minority districts that allow

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particular importance for district 113, which had originally been drawn with a Hispanic voter registration less than fifty percent. (*See* http://bit.ly/xSYWNL).

minority voters to elect their candidates of choice may [not] be traded for a larger number of 'influence' districts. This scenario is precisely what the 2006 VRA Amendments were intended to address." NAACP Cmt. at 8. This is squarely consistent with the House Map's maintenance of all existing majority-Black VAP districts. Plainly, the NAACP does not want to see "performing minority 'ability to elect' districts . . . dismantled in order to create more Democratic, or any party, districts, even if labeled as minority 'influence' districts." *Id.* at 10.

Moreover, the LOWV's baseless allegation of "packing" is betrayed by the numbers. In the House Map's thirteen highest Black-VAP districts (the twelve majority-minority seats and District 70, a Section 5 district with 45.09% Black VAP), the average Black VAP is 52.79%. The LOWV Map's thirteen highest Black-VAP districts have an average Black VAP of 53.84%. (*See* Appendix 1.) This results from the LOWV's decision to include three 60%+ Black VAP districts, compared to the House Map's one. Yet the LOWV accuses the House of "packing." (*See* House Br. at 16-18.)[8]

2. <u>The House Map, Unlike the LOWV Map, Does Not Diminish the Voting Rights of Hispanics.</u>

The LOWV's accusations regarding "packing" are particularly disingenuous considering their treatment of Hispanics. The LOWV Map includes three 90%+

Hispanic VAP districts. All three (113, 117 and 119), along with District 118 (87.93%), are adjacent to two districts with less than 56% Hispanic VAP (107 and 120), both of which have a voter registration Hispanic population less than fifty percent. *See* Proposal SPUBH0177, Data Report. By "packing" Hispanics into fewer districts, the LOWV Map eliminates the opportunity for other Hispanic communities to elect candidates of choice. As a result, the LOWV Map establishes fewer majority-Hispanic VAP districts than the House Map, and fewer districts that historically perform for Hispanics in Miami-Dade County. *See id*.

Regardless of the fact that African Americans and South Florida Hispanics might have allegiances to different political parties, the House Map treats them consistently. The House Map protects each existing majority-minority district and does not "pack" minorities to avoid creating additional majority-minority districts. The LOWV Map, on the other hand, dilutes African American votes and "packs" Hispanic votes. This is unlawful.

C. The House Map Is More Compact Than the LOWV's.

The LOWV concedes the House Map is more compact than the LOWV Map. They wrongly blame this on the utilization of existing boundaries and say they "took the constitution at its word." (LOWV Rep. at 13.) The constitution's

[8] Appendix 2 to this brief shows the districts the NAACP proposed next to districts the House Map adopted. As the Appendix shows, the House Map and the NAACP agree on much about how African-American districts should be drawn.

words also, though, say that "districts shall be compact," which the House Map honored. Even with more compact districts, the House Map split fewer counties than the LOWV Map and essentially the same number of municipalities—the House Map kept whole 336 municipalities; the LOWV map keeps whole 341.[9]

D. The LOWV's Objections to the Legislative Process Are Unfounded.

The LOWV contends that the legislative process demonstrates the House Plan's invalidity. This is wrong, of course, because this Court must consider only the final legislative product—not the process. *See Fla. Senate v. Fla. Public Employees Council 79*, 784 So. 2d 404, 408 (Fla. 2001). The final product is SJR 1176, which the entire Legislature adopted. Whether each chamber drew its own map is particularly meaningless. By avoiding a time-consuming conference committee and political negotiation, the Legislature passed the apportionment in record time—precisely what the LOWV and others requested. This is just another example of the Legislature's facing a challenge for its decisions either way.

Next, the LOWV contends that improper intent to favor is proven because the House Map's districts overlap with existing districts. According to the LOWV's analysis, the House Map districts' average continuity with the 2002

[9] Attempting to skew the numbers, the LOWV considers municipalities and "CDPs" together. (LOWV App. at D-3.) Even if Amendment Five protected CDPs as "political or geographical" boundaries, that the LOWV Map divided fewer CDPs is constitutionally meaningless.

districts is 59.2%. (LOWV App. G-15.) The LOWV Map, by the same analysis, has an average continuity of 55.0%—a negligible difference. (*Id.*) Besides, as with numerous other issues, numbers alone do not tell the story. Some incumbents, for example, would favor having 60% of their old constituents than 100% of them. It all depends on which constituents remain.

CONCLUSION

For the reasons in the House's initial brief and this brief, the House Map is valid. Should the court find some aspect of SJR 1176 invalid, its severability clause dictates the rest of the bill should be upheld.

[Signature on following page.]

Respectfully submitted,

/s/ Allen Winsor

Miguel De Grandy (FBN 332331)
800 Douglas Road, Suite 850
Coral Gables, Florida 33134
(305) 444-7737
Facsimile (305) 443-2616
mad@degrandylaw.com

George T. Levesque (FBN 555541)
General Counsel
Florida House of Representatives
422 The Capitol
Tallahassee, Florida 32399-1300
(850) 410-0451
George.Levesque@myfloridahouse.gov

Charles T. Wells (FBN 086265)
George N. Meros, Jr. (FBN 263321)
Jason L. Unger (FBN 0991562)
Allen Winsor (FBN 016295)
Charles B. Upton II (FBN 0037241)
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
(850) 577-9090
Facsimile (850) 577-3311
Charles.Wells@gray-robinson.com
George.Meros@gray-robinson.com
Jason.Unger@gray-robinson.com
Allen.Winsor@gray-robinson.com
CB.Upton@gray-robinson.com

Attorneys for the Florida House of Representatives

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by U.S. Mail and electronic mail on February 23, 2012, to all parties listed on the Court's service list on its Internet website as of this morning. Those persons and the addresses to which the foregoing was furnished are listed on the attached Service List.

/s/ Allen Winsor
Allen Winsor

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this Response is Times New Roman 14 point and in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

/s/ Allen Winsor
Allen Winsor

SERVICE LIST

Timothy D. Osterhaus
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681; Fax (850) 410-2672
Timothy.osterhaus@myfloridalegal.com

Andy Bardos
Special Counsel to the President
The Florida Senate
404 South Monroe Street, Suite 409
Tallahassee, Florida 32399
(850) 487-5229
Bardos.andy@flsenate.gov

Michael A. Carvin
Jones Day
51 Louisiana Avenue N.W.
Washington, D.C. 20001
(202) 879-7643
macarvin@jonesday.com

Ronald G. Meyer
Meyer, Brooks, Demma and Blohm, PA
131 North Gadsden Street
Post Office Box 1547
Tallahassee, Florida 32302
(850) 878-5212; Fax (850) 565-6750
rmeyer@meyerbrookslaw.com

Paul M. Smith
Michael B. DeSanctis
Jessica Ring Amunson
Kristen M. Rogers
Jenner & Block, LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000; Fax (202) 639-6066
psmith@jenner.com
mdesanctis@jenner.com
jamunson@jenner.com
krogers@jenner.com

J. Gerald Hebert
191 Somervelle Street, #415
Alexandria, Virginia 22304
(703) 628-4673
hebert@voterlaw.com

Joseph W. Hatchett
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
(850) 224-9634; Fax (850) 222-0103
Joseph.hatchett@akerman.com

John M. Devaney
Mark Erik Elias
Perkins Coie, LLP
700 Thirteenth Street, NW, Suite 700
Washington, DC 20005
(202) 654-6200; Fax (202) 654-6211
JDevaney@perkinscoie.com
MElias@perkinscoie.com

Abha Khanna
Kevin J. Hamilton
Perkins Coie, LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 359-8000; Fax (206) 359-9000
AKhanna@perkinscoie.com
KHamilton@perkinscoie.com

Jon L. Mills
Boies, Schiller & Flexner, LLP
100 Southeast Second Street
Suite 2800
Miami, Florida 33131
(305) 539-8400; Fax (305) 539-1307
jmills@bsfllp.com

Karen C. Dyer
Elan M. Nehleber
Boies, Schiller & Flexner, LLP
121 South Orange Avenue
Suite 840
Orlando, Florida 32801
(407) 425-7118; Fax (407) 425-7047
kdyer@bsfllp.com
enehleber@bsfllp.com

David A. Theriaque
S. Brent Spain
Christopher Busch
Theriaque & Spain
433 North Magnolia Drive
Tallahassee, Florida 32308
(850) 224-7332; Fax (850) 224-7662
dat@theriaquelaw.com
sbs@theraquelaw.com
cfb@theriaquelaw.com

Timothy James McCausland
228 South Massachusetts Avenue
Lakeland, Florida 33801
(863) 834-6010; Fax (863) 834-8204
Timothy.mccausland@lakelandgov.net

Ronald A. Labasky
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
(850) 222-7718; Fax (850) 222-8222
rlabasky@bplawfirm.net

Peter M. Dunbar
Cynthia S. Tunnicliff
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32301
(850) 222-3533
pete@penningtonlaw.com
cynthia@penningtonlaw.com