IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

IN RE: JOINT RESOLUTION OF LEGISLATIVE APPORTIONMENT	)	CASE NO. SC12-460

REPLY BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA, THE NATIONAL COUNCIL OF LA RAZA, AND COMMON CAUSE FLORIDA IN OPPOSITION TO THE LEGISLATURE'S JOINT RESOLUTION OF LEGISLATIVE APPORTIONMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Senate's reply brief wholly fails to offer a valid defense of the Legislature's second attempt to draw a constitutional Senate district map. The Legislature did fix some of the deficiencies that the Coalition and this Court specifically identified. But in making these changes, the Senate created new problems and left old problems unfixed. The bottom line is that the Legislature did not fully implement this Court's decision, choosing instead to risk invalidation of its plan by this Court rather than risk the internal political costs of drawing its plan without an intent to favor incumbents and the controlling party.

ARGUMENT

I. The Court's Scope Of Review As Established in Article III, Section 16 Is To Determine The Validity Of The Apportionment.

The Senate begins by contending that the Court is precluded from reviewing anything other than "whether the Legislature complied with the Court's specific mandate" in its March 9th opinion. Senate Br. 17. This argument is based on a misreading of both the Constitution and this Court's prior decision.

Under Article III, Section 16, when an extraordinary apportionment session is called due to the invalidity of a prior apportionment plan, this Court is not charged simply with determining whether the Legislature has adopted a plan "conforming to the judgment of the supreme court." Fla. Const., art. III, § 16(d). Rather, the Court is specifically charged with considering "the validity of a joint

resolution of apportionment" just as it would one "adopted at a regular or special apportionment session," *id.* § 16(e) – *i.e.*, "determining the validity of the apportionment," *id.* § 16(c). Indeed, the Court would have this constitutional responsibility even if *no* challengers came forward to oppose the Legislature's new plan. Thus, the Senate's argument that the Court should not consider the plan's overall validity and is instead "limited" in its scope of review, *see* Senate Br. 17, is refuted by the plain text of the Constitution.

Moreover, even if the Constitution did not require an independent review of the whole plan, the Senate's *res judicata* argument still would be wrong.[1] First, the challengers are opposing a new map, not the same map, and therefore this is not the "same cause of action." Senate Br. 18 (citation omitted).[2] Even districts unchanged from the first map may have different legal consequences in a new one. Second, the opponents in the prior proceeding did not just challenge specific districts. They argued that the entire map was illegal. Third, this Court's decision reached the same conclusion. It held the "Senate Plan is invalid," for a variety of reasons, including the Senate's failure to undertake a proper functional analysis of retrogression, failure to properly define compactness and utilization of existing

[1] Indeed, the Senate's counsel specifically instructed the Senate Committee on Reapportionment that the doctrine of *res judicata* was likely inapplicable here. *See* Att'y Gen. Supp. App. at G125-27.

[2] The *McNeil* and *Snyder* cases cited by the Senate, Senate Br. 19, involved successive challenges to the *same* district maps.

boundaries, and design of a plan that was "rife with objective indicators of improper intent." *In re Senate Joint Resolution of Legislative Apportionment 1176*, No. SC12-1, --- So. 3d ----, 2012 WL 753122, at *76 (Fla. Mar. 9, 2012) (hereinafter "Op."). It follows that the Legislature was obligated to apply the Court's authoritative interpretations throughout the state to produce a new and constitutional map. That obligation is enforceable here for all the reasons stated above.[3]

II. The Legislature's New Senate Plan Contains Many Of The Same Objective Indicators Of Improper Intent.

The Legislature's revised Senate plan again demonstrates blatant favoritism for incumbents and the majority party. The Senate responds that it did pair two non-term-limited Republicans and that residential patterns explain the absence of more pairings as well as the map's partisan bias. Neither argument works.

To begin with, anyone who has drawn a redistricting plan knows there are infinite ways to do it. Therefore, the Senate's claim that it did not intentionally choose to produce a map favoring incumbents and one party is baseless. Moreover, the Senate does not dispute that – given Senator Simmons' announcement that he will run for reelection in the conveniently open District 10 –

[3] This case is thus completely distinguishable from the ballot summary case relied on by the Senate. Senate Br. 18-19. There, the Court interpreted its prior decision as having considered and upheld any part of the proposed ballot amendment that it had not specifically rejected. Here, the Court did not uphold anything, and even if it had, the Constitution would still require plenary review of the entire new map.

no incumbents are truly paired with one another and every non-term-limited Senate incumbent will have his or her own district for the 2012 elections. To be clear, the Coalition in no way contends that the Court "require[d] the Senate to pair a certain number of incumbents." Senate Br. 23. But the Court did require the Senate to apply the standards set forth in Article III, Section 20. And as counsel for the House told this Court, the "inevitable result [] when you apply these standards, [is that] people will be paired whether one likes it or not." G. Meros, Oral Argument at 32:00, Case No. SC12-1 (Fla. Feb. 29, 2012). The fact that the inevitable did not happen here is strong evidence of incumbent favoritism.

The Senate likewise brushes off the striking discrepancy in continuous population statistics between term-limited and non-term-limited incumbents. It cannot be an accident that term-limited incumbents retain, on average, just 54% of their districts, while non-term-limited incumbents retain 63%. This is objective evidence of incumbent favoritism.

The Senate also dismisses the Coalition's claims regarding the severe partisan skew of the plan. *See* Senate Br. 28-30. But it agrees that "a plan in which the legislative majority shifts in conjunction with shifts in voter preferences is the ideal for a 'fair' plan." *Id.* at 30 n.7. As is demonstrated in the Coalition's appendix at H-4, the Senate's plan utterly fails on this metric. The data show that if Democrats got 50.6% of the vote statewide, they would capture only 37.5% of

the Senate seats (or 15 seats). Democrats would have to capture 54.6% of the statewide vote before they could capture a majority of the Senate seats (21 seats). That is a sure sign of a gerrymander. And it has nothing to do with whether or not Democrats and Republicans are actually evenly divided. *See* Senate Br. 30. The Coalition agrees that if Republicans capture more votes, they should capture more seats. But if Democrats capture more votes or if voters divide evenly, Republicans should not be virtually guaranteed a majority of the seats.

III. The Legislature's Violations Of Tier 2 Criteria In Individual Districts Are Not Justified.

The Coalition has submitted to this Court an alternative plan based on the Legislature's first plan that "achieves all of Florida's constitutional criteria without subordinating one standard to another." Op. at *43. The Coalition's alternative plan thereby "demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan." *Id.* Although the Senate barely mentions the new alternative plan until page 84 of its brief, a comparison of the Legislature's plan with the Coalition's alternative plan demonstrates the invalidity of several districts in the Legislature's plan.

A. Districts 6 And 8 Are Unconstitutional.

The Senate urges this Court to defer to its legislative "discretion" to place the dividing line between Districts 6 and 8 down the middle of Daytona Beach,

splitting the African-American community there. Senate Br. 45. The Court should neither defer, nor accept pretextual excuses for constitutional violations.

The Senate claims it went into Volusia County to keep Clay County whole. *See id.* 45. But that does not explain why it sliced Volusia County in such a way as to split the heavily Democratic city of Daytona Beach in half. The Senate makes no mention of Senator Chris Smith's explanation of the deleterious effects this would have on Daytona's minority community, nor does it mention that the Senate rejected an amendment that would have kept the city whole after specifically discussing what the amendment would do to the partisan breakdown of Districts 6 and 8. *See* Att'y Gen. Supp. App. at G763-66.

The Senate turns the Article III, sec. 21 inquiry on its head, stating that the "fact that Districts 6, 7, and 8 do not guarantee victory for Democrats does not violate the Constitution's minority protections." Senate Br. 47. That much is true. But the fact that Districts 6 and 8 were drawn in a clear attempt to guarantee defeat for Democrats *does* violate the Constitution's anti-favoritism protections. In Districts 6 and 8, the Legislature blatantly violated the Tier 2 requirements in order to accomplish a partisan result. The Senate admits that District 8 has a Reock score that is non-compact. Senate Br. 49. And the intent to favor the Chair of the House's Senate Redistricting Committee, Dorothy Hukill, is not "easily refuted"

when the objective facts show the contorted boundaries of Senate District 8 mirroring the boundaries of Representative Hukill's House district.

In contrast, the Coalition's map does exactly what this Court suggested: it uses counties as building blocks. *See* Op. at *48-49. This is why the Coalition's map overall keeps more counties whole than the Legislature's. Senate Br. 92. Thus, the Coalition's District 6 is comprised wholly of three counties: Clay, St. John's, and Flagler Counties, while District 8 remains wholly within Volusia County. The Senate's claim that the Coalition map "divides three counties in the region – Clay, Marion, and Volusia – while the Senate plan only splits two," Senate Br. 50, employs a highly selective definition of "region" that excludes Lake County (which the Coalition keeps whole and the Senate splits). And the Coalition's District 6 plainly is not less visually compact than the Senate's. *See id.* Both are made up of three counties.

In short, the Legislature had no reason – other than partisan gain – for splitting the heavily Democratic city of Daytona Beach right down the middle. The Senate admits that a proper configuration of Volusia County keeping Daytona Beach whole would tend to favor Democrats. Senate Br. 48. So it is no surprise that the Legislature chose to split the city as it did.

B. Districts 10 And 13 Are Unconstitutional.

The Legislature once again went to great lengths to ensure that two of the most powerful Senators have their own districts. The Senate tries to justify the appendage in District 13 by arguing that it cannot be eliminated without diluting the adjoining minority districts. But "this bizarre shape cannot be justified based on concerns pertaining to ensuring minority voting strength." Op. at *67. As alternative maps demonstrate, there are other ways to include Winter Park and Maitland (the homes of Senators Gardiner and Simmons respectively) in a non-minority district—but not if you are trying to accommodate two Senate leaders. *See* App. K-11.[4] Alternative proposals (including the Coalition's) place both Senators' present homes in District 10, creating a true pairing. But they also include most of Senator Simmons' old district and his homes in Sanford and Longwood, making it genuinely difficult for him to run in another district.[5]

Contrary to the Senate's claim that it has now paired two incumbents in the appendage, it did so knowing that it had drawn District 10 to the north as an open district in which Senator Simmons already owned property and would have the benefit of 64.6% of his former constituents. There is no true incumbent pairing in District 13. Rather, Senator Gardiner will keep District 13 to himself by

[4] *See also* Proposed Plan S016S9018, *available at* http://www.flsenate.gov/Session/Redistricting/Plans.

[5] *See* http://www.scpafl.org/RunQuery.aspx?Which=OWNER&What=Simmons, last visited April 15, 2012.

maintaining the "bizarrely-shaped appendage" where he lives and attaching it to a district that goes all the way to the eastern coastline.

C. Districts 17, 19, And 22 Are Unconstitutional.

The Senate urges this Court not to look at the Tampa Bay region for fear of what this Court will see – that the Senate did not take seriously this Court's instructions to adopt a plan conforming to the Constitution, including the requirements of compactness and respect for political and geographical boundaries. The Tampa Bay region demonstrates exactly the type of "expansive interpretations" and "inconsistent use" of the standards of compactness and respect for political and geographical boundaries that led this Court to declare the first Senate plan invalid. Op. at *76.

The Senate plan for Tampa Bay has two chief flaws: *first*, the Senate packed a largely Hispanic and Democratic population into the northwest corner of District 19 to keep District 17 safe for Republican incumbent Jim Norman; and *second*, the Senate drew District 22, a non-minority Pinellas district, to cross Tampa Bay.

The Senate's purported excuse is a 1992 letter from the Department of Justice objecting to preclearance of a Senate plan in which a Senate district "failed to cross Tampa Bay to create a minority district." Senate Br. 68. But that letter reflects a now-superseded version of Section 5 of the Voting Rights Act. *See* Op. at *26; *see also Perry v. Perez*, 132 S. Ct. 934, 944 (2012). And in any event, the

Coalition does not object to the fact that District 19 crosses Tampa Bay to St. Petersburg to place minority voters in that Hillsborough-centered Section 5 district. The Coalition's objection is that a second district—District 22—crosses the bay for no reason at all other than partisan and incumbent favoritism.

D. District 18 Is Unconstitutional.

The Senate offers no real response to the contention that it chose to incorporate the whole of a House incumbent's district rather than choosing to keep Sumter County whole. That it paired that incumbent with a "businessman who has received the endorsement" of the Senate President does not disprove incumbent favoritism. Representative Legg will continue to be the only incumbent running in the district, which is plainly less compact and less compliant with the Court's interpretation of Article III, Section 21 than the Coalition's alternative District 18.

E. Districts 21 And 26 Are Unconstitutional.

The Senate changed Districts 21 and 26, which had not been specifically invalidated in the earlier proceeding, through a last-minute amendment from Senator Latvala. As other Senators recognized at the time, the amendment separated two candidates for the Senate – a House incumbent, Representative Grimsely, and a prominent former incumbent Representative Galvano. *See* Coalition Br. 30-31. Senator Thrasher worried that the amendment "puts the entire plan at jeopardy . . . ." Att'y Gen. Supp. App. at G813. And Senator Latvala's

only response was to deny that this was favoritism since both beneficiaries were Republicans. *See* Coalition Br. 30-31.

Now the Senate says that it had to move the Sebring area (and with it Representative Grimsley's home) into District 21 in order to move Plant City into a district based in Hillsborough County. There were many ways to accomplish this population shift that would not include moving Sebring to District 21. Indeed, the Senate did not simply move the southernmost border of District 21 southward to pick up the necessary population as it suggests, Senate Br. 74; rather, it moved much of the border north and only pushed the border south where it would encompass Sebring and Representative Grimsley's home.[6]

The Senate's story about the "passionate" plea from the Mayor of Plant City is plainly a pretext. Senate Br. 72-73. Apparently the Senate feels free to ignore passionate pleas from members of the Bethune-Cookman College community to keep Daytona Beach together, but is duty-bound to listen to the Mayor of Plant City when he wants to be in Hillsborough County. It was precisely this lack of consistency that the Court found so troubling in the Legislature's last plan. The "fixes" to Districts 21 and 26 are exactly the type of insider baseball and self-serving power play that the voters enacted Article III, sec. 21 to prevent.

[6] The Senate also offers a half-hearted argument that sitting House members who vote on apportionment plans are not incumbents (they most certainly are).

F. District 32 Is Unconstitutional.

Contrary to the Senate's contention, the Court has not previously considered a challenge by the Coalition to District 32. This Court denied a challenge by the FDP to the district in the prior invalid map most similar to District 32 because the Court did not have evidence before it that the prior district "could have been drawn to split fewer counties and cities while adhering to the remaining constitutional requirements." Op. at *72. The Coalition plan now before this court provides the necessary evidence. When the above standard is applied to District 32 in light of the Coalition's proposed alternative, the validity of District 32 is not even a close call. The Senate offers no justification at all for the district, which (like its earlier treatment of the panhandle) splits four counties, does not consistently follow political and geographic boundaries, and retains an extremely high percentage of its incumbent's former population (72.2%). The Senate does not rebut the fact that the Coalition's district is almost twice as compact as the Legislature's and keeps Martin County whole. The Coalition alternative demonstrates that it was not necessary for the Senate to depart from Tier 2 in the way that it did.

G. District 39 Is Unconstitutional.

The Senate cannot dispute that District 39 is "visually non-compact and clearly encompasses an incumbent in an appendage." Op. at *67 (holding district constitutionally defective for these reasons). And contrary to the Senate's claims,

this Court has not previously assessed whether District 39, or its predecessor District 40, deviates from the mandate of compactness greater than the extent necessary to comply with Tier 1 or federal law. As the Coalition's District 39 demonstrates, the Legislature could have drawn it both to be more compact and to ensure that African-Americans in counties covered by Section 5 maintain an ability to elect a candidate of choice. Coalition Br. 39. In fact, the Coalition's District 39 and Legislature's District 39 contain nearly identical African-American VAP. *See* Coalition App. at D-2, D-4; Att'y Gen. App. at B121; Senate App. at 9.

The Senate argues that District 39's bizarre shape is justified by a need to protect the rights of Hispanic voters in District 37. Senate Br. 82-83. However, as the Coalition's map demonstrates, District 39 may be drawn more compactly while maintaining 75.2% Hispanic VAP in District 37. Senate App. at 9. Though the Senate claims that a 75% Hispanic district could be subject to a challenge under Section 2 of the Voting Rights Act, Senate Br. 83, this purported concern is unfounded. A successful Section 2 claim "requires a showing that a minority group was denied a majority-minority district that . . . could have potentially existed." Op. at 24. But the Senate map and the Coalition's map each contain three districts in which Hispanics are an overwhelming majority of the population.

Likewise Section 2, Section 5, and their Section 21 analogues require a showing that the minority population is "politically cohesive." Op. at *23, *64,

*65, *70 n.55; *see also Texas v. United States*, --- F. Supp. 2d ----, 2011 WL 6440006, at *14–*15 (D.D.C. Dec. 22, 2011). With more than 75% of the voting age population and an estimated 64% of the citizen voting age population, Coalition App. at D-4, Hispanics in the Coalition's District 37 clearly have the ability to elect the candidate of their choice if they vote cohesively. The Senate's real problem with the Coalition's District 37 is that Hispanic *Republicans* might not be able to elect a Republican of their choice. But Article III, sec. 21 protects racial and language minorities, not political parties. As the Senate elsewhere recognizes, a minority group's ability to elect "'candidates of their choice' does not mean simply 'Democrats.'" Senate Br. 47. Nor does it mean simply Republicans.

IV. The Coalition's Alternative Plan Demonstrates That The Legislature's Plan Is Invalid.

Primarily relying on out-of-state cases, the Senate claims that the Coalition's alternative plan is not relevant to the question of whether the Legislature's plan meets constitutional standards. Senate Br. 84-86. This is incorrect. Clearly, this Court may not invalidate the Legislature's plan simply because it prefers another plan. But when an alternative plan is more compact and better utilizes existing political and geographic boundaries while still adhering to the requirements of Tier 1 and federal law, it demonstrates that the Legislature's plan violates Tier 2 criteria and it provides powerful evidence of an improper intent to favor incumbents and a political party. *See* Op. at *65; *see also id.* at *14, *43, *63. As the chart the

Senate provides at page 92 of its brief demonstrates, the Coalition's alternative plan is more compact and better utilizes political and geographic boundaries.

Similarly misplaced is the Senate's broadside on the supposed intent of the Coalition's plan. The gravamen of the Senate's complaints about the Coalition plan is that – unlike the Senate – the Coalition did not draw the maps to favor Republicans and incumbents. Senate Br. 86-92. Suffice it to say that the Coalition's intent – if it were relevant, which it is not – was to adhere to the requirements of Florida law as interpreted by this Court. By rigorously complying with those requirements, the Coalition produced a map that "maximize[s] electoral possibilities by leveling the playing field for the increased protection of the rights of Florida's citizens to vote and elect candidates of their choice." Op. at *8.

CONCLUSION

The Legislature's first Senate plan was "rife with objective indicators of improper intent." *Id.* at *76. Rather than reevaluate its redistricting practices with the benefit of this Court's thorough and thoughtful opinion, the Legislature doubled down on partisan favoritism and incumbent protection. This Court should declare the Legislature's new plan invalid, and, per Article III, § 16(f), adopt a constitutional plan using the Coalition's plan as guide.

Respectfully submitted this 16th day of April, 2012.

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I certify that this submission complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210. This brief was typed using Times New Roman, 14 point font.

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