IN THE SUPREME COURT OF FLORIDA

Case No. SC12-1

IN RE: JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT

REPLY BRIEF OF THE FLORIDA SENATE

MICHAEL A. CARVIN
JONES DAY
51 Louisiana Avenue N.W.
Washington, D.C. 20001
Telephone: (202) 879-7643
Pro Hac Vice

ANDY BARDOS (FBN 822671)
Special Counsel to the President
THE FLORIDA SENATE
404 South Monroe Street, Suite 409
Tallahassee, Florida 32399
Telephone: (850) 487-5229

PETER M. DUNBAR (FBN 146594)
CYNTHIA S. TUNNICLIFF (FBN134939)
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street,
Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: (850) 222-3533

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As the Senate already has explained (*see* Sen. Br. at 4–11), this Court correctly held ten years ago that its review in a section 16(c) proceeding is "extremely limited," and does not encompass "fact-intensive" allegations of race-based or political discrimination in violation of the federal or Florida constitutions. *In re House Joint Resolution 1987*, 817 So. 2d 819, 824–29 (Fla. 2002). The League of Women Voters, the National Council of La Raza, and Common Cause Florida (the "LWV") now ask the Court to engage in such a fact-bound analysis, but provide no cognizable basis to overrule the Court's precedent.

The LWV's sole argument is that adoption of Amendment 5 somehow magically enables the Court to engage in fact-intensive review in this context. (LWV Reply at 1–3). First, this argument is directly at odds with this Court's holding that Amendment 5 does not "substantially alter the functions of the multiple branches of government" and the "judiciary maintains the *same role* as it has always possessed" in reviewing redistricting plans. *Advisory Op. Re: Legislative Boundaries*, 2 So. 3d at 175, 187 (Fla. 2009).

Moreover, the argument makes no sense. If the Court could not credibly review the discrete question of whether a plan violated the Florida Constitution's prohibition against racial discrimination, it surely cannot credibly review the five

additional substantive questions added by Amendment 5 in this time-limited appellate context. *See* LWV Reply at 3–4.

The LWV's justification for this result appears to be that, in 2002, the Court declined to review race-based discrimination claims and political gerrymandering claims arising under federal law, but Amendment 5 now makes it "the Court's constitutional duty to resolve" its political favoritism claim. LWV Reply at 4. This theory is demonstrably false: the Court's definition of the scope of review did not turn on whether the claims were based on federal law or the state constitution, but rather whether they were "fact-intensive." *In re House Joint Resolution 1987*, 817 So. 2d at 829. The Court therefore *declined* to review a *state* constitutional claim of race-based discrimination. *See id.* That action did not violate the Court's "constitutional duty" to remedy race-based discrimination (LWV Reply at 4). Instead, that decision reflected the Court's correct recognition that a hasty resolution of such a claim might *harm* protected voters, and thus is "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." *In re House Joint Resolution 1987*, 817 So. 2d at 829.

In any event, we note that the LWV mischaracterizes this Court's task in reviewing the Senate Plan. First, the LWV ignores that its proposed plan is completely irrelevant to the Senate's intent because it was not submitted until three

weeks after enactment the Senate Plan. LWV Br. at 12. Second, the LWV brushes over the fact that this Court's "job is not to select the best plan, but rather to decide whether the one adopted by the Legislature is valid." *In re Senate Joint Resolution 2G*, 597 So. 2d 276, 285 (Fla. 1972). Thus, even if they were based on accurate data, the barely susceptible "differences" "shown" by LWV's "analysis" cannot require invalidation of the Senate Plan. LWV Reply at 6.

Moreover, the LWV's assertion that its proposed plan is superior to the Senate Plan is false. The LWV plan would make many voters, especially protected minority voters, *worse* off than they are under the Senate Plan. At a minimum, LWV's own one-sided evidentiary presentation exposes a host of disputed factual issues, which cannot possibly be accurately resolved in this context.

THE LWV'S VARIOUS ALLEGATIONS RAISE DISPUTED FACT-INTENSIVE ISSUES

Political Favoritism. The LWV's reply brief reveals three flawed premises underlying its political favoritism theory. *First*, the LWV boldly asserts that the Court can presume that the Legislature acted with an intent to favor the Republican Party because, in its view, Amendment 5 "requires only proof of intent," and such proof is supplied "as long as redistricting is done by a Legislature." *See* LWV Reply at 7 n.2. Of course, the Coalition's presumption that the Legislature acted unconstitutionally contravenes the bedrock rule that a "joint resolution of

apportionment . . . is presumptively valid" and constitutional. *In re House Joint Resolution 1987*, 817 So. 2d at 824.

Second, even though the LWV contends that Amendment 5 "does not require proof of actual discriminatory effect," it points *solely* to the purported effects of the Legislature's plans to supports its allegation of discriminatory intent. *Id.* at 7 n.2. This is facially inadequate for a number of reasons.

First, the LWV grossly misstates the law when it suggests that governing precedent "permit[s] inferences of legislative intent" to discriminate "from the effects of legislation." LWV Br. at 20 n.9 (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979)). In fact, in the very case that the Coalition cites, the United States Supreme Court *rejected* that proposition and clarified that "[d]iscriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences" but "that the decisionmaker . . . selected or reaffirmed a particular course of action in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

Moreover, on its own logic, the LWV must identify what effects constitute political favoritism in order to infer an improper intent to bring about such favoritism. LWV Reply at 6–7. The LWV, however, offers nothing more than the discredited notion of proportional representation. *See id.* It claims that Democrats are 50% of the electorate so any plan providing them congnizably less than 50% of

the seats is "biased" or reflects favortism. *Id.* But, as all nine justices of the United States Supreme Court have agreed, a failure to provide such proportional representation does not establish an intent or effect of disfavoring a political party. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality op.); *see id*. at 338 (Stevens, J. dissenting); *id.* at 352 n.7 (Souter, J. and Ginsburg, J., dissenting); *id.* at 357–58 (Breyer, J. dissenting); *see also* Sen. Br. at 33–34. And this Court has affirmed that even a *racially* discriminatory purpose "cannot be proved by merely showing that the group . . . has not elected representatives in proportion to its numbers," *Advisory Op.*, 2 So. 3d at 186—so, *a fortori*, a failure to achieve proportional representation cannot establish *political* favoritism.

Third, the LWV's own statistics expose a host of disputed factual issues and further undercut its faulty syllogism. First, the LWV's assertion that "Floridians . . . typically split their vote between the Republican and Democratic parties" in 50-50 shares rests exclusively on data from "the 2006 and 2010 gubernatorial elections and the 2004 and 2008 presidential elections." LWV Reply at 6–7. But those elections are hardly the best indicators of legislative voting patterns: a far more comprehensive review reveals that from 2000 to the present, the Republican Party has won 12 of 13 elections for statewide office with an average margin of victory of nearly 11%. *See* Fla. Div. of Elections (http://election.dos.state.fl.us/). In fact, it is quite typical for a party with even a slight numerical advantage of

voters to capture a "winner's bonus" of an even great numerical advantage of seats. *See Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.); *Vieth*, 541 U.S. at 357 (Breyer, J., dissenting).

Moreover, the LWV infers "overwhelming partisan bias" because, instead of a 50-50 split, the Senate Plan "has 26 Republican seats to 14 Democratic seats." LWV Reply at 7. The LWV, however, fails to mention that its own plan has 23 Republican seats and 17 Democratic seats, and offers no explanation as to how this imbalance comports with its theory that strict parity is required. LWV App. F. The LWV also ignores the Florida Democratic Party's conclusion that the Senate Plan has 23 Republican seats and 17 Democratic seats (Dem. Br. at 15), precisely the split that the LWV presumably believes is constitutional in its own plan.

Further, the LWV attempts to infer "overwhelming incumbent bias" because "[n]o non-term-limited Senate incumbent is paired against any other non-term-limited incumbent." LWV Reply at 7. Yet the LWV and the Democratic Party elsewhere argue that pairing incumbents is indicative of partisan favoritism. LWV Br. at 46; Dem. Br. at 21–22. The LWV cannot have it both ways.

Minority Voting Rights. The LWV's most dangerous and politically motivated argument is that the Legislature (or this Court) should engage in a deliberate effort to dismantle functioning minority districts and replace them with districts with cognizably lower minority voting age population (VAP), without a

shred of evidence either that the lower numbers will not "diminish" minority voters "ability to elect" or any evidence (or even credible allegation) that these gratuitous reductions will enhance *minority* (as opposed to Democratic) opportunities elsewhere. Most notably, the LWV does not seriously contend that the Senate Plan violates Amendment 5's minority voting rights protections. It does not hint that the Plan violates Amendment 5's analog to Section 5 by "diminishing" minority voters "ability to elect" and does not seriously maintain that it violates Amendment 5's Section 2 analog by diluting minority voting strength through the failure to create an additional minority district (which is hardly surprising since the Plan actually has more majority-minority or performing districts than the LWV alternative). Thus, the LWV has not even articulated a legally sufficient theory of retrogression or vote dilution. *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994) (Section 2 and vote dilution "*requires* the possibility of creating *more* than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice" (emphasis added).)

Rather, LWV's illogical theory is that the Legislature was too careful and punctilious about perserving minority voter's ability to elect since the Legislature used existing VAP as an "important starting point and did not radically redraw the existing minority communities comprising those performing districts. But nothing in logic or law requires dismantling performing minority districts unless (in some

circumstances) reducing "excess" VAP will enable the line-drawers to redeploy the minority population to improve minority voting strength in adjacent districts. No case anywhere has ever found "packing" unless the excess can be redeployed in this manner. *See, e.g.*, *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1317-1319 (S.D. Fla. 2002) (concluding that districts with 70.4% and 60.4% BVAP "could perform for black candidates of choice with far fewer blacks in the district" but rejecting packing claim where moving excess black voters to adjacent districts "would not enhance the influence of those voters or of black voters generally").

The LWV believes it can cover up these basic threshold flaws by simply alleging that the Legislature "packed" minority voting districts to somehow facilitate a Republican gerrymander. At the outset, this baseless *ad hominem* attack is completely refuted by the fact that the minority districts virtually mirror the recommendations of the NAACP and LatinoJustice PRLDEF, and was supported by three of the six black Democractic senators. *See* SEN. Br. at 15-16. Presumably, none of these groups or individuals has any reason to harm minority voters, in an effort to enhance Republican electoral prospects.

Moreover, none of their "statistical evidence" remotely supports their claims. *First*, the LWV nowhere identifes the minority VAP level that is *enough* to consistently elect minority-preferred candidates, and therefore what is "too much" or "packed." Without such a standard, the LWV cannot possibly show that

the Senate Plan "packed" minority voters in excess of that level. *See* Sen. Br. at 30–31.

The LWV's improperly appended expert report merely breaks down stqatewide election results, almost all of which involved two white candidates, into the districts and finds that the white Democratic (or Republican,) candidate received a majority of votes in the proposed LWV districts. *See* Coal. App. M. Thus, the putative expert report at best demonstrates that certain districts are reliable Democratic districts, but does not even begin to address whether minority voters could elect a minority candidate. *See id.* No court anywhere has ever relied on this kind of analysis to determine what VAP is needed to provide minority voters with an equal opportunity to elect. Rather, they use a *regression* analysis to determine minority and white *bloc voting* patterns in elections involving *minority* candidates to determine whether a new minority district will functionally perform. *See Gingles*; *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1320–21 (S.D. Fla. 2002). Minority voters do not have an equal opportunity unless they can elect either a *minority* or white candidate, and LWV simply does not analyze whether minority candidates can be elected. And a federal three-judge court in Florida doing this proper analysis directly found that, if "blacks do not comprise a *majority or near majority* of actual voters, it is likely that the black candidate of choice . . . will not often prevail." *Martinez*, 234 F. Supp.2d at 1275 (emphasis added). This

compeltely refutes LWV's allegation that 47.6% is "packed" or that 42% is enough (*See LWV* Br. at 42-43) and, as noted, LWV did not provide the Legislature or even this Court with any contrary analysis.

Third, on the LWV's own logic, the LWV plan packs Hispanic voters and does so to favor the Democratic Party. The LWV plan creates four districts in South Florida with Hispanic voting age populations (HVAP) of at least 63.6% in South Florida. *See* LWV App. H at 5. As LWV's expert notes, "[i]n Florida, electoral analysis demonstrates that Latinos in South Florida are generally Republican." Coal. App. M-4. Indeed, the LWV plan splits Republican-leaning Hispanic communities in South Florida, and submerges many of these voters into a proposed Democratic majority-black District 34, where they would have no ability to elect the candidate of their choice. *See* LWV App. A-1, A-7.

Fourth, the LWV's plan also retrogresses minority voting strength in contravention of Section 5 of the Voting Rights Act. The Legislature was required to extend new District 40 into the City of Miami in order to preserve the voting strength of black voters residing in Collier and Monroe Counties, which are jurisdictions covered by Section 5. *See* Sen. Br. at 25–26. But the LWV's plan transfers some of the Collier and Monroe County *black* voters out of a black-majority district and into Hispanic-majority Republican districts, in contravention of Section 5. LWV App. A-1, A-7.

Other Factors. 1. The LWV boldly asserts that, because Amendment 5 requires that populations be as nearly equal as "practicable," the one-person, one-vote mandate of Amendment 5 is *stricter* than that of the Equal Protection Clause. (Reply at 9.) This emphasis on the word "practicable"—as though it were a new entry in the redistricting lexicon—is misleading because Amendment 5 simply incorporates the exact wording that courts have used for decades to describe the Equal Protection standard. *Compare* Art. III, § 21(b), Fla. Const. ("[D]istricts shall be as nearly equal in population as is practicable . . . ."), *with Brown v. Thomson*, 462 U.S. 835, 842 (1983), ("[Districts must be] as nearly of equal population as is practicable."); *see also In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 826. This textual resemblance makes clear that Amendment 5 codifies the one-person, one-vote standard of the Equal Protection Clause. *See, e.g.*, *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 263-64 (Fla. 2005).

The LWV's contention that it has achieved a lower population deviation is not true. The overall deviation of the LWV Plan is 9,615 people, or 2.05%, while the overall deviation of the Senate Plan is 9,342 people, or 1.99%. LWV App. A-1 Page A-1. The population deviation in the Senate Plan is not only less than in the LWV Plan, but also less than in virtually any redistricting plan in the country. (And no court anywhere has struck down a plan based on *average* population

deviation, much less a *0.39%* "difference" in average deviation. *See* LWV Reply at 9.)

2. LWV asserts that its plan divides fewer political boundaries, thereby somehow affording a basis to find the Senate plan does not comply with this requirement. *First*, LWV simply ignores that the obligation is to "utilize political *and geographical* boundaries," and it is the Legislature's choice to determine which gets priority and when. Consequently, an analysis of *political* boundaries is necessarily incomplete, since it says nothing about geographical boundaries.[1]

Second, Amendment 5 is *not* a prohibition upon dividing political subdivisions—it is a requirement to *utilize*, or "make use of," such boundaries. The number of cities and counties divided by districts is not dispositive of whether districts *utilize* political (or geographical) boundaries. It is, at best, a rough proxy for compliance.

Third, under a proper interpretation of this standard, the Senate Plan outperforms the LWV's plan. The average district in the Senate Plan utilizes political or geographical boundaries along 82.7% of its perimeter. The average

[1] An illustrative example is the Panhandle districts. While the LWV complains that the Senate Plan "split five counties" in Districts 1 and 3 (Reply at 11), those districts in fact utilize political and geographical boundaries along more than 98% of their perimeters. By contrast, the Panhandle districts in the LWV Plan (Districts 2 and 4) follow political and geographical boundaries along only 94 and 97% of their perimeters. The districts in the LWV Plan deviate from political or geographical boundaries in Okaloosa County, while the districts in the Senate Plan utilize the Yellow River and Interstate 10 in Okaloosa County.

district in the LWV Plan utilizes political or geographical boundaries along 81.4% of its perimeter. In other words, districts in the Senate Plan utilize political and geographical boundaries *to a greater extent* than districts in the LWV Plan.

Fourth, counting "Census-designated places" as "political boundaries" is wholly meritless and no State suggests that preserving such "places" is a traditional or important redistricting principle.

Fifth, even assuming splitting political subdivisions were dispositive, the difference between the Senate Plan and the LWV Plan—375 divisions in the Senate Plan and 362 divisions in the LWV Plan—is virtually non-existent. At most, this slight difference shows that the LWV and the Senate made different reconciliations of competing priorities. To make these compromises is within the Legislature's province.[2]

3. On compactness, the LWV simply ignores the non-numerical factors (described in the Senate's initial brief) that "provide an electorate with effective representation." *Opinion to the Governor*, 221 A.2d 799, 802 (R.I. 1966). And the LWV does not begin to demonstrate that any deviations from compactness in the Senate Plan were either unnecessary to comply with federal law or Tier One of Amendment 5, or unreasonable reconciliations of competing standards.

[2] *See* Art. III, 21(c), Fla. Const.; *Mayor of Cambridge v. Sec'y of the Commonwealth*, 765 N.E.2d 749, 756 (Mass. 2002); *In re 1983 Legislative Apportionment*, 469 A.2d 819, 828 (Me. 1983).

Moreover, the LWV hides the ball from the Court with its selective use of compactness measures. After it explains that the "two standard measures of compactness" are the Reock test and the Polsby-Popper test (LWV Br. at 28-29 & nn.14-15), it *twice* tells the Court that the LWV Plan achieves a better Reock score than the Senate Plan (*Id*. at 43; Reply at 11). It does *not* tell the Court that the Senate Plan achieves a *better* Polsby-Popper score than the LWV Plan.

Further, again, the "differences" between the LWV Plan and the Senate Plan are not cognizable. The LWV cites no support for the conclusion that a difference in Reock scores of *five hundredths* is at all significant, or that the Senate Plan's Reock score—0.35—is not well within the bounds of compactness. Again, this Court "is not a referee in a contest involving apportionment plans." *In re Interrogatories by Gen. Assembly by House Resolution No. 1020*, 497 P.2d 1024, 1025 (Colo. 1972), but a Court determining whether the Legislature's presumptively constitutional acts have violated Amendment 5. So the existence of a "superior" plan, even one with minor differences, affords no basis for invalidation.

4. With respect to preserving the cores of existing districts, this traditional districting principle was not, contrary to LWV's suggestion, outlawed by Amendment 5. *Brown v. Sec'y of State of Fla.*, No. 11-14554, 2012 WL 264610, at *8 (11th Cir. Jan. 31, 2012). And there is nothing to its hyperbolic

assertion that the degree of preservation reflects some effort to perpetuate a gerrymander. The fact that the Senate preserves *only* 64.2% of its prior population represents real change. (Br. at 37-39) In the Senate Plan, 25 districts lost more than 30% of their former populations, while 18 lost more than 40% of their former populations. (Br. of LWV, Tab G) The average retention rate for Democrats actually exceeds the average retention rate for Republicans, 65.3 to 63.6%. (*Id*.) Democrats represent seven of the 15 districts with the highest retention rates. (*Id*.) Nothing in Amendment 5 requires drastic decennial changes in districts merely to create the appearance of neutrality.[3]

[3] The LWV also falsely asserts that the Senate Plan renumbers districts "to ensure that all non-term-limited Senators but one had the opportunity for a ten-year term." LWV Reply at 14. District numbering is irrelevant under Amendment 5, which addresses only district *drawing*. Art. III, § 21(a), Fla. Const. And the Plan renumbered districts to provide Senators with 2 years or less on their terms the opportunity to compete for 4-year terms after redistricting not to "help" incumbents. (App. 995–96.)

Respectfully submitted,

MICHAEL A. CARVIN
JONES DAY
51 Louisiana Avenue N.W.
Washington, D.C. 20001
Telephone: (202) 879-7643
E-Mail: macarvin@jonesday.com
Pro Hac Vice

ANDY BARDOS (FBN 822671)
Special Counsel to the President
THE FLORIDA SENATE
404 South Monroe Street, Suite 409
Tallahassee, Florida 32399
Telephone: (850) 487-5229
E-Mail: bardos.andy@flsenate.gov

PETER M. DUNBAR (FBN 146594)
CYNTHIA S. TUNNICLIFF (FBN134939)
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street,
Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: (850) 222-3533

Attorneys for the Florida Senate

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Notice was furnished by United States Mail to the following parties on February 23, 2012. Service was made to all parties appearing on the most recently revised service list at the time of service.

Timothy D. Osterhaus
Deputy Solicitor General
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
Attorneys for the Attorney General

Charles T. Wells
George N. Meros, Jr.
Jason L. Unger
Allen Winsor
Charles B. Upton II
GrayRobinson, P.A
Post Office Box 11189
Tallahassee, Florida 32302
Attorneys for the Florida House of Representatives

Miguel De Grandy
800 South Douglas Road, Suite 850
Coral Gables, Florida 33134
Attorneys for the Florida House of Representatives

George T. Levesque
General Counsel
Florida House of Representatives
422 The Capitol
Tallahassee, Florida 32399-1300
Attorneys for the Florida House of Representatives

Joseph W. Hatchett
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Attorneys for the Florida Democratic Party

John Devaney
Mark Elias
Perkins Coie LLP
700 13th Street, N.W., Suite 600
Washington, D.C. 20005-3960
Attorneys for the Florida Democratic Party

Kevin J. Hamilton
Abha Khanna
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101
Attorneys for the Florida Democratic Party

Jon S. Mills
Bois, Schiller & Flexner LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131
Attorneys for the Florida Democratic Party

Karen C. Dyer
Elan M. Nehleber
Bois, Schiller & Flexner LLP
121 South Orange Avenue, Suite 840
Orlando, Florida 32801
Attorneys for the Florida Democratic *Party*

Ronald G. Meyer
Meyer, Brooks, Demma & Blohm, P.A.
Post Office Box 1547
Tallahassee, Florida 32302
Attorneys for League of Women Voters of Florida, Inc.; *National Council of La Raza*; *and Common Cause Florida*

Paul M. Smith
Michael B. DeSanctis
Kristen M. Rogers
Jessica Ring Amunson
Jenner & Block, LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
Attorneys for League of Women Voters of Florida, Inc.; *National Council of La Raza*; *and Common Cause Florida*

J. Gerald Hebert
J. Gerald Hebert, P.C.
191 Somervelle Street, Unit 415
Alexandria, Virginia 22304
Attorneys for League of Women Voters of Florida, Inc.; *National Council of La Raza*; *and Common Cause Florida*

David A. Theriaque
Steven B. Spain
Christopher Busch
Theriaque & Spain
433 North Magnolia Drive
Tallahassee, Florida 32308
Attorneys for the City of Lakeland

Timothy J. McCausland
City of Lakeland
228 South Massachusetts Avenue
Lakeland, Florida 33801
Attorneys for the City of Lakeland

Ronald A. Labasky
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
Attorneys for the Florida State
Association of Supervisors of Elections

ANDY BARDOS (FBN 822671)

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is 14-point Times New Roman and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

ANDY BARDOS (FBN 822671)