IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

IN RE: JOINT RESOLUTION OF LEGISLATIVE APPORTIONMENT	)	CASE NO. SC12-1

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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Pursuant to this Court's order of February 21, 2012, the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida (together, "the Coalition") submit this reply to the February 17, 2012 briefs of the Attorney General, the Florida House of Representatives, and the Florida Senate. The Coalition herein addresses the differing positions of the parties regarding the scope of this Court's review under Article III, Section 16.

In their briefs, the Attorney General, the Florida Senate, and the Florida House act as though nothing has changed since this Court's last review of the Legislature's Joint Resolution of Legislative Apportionment in 2002. They therefore urge the Court merely to rubber-stamp the Legislature's plans and the Legislature's flawed interpretation of Article III, Section 21. But as has been true for more than two centuries, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It is the responsibility of this Court – not the Legislature – to authoritatively interpret and enforce Article III, Section 21. The Court may not simply accept the Legislature's view that its plans are valid under a constitutional provision that has never been judicially interpreted and was designed to impose meaningful limits on the Legislature's exercise of redistricting authority.

The Attorney General and the Legislature repeatedly quote this Court's past apportionment reviews in an attempt to convince the Court that it has no real role to play in interpreting or enforcing Article III, Section 21. *See, e.g.*, Att'y Gen. Br. at 6, 11-13; Florida House Br. at 7-8; Florida Senate Br. at 2-6. But the Court's past apportionment reviews were conducted under vastly different circumstances. In the Court's 2002 review (as well as in prior reviews), the Court was faced with only two questions: "(1) whether the plan satisfies the equal protection standard of one-person, one-vote; and (2) whether the plan satisfies the State constitutional requirement that the districts contain contiguous, overlapping, or identical territory." *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1178 (Fla. 2003); *see also In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002). Moreover, in those reviews, "the requirements under the Florida Constitution [we]re not more stringent than the requirements under the United States Constitution." 817 So. 2d at 824.

Now, of course, the Court is faced with a much different inquiry. Indeed, this Court has already acknowledged that Article III, Section 21 would "change the standard of review to be applied when either the attorney general seeks a 'declaratory judgment' with regard to the validity of a legislative apportionment, or a redistricting plan is challenged." *Advisory Opinion to Attorney General re Standards For Establishing Legislative District Boundaries*, 2 So. 3d 175, 183

(Fla. 2009). That standard of review is now far more stringent because the requirements under the Florida Constitution are now far more stringent than those under the United States Constitution. Perhaps most dramatically, while intentional partisan and incumbent favoritism is permissible under the United States Constitution, it is no longer permissible under the Florida Constitution. Applying a new standard of review, Article III, Section 16 mandates that this Court enter a declaratory judgment determining:

- Whether the Senate and House plans were drawn with intent to favor or disfavor a political party or any incumbent;
- Whether the plans were drawn with the intent or result of interfering with the equal opportunity of racial or language minorities to participate in the political process or to diminish the ability to elect representatives of choice;
- Whether the districts are contiguous, and to the extent possible without interfering with federal law or the previously stated criteria;
- Whether the districts are compact;
- Whether the districts are as equal in population as practicable; and
- Whether the districts utilize existing geographical and political boundaries wherever feasible.

Contrary to the Florida Senate's view that the Court "should decline to resolve these or any other claims in this proceeding," Florida Senate Br. 3, it is the Court's

constitutional duty to resolve these claims so that it can determine the validity of the Legislature's plans under the Florida Constitution.

In interpreting the new standards, the Court must pay close attention to the language of Article III, Section 21. Though the Legislature's briefs paint with a broad brush in asserting the validity of its apportionment plans, the language of Article III, Section 21 demands that this Court look at many issues on a district-by-district basis, and others on a statewide basis. Critically, not even a single district may be drawn with the intent to favor a political party or an incumbent. Art. III, sec. 21(a). Thus, if the Court finds that even a single district was drawn with such intent, the entire plan must be found invalid under Article III, Section 21.

Though the Court's inquiry is much expanded, the method of its analysis remains the same. As in the past when it reviewed plans for only one-person-one-vote and contiguity purposes, the Court should look to the plans themselves, to the legislative history, and to the statistics about those plans. *See, e.g., In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 825-26 (analyzing statistics regarding population deviations for the plans); *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 278-79 (Fla. 1992) (same); *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1044-45 (Fla. 1982) (same); *In re Apportionment Law Senate Joint Resolution No. 1305*, 263 So. 2d 797, 802 (Fla. 1972) (same).

Moreover, the Court can look to how the statistics about the Legislature's plans compare to those of alternative plans. Indeed, in 1992 when this Court analyzed the plan's compliance with the Voting Rights Act, the Court's analysis "include[d] a consideration of all of the statistical data filed herein, including the breakdown of white, black, and Hispanic voting-age populations and voting registrations in the legislative districts contained in the Joint Resolution *and in other proposed plans*." *In re Senate Joint Resolution 2G*, 597 So. 2d at 282 (emphasis added).

The Attorney General and the Legislature repeatedly warn this Court against resolving "fact-based" claims.[1] But it is no more "fact-based" to look at partisan performance statistics, compactness statistics, political and geographical boundary statistics, and district continuity statistics than it is to look at population deviation and demographic statistics (as this Court has consistently done). Contrary to the Florida House's view that "'there are three kinds of lies: lies, damned lies, and

[1] The House and Senate complain in their briefing that an inability to respond to supposedly "fact-based" evidence of invalidity would violate their due process rights. *See* Florida House Br. at 8; Florida Senate Br. at 6. But this claim is legally erroneous – since legislators have no property interest in the districts they have enacted and thus cannot claim any due process interest in challenging the review process set up by the Florida Constitution. It is also pretextual, since when the Coalition asked for leave for all parties to file reply briefs – thus giving the Legislature the opportunity to respond to charges of invalidity – these same legislators opposed the request. It does not appear that these parties really want the opportunity to respond to evidence of invalidity. Instead, they simply want to keep the Court from considering it.

statistics,'" Florida House Br. at 38 n.23 (quoting *The Autobiography of Mark Twain*), the statistics do not lie. Instead, the statistics incontrovertibly demonstrate that the Legislature's plans are invalid. Considered in tandem with a visual examination of the plans themselves and the legislative history, the statistics show that the Legislature's plans do not comply with the Constitution.

A. The Court Should Consider Statistical Evidence.

As it has in the past, this Court can and should consider statistical evidence and statistical comparisons to determine the validity of the Legislature's plans. The Senate would have the Court avoid such analysis, arguing that the Article III, Section 21 standards are in conflict with one another and would require "fact-bound policy judgments" about how to reconcile them. Florida Senate Br. at 8. But where an alternate plan – such as the Coalition's Senate plan – shows that it was possible to reconcile the constitutional criteria while surpassing the Legislature on *every single element of the criteria*, no "policy judgment" is necessary. The Legislature's plans must be found invalid. To rule otherwise would be to nullify the new provisions of the constitution.

First, with respect to the constitutional prohibition against favoring incumbents or political parties, the statistics show that:

- The Legislature's plans demonstrate an overwhelming partisan bias. Using as partisan performance measures the average of the 2006 and 2010

gubernatorial elections and the 2004 and 2008 presidential elections, the Legislature's Florida Senate plan has 26 Republican seats to 14 Democratic seats (65% Republican). App. F-1. The Legislature's Florida House plan has 75 Republican seats to 45 Democratic seats (62.5% Republican). App. F-2. Where Floridians in statewide elections typically split their vote between the Republican and Democratic parties, these plans are plainly skewed to favor the Republican Party.[2] In fact in the last five presidential elections, out of all votes cast, there were 15,397,180 for the Democratic candidate and 15,340,416 for the Republican candidate, only a 56,764 vote difference—less than .2%. *See* http://election.dos.state.fl.us/elections/resultsarchive/Index.asp.

- The Legislature's plans demonstrate an overwhelming incumbent bias. No non-term-limited Senate incumbent is paired against any other non-term-limited Senate incumbent. App. G-1 to G-2. On average, non-term-limited incumbents in the Senate retain 68.59% of their prior districts. App. G-5.

[2] The Senate's brief discusses at length the difficulties of bringing partisan gerrymandering claims under the Equal Protection Clause. *See* Florida Senate Br. at 31-38. But unlike a claim under the Equal Protection Clause, a claim under Article III, Section 21 does not require proof of "actual discriminatory effect," *id.* at 33 (quotation marks omitted). Rather, the Florida Constitution requires only proof of intent to favor a political party, which the cases universally acknowledge is not very difficult to come by "[a]s long as redistricting is done by a Legislature." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 830 (quotation marks omitted).

Non-term-limited incumbents in the new House map retain 59.1% of their prior districts. App. G-15.

- The Legislature's plans demonstrate a bias toward particular incumbents in charge of the redistricting process. The Chair of the Senate Redistricting Committee retains 86.06% of his prior district, the second-highest of any incumbent in the Senate. App. G-1. The Chair of the House Redistricting Committee retains 98.48% of his prior district, the second-highest of any incumbent in the House. App. G-8.

Second, with respect to the prohibition against diminishing the ability of minorities to elect candidates of their choice and to participate in the political process, the statistics show that the Legislature's plans create 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." *In re Senate Joint Resolution 2G*, 597 So. 2d at 284.

- The Senate admitted that it conducted no analysis of minority ability to elect and instead focused solely on keeping the minority voting age percentages the same as in the benchmark districts. *See* Florida Senate Br. at 26 & n.2.
- The House similarly focused solely on keeping minority voting age percentages the same as in the benchmark districts. *See* House Br. at 18-20.

This Court has rejected exactly the view of retrogression espoused by the Legislature that focuses solely on whether "voting-age percentages have been reduced in certain Senate and House districts." *In re Senate Joint Resolution 2G*, 597 So. 2d at 284. This Court has held that "in restructuring all of the district lines, there is bound to be some retrogression in minority voting strength in some districts" and therefore it is "more appropriate to look at the overall plan to see whether or not it discriminates against minorities." *Id.* The Legislature did not undertake this analysis.

Third, with respect to the requirement that districts be as equal in population as is practicable, the statistics show that it was, in fact, practicable to create districts with less population deviation. Contrary to the Senate's apparent belief that the equal population requirement of Article III, Section 21 is no more demanding than that of the Equal Protection Clause, *see* Florida Senate Br. at 7, 11-13, the Florida Constitution demands that the Legislature keep districts equal in population unless it can demonstrate that it was not "practicable" to do so. The Coalition's plans show that it was practicable to do so.

- The Coalition's Senate plan has an average population deviation of 0.29% as compared to the Legislature's 0.68%. App. E-1.
- The Coalition's Nested House plan has an average population deviation of 0.46% as compared to the Legislature's 0.83%. App. E-6.

Fourth, with respect to the requirement that districts use existing political and geographic boundaries "where feasible," the statistics show that it was feasible to use such boundaries to a greater degree than the Legislature did.

- The Coalition's Senate plan keeps 45 counties whole, as compared to the Legislature's 36 counties kept whole. App. D-2.
- The Coalition's Senate plan keeps 872 cities, towns, villages, and census designated places whole, as compared to the Legislature's 820 cities, towns, villages, and census designated places kept whole. *Id.*
- Excluding census designated places, the Coalition's Senate plan keeps 375 cities, towns, and villages whole as compared to the Legislature's 362 cities, towns, and villages kept whole. *Id.* at n.2.
- The Coalition's Nested House plan keeps 834 cities, towns, villages, and census designated places whole, as compared to the Legislature's 750 cities, towns, villages, and census designated places kept whole. App. D-3.
- Excluding census designated places, the Coalition's Nested House plan keeps 346 cities, towns, and villages whole as compared to the Legislature's 341 cities, towns, and villages kept whole. *Id.* at n.2.

Fifth, with respect to the requirement that districts be compact, the statistics show that the Senate districts are not compact.

- The Senate's average Reock score is 0.35 out of 1.0, as compared to the Coalition's average Reock score of 0.40. App. C-2. (The higher the score, the more compact the district.)

In sum, the Court has consistently considered statistical evidence in its review of apportionment plans and the statistical evidence presented here shows that the plans are invalid. In the past, it is true that this Court's job in analyzing such statistics has not been "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 at 285. But now, the inquiries are in large part one and the same. Where an alternative plan shows that it was possible to draw a map that surpasses the Legislature's maps on all or most of the criteria, it is not just the "best" plan. It is a plan demonstrating that the Legislature acted unconstitutionally.

B. The Court Should Conduct A Visual Examination Of The Plans.

Beyond the statistics, as it has in the past, the Court should examine the plans themselves and compare them with alternative plans. *See, e.g.*, *id.* at 282. Compare, for example Senate Districts 1 and 3 in the Legislature's plan with Senate Districts 2 and 4 in the Coalition's plan. *Compare* Att'y Gen. Pet. App. at 690 *with* App. A-2. Plainly, as the Coalition's plan demonstrates, it was possible to utilize existing political and geographical boundaries to create compact districts in the Panhandle. Instead, the Legislature chose to split five counties in District 1

and five counties in District 3. In so doing, the Legislature created two of the least compact districts in the Senate plan. District 1 is the second-least compact of all 40 districts under the Reock measure and District 3 is not far behind. *See* App. C-3. As the Coalition explained in its brief, such a configuration appears designed to avoid pitting incumbent Senators Gaetz and Evers against each other for re-election. *See* Coalition Br. 37 & App. J-2.

Another example is to compare Senate District 6 in the Legislature's plan with Senate District 1 in the Coalition's plan. *Compare* Att'y Gen. Pet. App. at 693 *with* App. A-4. Plainly, as the Coalition's plan demonstrates, it was possible to keep a minority ability-to-elect district contained entirely in Duval County, rather than snaking through five counties to pick up every possible pocket of African American voters. *See* Coalition Br. 42-43. District 6 is the least compact of all 40 Senate districts under the Reock measure. App. C-3.

Overall, a visual examination of the plans conducted in tandem with the statistical analysis shows that the Coalition was better able to comply with the constitutional criteria. Importantly, while some districts under the Coalition's House plan may appear less compact than those in the Legislature's House plan, *see, e.g.*, Florida House Br. App., that is a consequence of the fact that the Coalition followed the constitutional mandate to utilize existing political and geographical boundaries everywhere that it was "feasible" to do so. *See* App. D-2

to D-3 (showing that the Coalition's plans keep far more municipalities whole than the Legislature's plans). Many of Florida's municipal boundaries have jagged edges and are not compact. Yet the constitution demands their utilization wherever "feasible," and the Coalition took the constitution at its word.

C. The Court Should Consider The Plans' Legislative History.

Moreover, the Court can, as it has in the past, look to the legislative history of the passage of the redistricting plans. *See, e.g., In re Senate Joint Resolution 2G*, 597 So. 2d at 278; *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d at 1052; *accord Hartung v. Bradbury*, 33 P.3d 972, 987 (Or. 2001) ("It may be true that, in some circumstances, this court could infer from a record that a Secretary of State had the purpose of favoring one particular political party over another."). Here, the legislative history is replete with examples of self-dealing and incumbency protection. Perhaps most egregious is the fact that from the very outset of the process, the House and Senate agreed that each chamber would draw its own map, and neither chamber would alter the other's plan in any way. *See* Coalition Br. 10-11. This was obviously done so that each chamber could protect its own incumbents without interference from the other. Thus, not only did the chambers not act as a check upon each other, they now ask that this Court not act as a check upon either of them.

Also egregious was the Senate renumbering scheme, which the Senate admitted was done specifically to ensure that all non-term-limited Senators but one had the opportunity for a ten-year term. *See* Coalition Br. at 33-35. This, the Senate determined, was most "equitable" to its current members. This evidence of blatant self-dealing alone should invalidate the Senate plan.

The legislative history also demonstrates that the Legislature adopted its plans with full knowledge of their partisan impact and was fully informed (by the Coalition) of the many constitutional deficiencies in its plans. *See* App. K-1 to K-18. Despite this knowledge, the Legislature chose not to do anything to change its plans. It thus intentionally adopted plans that result in favoring the Republican Party and favoring incumbents. *See* Coalition Br. 22-23.[3]

The Legislature would have this Court ignore all of this and instead focus only on the purportedly "open" and "transparent" process that preceded the release of the Legislature's plans. Florida Senate Br. at 1; *see also* Florida House Br. at 2-3. But as the Coalition explained, the public hearing process was largely for show. With no plans released until after all public hearings had concluded, the hearings instead provided fodder for "cherry-picking" certain testimony to suit the

[3] The House claims that it would have violated Article III, Section 21 had it considered its plans' severe partisan skew. *See* Florida House Br. at 44-45. This argument conflates the fair treatment that Section 21 demands with the favoritism it prohibits. Intentionally adopting a redistricting plan favoring one party with significantly more seats in the Legislature even when citizens divide their votes evenly is the sort of intentional partisan favoritism that Section 21 forbids.

Legislature's partisan and incumbent-protection agenda. *See* Coalition Br. 9-10. An "open" and "transparent" process becomes a sham if it is used to justify an invalid result. Thus, the Court can and should consider this legislative history (as it has in the past) to determine the plans' validity.

CONCLUSION

What the Legislature wants is simply a rubber stamp saying that its plans are valid. But that is not what the Constitution contemplates and it is not what this Court should do. This Court can and must consider the incontrovertible facts offered by the Coalition that demonstrate the manifest invalidity of the Legislature's plans. That is what is required by Article III, Section 16(d), which entrusts this Court with making a "judgment … determining the apportionment to be valid" or "determin[ing] that the apportionment made by the legislature is invalid." Fla. Const., Art. III, sec. 16(d).

While reapportionment is a matter entrusted to the Legislature, interpreting and enforcing the Constitution is a matter entrusted to this Court. The Court cannot possibly determine the validity or invalidity of the Legislature's plans without authoritatively interpreting and enforcing Article III, Section 21. As it has in the past, the Court should look to the plans themselves, the statistics about those plans, and the plans' legislative history to determine their validity. Applying such a standard, the Legislature's plans must be found invalid.

Respectfully submitted this 22nd day of February, 2012.

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I certify that a true and correct copy of this Reply Brief was furnished by United States Mail and email to the following parties on this 22nd day of February, 2012. These are all parties appearing on the most recently revised service list at the time of service.

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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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