IN THE SUPREME COURT OF FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., *et al*.,

Appellants,

v.

KEN DETZNER, in his official capacity as Florida Secretary of State, *et al*.,

Appellees.

Case No. SC14-1905
L.T. Case No. 2012-CA-000412
L.T. Case No. 2012-CA-000490

THE FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEFS

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PRELIMINARY STATEMENT

In this Brief, "J. App." refers to the Joint Appendix filed by the Florida Senate on October 16, 2015, and "H. Ex." refers to the House's exhibits admitted during the relinquishment proceeding. "Br." refers to the Coalition Plaintiffs' Supplemental Brief on Remedy, dated October 23, 2015.

References to the Legislative Parties' Amended Designation of Deposition Testimony to be Presented at Trial, filed on September 27, 2015, are to the names of the deponents, followed by the page and line numbers (*e.g.*, Dreschler Dep. at 297:9-298:16).

"House Map" refers to H110C9071, which the House passed during the special session and submitted to the trial court below. "Senate Map" refers to S026C9062, which the Senate passed during the special session and submitted to the trial court below. "CP-1" refers to the map submitted to the trial court under that denomination by the Coalition Plaintiffs.

The House refers to *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012), as "*Apportionment I*"; to *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013), as "*Apportionment IV*"; and to *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015), as "*Apportionment VII*".

ARGUMENT

CP-1 diminishes the ability of Hispanics to elect candidates of their choice, contains an unnecessary appendage, and ignores this Court's conclusion that transparency is "legally significant" under the Florida Constitution. This Court should adopt the House Map, the constitutionality of which is uncontested on this appeal.[1]

I. THE TRIAL COURT APPLIED AN INCORRECT STANDARD OF REVIEW.

The trial court gave no effect to this Court's direction to "focus" on the maps passed during the special session and on the "areas of agreement" between them. It misunderstood this direction to prescribe a particular sequence of analysis—the House and Senate Maps first and then Plaintiffs' maps, J. App. 868—but this Court could not have intended such a conspicuous instruction to hold so little meaning.

The House does not conflate *focus* and *deference*. Br. at 13. This Court's instruction to "focus" on the House and Senate Maps did not require deference to their legal positions, but it recognized that the House and Senate Maps were developed transparently and on the record, in a public, governmental process, by elected representatives of the people who are constitutionally charged with the creation of the State's congressional districts. It was proper to accord precedence to maps de-

[1] In their statement of facts, the Coalition Plaintiffs repeat the rejected allegation that the Legislature's professional staff "maneuvered" the boundaries of District 26 for partisan purposes, Br. at 2-3, but they do not pursue this claim in their argument and did not think enough of it to seek leave to conduct discovery. As to District 26 in the House Map, the House refers the Court to Section I of its proposed order below, which is attached in a supplemental appendix to this brief.

veloped by a coordinate branch of government in a public and transparent process.

This Court was clear, moreover, that the Legislature was not required to redraw the entire map or explore new configurations in order to create the "best" possible districts. As to the invalidated districts, this Court provided specific instructions. *Apportionment VII*, 172 So. 3d at 413 ("We have . . . provided precise guidelines as to the deficiencies in these districts."). The Legislature did not "make the smallest possible changes," Br. at 2, but hewed to the precise guidance that this Court provided. If the Legislature, bearing the burden of proof, had explored new district configurations without reference to this Court's corrective instructions, then it would have exceeded its charge and imperiled the new districts.

The trial court, however, changed the applicable standard *after* the special session had concluded. It was no longer the Legislature's task to implement this Court's precise instructions; rather, the trial court sought the "best" possible districts and penalized the Legislature's scrupulous adherence to the precise guidance provided by this Court. J. App. 873-74. On the other hand, the Coalition Plaintiffs fundamentally reconfigured several of the invalidated districts in a manner wholly unrelated to this Court's instructions.

The trial court erred when it failed to focus on the House and Senate Maps and gave favorable consideration to fundamental changes made by the Coalition Plaintiffs in excess of this Court's clear directives.

II. DISTRICT 26 IN CP-1 DIMINISHES THE ABILITY OF SOUTH FLORIDA HISPANICS TO ELECT THE CANDIDATES OF THEIR CHOICE.

Like the trial court, the Coalition Plaintiffs do not perform a functional analysis of District 26 in CP-1. The Coalition Plaintiffs again fail to explain how Hispanics, with only 22.8% of the actual Democratic primary electorate, will be able to nominate their preferred candidates in a contested Democratic primary. J. App. 60. Rather than perform a functional analysis as this Court's precedents require, the Coalition Plaintiffs rewrite the retrogression standard and distract the Court with unfounded assertions that the House has taken inconsistent positions. All that is requisite is a functional analysis, and the Coalition Plaintiffs do not perform one.

In its simplest form, the retrogression standard asks whether the minority candidate of choice is "*likely*" to win a contested primary, and whether that candidate is "*likely*" to win the general election. *Apportionment VII*, 172 So. 3d at 404-05. In District 26 in CP-1, the Hispanic candidate of choice is "*likely*" to win the Republican primary—but not a contested Democratic primary—and the Democratic candidate is "*likely*" to win the general election. The Coalition Plaintiffs do not and cannot dispute these conclusions. The objective data are clear and irrefutable.

Unable to perform the necessary functional analysis, the Coalition Plaintiffs argue that District 26 in CP-1 is "essentially the same" as Benchmark District 26, which was non-retrogressive. Br. at 21. In doing so, the Coalition Plaintiffs hope to avoid a functional analysis of their own District 26 and to satisfy the non-

diminishment standard by proxy. Important differences between the two districts undercut the Coalition Plaintiffs' attempt to piggyback on Benchmark District 26.

Benchmark District 26 was a competitive but "Republican-leaning district." *Apportionment VII*, 172 So. 3d at 384, 409. District 26 in CP-1 leans Democratic. Democratic candidates carried District 26 in CP-1 in the 2012 presidential election (55.8%), the 2010 gubernatorial election (50.7%), and the 2008 presidential election (51.8%). J. App. 61.[2] The change in general-election performance is material to the retrogression calculus. In a Republican-leaning district, the winner of the Republican primary is likely to win the general election. The Court must therefore consider whether the minority candidate of choice is likely to win a contested Republican primary. In a Democratic-leaning district, the winner of the Democratic primary is likely to win the general election. The Court must therefore consider whether the minority candidate of choice is likely to win a contested Democratic primary. The general-election performance of the district dictates the relative significance of the Democratic and Republican primaries in the retrogression analysis.

To minimize the importance of the Democratic primary in District 26 in CP-1, the Coalition Plaintiffs argue that the district is not a "stronghold" for either political party, and go to great lengths to demonstrate what the House has never con-

[2] The Coalition Plaintiffs rely on Cabinet races to suggest that District 26 in CP-1 might be a Republican district, Br. at 24, but this Court has never relied on Cabinet races to forecast the results of congressional elections, especially in contradiction to the results of presidential and gubernatorial elections.

tested—that either a Democrat or a Republican *could* win either Benchmark District 26 or District 26 in CP-1. Br. at 22-24. The retrogression standard, however, does not ask who *could* win, but who is *likely* to win. *Apportionment VII*, 172 So. 3d at 404-05. The fact that a Hispanic Republican *could* win District 26 in CP-1 does not render it *likely*. A Democratic-leaning district and a Republican-leaning district are not indistinguishable merely because neither is a partisan "stronghold."

Thus, in *Apportionment VII*, the Court held that east-west District 5 does not retrogress because the African-American candidate of choice was "likely" to win a contested Democratic primary, and the Democrat was "likely" to win the general election. 172 So. 3d at 404-05. If the success of the African-American candidate of choice were *possible* but *unlikely*, then the district would have diminished the ability to elect. The retrogression standard relies on *probabilities*, not *possibilities*.

Applying the correct standard, District 26 in CP-1 clearly diminishes. First, the Democratic candidate is "likely" to win the general election. The Republican candidate *could* win—it is not impossible—but the *likely* winner is the Democratic candidate. Second, the Hispanic candidate of choice is not "likely" to win a contested Democratic primary. Hispanics comprise only 22.8% of the Democratic primary electorate, behind both whites and blacks. Here too, the Hispanic candidate of choice *could* win, but, as the data clearly indicate, that outcome is *unlikely*.

Benchmark District 26 was a competitive district—as the House formerly

argued—but it was also a district that, as this Court later noted, leaned Republican. *Apportionment VII*, 172 So. 3d at 384, 409 & n.19. Thus, while a Democrat *could* have won the general election, the Republican was *likely* to win the general election. The Republican primary was accordingly the relevant primary election. And because Hispanics were 63.6% of the Republican primary electorate, J. App. 30, the Hispanic candidate of choice was likely to win a contested Republican primary.

The House's argument, therefore, has been clear and consistent. The House argued that Benchmark District 26 was a competitive district in which a candidate of either party could be successful—and it was. But the House never argued that Hispanics controlled the Democratic primary in Benchmark District 26 or that the Democratic nominee was likely to win the general election. If the Democratic Party happened to nominate a Hispanic candidate, then the Hispanic Democrat could have won the general election with the support of Hispanic independents. But if the Democratic Party were to have nominated a non-Hispanic candidate, then Hispanic independents would have supported the Hispanic Republican in the general election. J. App. 433-34. A Hispanic candidate was likely to win the general election—regardless of whether the Democratic Party nominated a Hispanic candidate.

The same is not true of District 26 in CP-1, which is a Democratic-leaning district. Because the Democratic primary is likely to produce the general-election winner, the Coalition Plaintiffs must show that the Hispanic candidate of choice is

likely to win a contested Democratic primary. They have made no such showing.

There is no merit, therefore, to the suggestion that the House "must believe" that Hispanics controlled the Democratic primary in Benchmark District 26, even though Hispanics were only 22.7% of the Democratic primary electorate. Br. at 24. In Benchmark District 26, the Republican primary was likely to produce the general-election winner, and Hispanics were 63.6% of the relevant primary electorate. J. App. 30. In District 26 in CP-1, the Democratic primary is likely to produce the general-election winner, and Hispanics are 22.8% of the relevant primary electorate. J. App. 60. *The Coalition Plaintiffs reduce the Hispanic share of the relevant primary electorate from 63.6% to 22.8%, depriving Hispanics of control over the primary that is likely to produce the successful general election candidate*.

The Coalition Plaintiffs therefore attempt to refute two "assumptions" that they erroneously claim are built into the House's argument: that Benchmark District 26 "would never elect a Democrat" and that District 26 in CP-1 "would never elect a Republican." Br. at 21-22. The House makes neither argument. Surely, a Democrat could have won (and did win) Benchmark District 26, and a Republican could win District 26 in CP-1. But the dispositive question is not who *could* win, but who is *likely* to win. The Coalition Plaintiffs' efforts to prove that a Democrat could have won Benchmark District 26, or that a Republican could win District 26 in CP-1, cannot disguise the material differences between the two districts. Nor

can it obscure the important fact that, in District 26 in CP-1, the Democratic primary—not the Republican primary—is likely to produce the general-election winner. The change in general-election performance matters to the retrogression analysis.

Retrogression does not occur merely when the election of a minority candidate becomes *impossible*. "To undertake a retrogression evaluation requires an inquiry into whether a district is *likely* to perform for minority candidates of choice." *Apportionment I*, 83 So. 3d at 625 (emphasis added). The diminishment standard was "intended to be specifically focused on whether the electoral power of the minority community was more, less, or just as able to elect a preferred candidate of choice after a voting change as before." *Id*. at 624-25 (quoting H.R. Rep. No. 109-478, at 44 (2006)). But according to the Coalition Plaintiffs, the non-diminishment standard would not be violated unless minorities were "*never*" able to elect their preferred candidates. Br. at 21-22. Under that standard, it is no wonder that the Coalition Plaintiffs dismiss all retrogression concerns as "trumped up." Br. at 19.

This Court found that Benchmark District 26 was a "Republican-leaning district." *Apportionment VII*, 172 So. 3d at 384, 409. District 26 in CP-1 is not Republican-leaning, but Democratic-leaning. Because the two districts are not "essentially the same," the Coalition Plaintiffs cannot perform a functional analysis by proxy. Indeed, if the two districts were "essentially the same," then the Coalition Plaintiffs should easily be able to perform a functional analysis of District 26 in

CP-1. Still, neither the trial court nor the Coalition Plaintiffs have performed a full functional analysis, as this Court's precedents require. District 26 in CP-1 diminishes the ability of South Florida Hispanics to elect the candidates of their choice.

III. CP-1 IS NOT EXEMPT FROM THE CONSTITUTION'S PROHIBITION ON PARTISAN GERRYMANDERING OR ITS INSISTENCE ON TRANSPARENCY.

The Coalition Plaintiffs urge this Court to hold that the cardinal rules of the Fair Districts Amendments—neutrality and transparency—are "entirely irrelevant" to an assessment of *their* proposed remedial plan. Br. at 41. In other words, the Constitution protects the citizens of Florida from districts gerrymandered by the Legislature, but not from districts gerrymandered by private parties. Neither the constitutional text nor the intent of the voters supports such an arbitrary position.

The centerpiece of the Fair Districts Amendments is its prohibition against partisan political gerrymandering. As this Court has explained, the voters sought to prohibit the political manipulation of district boundaries. *See Apportionment VII*, 172 So. 3d at 374-75. The words of the Constitution are as broad as language permits: "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . ." Art. III, § 20(a), Fla. Const. Rather than provide that "the *Legislature* shall not draw districts with" partisan intent, the Constitution expresses itself in the passive voice in order to embrace all redistricting plans. The text of the Constitution makes no distinction.

The intent of the voters is consistent with the broad language of the Consti-

tution. The voters sought to prohibit gerrymandered districts—period. The voters did not differentiate between districts drawn by the Legislature, districts drawn by the Coalition Plaintiffs, or districts drawn in the first instance by the Judiciary. Their intent was—and their constitutional right is—to live and vote in districts drawn without regard to incumbency or partisanship. It makes no difference who drew them. "The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it." *Apportionment I*, 83 So. 3d at 599 (quoting *Pleus v. Crist*, 14 So. 3d 941, 944-45 (Fla. 2009)). Clearly, the voters did not prohibit gerrymandered districts only to vote in districts gerrymandered by private parties. If some maps are exempted from the prohibition, then the will of the voters is not fully effectuated.

The Coalition Plaintiffs agree that their districts must comply with the Constitution's minority-protection provisions, as well as the requirements of contiguity, population equality, compactness, and adherence to political and geographical boundaries. They seek an exemption from *one* and *only one* of the Constitution's mandates: the prohibition upon partisan political gerrymandering. But neither the language nor the intent of the Constitution suggests that this standard should be treated differently from the others. Nor do the Coalition Plaintiffs explain why the most important principle of the Fair Districts Amendments—the prohibition on

gerrymandering—should not apply to their maps, while secondary requirements, such as compactness and the use of political and geographical boundaries, should.

This Court recently recognized that all constitutional standards apply to all redistricting plans that might be imposed on Florida's citizens. In its relinquishment order, the Court directed the trial court to determine "which map *proposed by the parties* . . . best fulfills the specific directions in [*Apportionment VII*] and *all constitutional requirements*." J. App. 7-8. The Court thus rejected the Coalition Plaintiffs' view that *some* maps must comply with *all* constitutional requirements, while *other* maps need only comply with *some* constitutional requirements. Indeed, if Plaintiffs were correct, then the same political operatives who allegedly manipulated the enacted districts might have intervened in this remedial proceeding and offered districts drawn with partisan intent, and, according to the Coalition Plaintiffs, their partisan intent would have been "entirely irrelevant." Br. at 41.

In this proceeding, unlike *Apportionment VII*, the Coalition Plaintiffs did not present CP-1 as a mere "alternative map" to illustrate hypothetical district configurations. Br. at 40. They chose to submit CP-1 for adoption by this Court as "the plan governing congressional elections in Florida." *Id*. at 1. Here, CP-1 is on trial.

Likewise, when offering a redistricting plan for adoption by this Court, the Coalition Plaintiffs do not receive a pass on transparency. This Court recognized that, with the adoption of the Fair Districts Amendments, "transparency became

legally significant under the Florida Constitution," and that "transparency is critical in light of . . . the purpose of the Fair Districts Amendment to outlaw partisan manipulation in the redistricting process." *Apportionment VII*, 172 So. 3d at 374, 415. The same transparency is no less critical or legally significant when private parties propose districts than when the Legislature does. Transparency is critical and legally significant because it protects the constitutional right of the people to live and vote in neutral districts, and that right is sufficiently important and fundamental to merit protection regardless of who the proponents of a redistricting plan might be.

This Court should reject the position that "different standards" apply to different parties. Br. at 40. Basic fairness and equal justice dictate that the same standards should apply to different parties that offer maps for the same purpose.

The Coalition Plaintiffs are incorrect to assert that this Court did not require them to draw their maps transparently and on the record. Br. at 40-41. The Court clearly contemplated that the challengers would present their maps and testimony in the legislative process, *Apportionment VII*, 172 So. 3d at 415, and it declined the House's request for discovery specifically because "it contemplated instead that the remedial map-drawing would occur transparently and on the record," J. App. 9. After *Apportionment VII*, moreover, Plaintiffs were on full notice that transparency in redistricting is a "legally significant" element of the Fair Districts Amendments.

To avoid scrutiny, the Coalition Plaintiffs argue that it is "the decisionmak-

ing process of the judiciary—not the Coalition Plaintiffs—that is relevant." Br. at 41. By that logic, the intent of the House is also irrelevant, since it, like the Coalition Plaintiffs, merely offers a map for judicial adoption. But in the trial court, the Coalition Plaintiffs argued (against the evidence) that the House and Senate drew their proposed remedial districts with improper intent—in direct opposition to their new argument that, in a remedial process, the intent of the Court is all that matters.

The Coalition Plaintiffs argue that private parties should be exempt from the anti-gerrymandering prohibition because the resulting inquiries might burden them. Br. at 41. But the right of the people to reside in neutral districts comes first, and trial courts retain every ability to limit the burdens of discovery. And the Coalition Plaintiffs, who had raised and spent more than $5.3 million by June 30, 2014, *see* FOUNDATION CENTER, http://990finder.foundationcenter.org/990results.aspx?990_type=&fn=&st=&zp=&ei=274350551&fy=&action=find, can hardly claim penury.

The trial court erred when it dismissed the evidence of improper intent that, even without discovery, the Legislative Parties were able to present. The Coalition Plaintiffs sent a letter to the Legislature contending that the "Democratic performance index" of District 26 in the Base Map was too low, and urging changes intended to make the district—in the Coalition Plaintiffs' own words—"more Democratic." H. Ex. 155. The Coalition Plaintiffs denounce these assertions as "entirely fabricated," Br. at 38, but their letter is in the record, H. Ex. 155. The clear import

of the letter was that District 26 was too Republican and must be redrawn in order to increase its Democratic performance. Of course, if the House had penned a letter that critiqued a district's sluggish "Republican performance index" and offered changes to make the district "more Republican," then, at the Coalition Plaintiffs' insistence, its proposed remedial plan would immediately have been disqualified.

Strategic Telemetry, which created CP-1, is not merely "a company that has Democrats among its clients." Br. at 39. It is a partisan political consulting firm—a self-described "Democratic firm"—dedicated to the causes and candidates of the Democratic Party. Dreschler Dep. at 29:4-33:23, 34:15-36:7, 61:13-62:14, 297:9-298:16, Ex. 1. By comparison, if the House had hired Data Targeting to draw its proposed remedial plan, then the trial court would have discarded the House Map.

This Court held that transparency is "critical" and "legally significant" in order to ensure that districts are not gerrymandered. *Apportionment VII*, 172 So. 3d at 374, 415. The Coalition Plaintiffs ignored this Court's holding and offered maps developed in secrecy and never presented for public discussion. To this day, the Coalition Plaintiffs have produced no emails, draft maps, or other record related to CP-1. They scoff at the suggestion that CP-1 was drawn in a Los Angeles apartment, Br. at 39, but their own counsel said that it was, J. App. 700:17-18 ("Mr. O'Neill drew the map in his apartment in Los Angeles."). After attacking the shadow process in which the enacted districts were allegedly drawn, the Coalition

Plaintiffs cannot now be heard to advocate a map developed in complete darkness.

The trial court should not have ignored these facts. To impose a map drawn by political consultants in the secrecy of a Los Angeles apartment, with no written record or public discussion, is incompatible with this Court's precedents in favor of transparency. The House does not oppose CP-1 because the Coalition Plaintiffs offer it, Br. at 10-11, but because the Coalition Plaintiffs defied this Court's guidance and contradicted their own professed values of neutrality and transparency. A map that ignores the legal significance of transparency—and which was drawn by a partisan firm—is not the map that best fulfills all constitutional requirements.

This Court has energetically protected the constitutional right of the people to vote in districts drawn without partisan intent and recognized its "'important duty' to 'honor and effectuate the intent of the voters in passing Florida's groundbreaking constitutional amendment prohibiting partisan or discriminatory intent in drawing the congressional apportionment plan.'" *Apportionment VII*, 172 So. 3d at 416 (quoting *Apportionment IV*, 132 So. 3d at 154-55 (Labarga, J., concurring)). To exempt some parties from the essential rule of the Fair Districts Amendments would open a door to its subversion. Gerrymandered districts must not be imposed on Florida's voters—whatever their source and whoever their proponents might be.

This Court should decline the trial court's recommendation to accept CP-1 and instead adopt the constitutionally compliant House Map.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was furnished by electronic mail on the thirtieth day of October, 2015, to all counsel identified on the attached Service List.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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