IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1905

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

Appellants,

L.T. Case No. 1D14-3953

vs.

KEN DETZNER, *et al.*,

Appellees.
_____/

ON DISCRETIONARY REVIEW OF AN ORDER OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA, CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL AS PASSING UPON A QUESTION OF GREAT PUBLIC IMPORTANCE

THE FLORIDA SENATE'S RESPONSE TO THE PARTIES' SUPPLEMENTAL BRIEFS

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I. THE COURT SHOULD ADOPT THE LEGISLATURE'S CONFIGURATION OF SOUTH FLORIDA

The Legislature's configuration of South Florida is superior to the Plaintiffs' because (A) they were vetted in an open and transparent process; and (B) they assure that Hispanics' ability to elect the candidate of their choice is undiminished.

A. The Court Should Approve a Plan Drawn in an Open and Transparent Legislative Process, Not a Plan Drawn in Secret

The LOWV Plaintiffs suggest that this Court should place no weight on the fact that the Legislature's maps are the product of an open and transparent process, and instead ask this Court to adopt a plan never submitted to the Legislature and drawn in secret. But their interpretation of this Court's September 4 order renders meaningless the instruction to "especially focus[ ] on the map passed during the special session by the House [Plan 9071], and any amendments offered thereto; the map passed during the special session by the Senate [Plan 9062], and any amendments offered thereto [Plan 9066]; and the areas of agreement between the legislative chambers" (J.A. 7). The LOWV Plaintiffs argue that the trial court complied with the Court's directive simply because "it began with the three maps submitted by the House and Senate" and then analyzed the Plaintiffs' alternatives (LOWV br.14). But if the trial court's task was to select the "best" plan, regardless of its origin, then the sequence by which it considered plans was irrelevant.

Instead, this Court's instruction suggested that, even in this remedial stage, the trial court should have recognized the inherent value of maps prepared in an open and transparent process by legislators duly elected by Florida's citizens. While the Court's directive did not require "deference," it did require the trial court to consider the validity of the Legislature's plans on their merits, rather than turning the process in a map-drawing workshop.

The LOWV Plaintiffs also attempt to rebut any suggestion that they are acting for partisan interests, protesting that their demand that the Legislature make District 26 "more Democratic" was actually a call "to avoid partisanship and improve tier-two compliance" (LOWV br. 38). To the contrary, if—as the trial court recognized—the Legislature "has drawn the map without regard to political performance, then it would be improper for it to 'correct' the political effect of the map in certain districts when someone complains" (J.A. 874). And the trial court found no "evidence that the staff map drawers had a conscious intent to favor or disfavor a political party or incumbent" (J.A. 873). Because—contrary to the LOWV Plaintiffs' accusations in their letter—the court found that CD26 in the base map was *not* drawn with partisan intent, it would have violated the Florida Constitution to later "correct" any partisan effect.

Plaintiffs also argue that the fact that they drew their maps in private is not relevant, quoting this Court's language that "the alternative maps are not on trial

themselves" (LOWV br. 40). They even assert that their motivations are irrelevant (LOWV br. 41). But in *Apportionment VII*, the Court did not consider whether to adopt one of Plaintiffs' maps, but only whether the enacted plan was constitutional. Now, however, Plaintiffs ask the Court to adopt one of their maps. Therefore, their maps *are* on trial. They, too, must comply with the constitutional requirements—including party and incumbent neutrality. Any other rule would create a double standard for remedial maps, whereby this Court scrutinizes the Legislature's maps drawn in an open and transparent process, but ignores the motivations of challengers who draw maps in secret, lest such scrutiny "erect obstacles" to future challenges (LOWV br. 41).

The fact that Plaintiffs purport to improve tier-two metrics does not warrant the adoption of their plan over a legislative plan. As the trial court recognized, "changes which improve tier two performance somewhat" may be "motivated by a desire to affect political performance" (J.A. 872). To adopt the Plan CP-1 simply because it improves certain two-tier metrics would treat the Legislature's product as a mere working draft that outsiders could alter for political reasons under the guise of improving compactness or some other measure.

The LOWV Plaintiffs also defend the work product of their map-drawer, a contractor for the Democratic microtargeting firm Strategic Telemetry (LOWV br. 39). Their statement that Strategic Telemetry "has Democrats among its clients" is

too modest; the record shows that the firm works almost exclusively for Democratic clients (SR59. 8659-60). More importantly, the LOWV Plaintiffs fail to explain why this Court should disregard the work product of the Legislature's open and transparent process and instead rely on a map submitted by Plaintiffs who successfully fought *any* discovery about their map-drawing process. While the LOWV Plaintiffs state that their map drawer retained his emails and draft maps (LOWV br. 39 n.13), they never disclosed them.

Finally, while keeping their own records and motives hidden from view, the LOWV Plaintiffs question the Legislature's, implying that its map drawers drew Districts 26 and 27 to improve Republican performance and suggesting that they drew District 26 to be "even better performing for Republicans than in the invalidated plan" (LOWV br. 17). But the LOWV Plaintiffs admit that "[t]he factual portions of the trial court's recommendation must be upheld if supported by competent, substantial evidence" (LOWV br. 9), and the trial court "d[id] not find from the evidence that the staff map drawers had a conscious intent to favor or disfavor a political party or incumbent" (J.A. 873). That finding alone justifies the adoption of the Legislature's configuration of South Florida.

B. Plaintiffs' Alternative Maps Diminish the Ability of Hispanics to Elect Candidates of Their Choice in District 26

As explained in the Senate's supplemental brief, Plan CP-1 diminishes the ability of Hispanics to elect candidates of their choice (Senate supp. br. 36-43).

Plaintiffs assert that this argument is inconsistent with the Senate's earlier position that District 26 in Plans 9047 and 9057 is non-retrogressive (LOWV br. 20). But the appropriate benchmark is not the invalidated plans passed in 2012 and 2014, but the valid plan passed in 2002. And the district Plaintiffs recognize as the benchmark district in the 2002 plan, District 25 (LOWV br. 23 n.5), does not have "essentially the same metrics" as their District 26, as shown below:

	Benchmark CD 25	**Plan CP-1 CD26**
2010 Census HVAP	72.2%	68.3%
2012 Hispanic Voter Registration	61.3%	56.5%
Hispanic Share of the 2010 Democrat Primary Turnout	29.6%	22.8%
Hispanic Share in 2012 General Election Turnout	59.7%	55.0%

Not only does Plan CP-1 reduce Hispanics' share of the relevant metrics, but it also turns a competitive district trending for Democrats into a district where Democrats' control is more secure. Using the 13 elections Plaintiffs cite, District 26 in Plan CP-1 improves Democrat performance by 1.2 percentage points, and reduces Republican performance by 1.1 percentage points—a swing of 2.3 points (J.A. 25, 61). More recent elections show an even greater swing: in 2012, President Obama won District 26 in Plan 9047 by 6.8 percentage points, but won it in Plan CP-1 by 11.6 percentage points—a swing of 4.8 points (J.A. 25, 61). Meanwhile, compared to the benchmark identified by Plaintiffs (LOWV br. 23 n.5), District 26 in Plan CP-1 improves Democrat performance by 2.4 percentage

points, and reduces Republican performance by 2.6 percentage points, creating a total swing of 5 percentage points (J.A. 20).

As the Romo Plaintiffs' own expert testified, in a Democrat-leaning district, the primary acquires increased significance (J.A. 499-500). And, as the trial court acknowledged, in Plan CP-1's District 26, "when it comes to control of the Democratic primary, Hispanics made up only 22.8% of the Democratic primary electorate in 2010, compared to 26.7% in Benchmark District" (J.A. 880). The trial court also noted that "[b]lacks are the second most represented group in the 2010 Democratic primary electorate under CP-1, with Hispanics falling to third" (J.A. 880). Thus, Hispanics will not control the Democratic primary in a district that performs for Democrats.

The LOWV Plaintiffs make a strawman argument that the Legislature assumes that "the invalidated version of District 26 would never elect a Democrat" and "District 26 in CP-1 would never elect a Republican" (LOWV br. 21-22). But the Legislative Parties need not show that the Plaintiffs' configurations District 26 will *eliminate* Hispanic's ability to elect whom they choose; only that Plan CP-1 *diminishes* that ability. *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 624-25 (Fla. 2012) ("*Apportionment I*"). (noting that the question is whether minorities are "more, less, or just as able to elect" their candidates). Since under the benchmark plan District 26 is a toss-up

district, the fact that Plan CP-1 increases non-Hispanic registered Democrats and decreases registered Republicans will necessarily diminish Hispanics' ability to elect the candidate of their choice.

Plaintiffs rely on the expert report of Dr. Lichtman, but fail to identify where in his report Dr. Lichtman opined on the ability of a Hispanic to emerge from the Democratic primary in Plan CP-1's District 26 (LOWV br. 27-28). Indeed, Dr. Lichtman did not opine on the issue, and the Legislative Parties had no obligation to provide him a forum to offer new, additional opinions through cross-examination. Plaintiffs suggest that the Legislative Parties had a duty to cross-examine Dr. Lichtman under section 90.705(1), Florida Statutes (LOWV br. 28), but that statute simply allows an expert to testify without prior disclosure of the underlying facts or data "[u]nless otherwise required by the court." Here, the trial court ordered the parties to provide expert reports that included "a complete statement of the expert's opinion" and to provide "all data and materials relied upon by the expert . . . in forming those opinions" (J.A. 17). None of the materials Dr. Lichtman produced indicate that he analyzed Democratic primaries in District 26, much less formed an opinion about them. Plaintiffs also cite *Myron v. South Broward Hospital District*, 703 So. 2d 527 (Fla. 4th DCA 1997), but that case concerned the application of section 90.705(1) after an expert fully disclosed his opinions. It did not address this situation, where the trial court found that the

Legislative Parties were required to cross-examine Dr. Lichtman if they wished to learn his actual opinions.

Plaintiffs criticize Dr. Liu for not addressing topics that were outside the scope of his opinion (LOWV br. 32), but they did not dispute the opinion itself: in South Florida, African Americans and Hispanics do not vote as a coalition. Meanwhile, Plaintiffs criticize Dr. Moreno for not analyzing whether Plan CP-1 diminishes the ability of Hispanics to elect candidates of their choice as compared to the benchmark plan drawn in 2002 (LOWV br. 29). But Dr. Moreno testified that he found the inclusion of African-American precincts in Plan CP-1's District 26 made it less likely that a Hispanic candidate of choice would be elected than in the benchmark district (J.A. 439). Plaintiffs criticize Dr. Moreno for merely opining on the "possibility" that District 26 will not elect a Hispanic candidate of choice (LOWV br. 31), but, as noted above, the Legislative Parties need only show diminishment of the ability of Hispanics to elect candidates of their choice.

Plaintiffs also suggest that Dr. Moreno's testimony is inadmissible under section 90.702, Florida Statutes (LOWV br. 29), but they never moved to exclude his testimony below. *See Jones v. State*, 701 So. 2d 76, 78 (Fla. 1998) (finding that an objection to expert testimony "is waived unless it is made at the time the testimony is offered.") They claim that his analysis of local candidates and party behavior is "anecdotal" (LOWV br. 31), but this is precisely the type of analysis

that is appropriate under the *Gingles* test. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (explaining that Section 2 of the Voting Rights Act requires an "intensely local appraisal of the design and impact" of electoral mechanisms). Moreover, none of the cases Plaintiffs cite address redistricting, much less the type of expert analysis that is appropriate under *Gingles*.

C. Plan CP-1 Has Additional Defects Not Found in the Senate's Plans

Plaintiffs state that the Legislature "raised no objection to Districts 20 through 25 in CP-1 . . . despite being ordered to do so." But the order required the parties to disclose objections only to the *constitutionality* of plans (J.A. 16), which the Senate duly raised (SR42. 5894-5909). The Senate's arguments that Plaintiffs went beyond the mandate on remand, and that their maps were inferior to the Legislature's plans, did not implicate constitutional concerns.

Plaintiffs justify their changes to District 20 by citing this Court's instruction to keep Hendry County wholly within District 25 (LOWV br. 34). But nothing in the opinion justifies modifying District 20 to add a third appendage. The Legislature's configuration demonstrates that it was possible to keep Hendry County within District 25 without introducing new, visually non-compact, features.

The LOWV Plaintiffs also claim that the Legislature's objection to the third appendage "defies common sense" (LOWV br. 35). But it does not take common sense to observe that the LOWV Plaintiffs introduce an appendage that did not

exist. Plaintiffs also suggest that the Legislature's plan includes a "finger" reaching into District 21, but that incursion does not compare visually to the bizarre third appendage in Plan CP-1, which starts in the Everglades and extends almost all the way to the coast (J.A. 56).

II. THE FLORIDA SENATE'S CONFIGURATIONS OF CENTRAL FLORIDA ARE SUPERIOR TO THE OTHERS PROPOSED

The Senate offered two Plans: 9062, which the Senate passed during the special session; and 9066, which Senator Galvano, chair of the Senate Committee on Reapportionment, drafted after the session to propose a compromise between the House and Senate plans. We address each in turn.

A. Plan 9062 Keeps District 16 as it was in the Enacted Plan and Reduces the Splits to Hillsborough County

The LOWV Plaintiffs argue that Plan 9062 "raise[s] potential tier-one concerns" (LOWV br. 15). Yet they never raised such concerns in their objection to the Senate's plan (Senate Ex. 29), never cross-examined the Senate's witnesses on such concerns, and never expressed such concerns below in their pretrial memoranda, closing argument, or proposed order (except by referring to the House's own unproven allegations). Their attempt to do so now is improper. *W. Fla. Reg'l Med. Ctr. v. See*, 79 So. 3d 1, 13 (Fla. 2012) ("As a general matter, a reviewing court will not consider points raised for the first time on appeal.").

The LOWV Plaintiffs insinuate that Senator Tom Lee intentionally drew Congressman Dennis Ross out of his district (LOWV br. 15); but neither the House nor the LOWV Plaintiffs presented any evidence about where Representative Ross resides in relation to the district line (or any other evidence of intent). In fact, Congressman Ross's house lies just outside the district because it is outside the City of Lakeland, the district boundary (Plan 9062 keeps that city whole) (House Ex. 247, J.A. 44). Senator Lee testified that when he developed Plan 9062, he had no idea where Congressman Dennis Ross lived; and only learned that the plan drew Congressman Ross outside his district after the plan became public (J.A. 390). He had no intention to run for Congress (J.A. 397).

No party offers a valid objection to Plan 9062's configuration of Central Florida, which preserves current District 16 (which this Court did not require redrawn) while reducing unnecessary splits to Hillsborough County's population (Senate supp. br. 15-17). The House argued below that while Plan 9071 and Plan 9062 split the same number of counties and municipalities, the difference between the plans' compactness "tips the scales" (SR59. 8745).[1] But, as explained in the Senate's brief, that difference is statistically insignificant and only appears in the

[1] The House's supplemental brief does not directly address the Senate plans, but refers to its proposed order below (br. at 45). This is not a proper argument on appeal. *See, e.g., Mendoza v. State*, 87 So. 3d 644, 663 n.16 (Fla. 2011) (finding that appellant "abandoned" arguments purportedly "incorporated by reference" into his brief). Nevertheless, in an abundance of caution, the Senate responds to it.

Polsby-Popper scale (Senate supp. br. 17), which, in seven apportionment opinions since 2012, this Court has never cited.

The House criticized the Senate for relying on statewide compactness scores, and instead compares six Central Florida districts (SR59. 8745-46). But the House admits that the difference is "not dramatic" (SR59. 8746), and its numbers include District 16, which this Court did not require to be redrawn. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 413 (Fla. 2015) ("*Apportionment VII*"). The House also argues that "there is no good reason to exclude District 16" because "[t]he Court must recommend a complete plan" (SR59. 8745). But that argument concedes that statewide compactness scores *are* relevant; and they are virtually identical for Plans 9071 and 9062 (Senate supp. br. 17).

The House also argued that both Plan 9071 and 9062 "divide Hillsborough County into four districts" (SR59. 8745). But Plan 9062 consolidates the *population* of the county into three districts, and leaves only an unpopulated area (Egmont Key) in District 16 (J.A. 46, 621). Thus, the House's remark—that "[t]he distribution of population among Hillsborough County's districts . . . is not a matter of constitutional significance" (SR59. 8746)—ignores that Plan 9062 does not divide the population of Hillsborough County into as many districts as does Plan 9071. The House argued that the Senate did not reduce splits in other counties (SR59. 8747-48), but that does not invalidate an improvement to

Hillsborough. Finally, the House criticized the Senate for "not restor[ing] the exact boundaries of the prior district" (SR59. 8748), but the only change was to an unpopulated area (Senate supp. br. 17 n.1).

B. Plan 9066 Keeps More Counties Intact Than Any Other Plan

The House criticized Plan 9066 because it is not one of the maps "passed by the House and Senate during the special session" (SR59. 8749-51). But this Court's September 4 order instructed the trial court to "especially focus[ ] on . . . the map passed during the special session by the Senate [Plan 9062], and *any amendments offered thereto*" (J.A. 7). Senator Galvano offered Plan 9066 as an amendment to Plan 9062.

Both the House and the LOWV Plaintiffs criticize Plan 9066 for splitting the City of Longboat Key (SR59. 8749; LOWV br. 16). But as the House acknowledged, Longboat Key is unusual in that it "straddles the boundary between Sarasota and Manatee Counties" (SR59. 8749). The Senate's decision to preserve one more county at the expense of a city is consistent with an approach this Court has endorsed (Senate supp. br. 23-24).

The House also claimed that Plan 9066 "decreases the visual and numerical compactness of the four districts that differ between the House Map" and Plan 9066 (SR59. 8749); and singled out "the J-shape of District 17" as "visually non-compact" (*id*. at 8749). But as demonstrated at the hearing, the "J-shape" is the

result of keeping Sarasota County whole and the indentation in that county's northeastern corner; one can avoid it only by splitting Manatee or Sarasota Counties (J.A. 629). As this Court has noted, a degree of non-compactness might "result from the Legislature's desire to follow political or geographical boundaries or to keep municipalities wholly intact." *Apportionment I*, 83 So. 3d at 635.

The House also argued that District 9 in Plan 9066 is "less compact visually than its analogue in the House Map" (SR59. 8749). But that is due in part to changes to District 15, which is more compact visually and numerically in Plan 9066 than in Plan 9071 (J.A. 38-30, 50-51). Both the House and the LOWV Plaintiffs cite the differences in compactness of the four districts that differ between Plan 9071 and Plan 9066 (SR59. 8749; LOWV br. 16), but these differences are slight (*e.g.*, a difference in mean Reock of .02) and disappear when one compares the mean compactness of the entire plans (Senate supp. br. 25).

Finally, the House suggested that there are "unanswered questions engendered by" Plan 9066 because it includes "an open congressional district in eastern Hillsborough County and Manatee County" (SR59. 8751). But the House previously stated that it does "not contend that the Senate, or any Senator, drew Plan 9062 or Plan 9066 with an intent to favor or disfavor a political party or an incumbent" (Senate Ex. 31). And, as explained above, neither the House nor the

LOWV Plaintiffs offered evidence that the Senate modified the base maps to favor any political party or individual.

III. THE COURT SHOULD NOT RETAIN JURISDICTION

The LOWV Plaintiffs ask this Court to retain jurisdiction indefinitely "to ensure that prompt remedial action can be taken if the Legislature attempts to adopt an unconstitutional successor plan" (LOWV br. 43). The Senate has no intention of adopting another remedial congressional plan before the next redistricting cycle, and Plaintiffs do not identify evidence to the contrary. And this Court's limited jurisdiction is defined in Article V, Section 3 of the Florida Constitution. *State v. Barnum*, 921 So. 2d 513, 522 n.8 (Fla. 2005) (noting "this Court's extremely limited jurisdiction set forth in article V, section 3, of the Florida Constitution.") Nothing in the Florida Constitution authorizes this Court to retain jurisdiction to address hypothetical future events. Even if the Legislature were to adopt a new congressional plan before the next cycle, Plaintiffs can file a new complaint challenging any alleged violations.

CONCLUSION

For the reasons stated above and in the Senate's Supplemental Brief, the Senate respectfully requests that this Court adopt either Plan 9062 or Plan 9066.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 30, 2015, a copy of the foregoing was served by e-mail to all counsel on the attached service list.

By: */s/ Raoul G. Cantero*
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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