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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

RENE ROMO, *et al.*,

Plaintiffs,

vs. Case No. 2012-CA-000412

KEN DETZNER, in his official capacity as Florida Secretary of State, and PAMELA JO BONDI, in her official capacity as Attorney General,

_____/

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

Plaintiffs,

vs. Case No. 2012-CA-000490

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

Defendants.

_____/

THE LEGISLATIVE PARTIES' RESPONSE TO
PLAINTIFFS' JOINT MEMORANDUM REGARDING EVIDENTIARY STANDARD

Defendants, the Florida House of Representatives; Will Weatherford, in his official capacity as Speaker of the Florida House of Representatives; the Florida Senate; and Don Gaetz, in his official capacity as President of the Florida Senate (collectively, the "Legislative Parties"), respectfully submit their response to Plaintiffs' Joint Memorandum Regarding Evidentiary Standard (the "Memorandum").

In the Memorandum, Plaintiffs once again ask this Court to apply strict scrutiny, claiming that "the legal standard applied by the Florida Supreme Court [in *Apportionment I*[1]] was strict scrutiny." Plaintiffs misstate the standard applied in *Apportionment I*. There, the Supreme Court repeatedly affirmed that the objectors bear the burden of proof, which is not the case when strict scrutiny applies. *See, e.g.*, 83 So. 3d at 648 (concluding that the Florida Democratic Party "has not demonstrated" that House District 70, which was drawn to comply with the minority-protection provisions, unconstitutionally violated compactness); *id.* at 649 (concluding that the Florida Democratic Party did not "demonstrate" that House District 88, which was drawn to comply with the minority-protection provisions, unconstitutionally violated compactness); *id.* at 651 (concluding that the Florida Democratic Party "has not shown that it was feasible" for House Districts 100, 102, 103, and 105, which were drawn to comply with the minority-protection provisions, to preserve additional municipalities); *id.* at 653 (concluding that the Florida Democratic Party "has not demonstrated" that House District 105, which was drawn to comply with the minority-protection provisions, unconstitutionally violated tier-two requirements); *id.* at 679-80 (concluding that "the Coalition has not carried its burden to demonstrate" that Senate District 38, which was drawn to comply with the minority-protection provisions, unconstitutionally violated tier-two requirements); *id.* at 680 (concluding that "the Coalition has not satisfied its burden of proof" to demonstrate that Senate Districts 35 and 36, which were drawn with comply with the minority-protection provisions, unconstitutionally violated tier-two requirements).

Plaintiffs also assert that Florida law "imposes a strict scrutiny standard where a statute implicates fundamental rights" (Memorandum at 2). While courts recognize that election laws affect fundamental rights, they do not apply strict scrutiny to all election laws. *See, e.g., Levy v.*

[1] *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012).

Miami-Dade Cnty., 358 F.3d 1303, 1306 (11th Cir. 2004) (applying rational basis review to incorporation structure which allowed residents of incorporated municipalities to participate in county elections); *Fla. Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666, 676 (Fla. 1st DCA 2007) (applying rational basis review to statute limiting the length of ballot summaries); *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996) (applying rational basis review to statute prescribing the contents of ballots); *Bd. of Comm'rs of Sarasota Cnty. v. Gustafson*, 616 So. 2d 1165, 1167 (Fla. 2d DCA 1993) (applying rational basis review to candidate residency requirement).

Moreover, even when a defendant justifies a challenged decision on racial grounds, courts have rejected the application of strict scrutiny outside the context of a racial-gerrymandering case. *See Harris v. Ariz. Independent Redistricting Comm'n*, __ F. Supp. 2d __, 2014 WL 1801136, at *27 (D. Ariz. Apr. 29, 2014) ("[W]e reject plaintiffs' argument that strict scrutiny applies to the extent that the Commission claims that racial motivations drove the deviations from population equality. . . . As plaintiffs concede, this is not a racial gerrymandering case.") As noted above, in *Apportionment I*, the Florida Supreme Court placed the burden on the challengers, over and over again, even with respect to districts that the Legislature justified under the federal Voting Rights Act or the minority-protection provisions of the Florida Constitution. Plaintiffs posit no reason to apply a heavier burden of proof in this case than the Supreme Court applied in *Apportionment I*.

Plaintiffs' position is not only inconsistent with case law, but also sound judicial policy. It would be paradoxical and inconsistent with the will of the voters that the Legislature's efforts to satisfy the first-tier constitutional priorities of minority protection should be presumed invalid and subjected to strict scrutiny, while its efforts to comply with second-tier constitutional priorities should be presumed valid. Under Plaintiffs' theory, when the Legislature seeks to effectuate the

objective that the voters deemed most important, it is presumed to have done wrong and bears a burden that has been described as "strict in theory, but fatal in fact." *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting). The application of strict scrutiny to the Legislature's efforts to effectuate and implement constitutional priorities of paramount importance would frustrate the intent of the voters.

Plaintiffs also argue that even if the reasonable doubt standard applies, they need only establish individual facts by a preponderance of the evidence (Memorandum at 3). But neither of the two authorities cited by Plaintiffs supports this proposition. Plaintiffs rely on *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999), but that case did not address the constitutionality of a statute, and therefore did not apply the "beyond a reasonable doubt" standard. Rather, the issue in that case was whether the electric chair used by Florida to conduct executions functioned in a manner consistent with the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.* at 413.

Plaintiffs also cite *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002), but that case did not address what evidentiary standard applies to individual findings of fact; it merely held that in a criminal case, the "beyond a reasonable doubt" standard applies. Indeed, Plaintiffs' analogy to the standard applied in a criminal case actually *supports* the Legislative Parties' contention that Plaintiffs must prove their allegations beyond a reasonable doubt. Under Florida Standard Jury Instruction 3.7, "[t]he presumption [of innocence] stays with the defendant *as to each material allegation* in the [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt" (emphasis added). *See also Marston v. State*, 136 So. 3d 563, 568 (Fla. 2014) (stating instruction). Likewise, here Plaintiffs must prove their material allegations beyond a reasonable doubt to establish that the enacted congressional plan is unconstitutional.

Finally, even if individual findings of fact could be established by a mere preponderance of the evidence, the ultimate inference or conclusion of invalidity must be established beyond a reasonable doubt. The principle that the invalidity of a statute must appear beyond a reasonable doubt is now firmly cemented in Florida law. *See Pub. Defender, Eleventh Jud. Circuit of Fla. v. State*, 115 So. 3d 261, 280 (Fla. 2013); *Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011); *Crist v. Fla. Ass'n of Criminal Defense Lawyers*, 978 So. 2d 134, 139 (Fla. 2008); *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004); *State v. Kinner*, 398 So. 2d 1360, 1363 (Fla. 1981); *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184 (Fla. 1957); *City of Jacksonville v. Bowden*, 64 So. 769, 771-72 (Fla. 1914). Plaintiffs have failed to meet this burden, and the Court should therefore grant judgment in favor of the Legislative Parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by electronic transmission on June 25, 2014, to the persons listed on the following Service List.

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