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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.
_____/

THE LEGISLATIVE PARTIES' REPLY BRIEF ON CROSS APPEAL

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Appellants ask this Court not to consider the merits of the Legislative Parties' cross appeal, claiming that the Legislative Parties did not identify any order they ask this Court to reverse. But the Legislative Parties clearly stated that they appeal the trial court's Final Judgment, and their initial brief identified the points on which the trial court erred. Thus, the Court should consider the cross appeal.

On the merits, Appellants state that they agree that public participation in the redistricting process should be encouraged—indeed, their own participation in the legislative process involved submitting maps drawn for partisan purposes—yet they disregard the language in the Final Judgment discouraging the Legislature from seeking public input. Appellants also assert that Article III, Section 20 concerns only the intent of those who actually drew the map the Legislature adopted. To the contrary, this Court has recognized that Article III, Section 20 concerns the intent of the entire Legislature.

Appellants also argue that the Legislative Parties are precluded from challenging Amendment 6, but they waived this argument below. In any event, collateral estoppel requires mutuality—which does not exist here—when invoked against a government entity. Even if mutuality were not required, collateral estoppel does not apply to the Senate, which has never previously challenged Amendment 6 under the Elections Clause. Finally, the NAACP fails to demonstrate that

Amendment 6 is consistent with the Elections Clause of the United States Constitution; instead, Amendment 6 encroaches on the Legislature's authority to regulate congressional elections. Accordingly, the Court should declare Article III, Section 20 invalid.

I. THE CROSS APPEAL PROPERLY CHALLENGES THE FINAL JUDGMENT

Appellants argue that "the cross-appeal should be dismissed because the Legislature has not identified any order or ruling by the trial court it asks this Court to reverse" (Reply Br. at 56). Appellants cite *Breakstone v. Baron's of Surfside, Inc.*, 528 So. 2d 437, 439 (Fla. 3d DCA 1988), which states that a "notice of cross appeal . . . must identify with particularity the exact adverse trial court order or ruling which the appellee claims is error."

The Legislative Parties' notice of cross-appeal identified with particularity the trial court order they claim is erroneous: the Final Judgment. *See* Legislative Parties' Notice of Cross-Appeal at 1 (stating that the Legislative Parties appeal "the final order of this court dated July 10, 2014.") And their answer brief identified the specific rulings they appeal: (i) the court's conclusion that the Legislature should not seek the views of the public during the redistricting process (App. 190-91); (ii) the court's reliance on the alleged motivations of a small number of individual legislators to infer the intent of the entire Legislature (App. 187-96); and (iii) the court's failure to recognize that Amendment 6 violates the Elections

Clause of the United States Constitution (App. 167). Under Appellants' own authority, review of these adverse rulings by cross appeal is appropriate. *Breakstone*, 528 So. 2d at 439 ("The function of the cross appeal, then, is to call into question error in certain trial court orders or rulings adverse to the appellee which 'merge' into or are an inherent part of the order or orders under review by the main appeal—although the latter may be favorable or substantially favorable to the appellee.").

Appellants argue that this Court should not consider the cross appeal because the Legislative Parties ask the Court to affirm the trial court's approval of the Remedial Plan, rather than to reinstate the 2012 Enacted Plan (Reply Br. at. 56-57). They argue that if the Legislative Parties prevail on cross appeal, "the remedy would be to reverse the judgment below and reinstate the Enacted Plan" (Reply Br. at 56). It is true that, regardless of the Final Judgment's correctness, the Remedial Plan's passage into law superseded the 2012 Enacted Plan, *see* § 8.088, Fla. Stat. (2014) (stating that the Remedial Plan applies "with respect to the qualification, nomination, and election to the office of representative to the Congress of the United States for any election held after the 2014 general election."), and that the Legislative Parties do not seek reinstatement of the 2012 Enacted Plan. But that does not mean that the Legislative Parties seek only "an advisory opinion" (Reply Br. at 57). If the Legislative Parties did not cross appeal, they could only *defend*

the Final Judgment, even though its errors—the validity of Amendment 6, the meaning of legislative intent, and the ability of courts to dictate the internal procedures of the Legislature—are all directly relevant to the questions raised in Appellants' appeal. *See Cespedes v. Yellow Transp., Inc. (URC)/Gallagher Bassett Servs., Inc.*, 130 So. 3d 243, 249 (Fla. 1st DCA 2013) ("A cross-appeal is an appellee's exclusive method of obtaining relief from error in an order, and absent a cross-appeal, an appellee may not seek affirmative relief from any part of the order; the appellee may only defend the order.") Indeed, if Amendment 6 is invalid, Appellants' entire appeal is moot. Therefore, this Court should consider the cross appeal.

II. THE FINAL JUDGMENT IMPROPERLY DISCOURAGES PUBLIC INPUT IN THE REDISTRICTING PROCESS

Appellants admit that the trial court opined that the public submission process "may not be the best way to protect against partisan influence," but they claim that the Legislative Parties take those comments "out of context" (Reply Br. at 57, 59). Instead, they claim that the "trial court **encouraged** a genuinely open process," quoting the trial court as stating that "[p]erhaps it would be best to have it out on the table for all to see and evaluate" (Reply Br. at 57-58). But those remarks refer to the separate issue of whether, during their deliberations, legislators should have information about the political performance of maps (App. 192).

In any event, Appellants state that they "emphatically agree that true efforts at public participation are a hallmark of good governance that should be encouraged" (Reply Br. at 58). If so, then it is unclear why Appellants oppose clarification from this Court that the Legislature will not be penalized for encouraging public participation in the redistricting process. Indeed, Appellants maintain that the Legislature's reliance on public submissions cannot invalidate the enacted plan unless the Legislature "knowingly" relied on districts drawn by partisan operatives (Reply Br. at 59). At the same time, Appellants ask the Court to impute to the Legislature the intent of outsiders of whose involvement the Legislature had no knowledge. Appellants still have pointed to no evidence that the Legislature *knew* that the maps submitted under the name of Alex Posada were drawn by political operatives—or, for that matter, that the Legislature relied on them. Appellants cannot have it both ways. If the intent of unknown individuals who draw public submissions can be imputed to the Legislature, then the Legislature, for fear of that result, will have strong incentives to avoid public comment in the future.

The Final Judgment presumes that public participation is a mere channel for improper intent, and suggests that the Legislature should ignore public input to avoid the possibility of improper partisan influence (App. 190-91). A fundamental right of the people is the right to "instruct their representatives." Art. I, § 5, Fla. Const. The trial court thus improperly penalized the Legislature for soliciting pub-

lic comment, and improperly opined on the Legislature's internal workings. *See Fla. Senate v. Fla. Pub. Emps. Council 79*, 784 So. 2d 404, 409 (Fla. 2001) ("Florida courts have full authority to review the final product of the legislative process, but they are without authority to review the internal workings of [the Legislature]."). This Court should protect the right of Florida's citizens to express their views to the Legislature—and the duty of the Legislature, as a representative body, to solicit those views—and clarify that courts should not infer improper intent from the Legislature's efforts to solicit public input during the redistricting process.

III. UNDER THE FLORIDA CONSTITUTION, THE CONTROLLING INTENT IS THAT OF THE ENTIRE LEGISLATURE

Appellants argue that "this Court has already determined that the intent of individual legislators and legislative staff members is relevant to the assessment of legislative intent," citing *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013) ("*Apportionment IV*") (Reply Br. at 60). But in *Apportionment IV*, this Court did not hold that the intent of individual legislators controlled that of the Legislature as a whole, expressly shielding the subjective motivations of individual legislators under the legislative privilege. 132 So. 3d at 154 (recognizing the privilege could be asserted by legislators and staff related to "their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators.") Instead, the Court explained that "communications of individual legislators or legislative staff members, *if part*

of a broader process to develop portions of the map, could directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent." *Id*. at 150 (emphasis added). The Court found that the communications of individual legislators could be relevant because they might furnish evidence of a "broader process," and thus probative of the intent of the Legislature. This Court did not recede from its earlier holdings that the intent of the Legislature controls, or hold that the intent of a few individual legislators was dispositive, rather than potentially probative. *See In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 882 (Fla. 2012) (*"Apportionment II"*), (considering whether "the Legislature redrew the plan with an improper intent"); *id*. at 889 (considering whether "the Legislature redrew these districts with impermissible intent"); *id*. at 892 (Pariente, J., concurring) (referring to "the Legislature's 'intent'"); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 641 (Fla. 2012) (*"Apportionment I"*) (referring to "the Legislature's intent" and "improper intent on the part of the Legislature").

Appellants also argue that the Constitution "does not refer to the intent with which a plan is enacted, adopted, or even voted on, but rather to the intent with which it is drawn" (Reply Br. at 62). Under their theory, the entire Legislature could vote for or against a map for partisan reasons, so long as the individual who drew the map did not act with improper intent. Appellants' unreasonable interpre-

tation of Article III, Section 20 conflicts with this Court's previous statements that the intent of the Legislature—rather than that of individual map drawers—controls. *See, e.g.*, *Apportionment I* 83 So. 3d at 641 (referring to "the Legislature's intent" and "improper intent on the part of the Legislature"). It also conflicts with their own earlier position. At the pretrial conference, Appellants agreed that the intent of a staff member who drew a hypothetical redistricting plan could not alone invalidate the plan, and that, while the intent of individuals who participated in the map-drawing process was admissible evidence, it was "the Legislature's intent" that controlled (SR28: 4743-44). Moreover, if the intent of individual map drawers controlled, then the trial court could not have held the Enacted Plan unconstitutional, as it found that the professional staff who drew the Enacted Plan were "frank, straightforward and credible" and intended to draw compliant maps (App. 186).

Appellants also argue that "under principles of agency law" the "acts and intent" of the individual legislators can be attributed to the Legislature as a whole (Reply Br. at 64-65). But none of the cases they cite applies agency law to the Legislature. *See Roessler v. Novak*, 858 So. 2d 1158 (Fla. 2d DCA 2003) (addressing whether a radiologist was an agent of a hospital); *Morgan Int'l Realty, Inc. v. Dade Underwritings Ins. Agency, Inc.*, 617 So. 2d 455 (Fla. 3d DCA 1993) (addressing vicarious liability of corporation for acts of its president); *O'Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039 (Fla. 2d DCA 2007) (addressing

applicability of *in pari delicto* defense where plaintiff was alleged to be participant in corporation's wrongdoing).

This Court has held that "[e]ssential to the existence of an actual agency relationship is (1) acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." *Goldschmidt v. Holman*, 571 So. 2d 422, 424 n.5 (Fla. 1990). Here, no evidence showed that the Legislature controlled the activities of any individual legislators, who are independently elected constitutional officers and are not subject to control in the performance of their official duties by their colleagues in the Legislature. The Legislature had authority to control its professional staff, but as noted above, the trial court found that those individuals did not act with improper intent (App. 186).

Finally, Appellants cite cases for the proposition that "courts routinely look to evidence relating to staff members and individual legislators when the central question is the intent of a legislative body" (Reply Br. at 65). Appellants rely on *Easley v. Cromartie*, 532 U.S. 234 (2001), but ignore the United States Supreme Court's finding that a staff email was not "persuasive" evidence and at best provided only "a modicum of evidence" supporting the trial court's conclusion that the North Carolina General Assembly acted with improper intent in enacting its congressional redistricting plan—a finding the Court found to be clearly erroneous. *Id.*

at 254, 257. Appellants also cite *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), which merely holds that the legislative record *may* be relevant to determining legislative intent. Appellants also rely on *Texas v. United States*, 887 F. Supp. 2d 133, 165 (D.D.C. 2012), which the United States Supreme Court vacated, *see* 133 S. Ct. 2885 (2013), and therefore holds no precedential value. *See United States v. Ellis*, 419 F.3d 1189, 1192 (11th Cir. 2005) ("[V]acated opinions are officially gone. They have no legal effect whatever. They are void.") (marks omitted). Finally, Appellants cite *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), but that case did not hinge on the subjective intent of individual staff members; instead, the court found that a redistricting plan unconstitutionally subordinated traditional redistricting criteria, notwithstanding the legislature's "good faith." *Id*. at 1208, 1210. Thus, no authority supports the Appellants' position that the trial court could rely on the perceived subjective intent of selected individual legislators, rather than the intent of the entire Legislature.

IV. AMENDMENT 6 IS INVALID BECAUSE THE UNITED STATES CONSTITUTION AUTHORIZES STATE REGULATION OF CONGRESSIONAL ELECTIONS ONLY THROUGH THE STATE'S LEGISLATIVE PROCESS

Appellants challenge the Legislative Parties' ability to contest the validity of Amendment 6, arguing that they are bound by the Eleventh Circuit's decision in *Brown v. Secretary of State*, 668 F.3d 1271 (11th Cir. 2012). Appellants waived

this argument during the trial court proceedings, however, and collateral estoppel plainly does not apply to the Senate, which did not participate in *Brown*. Meanwhile, contrary to the NAACP's contentions, States have no authority to regulate federal elections, except as authorized by the United States Constitution, and therefore Amendment 6 is invalid because it violates the Elections Clause.

A. The Eleventh Circuit's Decision in *Brown* Does Not Preclude the Legislative Parties' Challenge to the Validity of Amendment 6

Rather than address the merits of the Legislative Parties' argument that Amendment 6 violates the Elections Clause of the United States Constitution, Appellants claim that the Legislative Parties are "barred by the doctrine of collateral estoppel" from raising the issue (Reply Br. at 69). Appellants have waived this argument. The Legislative Parties asserted in their answers to the operative complaints that "Article III, Section 20 is inconsistent with, and violates, Article I, Section 4 of the United States Constitution" (R17: 2369, 2375). Appellants, however, never served a reply to these answers. More than a year later, after the Legislative Parties amended their answers to add affirmative defenses based on Appellants' unclean hands and fraud on the court, Appellants filed replies denying all the affirmative defenses (R43: 5640-48), but again failed to mention collateral estoppel.[1]

[1] Appellants' replies to the amended answer raised res judicata, but that doctrine "prevents *the same parties* from relitigating *the same cause of action* in a second lawsuit." *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013).

Therefore, Appellants' collateral estoppel argument was waived in the trial court, and this Court should decline to consider it now. *See Judkins v. Walton Cnty.*, 128 So. 3d 62, 65 (Fla. 1st DCA 2013) (finding an estoppel argument waived because "[a]voidance of affirmative defenses[ ] must be specifically pled in a Reply."); *Fla. First Nat'l Bank v. Martin*, 449 So. 2d 861, 865 (Fla. 1st DCA 1984) ("[T]he bank did not plead either waiver or estoppel by way of avoidance of the affirmative defenses raised by appellees. . . . Accordingly, there is no basis for granting relief to appellant bank on these grounds on this appeal."), *overruled on other grounds, Weiner v. Am. Petrofina Mktg., Inc.*, 482 So. 2d 1362, 1365 (Fla. 1986); *City of Brooksville v. Hernando Cnty.*, 424 So. 2d 846, 848 (Fla. 5th DCA 1982) ("Since estoppel is an avoidance which was not pleaded by the [plaintiffs], the issue of the [defendant's] estoppel to assert the applicable statute of limitations was not an issue properly before the trial court based on the pleadings at that time").

Appellants' assertion that "collateral estoppel does not require mutuality of parties" is wrong (Reply Br. at 71). In *United States v. Mendoza*, 464 U.S. 154 (1984), the United States Supreme Court noted its "disapproval" of "[a] rule allowing nonmutual collateral estoppel against the government" because it "would substantially thwart the development of important questions of law by freezing the

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Appellants do not contend that this case involves the same cause of action as *Brown* (Reply Br. at 70-71).

first final decision rendered on a particular legal issue." *Id*. at 159, 163. Courts have since applied *Mendoza* to state government entities. *See State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005) ("*Mendoza*'s rationale applies with equal force to [Plaintiff's] attempt to assert nonmutual defense collateral estoppel against IPC (a state agency)."); *In re Hercule Carriers, Inc.*, 768 F.2d 1558, 1579 (11th Cir. 1985) ("We hold that the rationale outlined by the Supreme Court in *Mendoza* for not applying nonmutual collateral estoppel against the government is equally applicable to state governments"). Thus, because Appellants were not parties in *Brown*, they cannot assert collateral estoppel against either the House or the Senate.

Even if mutuality were not required, Appellants' argument at most prevents the House—not the Senate—from challenging the validity of Amendment 6. As Appellants concede, federal common law determines the preclusive effect of the judgment in *Brown* (Reply Br. at 70 n.26). That law prohibits "nonparty preclusion" because "[a] person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008). Because the Senate was not a party in *Brown*, collateral estoppel does not apply to it.

The United States Supreme Court has recognized limited circumstances when collateral estoppel may apply to a nonparty.[2] One exception—which Appellants invoke here—exists when a nonparty is adequately represented by someone with the same interests in the suit (Reply Br. at 71). But that exception only applies in "class or representative suits" such as "properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries." *Taylor*, 553 U.S. at 894 (citation omitted); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 799 (1996). In *Brown*, the House did not act in a "class or representative" capacity. Therefore, regardless of whether collateral estoppel applies to the House, the Senate has properly raised the validity of Amendment 6.

Appellants also assert that the Elections Clause challenge is "not a justiciable issue in this appeal because resolution of that question can have no effect on the disposition of this appeal" (Reply Br. at 57). But all of Appellants' appellate issues are predicated on the standards in Amendment 6. If Amendment 6 falls, so does their appeal.

[2] These are: (i) when a nonparty agrees to be bound by a judgment; (ii) when a substantive legal relationship exists between a party and a nonparty, such as an assignor and assignee; (iii) when, "in certain limited circumstances," a nonparty is adequately represented by someone with the same interests who was a party to the suit; (iv) when a nonparty assumes control over the litigation; (v) when a nonparty brings a new suit as a proxy for an original party; and (vi) when a statute foreclosures litigation by nonlitigants. *Taylor*, 553 U.S. at 895.

B. Amendment 6 Violates the Elections Clause

Appellants have little to say on the merits of the argument, other than to cite *Brown* (Reply Br. at 72). The NAACP, however, argues that Amendment 6 complies with the Elections Clause. It does not. *Brown* effectively reads the words "by the Legislature" out of the Constitution.[3]

It is indisputable that States have no authority to regulate federal elections, except as the United States Constitution authorizes, and that the Elections Clause vests only the "Legislature" of each State with such authority. It is equally indisputable that Amendment 6 regulates congressional elections. Indeed, it does nothing else. Because it purports to regulate congressional elections but was not adopted by the Legislature, as the Elections Clause requires, it is invalid.

States have no inherent or reserved power to regulate federal elections. Because federal offices did not predate, but *arose from* the United States Constitution, the power to regulate federal elections "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995);

[3] Appellants cite *Wylie v. Investment Management & Research Inc.*, 629 So. 2d 898 (Fla. 4th DCA 1993) as holding that a state should "accord unusual weight to a decision . . . of the federal circuit in which the state is located." But *Wylie* stated only that this was an "arguable method," and found that it "must guess how the highest court is likely to decide the issue." *Id*. at 900; *see also Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) ("Generally, state courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law.")

accord id. at 805 ("In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself.").

With respect to congressional elections, this delegation appears in the Elections Clause, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1, U.S. Const. "No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment." *Cook v. Gralike*, 531 U.S. 510, 522-23 (2001); *accord Thornton*, 531 U.S. at 804-05. Therefore, states may not regulate congressional elections except as authorized by the Elections Clause.

The Elections Clause commits authority to regulate congressional elections to each state's "Legislature"—not to "states" generally—while reserving a supervisory power to Congress. The Framers knew perfectly well what the word "Legislature" meant: "the term was not one of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (marks omitted).

The Constitution, therefore, uses terms such as the "State," the "People," and the "Legislature," and carefully distinguishes among them. For example, as originally ratified, the Constitution committed the election of members of the United

States House of Representatives to the "People," *see* Art. I, § 2, cl. 1, U.S. Const., and members of the United States Senate to the "Legislature," *see* Art. I, § 3, cl. 1, U.S. Const. Where the Framers referred to the "Legislature," it must be presumed that they intended to refer to the Legislature. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 188 (1824) (explaining that the Framers "must be understood to have employed words in their natural sense, and to have intended what they have said").

Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932), held that a legislature's regulations of congressional elections are subject to the usual mechanics of the enactment process—specifically, the veto power. In *Davis*, the Ohio Constitution authorized veto by referendum, and incorporated the veto into the State's legislative process. *Smiley* concerned a gubernatorial veto. In both cases, the veto power was upheld because when a legislature enacts congressional election regulations, it must act "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367.

Davis and *Smiley* make clear that state regulations of congressional elections must emanate from the "Legislature"—"the representative body which made the laws of the people," *Smiley*, 285 U.S. at 365 (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920))—and that a legislature's congressional election regulations are subject to the mechanics of the legislative process, *id*. at 367. Neither case suggests that regulations of congressional elections may be enacted outside of the leg-

islative process. In determining whether a state regulation of congressional elections is valid, the dispositive question is whether the regulation was enacted by the Legislature in accordance with the method prescribed for legislative enactments.

The creation of redistricting standards is a regulation of congressional elections. Indeed, no act regulates such elections more than creating redistricting standards, which prescribe the "Manner of holding Elections for Senators and Representatives." Art. I, § 4, cl. 1, U.S. Const. Thus, when Congress enacts redistricting standards—requiring, at different times, that districts be contiguous, compact, and equally populated—it has done so pursuant to its authority under the Elections Clause. *Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004) (plurality opinion). The creation of redistricting standards is within the authority conferred by the Elections Clause and must comply with it. As noted, States have no *other* authority to regulate congressional elections. *Cook*, 531 U.S. at 522-23.

In Florida, the Constitution provides that the "legislative power of the state shall be vested in a legislature of the State of Florida," and it defines "legislature" to mean "a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district." Art. III, § 1, Fla. Const. In the same article, the Constitution delineates the process by which legislative enactments are prescribed, including a gubernatorial veto. *See* Art. III, §§ 6-9, Fla. Const. Under the Elections Clause,

this is the process by which regulations of congressional elections are to be enacted.

By contrast, the initiative process forms no part of "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367; *accord In re Advisory Opinion to Att'y Gen. ex rel. Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 601 (Fla. 2002) (Pariente, J., concurring) ("[S]ome of Florida's most crucial legal principles have evolved as a result of the initiative process. However, the legislative power of the state is vested in the Legislature, art. III, § 1 . . . ."). It is not found in Article III, but in Article XI of the Florida Constitution, which governs constitutional amendments—not legislative enactments. Indeed, far from forming part of the legislative process, the initiative process was intended to "bypass legislative and executive control." *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1063 (Fla. 2010) (plurality opinion); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) ("The text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state 'Legislature[s].'").

Nor can the State Constitution circumscribe power delegated by the United States Constitution. On that issue, *Bush v. Palm Beach County Canvassing Board*,

531 U.S. 70 (2000), is instructive. There, in reviewing this Court's interpretation of state statutes regulating the rejection of untimely presidential election returns, the United States Supreme Court emphasized that state constitutional provisions cannot "circumscribe" legislation enacted pursuant to Article II, Section 1 of the United States Constitution, which authorizes the "Legislature" of each State to regulate the appointment of presidential electors. Specifically, the Court was concerned that that this Court had construed the Legislature's enactments under Article II, Section 1 to avoid conflict with state constitutional provisions. *See id*. at 77 ("There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, circumscribe the legislative power.") (marks omitted). Because the United States Constitution delegated authority expressly and exclusively to the "Legislature," neither the Florida Constitution nor its voters could circumscribe that authority. *See also McPherson v. Blacker*, 146 U.S. 1, 25, 34-35 (1892) (explaining that Article II, Section 1 "does not read that the people or the citizens shall appoint" but confers "plenary" authority on state legislatures to determine the manner of appointing presidential electors).

This Court recognized the same principle in later cases. It noted the "plenary authority of the Legislature to direct the manner of selecting Florida's presiden-

tial electors." *Reform Party of Fla. v. Black*, 885 So. 2d 303, 303 (Fla. 2004); *accord Palm Beach Cnty. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1281 (Fla. 2000). It has described Article II, Section 1 as a "'direct grant of authority' to state legislatures," *Black*, 885 So. 2d at 308 (quoting *Bush*, 531 U.S. at 76), and has affirmed that "the Legislature has exclusive power to define the method of determining how the electors of the state are chosen under Article II, Section 1," *id*. at 312.[4]

Because the Elections Clause "parallels" Article II, Section 1, *Thornton*, 514 U.S. at 805, the same principles apply here. The Elections Clause grants plenary and exclusive authority to state legislatures that cannot be circumscribed by state constitutional provisions. *See, e.g.*, *Dummit v. O'Connell*, 181 S.W.2d 691, 694 (Ky. 1944) (holding that a state statute authorizing absentee voting in federal elections was valid despite a state constitutional provision requiring ballots to be cast in person); *In re Opinion of Justices*, 45 N.H. 595 (1864) (same).

In other contexts, courts have recognized that delegation of discretionary authority by a superior law cannot be confined by an inferior one. In *Ellis v. Burk*,

[4] Likewise, the discretionary authority that Article V of the United States Constitution delegates to state legislatures to ratify proposed amendments to the United States Constitution is not restrained by state constitutional provisions. *See Leser v. Garnett*, 258 U.S. 130, 137 (1922) (Brandeis, J.) (holding that state constitutional provisions cannot prevent legislatures from ratifying the Nineteenth Amendment; "the function of the state Legislature in ratifying a proposed amendment to the federal Constitution . . . is a federal function derived from the federal Constitution" and "transcends any limitations sought to be imposed by the people of a state").

866 So. 2d 1236 (Fla. 5th DCA 2004), the court held that the People, acting through a petition to amend their county charter, cannot limit the authority conferred by state law on county commissions to establish *ad-valorem* tax rates—even though county commissions would have retained ultimate authority to establish them. "To impose such a cap would appear to be contrary to the scheme established by the Legislature . . . which places the discretion and decision-making authority in the board of county commissioners." *Id*. at 1239 (quoting Op. Att'y Gen. Fla. 01-04 (2001)). Similarly, a state constitutional provision purporting to regulate congressional elections—and restricting the Legislature's discretion—violates the Elections Clause, which places the authority in each state's legislature.

The assertion that Amendment 6 does not divest the Legislature's authority completely (NAACP Reply Br. at 3) does not rescue it. A partial divestment of constitutionally delegated authority is no more permissible than a complete one. In *Bush*, the Legislature was not fully divested of authority to prescribe the manner of appointing presidential electors, but the Supreme Court prohibited *any* application of state constitutional provisions that "circumscribe" statutes enacted under Article II, Section 1. Clearly, a state constitution cannot subtract from authority conferred by the United States Constitution. And as to the matters Amendment 6 regulates, it *does* completely divest the Legislature of its authority. The Legislature cannot, for example, decide *not* to use geographical boundaries in drawing districts.

Ultimately, this Court must determine not whether the Legislature was divested of all of its authority or only part of it, but (1) whether Amendment 6 regulates congressional elections; and (2) if so, whether it was enacted by the Legislature, in accordance with the method the State has prescribed for legislative enactments. The answer to the first question is "absolutely"; the answer to the second is "obviously not." Because Amendment 6 regulates congressional elections but was not enacted by the Legislature in accordance with the method prescribed by the Florida Constitution for legislative enactments, it violates the Elections Clause.[5]

CONCLUSION

This Court should reverse and vacate the Final Judgment to the extent that (i) the trial court improperly discouraged public participation in the redistricting process, (ii) the court determined that intent under Article III, Section 20 of the Florida Constitution can be inferred from the intent of select individual legislators, and (iii) the court failed to recognize that Amendment 6 is invalid under the Elections Clause of the United States Constitution.

[5] Contrary to the NAACP's contentions (Reply Br. at 2-3), the Elections Clause challenge now before the United States Supreme Court—the first Elections Clause case before the Court in more than 80 years—is certain to be highly informative, if not dispositive, of the argument here.

Respectfully submitted,

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I certify that on January 23, 2015, a copy of the foregoing was served by e-mail to all counsel on the attached service list.

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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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