ORIGINAL

IN THE SUPREME COURT OF FLORIDA

IN RE: 2002 JOINT RESOLUTION OF APPORTIONMENT

CASE NO. SC02-194

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BRIEF OF GOVERNOR JEB BUSH

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Governor's sole interest in this matter is to defend the constitutional separation of powers principle.[1] Ordinarily, there would be no need for the Governor to participate in this proceeding, because this Court in the past has properly recognized the primacy of the Legislature in reapportionment. Unfortunately, the Attorney General has asked this Court to disregard law and precedent and to arrogate powers that the people of our state have entrusted to their elected representatives.

The Attorney General urges this Court to engage in an unprecedented act of judicial imperialism. Without identifying a single constitutional or statutory defect in the Legislature's reapportionment plans, he asks this Court to "deny the petition for declaratory judgment, allow the Legislature to determine the objective standards to guide reapportionment, make plan adjustments necessary to implement the standards, and return the plans for further review." AG Brief at 4.[2] There is absolutely no basis in law for the Attorney General's request.

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[1] Accordingly, we will not address the merits of the reapportionment plans under review. Our focus here is the separation of powers issue and the related issue of the proper standard of review to be applied by this Court.

[2] Throughout this brief, we will refer to this as "the Attorney General's proposed 'objective reapportionment standards' requirement" or "the Attorney General's proposal." Citations to the Attorney General's brief will be indicated as "AG Brief at __."

This Court's only role in this proceeding is to determine the submitted plans' facial compliance with the United States and Florida Constitutions. Unless a plan clearly conflicts with the mandates of those organic documents, this Court has a duty to issue a declaration of validity. Contrary to the Attorney General's suggestion, no law—old or new—obligates the Legislature to adopt and apply "objective reapportionment standards." For this Court to impose such a requirement by judicial fiat would clearly violate our constitution's separation of powers principle.

The underlying message of the Attorney General's submission is that the Legislature is not to be trusted. The Attorney General insinuates throughout his brief that the Legislature may have used modern technology to implement "unconstitutional" and "inappropriate" motives. AG Brief at 27, 30. Offered without any justification, this suggestion mocks the fundamental principles that the Legislature is presumed to act in good faith and that legislative enactments are entitled to every presumption of validity.

The Attorney General has made an about-face from the position he advocated to this Court in 1992. Then, he urged the Court to limit itself to a determination of the facial constitutional validity of the reapportionment plans at issue. He told the Court that political gerrymandering claims are not facial constitutional claims and that they are too complex and fact-specific to be

evaluated in this necessarily limited proceeding. Brief of Attorney General Robert Butterworth at 27-28, *In re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992* (Case No. 79,674) (Filed Apr. 20, 1992). Now, the Attorney General encourages this Court to micro-manage what has heretofore been a quintessentially political and legislative process.

The activist role that the Attorney General proposes for this Court would far exceed the institutional competence of any court. Reapportionment does not lend itself to the dispassionate application of neutral principles. The drawing of every line requires political choices. Seemingly "objective" criteria conflict and become difficult to define when they must be applied in concrete circumstances. It is with good reason that the people of our state have given their elected representatives in the Legislature the primary authority over reapportionment.

This Court should reject the Attorney General's radical proposal, follow its own precedents, and give the Legislature the respect and deference that the constitution requires.

ARGUMENT

I. THE ATTORNEY GENERAL'S PROPOSAL HAS NO BASIS IN LAW.

The Attorney General's proposal that this Court require the Legislature to adopt and apply "objective reapportionment standards" has no basis in law. The Attorney General readily concedes that "the United States Constitution does not require the use of any particular standards for reapportionment, other than population equality." AG Brief at 30. He further acknowledges that "the only explicit standards of the Florida Constitution are that districts be contiguous and separately numbered."[3] *Id.* In a publication purportedly intended "to assist the Legislature in avoiding challenges" to its reapportionment plans, the Attorney General observes that "[c]ompactness is not a constitutional requirement, and there is no state or federal constitutional mandate that county or other political

[3] The question of what reapportionment standards should be mandated by our state's constitution has been the subject of considerable public deliberation. In the past, there have been proposals to amend the constitution to *require* adherence to standards like those recommended by the Attorney General, but those proposals failed. For example, in 1992, Justice Overton recommended that the Legislature reexamine a failed proposal from the 1978 Constitution Revision Commission. That Commission's proposal would have required, among other things, that districts be compact, that they respect the boundaries of local political subdivisions, and that those drawing the plan limit their consideration of incumbency and election-related data. *See In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 286-87 (Fla. 1992). That an "objective reapportionment standards" requirement has already been considered and rejected by our state's representative bodies makes it all the more illegitimate for the Attorney General to ask this Court to impose such a requirement by judicial fiat.

boundaries be honored in drawing district lines." *2002 Florida Reapportionment and Redistricting Memorandum of Law*, Office of Attorney General Bob Butterworth, at preface, 6. Finally, the Attorney General admits that "objective standards have not been required in previous Florida reapportionments." AG Brief at 32.

Unable to find any established legal authority for an "objective reapportionment standards" requirement, the Attorney General suggests that this Court must nonetheless impose one because "times have changed with advanced technology and new legal standards." AG Brief at 32. This argument does not withstand even the slightest scrutiny.

In a line of cases beginning with *Shaw v. Reno,* 509 U.S. 630 (1993), the U.S. Supreme Court has held that "a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 903 (1995). One way for a jurisdiction to rebut such a claim is to demonstrate that the challenged plan is explained not by racial considerations, but by the application of "'traditional race-neutral districting principles.'" *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (quoting *Miller*). However, the Supreme Court has made it abundantly clear that "these criteria [*i.e.*, traditional districting principles] are important *not because they are*

constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 509 U.S. at 647 (emphasis added). In other words, absent a plausible allegation of race-based gerrymandering, a legislature is under no obligation to explain its choices by reference to "objective reapportionment standards."

The Attorney General's repeated invocation of the mantra that "reapportionment is one area in which appearances do matter" is misleading and does nothing to advance his argument. AG Brief at 2, 12, 26, 29. According to the Attorney General, this quotation from the Supreme Court's *Shaw* opinion means that "non-compact, unusual, contorted shapes of districts—*in and of themselves*—raise questions as to the underpinnings of the plan." AG Brief at 2 (emphasis added). It is clear from the context of the quotation, however, that the Supreme Court does not believe that the shape of a district—standing alone—has any legal relevance.

In the quoted passage, the Court was addressing district shape as it relates to *racial* gerrymandering. The "appearance" of a racially-gerrymandered district "matters" because it "bears an uncomfortable resemblance to political apartheid," perpetuates "racial stereotypes," "exacerbate[s] . . . racial bloc voting," and encourages elected officials to think that they need represent only members of a

particular racial group. *Shaw*, 509 U.S. at 647-48. In *Miller*, the Court expressed the point this way:

> Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

Miller, 515 U.S. at 913. The Attorney General has wrenched the Supreme Court's words out of context, and no amount of repetition can change the words' meaning.

The Attorney General's technology-based argument is not only unpersuasive, but offensive as well. He essentially asks this Court to impute bad faith to the Legislature: "Also, the FREDS system, in spite of all its benefits, can easily implement motives that may violate constitutional standards." AG Brief at 26-27. In any event, although redistricting technology has certainly improved, legislators have always conducted redistricting fully aware of the consequences of their actions. Writing nearly thirty years ago, the U.S. Supreme Court observed that:

> The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.

Gaffney v. Cummings, 412 U.S. 735, 753 (1973). There is nothing sufficiently novel about modern redistricting technology to justify this Court's imposition of an unprecedented "objective reapportionment standards" requirement.

II. THIS COURT'S IMPOSITION OF AN "OBJECTIVE REAPPORTIONMENT STANDARDS" REQUIREMENT WOULD VIOLATE THE SEPARATION OF POWERS PRINCIPLE.

For this Court to impose on the Legislature requirements beyond those dictated by the United States and Florida Constitutions would violate the separation of powers principle. The Florida Constitution mandates that "[n]o person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. And it is beyond argument that the constitutional text commits to the Legislature the power to reapportion the state in the first instance. *See* Art. III, § 16(a), Fla. Const. This Court could not have expressed more clearly the extent of legislative discretion in the reapportionment context:

> [W]e emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination. Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites. If these requisites are met, we must refrain, at this time, from injecting our personal views into the proposed reapportionment plan. Even though we may disagree with the legislative policy in certain areas, the fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.

In re Apportionment Law Appearing as Senate Joint Resolution Number 1305, 1972, 263 So. 2d 797, 799-800 (Fla. 1972) ("*1972 Reapportionment*"). Without question, the Attorney General's proposed "objective reapportionment standards" requirement would restrict the Legislature's discretion in a manner not contemplated by the constitution.

This Court has a duty to guard the constitutional prerogatives of the Legislature just as jealously as it guards its own. In *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000), this Court struck down the Death Penalty Reform Act of 2000 on the ground that the law violated the constitutional separation of powers principle. This Court reasoned that the Legislature had intruded on the Court's constitutional authority to prescribe rules of practice and procedure for all courts. Explaining its conclusion, this Court noted that "[a]s a general rule . . . whatever power is conferred upon the courts by the Constitution cannot be enlarged or abridged by the Legislature." *Id.* at 62 (internal quotations and citation omitted). Clearly, the imposition of an "objective reapportionment standards" requirement would constitute an abridgement of the Legislature's constitutional authority. No less than this Court, the Legislature is entitled to be protected from such an encroachment by a coordinate branch of government.

The Attorney General's assault on the separation of powers principle stems from a misguided understanding of this Court's role in the redistricting process.

According to the Attorney General, "this Court is not limited, in carrying out its duties to ensure implementation of a fully valid reapportionment, to acting only if a violation of constitutional standards is, in fact, established. This Court can act to avoid that potential liability in the first instance." AG Brief at 26. Such an approach would radically—and lawlessly—expand this Court's role, at the expense of the Legislature's constitutional authority.

The Attorney General's position is best refuted by this Court's own words. Evaluating the 1972 reapportionment, this Court declared:

> Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requirements.
>
> * * *
>
> Unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution, the courts have no authority to pronounce it invalid.
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> * * *
>
> Apportionment is primarily a matter for legislative consideration and, in these proceedings, we cannot consider the wisdom, policy or fairness of [a reapportionment plan] unless it violates some constitutional provision of the Federal or State constitution.

1972 Reapportionment, 263 So. 2d at 800, 805, 808. Nothing in this Court's 1982 and 1992 reapportionment decisions casts any doubt on the continuing validity of these emphatic pronouncements.

Notwithstanding the institutional modesty reflected in the above-quoted statements, the Attorney General asserts that the U.S. Supreme Court has "recogni[zed] . . . the *primary* role of this Court" in the redistricting process. AG

Brief at 25 (emphasis added). Of course, the Supreme Court has done no such thing. That court has simply acknowledged that *states*—as opposed to federal courts—have the primary responsibility for redistricting. The Supreme Court clearly has not purported to speak to the particular roles that Florida law assigns this Court and the Legislature in regard to reapportionment. Such duties are set forth in our state's constitution. And, interpreting that organic document, this Court has repeatedly emphasized that its role is secondary to that of the Legislature.

To remain faithful to its constitutional role, this Court need only apply to the plans at issue the same standards that it has used in the past. In both 1972 and 1982, this Court limited its inquiry to whether the submitted plan, on its face, complied with the U.S. and Florida Constitutions. *See 1972 Reapportionment*, 263 So. 2d at 808; *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session*, 414 So. 2d 1040, 1052 (Fla. 1982) ("*1982 Reapportionment*"). In 1992, this Court expanded its review to include a determination of whether the reapportionment plan facially complied with the federal Voting Rights Act. Even then, however, this Court limited its analysis to a consideration of the undisputed statistical data in the record. *See In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 282 (Fla. 1992) ("*1992 Reapportionment*"). Moreover, this

Court has always been mindful of the limitations imposed by the constitution's 30-day review deadline and by the Court's own inability to conduct fact-finding. *See 1972 Reapportionment*, 263 So. 2d at 808; *1982 Reapportionment*, 414 So. 2d at 1045 (issue proper for resolution because no fact-finding required); *1992 Reapportionment*, 597 So. 2d at 282 (Fla. 1992) (noting unavailability of specific factual findings).

Never before has this Court sought to use its authority to preempt subsequent litigation or to minimize the state's potential liability. In fact, it is virtually boilerplate for the Court to include in its redistricting opinions a statement acknowledging that future challenges to the state's reapportionment plan are almost inevitable. *See 1972 Reapportionment*, 263 So. 2d at 809; *1982 Reapportionment*, 414 So. 2d at 1052; *1992 Reapportionment*, 597 So. 2d at 286-87. As reapportionment becomes ever more contentious, and the applicable legal standards ever more complex, it would be both inappropriate and foolish for this Court to embrace the activist role set for it by the Attorney General.

III. THE ATTORNEY GENERAL'S PROPOSAL CONTRADICTS THE FUNDAMENTAL PRINCIPLE THAT LEGISLATIVE ENACTMENTS ARE ENTITLED TO A PRESUMPTION OF VALIDITY.

The Attorney General has turned on its head the bedrock principle that legislative enactments are entitled to every presumption of validity. This Court must not lose sight of the fact that, despite his obvious eagerness to invalidate the

work of the people's representatives, the Attorney General has not identified *any* statutory or constitutional defect in the Legislature's reapportionment plans.[4] The

[4] The closest the Attorney General comes to alleging a constitutional violation is to timidly assert that "[a]n example of a configuration which *might* raise an issue of *potential* political gerrymandering is revealed by districts 86 and 87 of the House plan." AG Brief at 31 (emphasis added). In connection with the 1992 reapportionment, the Attorney General argued to this Court that:

> [I]t is self-evident that a political gerrymandering claim requires a detailed, complex factual inquiry into the underlying application of the redistricting plan. As such, a political gerrymandering claim for purposes of this Court's jurisdiction is not a facial constitutional claim and is not properly before this Court in this proceeding.

Brief of Attorney General Robert Butterworth at 27-28, *In re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992* (Case No. 79,674) (Filed Apr. 20, 1992). The Attorney General's 1992 brief did not overstate the complexity of a political gerrymandering claim, which has numerous elements, including the following. "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). It must be shown that the voting strength of the minority party would be consistently degraded throughout the decade following the reapportionment, and "relying on a single election to prove unconstitutional discrimination is unsatisfactory." *Id.* at 135. Finally, "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." *Id.* at 131. Florida law should be at least as protective of the Legislature's discretion, since "[t]here are no provisions in the Florida Constitution relating to apportionment of the legislature more stringent than those of the United States Constitution." *1972 Redistricting*, 263 So. 2d at 808. In light of the necessarily limited nature of the Court's review in this proceeding, it is virtually inconceivable that it could ever invalidate a reapportionment plan on the basis of alleged political gerrymandering.

Attorney General supports his radical proposal with nothing but speculation and references to legally irrelevant aspects of the record.

The Attorney General's position seems to be that the Legislature is guilty until proven innocent. Throughout his brief, the Attorney General insinuates that the Legislature is not to be trusted. He frets that modern redistricting technology "can easily implement motives that may violate constitutional standards." AG Brief at 26-27. He posits that certain of the districts adopted by the Legislature are equally explainable by "any inappropriate motive" as by "valid State principles." AG Brief at 30. He implies that, unless this Court requires it to adopt extra-constitutional standards, the Legislature will treat Florida's residents arbitrarily and unfairly. AG Brief at 32. Contrary to basic legal doctrine, the Attorney General essentially asks this Court to apply to the Legislature's work a presumption of *invalidity*.

That remarkable demand cannot be squared with this Court's observation, made in the redistricting context, that:

> [N]o duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law.

1972 Reapportionment, 263 So. 2d at 805-806 (quoting *City of Jacksonville v. Bowden*, 64 So. 769 (Fla. 1914)). Without any justification, the Attorney

General's proposal would strip the Legislature of the presumption of good faith to which it is entitled. *See Miller*, 515 U.S. at 915 ("until a claimant makes a showing sufficient to support [an allegation of race-based decisionmaking] the good faith of a state legislature must be presumed").

IV. NO COURT IS INSTITUTIONALLY CAPABLE OF OVERSEEING THE "UNIFORM" AND "FAIR" APPLICATION OF "TRADITIONAL DISTRICTING CRITERIA."

In addition to the reasons already given, the Attorney General's proposal is fundamentally flawed because it rests on a false premise. It is simply disingenuous to argue that this Court could legitimately purport to oversee the "uniform" and "fair" application of "traditional race-neutral criteria." *See* AG Brief at 15 ("Of course, the traditional race-neutral criteria are inter-related and must be applied uniformly and fairly.").

A moment's reflection on the Attorney General's proposal reveals that he seeks to embroil this Court in matters that are inherently political and beyond *any* court's institutional competence. Even as it established a cause of action based on political gerrymandering, the U.S. Supreme Court warned that courts must take care to avoid unwarranted intrusions on a legislature's authority over reapportionment:

> Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely *unless the express or tacit goal is to effect its*

> *removal from legislative halls*. We decline to take a major step toward that end, which would be so much at odds with our history and experience.

Davis v. Bandemer, 478 U.S. 109, 134 (1986) (emphasis added). Of course, it is precisely the Attorney General's goal to substitute this Court for the Legislature as the ultimate authority over reapportionment in our state.

The choices and compromises required by the redistricting process are quintessentially legislative and, therefore, unsuited to judicial determination. Purportedly "objective" standards compete and conflict when they are applied in a specific factual context. For example, "communities of interest" could be based on politics, income, social ties, ethnicity, religion, occupational status, geography, or any combination thereof.

It is simply impossible to judge objectively whether a standard like "respecting communities of interest" has been applied "uniformly" and "fairly" throughout a statewide redistricting plan. The drawing of every boundary line requires a policy choice and a compromise among myriad competing interests. This point is powerfully expressed in a passage quoted approvingly by the U.S. Supreme Court in *Bandemer*:

> The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.

Id. at 129, n.10 (quoting Robert G. Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts" at 7-8, in *Representation and Redistricting Issues* (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow, eds. 1982)) (ellipsis in original). It is precisely for these reasons that the people of Florida have entrusted their elected representatives in the Legislature, and not this Court, with the primary responsibility for redistricting. *See* Art. III, § 16(a), Fla. Const.

CONCLUSION

For the foregoing reasons, this Court should reject the Attorney General's radical proposal, follow its own precedents, and give the Legislature the respect and deference that the constitution requires.

Respectfully submitted,

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