**Subject:** RE: American Oversight Public Records Requests - Redistricting Requests ending in 0226 & 0227

**Date:** Friday, May 6, 2022 at 5:45:55 PM Eastern Daylight Time

**From:** DeLorenz, Christopher

**To:** AO Records

**Attachments:** image001.png

EXTERNAL SENDER

Good afternoon,

A search of the Executive Office of the Governor's files has produced documents responsive to your request as stated in the attached. You may find your records on the Governor's website at the link provided below under "Contorno 20 and American Oversight___Responsive.pdf" "Contorno 20__and American Oversight Responsive.pdf" "Contorno 20_ and American Oversight Responsive.pdf" "1. Florida Constitution Article III, Section 20.pdf" "2.Florida Legislature Resource.pdf" "3(a). Apportionment I.pdf" "3(b). Apportionment VII.pdf" "3(c). Apportionment VIII.pdf" "4. Advisory Opinion Request.pdf" "5. Governor's Brief.pdf" "6. Florida Supreme Court Order.pdf" "7. Florida Constitution Article III, Section 21.pdf" "8. Florida Constitution Article III, Section 16.pdf"

Thank you for contacting the Executive Office of the Governor.

Public Records Requests

Sincerely,
Open Government

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# Fla. Const. Art. III, § 20

Current through the 2020 Session of the Florida Legislature.

*LexisNexis® Florida Annotated Constitution > Constitution of the State of Florida as Revised in 1968 and Subsequently Amended. > Article III. Legislature.*

## Section 20. Standards for Establishing Congressional District Boundaries.

In establishing Congressional district boundaries:

**(a)** No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

**(b)** Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

**(c)** The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

## History

Proposed by Initiative Petition filed with the Secretary of State September 28, 2007; adopted 2010.

LexisNexis® Florida Annotated Constitution
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# About Florida Redistricting

After each decennial census the Legislature redraws the districts from which Florida voters elect their state representatives, state senators, and members of the U.S. House of Representatives.

**Redistricting** is the redrawing of congressional and state legislative districts to adjust for uneven growth rates in different parts of the state. Districts determine which voters participate in which elections.

**Reapportionment** is the redistribution of seats in the U.S. House of Representatives among the 50 states, based on the decennial census. Each state gets at least one seat. Effective with elections in 2022, Florida gets 28 representatives in the U.S. House of Representatives, an increase of one from the last decade. Two U.S. Senators represent the entire state.

The Florida Redistricting Process flowchart shows the process for approving new state House and Senate districts (see Article III, Section 16 of the Florida Constitution). It also indicates the paths followed dating back to 1972. The process is different for congressional districts, which are set by act of the Legislature and approved by the Governor (there is no mandatory review by the Florida Supreme Court).

| Florida Fast Facts | 2010 | 2020 | Difference |
|---|---|---|---|
| Statewide Population | 18,801,310 | 21,538,187 | +2,736,877 |
| Number of Congressional Seats | 27 | 28 | +1 seat |
| Congressional District Ideal Population | 696,345 | 769,221 | +72,876 |
| Florida House of Representatives District Ideal Population *(based on 120 seats)* | 156,678 | 179,485 | +22,807 |
| Florida Senate District Ideal Population *(based on 40 seats)* | 470,033 | 538,455 | +68,422 |

*Para ver este documento en español, haga clic **AQUÍ**. Pou w wè dokiman sa a an kreyòl, klike **LA**.*

## Voting Rights Act

**Section 2**

Section 2 of the Voting Rights Act (VRA) prohibits any state from imposing any voting qualification, standard, practice or procedure that results in the denial of any U.S. citizen the right to vote on the basis of race, color, or membership in a language minority group. Applying this provision to redistricting creates a district that performs for racial and language minorities where (1) a minority population is geographically compact and sufficiently numerous to be a majority in a single district; (2) the minority population is politically cohesive; (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority-preferred candidate; and (4) under all of the circumstances, the minority population has less opportunity than others to participate in the political process and elect representatives of its choice.

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**Preclearance**

The Voting Rights Act also prohibits purposeful discrimination and protects against retrogression—or backsliding—in the ability of racial and language minorities to elect representatives of their choice. Prior to the 2013 U.S. Supreme Court case *Shelby County v. Holder*, which negated the coverage formula in the VRA, these requirements applied only to certain counties in Florida: Collier, Hardee, Hendry, Hillsborough, and Monroe. Districts containing parts of these covered jurisdictions had to be submitted to and precleared by a federal court or the U.S. Department of Justice before the redistricting plan could be enforced. The *Shelby County* decision means the preclearance process established by the Voting Rights Act is no longer in effect, but it does not affect the validity of the diminishment standard in the Florida Constitution.

# Florida Constitution & Statutes

**Article III, Section 16**

Article III, Section 16 requires the Legislature to divide the state into 30 to 40 contiguous senatorial districts and 80 to 120 contiguous house districts. A district is contiguous if all of its territory is in actual contact, uninterrupted by the territory of another district. Contact at a corner or right angle is insufficient, but territory may cross bodies of water. The Constitution allows state legislative districts to overlap, either partially or entirely.

> (a) "The legislature at its regular session in the second year following each decennial census…shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial …and into not less than eighty nor more than one hundred twenty consecutively numbered representatives…"

**Article III, Sections 20 & 21**

Article III, Sections 20 & 21 of the Florida Constitution prohibit line-drawing that intentionally favors or disfavors a political party or an incumbent. These Sections also afford protection to racial and language minorities, and provide additional standards for the drawing of plans and districts.

> (a) "No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory."
>
> (b) "Unless compliance with the standards in this subsection conflicts with the standards [of] federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries."
>
> (c) "The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection."

**Section 11.031, Florida Statutes**

Section 11.031, F.S. states that the Florida Legislature exclusively uses data from the U.S. Census Bureau to redraw districts.

> (1) "All acts of the Florida Legislature based upon population and all constitutional apportionments shall be based upon the last federal decennial statewide census."

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Caution
As of: February 13, 2022 7:29 PM Z

# *In re Senate Joint Resolution of Legislative Apportionment 1176*

Supreme Court of Florida

March 9, 2012, Decided

No. SC12-1

**Reporter**
83 So. 3d 597 *; 2012 Fla. LEXIS 507 **; 37 Fla. L. Weekly S 181

IN RE: SENATE JOINT RESOLUTION OF LEGISLATIVE APPORTIONMENT 1176.

**Subsequent History:** Judgment entered by *In re Senate Joint Resolution of Legislative Apportionment 2-B, 89 So. 3d 872, 2012 Fla. LEXIS 834 (Fla., 2012)*

Related proceeding at, Writ denied by *Fla. House of Representatives v. League of Women Voters of Fla., 2013 Fla. LEXIS 1427 (Fla., July 11, 2013)*

## Core Terms

districts, compactness, apportionment, incumbent, plans, elect, redistricting, voters, Coalition, geographical boundaries, voting, utilize, challenges, senatorial district, drawing, reapportionment, political party, terms, majority-minority, maps, joint resolution, lines, candidate, constitutional standard, numbering, constitutional provision, gerrymandering, retrogression, measurements, diminish

## Case Summary

### Procedural Posture

Following the release of new census data, the Florida Legislature adopted a joint resolution of apportionment, Senate Joint Resolution 1176. As required pursuant to *Art. III, § 16(c), Fla. Const.*, the Attorney General petitioned the state supreme court for a declaratory judgment to determine the validity of the apportionment plans as enacted.

### Overview

Within thirty days of receiving the Attorney General's petition, and after permitting adversary interests to present their views, the court had a mandatory obligation under the Florida Constitution to render the declaratory judgment determining the validity of the apportionment plans. The new standards expressed in the Fair Districts Amendment, *Art. III, § 21, Fla. Const.*, which was imposed by the voters and clearly acted as a restraint on legislative discretion in drawing apportionment plans, were defined for the first time. With the addition of the Fair Districts Amendment, the limitations on legislative authority in apportionment decisions had increased and the constitutional yardstick had more measurements. The court entered judgment declaring the apportionment plan of the House of Representatives, as contained in the joint resolution, to be valid under the Florida Constitution and declaring the apportionment plan of the Senate, as contained in the joint resolution, to be constitutionally invalid. As contemplated by § 16(d), the Legislature then had the task of adopting a joint resolution conforming to the court's judgment.

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**Outcome**

The court declared the House of Representatives' apportionment plan to be valid and the Senate's plan to be invalid.

## LexisNexis® Headnotes

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN1*[] **Census, Apportionment & Redistricting**

*Article III, §16, Fla. Const.* expressly entrusts the Legislature with the obligation to redraw Florida's legislative districts and expressly entrusts the Supreme Court of Florida with the mandatory obligation to review the Legislature's decennial apportionment plans. The Florida House of Representatives and the Florida Senate must adopt a joint resolution apportioning the legislative districts in accordance with federal and state constitutional requirements. After the Legislature adopts a joint resolution of apportionment, the Florida Constitution requires the Attorney General to petition this Court for a declaratory judgment to determine the validity of the Legislature's apportionment plans as enacted. § 16(c). Within thirty days of receiving the Attorney General's petition, and after permitting adversary interests to present their views, the Court has a mandatory obligation under the Florida Constitution to render a declaratory judgment determining the validity of the Legislature's apportionment plans. § 16(c).

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN2*[] **Census, Apportionment & Redistricting**

The overall goal of the Fair Districts Amendment, *Art. III, § 21, Fla. Const.*, is twofold: To require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations and to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts are avoided.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN3*[] **Census, Apportionment & Redistricting**

The Fair Districts Amendment, *Art. III, § 21, Fla. Const.*, imposes more stringent requirements as to apportionment than the U.S. Constitution and prior versions of the state constitution. The new standards are set forth in two tiers, each of which contains three requirements. The first tier, contained in § 21(a), lists the following requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. § 21(a). The second tier, located in § 21(b), lists three additional requirements, the compliance with which is subordinate to those listed in the first tier and to federal law in the event of a conflict: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) where feasible, districts shall utilize existing political and geographical boundaries. The order in which the constitution lists the standards in tiers one and two is not to be read to establish any priority of one standard over the other within that tier. § 21(c).

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Constitutional Law > State Constitutional Operation

HN4[] Constitutional Law, State Constitutional Operation

When interpreting constitutional provisions, the Supreme Court of Florida endeavors to ascertain the will of the people in passing the amendment. It follows the approach that has been consistently undertaken when interpreting constitutional provisions: The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied. The state constitution is not a grant of power but a limitation upon power.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN5[] Census, Apportionment & Redistricting

Legislative apportionment plays a crucial role with respect to the right of citizens to elect representatives. Indeed, the right to elect representatives—and the process by which the people do so—is the very bedrock of democracy. To ensure the protection of this right, the citizens of the state of Florida, through the Florida Constitution, employ the essential concept of checks and balances, granting to the Legislature the ability to apportion the state in a manner prescribed by the citizens and entrusting the Supreme Court of Florida with the responsibility to review the apportionment plans to ensure they are constitutionally valid. The obligations set forth in the Florida Constitution are directed not to the Legislature's right to draw districts, but to the people's right to elect representatives in a fair manner so that each person's vote counts equally and so that all citizens receive fair and effective representation.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN6[] Census, Apportionment & Redistricting

See Art. III, § 16(a), Fla. Const.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN7[] Census, Apportionment & Redistricting

See Art. III, § 21, Fla. Const.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN8[] Census, Apportionment & Redistricting

The validity of a joint resolution of apportionment is determined by examining whether the Legislature has operated within the constitutional limitations placed upon it when apportioning the state's legislative districts. Legislative redistricting is fundamental to ensuring that citizens choose their elected officials in an equitable manner. The right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. To the extent that a citizen's right to vote is debased, he is that much less a citizen. Since the achieving of fair and effective representation for all citizens is concededly the

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basic aim of legislative apportionment, the *Equal Protection Clause of U.S. Const. amend. XIV* guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN9*[] **Census, Apportionment & Redistricting**

The question posed by election districts of disparate size is an issue of fair representation. In such cases, it is not that anyone is deprived of a vote or that any person's vote is not counted. Rather, it is that one electoral district elects a single representative and another district of the same size elects two or more—the elector's vote in the former district having less weight in the sense that he may vote for and his district be represented by only one legislator, while his neighbor in the adjoining district votes for and is represented by two or more. Fairness in voting under the federal constitution extends to dilution of the right to vote based on districts that are drawn in a manner that favor a political party.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN10*[] **Census, Apportionment & Redistricting**

With fairness in drawing the legislative districts as the focus, *Art. III, § 21, Fla. Const.*, imposes additional standards upon the Florida Legislature to follow in apportionment proceedings. Section 21 also provides Florida citizens with additional constitutional protections to ensure that their right to fair and effective representation is not impaired by the manner in which the legislative districts are drawn. These constitutional constraints imposed on the Legislature in drawing legislative districts are designed to maximize electoral possibilities by leveling the playing field for the increased protection of the rights of Florida's citizens to vote and elect candidates of their choice. Although the advent of new constitutional requirements undoubtedly increases the Legislature's apportionment obligations, the House and Senate plans still come to the Supreme Court of Florida with an initial presumption of validity. This presumption serves to recognize the deference initially owed to legislative acts upon passage.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN11*[] **Census, Apportionment & Redistricting**

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, the court must refrain from injecting its personal views into the proposed reapportionment plan. Even though it 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 the court act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

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HN12[] **Census, Apportionment & Redistricting**

Even though the Supreme Court of Florida continue to recognize the presumption of validity that governs ordinary legislative acts, the operation of its process in apportionment cases is far different than its review of ordinary legislative acts, and it includes a commensurate difference in obligations. Challenges to the constitutionality of ordinary legislative acts passed by the Legislature must be brought in a trial court and then reviewed by a district court of appeal. The Supreme Court of Florida has mandatory jurisdiction in those circumstances only if the legislative act is found to be unconstitutional. *Art. V, § 3(b)(1), Fla. Const.* In contrast, its mandatory review to determine the validity of apportionment plans every ten years derives from a different provision of the constitution: *Art. III, § 16(c), Fla. Const.* The constitution specifies that the Attorney General shall file a petition for a declaratory judgment and that the court shall permit adversary interests to present their views. § 16(c). In this type of original proceeding, the court evaluates the positions of the adversary interests, and with deference to the role of the Legislature in apportionment, the court has a separate obligation to independently examine the joint resolution to determine its compliance with the requirements of the Florida Constitution.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN13[] **Census, Apportionment & Redistricting**

It is the Supreme Court of Florida's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid. A challenger is not required to prove facial invalidity beyond a reasonable doubt. Because legislative reapportionment is primarily a matter for legislative consideration and determination, the court defers to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements. The court's duty is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN14[] **Census, Apportionment & Redistricting**

Where a legislative decision runs afoul of constitutional mandates, the Supreme Court of Florida has a constitutional obligation to invalidate an apportionment plan.

Constitutional Law > State Constitutional Operation

HN15[] **Constitutional Law, State Constitutional Operation**

Every word of the Florida Constitution should be given its intended meaning and effect. In construing constitutions, that construction is favored which gives effect to every clause and every part of it. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which gives it effect. In ascertaining the intent of the voters, the court may examine the purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in the constitutional document, with the view that a constitutional amendment must be assessed in light of the historical development of the decisional law extant at the time of its adoption.

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Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN16[] Census, Apportionment & Redistricting

The Federal Equal Protection Clause of U.S. Const. amend. XIV requires that districts conform to a one-person, one-vote standard. Article III, § 16(a), Fla. Const. requires the Legislature to apportion both the Senate and the House in consecutively numbered districts of either contiguous, overlapping or identical territory. "Consecutively numbered" does not require districts to be consecutively numbered such that each district is adjacent to the next numbered district.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN17[] Census, Apportionment & Redistricting

The specific constitutional directive in Art. III, § 21(c), Fla. Const., that tier two is subordinate to tier one in the event of conflict means that the Legislature's obligation is to draw legislative districts that comport with all of the requirements enumerated in Florida's constitution. However, should a conflict in application arise, the Legislature is obligated to adhere to the requirements of § 21(a) (tier one) and then comply with the considerations in § 21(b) (tier two) to the extent practicable or feasible, depending on the wording of the specific constitutional standard.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN18[] Census, Apportionment & Redistricting

The term "political gerrymander" is defined as the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN19[] Census, Apportionment & Redistricting

In contrast to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent, Art. III, § 21(a), Fla. Const.; there is no acceptable level of improper intent. It does not reference the word "invidious" as the term has been used by the U.S. Supreme Court in equal protection discrimination cases, and Florida's provision should not be read to require a showing of malevolent or evil purpose. Moreover, by its express terms, Florida's constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually. Redistricting will inherently have political consequences, regardless of the intent used in drawing the lines. Thus, the focus of the analysis must be on both direct and circumstantial evidence of intent.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN20[] Census, Apportionment & Redistricting

While the standard of Art. III, § 21(a), Fla. Const., prohibiting drawing a redistricting plan with the intent to favor of disfavor a political party or incumbent does not prohibit political effect, the effects of the plan, the shape of district lines, and the demographics of an area are all factors that serve as objective indicators of intent. One

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piece of evidence in isolation may not indicate intent, but a review of all of the evidence together may lead the court to the conclusion that the plan was drawn for a prohibited purpose. With respect to intent to favor or disfavor an incumbent, the inquiry focuses on whether the plan or district was drawn with this purpose in mind. The incumbency provision is neutral on its face, explicitly requiring that lines not be designed to help or handicap particular candidates based on incumbency or membership in a particular party. Far from dictating electoral outcomes, the provision seeks to maximize electoral possibilities by leveling the playing field. At the outset, objective indicators of intent to favor or disfavor a political party can be discerned from the Legislature's level of compliance with the constitution's tier-two requirements, which set forth traditional redistricting principles. A disregard for these principles can serve as indicia of improper intent.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN21*[] **Census, Apportionment & Redistricting**

The tier-two requirements of *Art. III, § 21(b), Fla. Const.*, are meant to restrict the Legislature's discretion in drawing irregularly shaped districts; strict compliance with their express terms may serve to undercut or defeat any assertion of improper intent. However, where the shape of a district in relation to the demographics is so highly irregular and without justification that it cannot be rationally understood as anything other than an effort to favor or disfavor a political party, improper intent may be inferred. In making this assessment, the court evaluates the shapes of districts together with undisputed objective data, such as the relevant voter registration and elections data, incumbents' addresses, and demographics, as well as any proffered undisputed direct evidence of intent.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN22*[] **Census, Apportionment & Redistricting**

In examining a redistricting plan pursuant to *Art. III, § 21, Fla. Const.*, the inquiry for intent to favor or disfavor an incumbent focuses on the shape of the district in relation to the incumbent's legal residence, as well as other objective evidence of intent. Objective indicators of intent may include such factors as the maneuvering of district lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent's former district. When analyzing whether the challengers have established an unconstitutional intent to favor an incumbent, the court must ensure that it does not disregard obvious conclusions from the undisputed facts.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN23*[] **Census, Apportionment & Redistricting**

In examining a redistricting plan pursuant to *Art. III, § 21, Fla. Const.*, mere access to political data cannot presumptively demonstrate prohibited intent because such data is a necessary component of evaluating whether a minority group has the ability to elect representatives of choice—a required inquiry when determining whether the plan diminishes a protected group's ability to elect a candidate of choice. Likewise, the fact that the Senate or House, or their staff, may or may not have had the incumbents' addresses is not determinative of intent or lack of intent. Rather, when the court analyzes the tier-two standards and determines that specific districts violate those standards

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without any other permissible justification, impermissible intent may be inferred.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN24[] Census, Apportionment & Redistricting

The provision in Art. III, § 21(a), Fla. Const., that districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice, imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice. The dual constitutional imperatives follow almost verbatim the requirements embodied in the federal Voting Rights Act, 42 U.S.C.S. § 1973 et seq. Florida's provision aims at safeguarding the voting strength of minority groups against both impermissible dilution and retrogression.

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

HN25[] Voting Rights, Racial Discrimination

The Voting Rights Act (VRA), 42 U.S.C.S. § 1973 et seq., was designed by Congress to banish the blight of racial discrimination in voting, and to help effectuate the U.S. Const. amend. XV's guarantee that no citizen's right to vote shall be denied or abridged on account of race, color, or previous condition of servitude. Sections 2 and 5 of the VRA combat different evils and differ in structure, purpose, and application. Section 2, specifically, applies nationwide and provides that no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. 42 U.S.C.S. § 1973(a).

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

HN26[] Voting Rights, Racial Discrimination

See 42 U.S.C.S. § 1973(b).

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

Civil Rights Law > Protection of Rights > Voting Rights > Vote Dilution

HN27[] Voting Rights, Racial Discrimination

42 U.S.C.S. § 1973(b), § 2 of the Voting Rights Act, 42 U.S.C.S. § 1973 et seq., prohibits any practice or procedure that, when interacting with social and historical conditions, impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters. Importantly, § 2 employs a results test, under which proof of discriminatory intent is not necessary to establish a violation of the section. Vote dilution is the practice of reducing the potential effectiveness of a group's voting strength by limiting the group's chances to translate the strength into voting power. The usual device for diluting the minority voting power is the manipulation of district lines by either fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them or packing them into one or a small number of districts to minimize their influence in adjacent districts. For

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instance, under the interpretation of federal law, impermissible packing might occur when a minority group has sufficient numbers to constitute a majority in three districts but is packed into two districts in which it constitutes a super-majority.

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

Civil Rights Law > Protection of Rights > Voting Rights > Vote Dilution

HN28[] **Voting Rights, Racial Discrimination**

The U.S. Supreme Court sets out three necessary preconditions that a plaintiff is required to demonstrate before he or she can establish that a legislative district must be redrawn to comply with 42 U.S.C.S. § 1973(b), § 2 of the Voting Rights Act, 42 U.S.C.S. § 1973 et seq. These preconditions require an individual challenging the plan to show that: (1) a minority population is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority population is politically cohesive; and (3) the majority population votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. When the three Gingles preconditions are met, courts must then assess the totality of the circumstances to determine if the § 2 effects test is met—that is, if minority voters' political power is truly diluted.

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

Civil Rights Law > Protection of Rights > Voting Rights > Vote Dilution

HN29[] **Voting Rights, Racial Discrimination**

A successful vote dilution claim under 42 U.S.C.S. § 1973(b), § 2 of the Voting Rights Act, 42 U.S.C.S. § 1973 et seq., requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed. Majority-minority districts are ones in which a majority of the population is a member of a specific minority group. By contrast, a crossover or coalition district is one in which minority voters make up less than a majority of the voting-age population but are, at least potentially, large enough to elect the candidate of their choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. Influence districts are districts in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. The showing of either an additional minority influence district or a crossover district, as opposed to an actual majority-minority district, is insufficient for § 2 purposes; what is required is that the minority population in the potential election district be greater than 50 percent. Moreover, while there is no § 2 right to a minority district that is not reasonably compact, the creation of a noncompact district does not compensate for the dismantling of a compact minority opportunity district.

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

HN30[] **Voting Rights, Racial Discrimination**

Section 5 of the Voting Rights Act (VRA), 42 U.S.C.S. § 1973 et seq., is limited to particular covered jurisdictions and relates to claims of retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. Section 5 suspends all changes in state election procedure, including redistricting plans, in jurisdictions covered by the VRA until they are submitted to and approved by a three-

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judge Federal District Court in Washington, D.C., or the Attorney General of the United States. Florida is not a covered jurisdiction for the purposes of *§ 5*, but the state does include five covered counties: Collier, Hardee, Hendry, Hillsborough, and Monroe. Florida's new constitutional provision, *Art. III, § 21, Fla. Const.*, however, codifies the non-retrogression principle of *§ 5* and now extends it statewide. In other words, Florida now has a statewide non-retrogression requirement independent of *§ 5*.

Civil Rights Law > Protection of Rights > Voting Rights > Preclearance

*HN31*[] **Voting Rights, Preclearance**

Preclearance under *§ 5* of the Voting Rights Act, *42 U.S.C.S. § 1973 et seq.*, is granted only if the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. A violation can be shown where the drawing of the district lines has "the purpose of or will have the effect of diminishing the ability of any citizens on account of race or color, or membership in a language minority group, to elect their preferred candidates of choice. *42 U.S.C.S. § 1973c(b)*. The primary objective of *§ 5* is to avoid retrogression. A plan has an impermissible retrogressive effect under *§ 5* only if it would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. The existing plan of a covered jurisdiction serves as the benchmark against which the effect of voting changes is measured.

Civil Rights Law > Protection of Rights > Voting Rights > Preclearance

*HN32*[] **Voting Rights, Preclearance**

By including in *Art. III, § 21, Fla. Const.*, the "diminish" language of recently amended *§ 5* of the Voting Rights Act, *42 U.S.C.S. § 1973 et seq.*, Florida now adopts the retrogression principle as intended by Congress in the 2006 amendment. Accordingly, the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates. In other words, in addition to majority-minority districts, coalition or crossover districts that previously provided minority groups with the ability to elect a preferred candidate under the benchmark plan must also be recognized. Nonetheless, under Florida's provision, a slight change in percentage of the minority group's population in a given district does not necessarily have a cognizable effect on a minority group's ability to elect its preferred candidate of choice. This is because a minority group's ability to elect a candidate of choice depends upon more than just population figures.

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

*HN33*[] **Voting Rights, Racial Discrimination**

To undertake a retrogression evaluation requires an inquiry into whether a voting district is likely to perform for minority candidates of choice. This is termed a "functional analysis," requiring consideration not only of the minority population in the districts, or even the minority voting-age population in those districts, but of political data and how a minority population group has voted in the past. In making an assessment, the Supreme Court of Florida relies upon alternative or illustrative plans that make the least departure from Florida's stated redistricting criteria needed to prevent retrogression.

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Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN34[] **Voting Rights, Racial Discrimination**

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize the people into competing racial factions; it threatens to carry the people further from the goal of a political system in which race no longer matters—a goal that *U.S. Const. amends. XIV* and *XV* embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by the state legislatures demands close judicial scrutiny.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN35[] **Census, Apportionment & Redistricting**

In a manner consistent with what is required to determine whether a district is likely to perform for minority candidates of choice, the court's analysis of a claim under *Art. III, § 21(a), Fla. Const.*, safeguarding the voting strength of minority groups, and any defense for the manner in which the district was drawn will involve the review of the following statistical data: (1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN36[] **Census, Apportionment & Redistricting**

The requirement that voting districts shall consist of contiguous territory exists in both *Art. III, §§ 16(a)* and *21(a), Fla. Const.* Contiguous is defined as being in actual contact: touching along a boundary or at a point. A district lacks contiguity when a part is isolated from the rest by the territory of another district or when the lands mutually touch only at a common corner or right angle.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN37[] **Census, Apportionment & Redistricting**

The Constitutions of Florida and the United States require that one man's vote in a district be worth as much as another. Mathematical exactness is not an absolute requirement in state apportionment plans; however, deviations, when unavoidable, must be de minimis. Whether a deviation is de minimis must be determined on the facts of each case. A State make an honest and good faith effort to construct districts as nearly of equal population as is practicable. Minor population deviations among state legislative districts do not substantially dilute the weight of individual votes in larger districts so as to deprive individuals in these districts of fair and effective representation. Some deviations from population equality may be necessary to permit States to pursue other legitimate objectives such as maintaining the integrity of various political subdivisions and providing for compact districts of contiguous territory. An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself

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furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN38*[] **Census, Apportionment & Redistricting**

The voters' inclusion of the one-person, one-vote standard in the second tier of *Art. III, § 21, Fla. Const.*, recognizes that, as under the federal constitution, strict and unbending adherence to the equal population requirement will yield to other redistricting considerations, but that those considerations must be based on the express constitutional standards. The Florida Constitution embraces this construction, expressly mandating that the equal population requirement give way to contiguity, the prohibition against the intent to favor an incumbent or political party, and the need to comply with the minority-protection provision. In addition, § 21, instructs that Florida's equal population requirement be balanced with both compactness and the use of political and geographical boundaries.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN39*[] **Census, Apportionment & Redistricting**

Although the *Equal Protection Clause of U.S. Const. amend. XIV* requires state legislatures to make an honest and good faith effort to construct districts as nearly of equal population as is practicable, there are legitimate reasons for states to deviate from creating districts with perfectly equal populations, including maintaining the integrity of political subdivisions and providing compact and contiguous districts. *Art. III, § 21, Fla. Const.*, is imbued with the same meaning, subject to this important caveat. Because obtaining equal population if practicable is an explicit and important constitutional mandate under the Florida Constitution, any deviation from that goal of mathematical precision must be based upon compliance with other constitutional standards. Accordingly, compliance with Florida's equal population standard must be assessed in tandem with the other constitutional considerations.

Constitutional Law > State Constitutional Operation

*HN40*[] **Constitutional Law, State Constitutional Operation**

In interpreting constitutional provisions, first and foremost, a court must examine the actual language used in the constitution. If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written. The words of the constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. Additionally, the court endeavors to construe a constitutional provision consistent with the intent of the framers and the voters. Constitutional provisions must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied. Thus, a fundamental tenet of constitutional construction applicable in a court's analysis is that the court will construe a constitutional provision in a manner consistent with the intent of the framers and the voters and will interpret its terms in their most usual and obvious meaning.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

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HN41[] **Census, Apportionment & Redistricting**

A compactness requirement serves to limit partisan redistricting and racial gerrymanders. Compactness is almost universally recognized as an appropriate anti-gerrymandering standard. Courts around the country generally define the term "compactness" on a geographical basis. Defining compactness geographically also conforms to the ordinary dictionary definition of the term. The Merriam-Webster's Collegiate Dictionary defines the word "compact" as having a dense structure or parts or units closely packed or joined. Black's Law Dictionary defines "compact" as closely or firmly united or packed having a small surface or border in proportion to contents or bulk.

Constitutional Law > State Constitutional Operation

HN42[] **Constitutional Law, State Constitutional Operation**

In construing the words used in the constitution, a court is not at liberty to add words and terms that are not included in the text of the constitution.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN43[] **Census, Apportionment & Redistricting**

Expanding the definition of compactness in *Art. III, § 21, Fla. Const.*, to include factors such as the ability to access and communicate with elected officials and their ability to relate and interact with one another would be contrary to the average voter's understanding of compactness and would be contrary to the usual and ordinary meaning of the word. In fact, using such a broad definition of this term would almost read out the requirement of compactness—enlarging this term to such a degree that it would frustrate the will of the people in passing this constitutional amendment. Accordingly, when reviewing compactness, the term should be construed to mean geographical compactness.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN44[] **Census, Apportionment & Redistricting**

As a geographical inquiry, a review of compactness in a redistricting plan begins by looking at the shape of a district; the object of the compactness criterion is that a district should not yield bizarre designs. Compact districts should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement. In addition to a visual examination of a district's geometric shape, quantitative geometric measures of compactness are used to assist courts in assessing compactness. In fact, there is commonly used redistricting software that includes tools designed to measure compactness. Despite a court's use of visual and numerical measurements of geographic compactness, its review of that mandate cannot be considered in isolation. Other factors influence a district's compactness, including geography and abiding by other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN45[] **Census, Apportionment & Redistricting**

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Since compactness is set forth in *Art. III, § 21(b), Fla. Const.*, the criteria of § 21(a) must predominate to the extent that they conflict with drawing a district that is compact. However, if a district can be drawn more compactly while utilizing political and geographical boundaries and without intentionally favoring a political party or incumbent, compactness must be a yardstick by which to evaluate those other factors. Among the § 21(b) criteria, the standard for compactness is that the district shall be compact without qualification. Compactness is a standard that refers to the shape of the district. The goal is to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. Compactness can be evaluated both visually and by employing standard mathematical measurements.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN46*[] **Census, Apportionment & Redistricting**

In tandem with compactness, *Art. III, §21(b), Fla. Const.*, requires that voting districts shall, where feasible, utilize existing political and geographical boundaries. Unlike the mandate of compactness, this requirement is modified by the phrase "where feasible," suggesting that in balancing this criterion with compactness, more flexibility is permitted.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN47*[] **Census, Apportionment & Redistricting**

The requirement in *Art. III, §21(b), Fla. Const.*, that voting districts utilize, where feasible, existing political and geographical boundaries refers to geographical boundaries that are easily ascertainable and commonly understood, such as rivers, railways, interstates, and state roads. Together with an analysis of compactness, an adherence to county and city boundaries as political boundaries, and rivers, railways, interstates and state roads as geographical boundaries provides a basis for an objective analysis of the plans and the specific districts drawn. There will be times when districts cannot be drawn to follow county lines or to include the entire municipalities within a district. Certainly, not every split of a municipality will violate this prohibition; the constitutional directive is only that existing political and geographical boundaries should be used where feasible.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

*HN48*[] **Census, Apportionment & Redistricting**

Where adherence to a tier-one requirement under *Art. III, § 21(b), Fla. Const.*, explains the irregular shape of a given district, a claim that the district has been drawn to favor or disfavor a political party can be defeated. Where it does not, however, further inquiry into the Legislature's intent becomes necessary. If an alternative plan can achieve the same constitutional objectives that prevent vote dilution and retrogression of protected minority and language groups and also apportions the districts in accordance with tier-two principles so as not to disfavor a political party or an incumbent, this will provide circumstantial evidence of improper intent. That is to say, an alternative plan that achieves all of Florida's constitutional criteria without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan.

Constitutional Law > Congressional Duties &

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Powers > Census > Apportionment & Redistricting

HN49[] Census, Apportionment & Redistricting

Democrats tend to cluster in cities, which may result in a natural "packing" effect, regardless of where the lines are drawn.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN50[] Census, Apportionment & Redistricting

Whether by reason of partisan districting or not, party constituents may always wind up "packed" in some districts and "cracked" throughout others.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN51[] Census, Apportionment & Redistricting

Apportionment plans that increase minority voting strength are entitled to preclearance under § 5 of the Voting Rights Act, 42 U.S.C.S. § 1973 et seq., and the same principle applies under Florida law.

Constitutional Law > Congressional Duties & Powers > Census > Apportionment & Redistricting

HN52[] Census, Apportionment & Redistricting

With respect to numbering, the Florida Constitution states only that Senate districts shall be consecutively numbered. Art. III, § 16(a), Fla. Const. However, because the constitution requires that Senate terms must be staggered, the number of a Senate district determines the years in which elections must be held for that district. Art. III, § 15(a), Fla. Const. Unquestionably, the numbering of a Senate district, whether given an odd or even number, directly affects the length of time a senator may serve. § 15(a). Section 15(a) provides for staggered Senate terms. In accordance with that requirement, the constitution requires Senate elections to occur in particular districts in alternating general election years, with the year of the election to be determined by whether the district is designated by an odd or even number. § 15(a). Moreover, any senator who represents a district where a change in the district lines has resulted in a change in constituency must stand for reelection in the next general election after reapportionment. The Florida Constitution, by its provisions, requires, upon reapportionment, that senate terms be truncated when a geographic change in district lines results in a change to the district's constituency.

Constitutional Law > State Constitutional Operation

HN53[] Constitutional Law, State Constitutional Operation

In construing multiple constitutional provisions addressing a similar subject, the provisions must be read in pari materia to ensure a consistent and logical meaning that gives effect to each provision.

Governments > State & Territorial Governments > Elections

HN54[] State & Territorial Governments, Elections

Under Art. VI, §4(b), Fla. Const., no person may appear on the ballot for re-election to the office of Florida senator if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years. It should first be emphasized that the Florida Constitution

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does not limit senators to a maximum of eight consecutive years. Rather, the constitution prohibits anyone who has already served for eight years from standing for reelection. Conversely, any senator who has served for less than eight years is not prohibited from seeking reelection.

Governments > State & Territorial Governments > Elections

*HN55*[] **State & Territorial Governments, Elections**

Elected officials have no property rights to the office to which they have been elected.

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Ronald A. Labasky of Brewton Plante, P.A., Tallahassee, Florida, on behalf of the Florida State Association of Supervisors of Elections, Inc.; and Charles G. Burr of Burr and Smith, LLP, Tampa, Florida, Victor L. Goode and Dorcas R. Gilmore, NAACP, Baltimore, Maryland, Allison J. Riggs and Anita S. Earls of Southern Coalition For Social Justice, Durham, North Carolina, Other Interested Parties Responding.

**Judges:** PARIENTE, J. LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur. LEWIS, J., concurs with an opinion. LABARGA, J., concurs with an opinion. PERRY, J., concurs with an opinion. CANADY, C.J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

**Opinion by:** PARIENTE

## Opinion

Original Proceeding — Apportionment Law

PARIENTE, J.

[*597] With the goal of reforming [**3] this state's legislative apportionment process, in 2010, the Florida voters approved an amendment to the Florida Constitution establishing stringent new standards for the

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once-in-a-decade apportionment of legislative districts. These express new standards imposed by the voters clearly act as a restraint on the Legislature in drawing apportionment plans. After the Legislature draws the apportionment plans, this Court is required by the Florida Constitution to review those plans to ensure their compliance with the constitution. In this review, we are obligated to interpret and apply these standards in a manner that gives full effect to the will of the voters. In order to do so, our review necessarily becomes more extensive than in decades past.

For the reasons set forth in this opinion, we declare the plan apportioning districts for the Florida House of Representatives to be constitutionally valid under the Florida Constitution. We declare the plan apportioning the districts for the Florida [*598] Senate to be constitutionally invalid under the Florida Constitution. The Legislature is now tasked by the Florida Constitution with adopting a new joint resolution of apportionment "conforming to [**4] the judgment of the supreme court" as set forth in *article III, section 16(d)*.

## I. INTRODUCTION

The once-in-a-decade process of redistricting follows the United States Census Bureau's release of new census data. *HN1*[↑] *Article III, section 16, of the Florida Constitution* expressly entrusts the Legislature with the obligation to redraw this state's legislative districts and expressly entrusts this Court with the mandatory obligation to review the Legislature's decennial apportionment plans. The Florida House of Representatives and the Florida Senate must adopt a joint resolution apportioning the legislative districts in accordance with federal and state constitutional requirements. *Id.* After the Legislature adopts a joint resolution of apportionment, the Florida Constitution requires the Attorney General to petition this Court for a declaratory judgment to determine the validity of the Legislature's apportionment plans as enacted. *Art. III, § 16(c), Fla. Const.* Within thirty days of receiving the Attorney General's petition, and after permitting adversary interests to present their views, the Court has a mandatory obligation under the Florida Constitution to render a declaratory judgment determining [**5] the validity of the Legislature's apportionment plans. *Id.*

Before 2010, this Court held that Florida's constitutional requirements guiding the Legislature during the apportionment process were "not more stringent than the requirements under the United States Constitution." *In re Constitutionality of House Joint Resolution 1987 (In re Apportionment Law— 2002), 817 So. 2d 819, 824 (Fla. 2002)*. Under this construction of the Florida Constitution, we reviewed legislative apportionment plans to determine whether those plans complied with (1) the general provisions of the United States Constitution, which set forth the one-person, one-vote standard under the *Equal Protection Clause*, and (2) the specific provisions of the state constitution, *article III, section 16(a)*, requiring districts to be "consecutively numbered" and to consist of "contiguous, overlapping or identical territory."

On November 2, 2010, the voters approved Amendment 5 (Fair Districts Amendment) for inclusion in the Florida Constitution, greatly expanding the standards that govern legislative apportionment.[1] When approving the Fair Districts Amendment for placement on the 2010 ballot, this Court explained that *HN2*[↑] the "overall [**6] goal" of the Amendment was twofold: "[T]o require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic

[1] Amendment 6 adopted identical standards for congressional redistricting. The Legislature's congressional redistricting plan is not currently before us.

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considerations" and "to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts . . . are avoided." *Advisory Op. to Atty. Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175, 181, 187-88 (Fla. 2009)* (plurality opinion). After its passage, the Fair Districts Amendment was codified as *article III, section 21, of the Florida Constitution.*

*HN3*[↑] With the advent of the Fair Districts Amendment, the Florida Constitution now imposes more stringent requirements as to apportionment than the United States Constitution and prior versions of the state [*599] constitution. The new standards enumerated in *article III, section 21*, are set forth in two tiers, each of which contains three requirements. The first tier, contained in *section 21(a)*, lists the following requirements: (1) no apportionment [**7] plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. The second tier, located in *section 21(b)*, lists three additional requirements, the compliance with which is subordinate to those listed in the first tier of *section 21* and to federal law in the event of a conflict: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) where feasible, districts shall utilize existing political and geographical boundaries. *See art. III, § 21(b), Fla. Const.* The order in which the constitution lists the standards in tiers one and two is "not [to] be read to establish any priority of one standard over the other within that [tier]." *Art. III, § 21(c), Fla. Const.*

These express new standards imposed by the voters clearly act as a restraint on legislative discretion in drawing apportionment plans. [**8] In this original declaratory judgment proceeding, we must define these new standards for the first time since the passage of the Fair Districts Amendment. Although this Court's role is unquestionably circumscribed by the extremely short time frame set forth in *article III, section 16(c), of the Florida Constitution*, such a limitation cannot deter the Court from its extremely weighty responsibility entrusted to us by the citizens of this state through the Florida Constitution to interpret the constitutional standards and to apply those standards to the legislative apportionment plans.

*HN4*[↑] When interpreting constitutional provisions, this Court endeavors to ascertain the will of the people in passing the amendment. We follow the approach that has been consistently undertaken when interpreting constitutional provisions:

> The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

*Pleus v. Crist, 14 So. 3d 941, 944-45 (Fla. 2009)*; [**9] *Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004)* (quoting *Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960)*; *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 501 (Fla. 2003)*.

This Court's duty to measure the Legislature's apportionment plans with the yardstick of express constitutional provisions arises from the "well settled" principle that "the state Constitution is not a grant of

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power but a limitation upon power." *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session (In Re Apportionment Law—1972), 263 So. 2d 797, 805 (Fla. 1972)*. With the recent addition of *section 21 to article III of the Florida Constitution*, the Legislature is governed by a different and more comprehensive constitutional measurement than before—the limitations on legislative authority in apportionment decisions have increased and the constitutional yardstick has more measurements.

In addition to measuring the Legislature's compliance with these standards, we [*600] recognize the crucial role *HN5*[⬆] legislative apportionment plays with respect to the right of citizens to elect representatives. Indeed, the right to elect representatives—and the process by which [**10] we do so—is the very bedrock of our democracy. To ensure the protection of this right, the citizens of the state of Florida, through the Florida Constitution, employed the essential concept of checks and balances, granting to the Legislature the ability to apportion the state in a manner prescribed by the citizens and entrusting this Court with the responsibility to review the apportionment plans to ensure they are constitutionally valid. The obligations set forth in the Florida Constitution are directed not to the Legislature's right to draw districts, but to the people's right to elect representatives in a fair manner so that each person's vote counts equally and so that all citizens receive "fair and effective representation." Once validated by the Court, the apportionment plans, which redraw each of the 40 Senate districts and each of the 120 House districts, will have a significant impact on the election of this state's elected representatives for the next decade.

On February 9, 2012, the Legislature passed Senate Joint Resolution 1176 (Joint Resolution), apportioning this state into 120 House districts and 40 Senate districts. The next day, the Attorney General fulfilled her constitutional [**11] obligation by filing a petition in this Court for a declaratory judgment to determine the validity of the legislative apportionment plans contained within the Joint Resolution. Following the Attorney General's filing, this Court "permit[ted] adversary interests to present their views" as required by *article III, section 16(c)*. Under this Court's plenary authority to review legislative apportionment plans, we now have "jurisdiction to resolve all issues by declaratory judgment arising under *article III, section 16(c), Florida Constitution.*" *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session (In re Apportionment Law—1982), 414 So. 2d 1040, 1045 (Fla. 1982)*.

We have carefully considered the submissions of both those supporting and opposing the plans.[2] We have held oral argument. For the reasons more fully explained below, we conclude that the Senate plan is facially invalid under *article III, section 21*, and further conclude that the House plan is facially valid. We agree with the position of the House that the House plan can

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[2] The House and Senate submitted briefs in support of the Joint Resolution. Briefs in opposition to the Joint Resolution were submitted by the following entities: (1) the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida (together "the Coalition"); (2) the Florida Democratic Party (FDP); and (3) the City of Lakeland. The Attorney General filed a brief, which did not take a position on whether the plans should be approved, but instead argued for an extremely limited review and for allowing all fact-based challenges to be brought subsequently in a trial court. The Florida State Conference of NAACP Branches, which did not take a position for or against the Joint Resolution, directed its comments solely to the interpretation of the Federal Voting Rights Act and Florida's constitutional minority voting protection provision. Finally, the Florida [**13] State Association of Supervisors of Elections filed a comment to make the Court aware of the qualifying deadlines for the Florida Legislature and Congress under the Florida Statutes.

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be severed from the Senate plan. In accordance with *article III, section 16(c), of the Florida Constitution*, the [**12] Court enters a declaratory judgment determining that the apportionment plan for the House of Representatives [*601] as contained in Senate Joint Resolution 1176 is constitutionally valid and determining that the apportionment plan for the Senate as contained in Senate Joint Resolution 1176 is constitutionally invalid.

## II. HISTORICAL EVOLUTION OF ARTICLE III OF THE FLORIDA CONSTITUTION

In order to provide context for our present task of determining the validity of the House and Senate apportionment plans, we first review the historical evolution of the constitutional provisions pertinent to the Legislature's decennial apportionment.

Before 1968, there was no process by which challengers to the Legislature's apportionment plans could seek direct and immediate review of the apportionment plans by the Supreme Court of Florida. Under the Florida Constitution of 1885, which was in effect until the adoption of the 1968 Constitution, litigation surrounding the validity of the Legislature's adopted apportionment plans proliferated. Indeed, "[f]rom the years 1955 through 1966, no fewer than seven apportionment plans were formulated by the state legislature, all of which were determined eventually to be invalid by the federal judiciary." *In re Apportionment Law—1982, 414 So. 2d at 1048 & n.4* (citing *Sobel v. Adams, 208 F. Supp. 316 (S.D. Fla. 1962)*; [**14] *Swann v. Adams, 214 F. Supp. 811 (S.D. Fla. 1963)*, *rev'd*, *378 U.S. 553, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (1964)*; *Swann v. Adams, 258 F. Supp. 819 (S.D. Fla. 1965)*, *rev'd*, *383 U.S. 210, 86 S. Ct. 767, 15 L. Ed. 2d 707 (1966)*; *Swann v. Adams, 258 F. Supp. 819 (S.D. Fla. 1965)*, *rev'd*, *385 U.S. 440, 87 S. Ct. 569, 17 L. Ed. 2d 501 (1967)*; *Swann v. Adams, 263 F. Supp. 225 (S.D. Fla. 1967)*).

In some cases, litigation over a particular plan literally spanned a period of several years, infusing the apportionment and the electoral process with uncertainty. The end product of the Legislature's attempt to avoid further apportionment litigation was the drafting of *article III, section 16*. In 1968, the citizens of Florida approved *article III, section 16*, for inclusion in the Florida Constitution, which provided a mechanism whereby the Supreme Court of Florida was given mandatory and express jurisdiction to determine the validity of the Legislature's enacted apportionment plan under a strict thirty-day time limit. *See id. at 1048*; *see also art. III, § 16(c), Fla. Const.*[3]

The affirmative decision of the voters to place the apportionment responsibility squarely in the state judiciary rather than leave it to the federal judiciary was in line with the United States Supreme Court's recognition of that preference:

> The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged. *State of Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 676, 84 S. Ct. 1429, 12 L. Ed. 2d 595 (1964)*; *City of Scranton v. Drew, 379 U.S. 40, 85 S. Ct. 207, 13 L. Ed. 2d 107 (1964)*, citing *Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964)*; *Jackman v. Bodine, 43 N.J. 453, 205 A.2d 713, 724*

[3] This constitutional provision is still in effect and has not been changed, other than a minor revision in *subsections (b)* and *(f)* to provide that if the Court is required to apportion the state, it must file "an order making such [**15] apportionment" with the custodian of state records.

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(1964). See also Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (1956), and discussion thereof in Baker v. Carr, 369 U.S. 186, 235-236, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

Scott v. Germano, 381 U.S. 407, 409, 85 S. Ct. 1525, 14 L. Ed. 2d 477 (1965) (parallel citations omitted).

[*602] In addition, article III, section 16, required the Legislature to comply with federal and state constitutional standards:

> HN6[] The legislature . . . shall apportion the state in accordance with the constitution of the state and of the United States into not [**16] less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

Art. III, § 16(a), Fla. Const. In every apportionment decision since the adoption of article III, section 16, this Court has reviewed the validity of the Legislature's joint resolution of apportionment consistent with the language of that provision, examining criteria such as population disparities between legislative districts (federal equal protection standard of one-person, one-vote), territorial boundaries (contiguity), and numbering issues (consecutiveness).[4]

In 2002, this Court discussed the scope of the Legislature's duty in relation to the constitutional standards, explaining that "the requirements under the Florida Constitution [were] not more stringent than the requirements under the United States Constitution." In re Apportionment Law—2002, 817 So. 2d at 824 (citing In re Apportionment Law—1972, 263 So. 2d at 807-08). Limited by a construction of Florida's constitution that was not more extensive than the United States Constitution, the Court declined to require the Legislature to adopt an apportionment plan using the following four objective standards proposed by Common Cause Florida and the Florida League of Women Voters:

> [A]ll districts should (1) have equal population as closely as possible; (2) be drawn to be compact and contiguous and respect local political boundaries; (3) not dilute the voting strength of any racial, ethnic, or minority group; and (4) be drawn neutrally without regard [**18] to the incumbent or political party.

Id. at 832. Other challengers, including the Attorney General, "questioned the Legislature's decision not to articulate objective standards that guided its redistricting process." Id. at 831. The Court rejected all of these arguments, making the following observation:

> The only standards that the Legislature is constitutionally required to follow in redistricting are the equal protection standard of "one-person, one-vote," the Florida Constitutional requirement that legislative districts be "either contiguous, overlapping, or identical territory," and the requirement not to discriminate against any racial or

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[4] See In re Apportionment Law—1972, 263 So. 2d 797 (Fla. 1972); In re Apportionment Law—1982, 414 So. 2d 1040; In re Senate Joint Resolution 2G, Special Apportionment Session 1992 (In re Apportionment Law—1992), 597 So. 2d 276 (Fla. 1992); In re Apportionment Law—2002, 817 So. 2d at 832. In In re Constitutionality of House Joint Resolution 25E, 863 So. 2d 1176 (Fla. 2003), this Court was required to determine the validity [**17] of a House Joint Resolution after the House redrew districts in response to the Department of Justice's objection that one of those districts was retrogressive within the meaning of Section 5 of the Voting Rights Act with respect to Hispanic voters.

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language minority or political group. *See* [*Davis v.] Bandemer, 478 U.S. [109,] 118-27, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986)*; *In re Senate Joint Resolution 2G, 597 So. 2d at 278-80*. While the other "standards" advocated by the opponents have been traditional considerations in the redistricting process, they are not constitutionally required. *See Shaw v. Reno, 509 U.S. [630,] 647, 113 S. Ct. 2816, 125 L. Ed. 2d 511 [(1993)]*; *Gaffney v. Cummings, [*603] 412 U.S. [735] 752 n. 18, 93 S. Ct. 2321, 37 L. Ed. 2d 298 [(1973)]*. Hence, we decline the Attorney General's and other parties' requests to return the plan to the Legislature to create standards. As explained [**19] above, for those standards that can be fully addressed in this opinion, we conclude that the Legislature has complied with the requirements set forth by the federal and state constitutions.

*Id. at 832*.

Under the state constitutional framework, while the Florida Constitution grants the Legislature the authority to apportion the legislative districts every ten years, the authority is circumscribed by the right of the people to instruct their representatives on the manner in which apportionment should be conducted. As this Court stated in 1972:

> When the people of Florida adopted the Constitution of 1968 they reserved to themselves the right to instruct their representatives and, at the same time, authorized the election of these representatives in senatorial and representative districts which may be "either contiguous, overlapping or identical territory."

*In re Apportionment Law—1972, 263 So. 2d at 807*.

In 2010, with the passage of the Fair Districts Amendment, the people of Florida increased the instructions to their representatives to provide additional constitutional imperatives for their elected representatives to follow when drawing the senatorial and representative districts. Our conclusion [**20] in 2002 that the above criteria were not constitutionally required has been expressly overridden by a constitutional amendment approved by the voters of Florida on November 2, 2010.

The ballot summary for the Fair Districts Amendment on which Florida citizens voted stated:

> Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

*Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d at 179*. Proposed by initiative petitions that the organization FairDistrictsFlorida.org sponsored, this constitutional amendment is now codified in *article III, section 21, of the Florida Constitution* and imposes additional substantive standards with which the Legislature must comply in carrying out its constitutional duties in establishing legislative district boundaries. [**21] *See art. III, § 21, Fla. Const.*

As approved by Florida voters, *article III, section 21*, provides in full:

> *HN7*[⬆] In establishing legislative district boundaries:
>
> (a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with

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the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with [*604] federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Art. III, § 21, Fla. Const. (footnotes omitted).

In contrast to the standards that guided the Legislature during [**22] prior apportionment cycles, the standards governing the instant apportionment process are now more stringent than the requirements under the United States Constitution and prior versions of the Florida Constitution. It is our task to interpret these new constitutional standards, together with the previous constitutional standards, against the apportionment plans contained within the Joint Resolution. Through our interpretation of these provisions, we necessarily determine the validity of both the House and Senate legislative apportionment plans.

In making these determinations, we first set forth the applicable standard of review. We next discuss each of the separate constitutional requirements imposed by the Florida and United States Constitutions and how the requirements are to be analyzed both individually and collectively. Then, in light of challenges raised by the opponents of the plans, we examine whether the Legislature's apportionment plans are facially consistent with these requirements.

## III. ANALYSIS

### *A. Standard and Scope of Review*

The overarching question to be considered by the Court in this declaratory judgment proceeding is the constitutional validity of the plans contained [**23] within the Legislature's joint resolution of apportionment. *See* In re Apportionment Law—2002, 817 So. 2d at 824; In re Apportionment Law—1982, 414 So. 2d at 1052. HN8[⬆] The validity of the joint resolution is determined by examining whether the Legislature has operated within the constitutional limitations placed upon it when apportioning the state's legislative districts. The newly added constitutional standards are directly related to ensuring that the process by which citizens choose their elected officials is fair.

Like Florida, other states have recognized that legislative redistricting is fundamental to ensuring that citizens choose their elected officials in an equitable manner. The Supreme Court of Pennsylvania stressed this very principle when it recently invalidated the Pennsylvania 2012 apportionment plan, stating that "[l]egislative redistricting 'involves the basic rights of the citizens . . . in the election of their state lawmakers.'" *Holt v. 2011 Legislative Reapportionment Comm'n, 7 MM 2012, 38 A.3d 716, 2012 Pa. LEXIS 232, 2012 WL 375298, at *1 (Pa. Feb. 3, 2012)* (quoting Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556, 559 (Pa. 1964)). The Supreme Court of Colorado has similarly emphasized that "[t]he basic purpose of [**24] the constitutional standards for reapportionment is to assure equal protection for the right to participate in the . . . political process and the right to vote." In re

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*Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1241 (Colo. 2002)*.

The recognition of the critical importance of redistricting in ensuring the basic rights of citizens to vote for the representatives of their choice is highlighted by a series of voting cases from the United States Supreme Court, most notably in *Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)*:

> [*605] [T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. . . .
>
> . . . .
>
> . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen.

*Id. at 561-62, 567*.

In explaining the goal of legislative apportionment in terms of the rights of voters, the United States Supreme Court in *Reynolds* emphasized:

> Since the achieving of fair and effective representation for all citizens is [**25] concededly the basic aim of legislative apportionment, we conclude that the *Equal Protection Clause* guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the *Fourteenth Amendment* just as much as invidious discriminations based upon factors such as race . . . .

*Id. at 565-66*.

In describing the significance of its prior jurisprudence in *Reynolds*, the United States Supreme Court emphasized the importance of the right of voters to fair representation:

> Furthermore, in formulating the one person, one vote formula, the Court characterized *HN9*[↑] the question posed by election districts of disparate size as an issue of fair representation. In such cases, it is not that anyone is deprived of a vote or that any person's vote is not counted. Rather, it is that one electoral district elects a single representative and another district of the same size elects two or more—the elector's vote in the former district having less weight in the sense that he may vote for and his district be represented by only one legislator, while his neighbor in the adjoining district [**26] votes for and is represented by two or more.

*Bandemer, 478 U.S. at 123*. In *Bandemer*, the United States Supreme Court recognized that fairness in voting under the federal constitution extended to dilution of the right to vote based on districts that were drawn in a manner that favored a political party.

*HN10*[↑] With fairness in drawing the legislative districts as the focus, *article III, section 21*, imposes additional standards upon the Florida Legislature to follow in apportionment proceedings. *Article III, section 21*, also provides Florida citizens with additional constitutional protections to ensure that their right to fair and effective representation is not impaired by the manner in which the legislative districts are drawn. These constitutional constraints imposed on the Legislature in drawing legislative districts are designed to "maximize electoral possibilities by leveling the playing field" for the increased protection of the rights of Florida's citizens to vote and elect candidates of their choice. *Brown v. Sec'y of State, No. 11-14554, 668 F.3d 1271, 2012 U.S. App. LEXIS 1775, 2012 WL 264610, at*

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*12 (11th Cir. Jan. 31, 2012)*.

Throughout these proceedings, the Attorney General, the Senate, and the House have asserted that the [**27] Legislature should have full discretion in balancing the constitutional criteria that apply to apportioning legislative districts. However, when addressing similar arguments that state legislatures should have full discretion in considering such matters, the United States Supreme Court in *Reynolds* eloquently stated: "We are cautioned about the dangers [*606] of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *377 U.S. at 566*.

Although the advent of new constitutional requirements undoubtedly increases the Legislature's apportionment obligations, the House and Senate plans still come to this Court with an initial presumption of validity. *In re Apportionment Law—2002, 817 So. 2d at 824-25*. This presumption serves to recognize the deference initially owed to legislative acts upon passage. Thus, what was true in 1972 regarding the respective roles of the Court and the Legislature in the apportionment process still holds true today:

> [W]e emphasize that *HN11*[↑] legislative reapportionment is primarily a matter for legislative consideration and determination. [**28] 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—1972, 263 So. 2d at 799-800*; *see also In re Apportionment Law—2002, 817 So. 2d at 824* (same).

*HN12*[↑] Even though we continue to recognize the presumption of validity that governs ordinary legislative acts, the operation of this Court's process in apportionment cases is far different than the Court's review of ordinary legislative acts, and it includes a commensurate difference in our obligations. Challenges to the constitutionality of ordinary legislative acts passed by the Legislature must be brought in a trial court and then reviewed by a district court of appeal. This Court [**29] has mandatory jurisdiction in those circumstances only if the legislative act is found to be unconstitutional. *See art. V, § 3(b)(1), Fla. Const.*

In contrast, the Court's mandatory review to determine the validity of apportionment plans every ten years derives from a different provision of the constitution: *article III, section 16(c)*. The constitution specifies that the Attorney General "shall" file a petition for a declaratory judgment and that this Court "shall permit adversary interests to present their views." *Art. III, § 16(c), Fla. Const.* In this type of original proceeding, the Court evaluates the positions of the adversary interests, and with deference to the role of the Legislature in apportionment, the Court has a separate obligation to independently examine the joint resolution to determine its compliance with the requirements of the Florida Constitution. Because it is the obligation of this Court to enter a judgment declaring the joint resolution valid or invalid, the Court has routinely accepted that judicial relief would be warranted where the Legislature has "fail[ed] to reapportion according to federal and state constitutional requisites." *In re Apportionment Law—*

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*2002, 817 So. 2d at 824* ( [**30] quoting *In re Apportionment Law—1972, 263 So. 2d at 800*).

This Court in *In re Apportionment Law—1972, 263 So. 2d at 806*, while cognizant that "[t]he propriety and wisdom of legislation are exclusively matters for legislative determination," also recognized that the Legislature's authority was not unbridled. The Court observed that, although [*607] "in accordance with the doctrine of separation of powers, [it would] not seek to substitute its judgment for that of another coordinate branch of the government," pursuant to that same constitutional doctrine, the Court was also responsible for measuring legislative acts "with the yardstick of the Constitution." *Id.*

Unlike 2002, when "the requirements under the Florida Constitution [were] not more stringent than the requirements under the United States Constitution," *In re Apportionment Law—2002, 817 So. 2d at 824*, now, the Florida Constitution imposes a higher standard on the Legislature when formulating the state's apportionment plans. The citizens of Florida mandated additional constitutional imperatives for their elected representatives to follow when redrawing senatorial and representative districts.

The new requirements dramatically [**31] alter the landscape with respect to redistricting by prohibiting practices that have been acceptable in the past, such as crafting a plan or district with the intent to favor a political party or an incumbent. By virtue of these additional constitutional requirements, the parameters of the Legislature's responsibilities under the Florida Constitution, and therefore this Court's scope of review, have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance.

*HN13*[↑] It is this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid. We reject the assertions of the Attorney General and the House that a challenger must prove facial invalidity beyond a reasonable doubt. While there have been decisions of this Court reciting that principle with regard to legislative enactments, such as *Crist v. Florida Association of Criminal Defense Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008)*, cited by the House, that principle of statutory construction was stated only once in an apportionment decision and was [**32] made in the context of an attack on multi-member districts. *See In re Apportionment Law—1972, 263 So. 2d at 805-06*. Since 1972, we have never used that principle of statutory construction when enunciating the standard for our review of legislative apportionment, including our last comprehensive statement in 2002. Therefore, to use the standard of beyond a reasonable doubt would be a departure from our precedent in legislative apportionment jurisprudence.[5]

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[5] There is a difference between the Court's role in reviewing a legislative apportionment plan to determine compliance with constitutionally mandated criteria and the Court's role in interpreting statutes; this Court has stated its responsibility in construing statutes differently. For example, in *Tyne v. Time Warner Entertainment, 901 So. 2d 802, 810 (Fla. 2006)*, in upholding a statute as constitutional, the Court stated that it had "an obligation to give a statute a constitutional construction where such a construction is possible." This Court has stated that it is

> committed to the fundamental principle that it has the duty if reasonably possible, and consistent with constitutional rights, to resolve doubts as to the validity of a [**33] statute in favor of its constitutional validity and to construe a statute, if reasonabl[y] possible, in such a manner as to support its constitutionality—to adopt a reasonable interpretation of a statute which removes it

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We conclude that the beyond a reasonable doubt standard is ill-suited for an original proceeding before this Court in which we are constitutionally obligated to enter a declaratory judgment on the validity of the legislative plans. Unlike a legislative [*608] act promulgated separate and apart from an express constitutional mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the "instructions" of the citizens as expressed in specific requirements of the Florida Constitution governing this process.

Because "legislative reapportionment is primarily a matter for legislative consideration and determination," *In re Apportionment Law—1972, 263 So. 2d at 799-800*, this Court will defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements. With an understanding [**34] that the Court's responsibility is limited to ensuring compliance with constitutional requirements, and endeavoring to be respectful to the critically important role of the Legislature, the Court has previously acknowledged that its duty "is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid." *In re Apportionment Law—1992, 597 So. 2d at 285*.

This principle is in keeping with the United States Supreme Court's decision in *Perry v. Perez, 132 S. Ct. 934, 941, 181 L. Ed. 2d 900 (2012)*, which stated that "redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." In *Perez*, when it became clear that a state's redistricting plan would not obtain preclearance under Section 5 of the Voting Rights Act, a federal district court drew an interim redistricting plan without giving deference to the state's policy choices. In reversing the federal court's drawing of the plan, the Supreme Court explained that a federal district court may not wholly disregard policy choices made by a state's legislature, where those policy choices are not inconsistent with the United [**35] States Constitution or the Voting Rights Act. *Id. at 943*. The Supreme Court held that a "state plan serves as a starting point" for a federal district court because "[i]t provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps . . . without displacing legitimate state policy judgments with the court's own preferences." *Id. at 941*.

*Perez* is in conformity with the federal judiciary's strong preference to yield to states in making initial redistricting decisions as long as there is no violation of either the United States Constitution or the Voting Rights Act. As was emphasized in *Scott v. Germano* over 45 years ago, the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the United States Supreme] Court but appropriate action by the States in such cases has been specifically encouraged." *Germano, 381 U.S. at 409*.

Any attempt to use *Perez* in support of an argument that the state judiciary is constrained in performing its constitutionally mandated review takes the holding of *Perez* out of context. In contrast to *Perez*, this Court's [**36] initial review of the Legislature's joint resolution of apportionment does not require any balancing of concerns for federal versus state sovereignty. Nor is this Court engaged at this point in redrawing the plans. Rather, this Court is *required* by the state constitution to evaluate whether the Legislature's apportionment plans conflict with Florida's express constitutional standards. *See art. III, § 16(c), Fla. Const.* The Supreme Court's concerns in *Perez* regarding judicial overreach by the

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farthest from constitutional infirmity.

*Id.* (quoting *Corn v. State, 332 So. 2d 4, 8 (Fla. 1976)*).

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federal court in redrawing the state's apportionment plan do not apply to this original state proceeding, during [*609] which this Court is mandated to assess the Legislature's compliance with constitutional standards. At this juncture, the Court plays no role in drawing the Legislature's apportionment plans, and the deference owed by the federal courts to the state in the drawing of the plan is not implicated.

In our initial review of the Legislature's plan, we recognize the limitations of this Court's responsibilities. At the same time, we acknowledge and accept our paramount responsibility in apportionment, as set forth by the Florida Constitution, to ensure that the adopted plans comply with the constitutionally [**37] required mandates. "In other words, it is this Court's duty to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards unconstitutional." *In re Legislative Districting of State, 370 Md. 312, 805 A.2d 292, 316 (Md. 2002)*.

*HN14*[⬆] Where the legislative decision runs afoul of constitutional mandates, this Court has a constitutional obligation to invalidate the apportionment plan. To accept the Legislature's assurances that it followed the law without any type of inquiry or any type of meaningful review by this Court would render the Court's review of the new constitutional standards, and whether the Legislature complied with the new standards, essentially meaningless. To accept the Legislature's and Attorney General's position that this Court should not undertake a meaningful review of compliance with the new constitutional standards in this proceeding, but instead await challenges brought in trial courts over a period of time, would be an abdication of this Court's responsibility under the Florida Constitution. This approach would also create uncertainty for the voters of this state, the elected representatives, and the candidates [**38] who are required to qualify for their seats.[6]

The question then becomes how this Court will accomplish its review in a meaningful way given the nature of this constitutionally required proceeding. Undoubtedly, this Court is limited by time to be able to relinquish for extensive fact-finding as we have undertaken in other original proceedings,[7] or to appoint a commissioner to receive testimony and refer the case back to the appellate court together with findings that are advisory in nature only.[8] A review of prior reapportionment decisions from 1972, 1982, and 1992 reveals that in the past, the Court has retained exclusive state jurisdiction to allow challenges to be later brought, and then, on one occasion, the Court appointed a commissioner to conduct fact-finding on a specific challenge pursuant to our apportionment original jurisdiction.[9]

In light of two distinct developments, our past approach is not determinative of our review in this post-2010 case. The first development, as mentioned above, is that in 2010, the voters imposed upon the Legislature explicit,

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[6] According to the comment filed on behalf of the Florida State Association of Supervisors of Election, the qualifying date for all federal, state, county, and district candidates is between June 4 and June 8, 2012, pursuant to *section 99.061, Florida Statutes*.

[7] *See, e.g., Lightbourne v. McCollum, 969 So. 2d 326, 329 (Fla. 2007)* (relinquishing in an [**39] all writs original proceeding to the trial court for that court to make factual findings on lethal injection and to then file those findings with this Court so this Court could make the ultimate determination).

[8] *See, e.g., State ex rel. Clark v. Klingensmith, 126 Fla. 124, 170 So. 616, 618 (Fla. 1936)*.

[9] *See Milton v. Smathers, 351 So. 2d 24 (Fla. 1977)*.

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additional state constitutional standards. In contrast to 2002, [*610] where the challenges exceeded our limited scope of review because they were based on violations of federal law, the challenges in 2012 are based specifically on allegations that the plans facially violate the requirements of the new provisions of our state constitution.

The second development is that technology has continued to advance in the last decade, allowing this Court to objectively evaluate many of Florida's constitutionally mandated criteria without the necessity of traditional fact-finding, such as making credibility determinations of witnesses. In furtherance [**40] of the goal to conduct an objective evaluation of the plans, the Court required all plans, including alternative plans, to be submitted electronically in .doj format, allowing for every party and the Court to evaluate the plans using the same statistical analysis and data reports. To ensure that the Court would have the means to objectively evaluate the plans, the Court specified in its order the manner in which the House and Senate plans should be submitted to the Court in .doj format:

> For each plan file submitted for the newly created apportionment plans, the Attorney General is directed to specify the software used to create the plan, the data and criteria used in drafting the plan, the source of the data used in drafting the plan, and any other relevant information. The Attorney General is also directed to file along with the plan statistical reports for both the new plans and the last legally enforceable plans in searchable Portable Document Format (PDF), which include at a minimum the following from the 2010 Census: the population numbers in each district, the total voting age population (VAP) in each district, and the VAP of each racial and ethnic group in each district. Reports [**41] with additional information and statistics (e.g., compactness measurements), and reports for prior apportionment plans, may also be submitted in searchable PDF format.
>
> The Attorney General is also directed to provide the Court with maps of the House and Senate apportionment plans depicting the new districts, which shall include maps depicting the entire state as well as regional maps. In addition to the maps depicting the districts, the Attorney General may also file maps depicting the apportionment plans with data overlays. For each such map, the Attorney General is directed to specify the data depicted in the data overlay and the source of that data. The Attorney General may also file maps other than maps depicting the new apportionment plans, including maps of prior apportionment plans with or without any data overlays.

*In re Joint Resolution of Legislative Apportionment*, No. SC12-1 (Fla. Sup. Ct. order filed Jan. 25, 2012). As for parties, the Court permitted the filing of alternative plans and ordered the parties to comply with the following requirements:

> Parties submitting alternative plans must submit the alternative plans electronically in .doj format . . . .
>
> For each plan file [**42] submitted, the submitting party must specify the software used to create the plan, the data and criteria used in drafting each plan, the source of the data used in drafting the plan, and any other relevant information. The submitting party shall also specify whether the alternative plan is a partial or complete plan, and the population deviation for each district in the plan; if a partial plan is submitted, the submitting party must specify what county or counties are included in the partial plan. Parties may also submit [*611] statistical reports related to each submitted plan in searchable PDF format.

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> For each submitted alternative plan, the submitting party must file map(s) depicting the alternative plan districts with this Court. At least one map shall be filed that reflects the entire alternative plan. The submitting party may file additional maps showing regions or areas of interest. In addition to maps depicting the districts of the alternative plan, the submitting party may also file maps depicting the apportionment plans with data overlays, including maps of the prior plans. Each such map shall specify the data depicted in the data overlay and the source of that data. For each map [**43] filed with the Court, the submitting party shall file the map in electronic PDF format and provide the Court with fifteen (15) color paper copies.

*Id.* The only opponent in this case to submit an alternative plan was the Coalition, which submitted two alternative plans to this Court: an alternative Senate plan and an alternative House plan.[10]

The Court permitted alternative plans because alternative plans may be offered as relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent.[11] The Legislature is not obligated to accept alternative plans; this Court, however, may review them to evaluate whether the Legislature's adopted plans are contrary [**44] to law. *See, e.g.,* *Holt, 2012 Pa. LEXIS 232, 2012 WL 375298, at *36* (explaining that alternative plans may be used as proof that the final plan "contained subdivision splits that were not absolutely necessary").

In furtherance of our goal to ensure that [**45] the Court had complete information, at the Court's direction, the Attorney General filed an appendix to the petition for declaratory judgment and filed the apportionment plans electronically in .doj format, which would allow this Court and the challengers to perform an objective statistical analysis of the plans submitted by using standard redistricting software. The House and Senate each developed and utilized its own web-based redistricting software, MyDistrictBuilder and District Builder, respectively. This Court had access to both MyDistrictBuilder and District Builder as well as the data in the House program, which included census data, American Community Survey data, and voter registration and elections data. We have also received the incumbent addresses [*612] upon which the challengers based their claims that districts were drawn to favor incumbents.[12]

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[10] After the deadline for the submission of briefs and alternative plans had passed, the Coalition sought to file a supplemental appendix, including a revised alternative House plan. The Court denied that request, and the supplemental appendix was stricken. *See In re Joint Resolution of Legislative Apportionment*, No. SC12-1 (Fla. Sup. Ct. order filed Feb. 22, 2012).

[11] In 1982, this Court concluded that because the proceeding was limited to reviewing the facial constitutional validity of the joint resolution, "the suggestion that we should adopt an alternative plan [was] not permissible in these proceedings." *In re Apportionment Law—1982, 414 So. 2d at 1052*. We did not conclude that alternative plans were impermissible for the purposes of constitutional comparison. With the advent of the new amendment codified in *article III, section 21, of the Florida Constitution*, portions of which bear a striking resemblance to the Federal Voting Rights Act, we deem it necessary, as we did in 1992, to review alternative apportionment plans to assess effect and intent. *See* *In re Apportionment Law—1992, 597 So. 2d at 282 n.7* (permitting all interested parties to file alternative apportionment plans in support of their arguments with respect to whether or not the Joint Resolution impermissibly discriminated against a minority group).

[12] We ordered the production of the incumbents' addresses

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The type of information available for this original review is objective data.[13] In performing its objective analysis of the data, the Court did not rely on the figures or statistical analysis contained in the appendices filed by the FDP or the Coalition. Instead, the Court utilized the MyDistrictBuilder and District Builder software applications to evaluate the Legislature's apportionment plans and the Coalition's alternative plans. The Court utilized both software applications to evaluate voting-age population[14] and to conduct a visual inspection of the districts. All of the maps depicting districts contained in this opinion were obtained using District Builder, except for a map depicting the City of Lakeland. This Court utilized MyDistrictBuilder when analyzing undisputed voter registration and election data because MyDistrictBuilder contained that data, but District Builder did not.[15] Specifically, this Court utilized the registration and election data to conduct an analysis of minority voting behavior in evaluating challenges to individual districts. [**47] Further, this Court utilized this data to examine the overall political composition of the House and Senate plans, as well as the political composition of each challenged district.

The Court additionally acquired Maptitude for Redistricting and inputted into Maptitude the voter registration, political, and elections data utilized [**49] by MyDistrictBuilder. The Court also inputted the incumbent addresses into Maptitude. The Court utilized Maptitude to conduct additional [*613] evaluation of the plans, such as the location of incumbents' addresses and calculations of the percentage of prior population retained by a district. This Court also examined graphical data overlays of voting-age population using Maptitude in evaluating certain challenged districts. Finally, the Court used ESRI Redistricting, also acquired

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upon which the opponents rely in their arguments. *See In re Joint Resolution of Legislative Apportionment*, No. SC12-1, Order on Incumbents' Addresses (Fla. Sup. Ct. order filed Feb. 21, 2012). The Attorney General, Florida Senate, and Florida House of Representatives were given [**46] the opportunity to advise the Court regarding whether any of the addresses were inaccurate and, if so, to provide the correct address.

[13] In that regard, although the Court did not strike the affidavit of the Florida Democratic Party's expert, as requested by the House and Senate, the Court did not rely on that affidavit, instead conducting its own independent analysis using objective data.

[14] The voting-age population numbers contained in MyDistrictBuilder were consistent with those contained in District Builder. With respect to the Legislature's apportionment plans, these voting-age population numbers were also consistent with the Attorney General's appendix.

[15] The House recognized that this data was required in order to evaluate compliance with Florida's minority voting protection provision as well as the Federal Voting Rights Act, and it included the data in MyDistrictBuilder. *See* Open Data and Code for MyDistrictBuilder, http://mydistrictbuilder.wordpress.com/opendata (last visited Mar. 6, 2012) ("Elections data is required to comply with: Sections 2 and 5 of the federal Voting Rights Act; and *Florida's Constitution, Article III, Sections 20(a)* [**48] and *21(a)*, which both read, 'districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice'"). The Senate chose to omit this data from District Builder. The District Builder Help Manual states: "Recent changes to the Florida Constitution require that districts not be 'drawn with the intent to favor or disfavor a political party or an incumbent.' . . . With this new language, the mere presence of political metrics in the interface for building districts could create a perception, unsubstantiated and inaccurate though it may be, that partisan factors influenced how districts were drawn. The Senate, in an abundance of caution, therefore departed from traditional practice and chose to omit voter registration counts and election results from District Builder's dashboard." District Builder Help Manual, https://db10.flsenate.gov/db1/help (last visited Mar. 6, 2012).

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by the Court, to generate compactness scores using compactness measurements of Reock and Area/Convex Hull, compactness measures that were used by the House in its plan data reports.

The controversy between the parties, set forth primarily by the House and Senate, is that no conclusion as to intent to favor a political party or incumbent can be made. The challengers contend that this Court is able to perform its review based on an assessment of statistical analysis, a visual examination of the plans, and an evaluation of legislative history. The challengers contend that this evidence will enable the Court to discern intent to favor or disfavor a political party or an incumbent because intent can be inferred from effect. [**50] We will discuss these arguments in more detail when we analyze the specific standards and apply them to the House and Senate plans.

Finally, we have the guidance of the many state courts that have similar provisions providing their respective state supreme courts with original jurisdiction.[16] Those courts have, over the years, both validated and invalidated plans based on many of the same criteria now contained in Florida's constitution.[17] As in those states, the Florida Constitution "expressly entrusts to this Court the responsibility, upon proper petition, to review the constitutionality of districting plans prepared and enacted by the political branches of [*614] government and the duty to provide appropriate relief when the plans are determined to violate the United States and [Florida] Constitutions." *In re Legislative Districting of State, 370 Md. 312, 805 A.2d 292, 316 (Md. 2002)*.

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[16] *See* *Ark. Const. art. VIII, § 5*; *Cal. Const. art. XXI, § 3(b)*; ***Colo. Const. art. V, § 48(1)(e)***; *Conn. Const. art. III, § 6(d)*; *Haw. Const. art. IV, § 10*; *Idaho Const. art. III, § 2(5)*; *Ill. Const. art. IV, § 3(b)*; *Iowa Const. art. III, § 36*; *Kan. Const. art. X, § 1(b)*; Mass. Const. amend. art. CI, § 3; *Me. Const. art. IV, pt. 1, § 3*; [**51] ***Md. Const. art. III, § 5***; *Mich. Comp. Laws §§ 3.71*, *4.262*; *N.J. Const. art. II, § 2, ¶ 7*; *Ohio Const. art. XI, § 13*; ***Or. Const. art. IV § 6(3)(b)***; *Pa. Const. art. II § 17(d)*; *Vt. Stat. Ann. tit. 17, § 1909(a)*, *(f)*; *Wash. Rev. Code § 44.05.130*.

[17] *Compare* *In re Reapportionment of Colo. Gen. Assembly, No. 11SA282, 2011 Colo. LEXIS 894, 2011 WL 5830123 (Colo. Nov. 15, 2011)* (invalid); *Twin Falls Cnty. v. Idaho Comm'n on Redistricting, No. 39373, 271 P.3d 1202, 2012 Ida. LEXIS 24, 2012 WL 130416 (Idaho Jan. 18, 2012)* (invalid); *Schrage v. State Bd. of Elections, 88 Ill. 2d 87, 430 N.E.2d 483, 58 Ill. Dec. 451 (Ill. 1981)* (invalid); *In re Legislative Districting of Gen. Assembly, 193 N.W.2d 784 (Iowa 1972)* (invalid); *In re Legislative Districting of the State, 370 Md. 312, 805 A.2d 292 (Md. 2002)* (invalid); *Hartung v. Bradbury, 332 Ore. 570, 33 P.3d 972 (Or. 2001)* (invalid); *Holt v. 2011 Legislative Reapportionment Comm'n, No. 7 MM 2012, 2012 Pa. LEXIS 232, 2012 WL 375298 (Pa. Feb. 3, 2012)* (invalid); *In re Reapportionment of Towns of Hartland, Windsor and W. Windsor, 160 Vt. 9, 624 A.2d 323 (Vt. 1993)* (invalid), *with* *Harvey v. Clinton, 308 Ark. 546, 826 S.W.2d 236 (Ark. 1992)* (valid); *Wilson v. Eu, 1 Cal. 4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (Cal. 1992)* (valid); *In re Reapportionment of the Colo. Gen. Assembly, 46 P.3d 1083 (Colo. 2002)* (valid); *Fonfara v. Reapportionment Comm'n, 222 Conn. 166, 610 A.2d 153 (Conn. 1992)* [**52] (valid); *Kawamoto v. Okata, 75 Haw. 463, 868 P.2d 1183 (Haw. 1994)* (valid); *Bonneville Cnty. v. Ysursa, 129 P.3d 1213, 142 Idaho 464 (Idaho 2005)* (valid); *Beaubien v. Ryan, 198 Ill. 2d 294, 762 N.E.2d 501, 260 Ill. Dec. 842 (Ill. 2001)* (valid); *In re Legislative Districting of Gen. Assembly, 196 N.W.2d 209 (Iowa 1972)* (valid); *In re Stovall, 273 Kan. 731, 45 P.3d 855 (Kan. 2002)* (valid); *In re 2003 Legislative Apportionment of House of Representatives, 2003 ME 81, 827 A.2d 810 (Me. 2003)* (valid); *Legislative Redistricting Cases, 331 Md. 574, 629 A.2d 646 (Md. 1993)* (valid); *McClure v. Sec'y of the Commonwealth, 436 Mass. 614, 766 N.E.2d 847 (Mass. 2002)* (valid); *Leroux v. Sec'y of State, 465 Mich. 594, 640 N.W.2d 849 (Mich. 2002)* (valid); *In re Reapportionment of Towns of Woodbury & Worcester, 177 Vt. 556, 861 A.2d 1117 (Vt. 2004)* (valid).

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With our important responsibility to ensure that the joint resolution of apportionment comports with both the United States and Florida Constitutions, and with full awareness of the inherent limitations in the process set out in the state constitution, we undertake our constitutionally mandated review of the facial validity of the Senate and House plans contained within Senate Joint Resolution 1176.

### *B. The Standards Governing Our Analysis*

Although this is the fifth time the Court has had the [**53] responsibility to undertake its constitutionally mandated review of legislative apportionment, it is the first time that the Court has been charged with defining and applying the criteria of *article III, section 21*. This Court's interpretation of the language contained in *sections 16(a)* and *21 of article III* begins with the basic principles spelled out by this Court in its 1972 apportionment decision:

> *HN15*[↑] Every word of the Florida Constitution should be given its intended meaning and effect. In construing constitutions, that construction is favored which gives effect to every clause and every part of it. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which gives it effect.

*In re Apportionment Law—1972, 263 So. 2d at 807*.

In accord with those tenets of constitutional construction, this Court "endeavors to construe a constitutional provision consistent with the intent of the framers and the voters." *Zingale, 885 So. 2d at 282* (quoting *Caribbean Conservation Corp., 838 So. 2d at 501*). In ascertaining the intent of the voters, the Court may examine "the purpose of the provision, the evil sought to be remedied, [**54] and the circumstances leading to its inclusion in our constitutional document," *In re Apportionment Law—1982, 414 So. 2d at 1048*, with the view that a constitutional amendment must be assessed "in light of the historical development of the decisional law extant at the time of its adoption." *Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980)*.

Guided by both this Court's precedent and a proper construction of the pertinent provisions contained within article III, we must determine whether the Legislature's joint resolution is facially consistent with the specific constitutionally mandated criteria under the federal and state constitutions. *HN16*[↑] The Federal *Equal Protection Clause* requires that districts conform to the one-person, one-vote standard. *Article III, section 16(a)*, requires the Legislature to apportion both the Senate and the House in "consecutively numbered . . . districts of either contiguous, overlapping or identical territory."[18]

The new standards [**55] enumerated in *article III, section 21*, are set forth in two tiers, each of which contains three requirements. The first tier, contained in *section 21(a)*, lists the following requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process [*615] or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. *See art. III, § 21(a), Fla. Const.* The second tier, located in *section 21(b)*, enumerates three additional requirements in drawing district lines, the compliance with which is subordinate to those listed in the first tier of *section 21* and to federal

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[18] We have previously interpreted "consecutively numbered" to not require districts to be consecutively numbered such that each district is adjacent to the next numbered district. *See In re Apportionment Law—1982, 414 So. 2d at 1050*.

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law in the event of conflict: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) where feasible, districts shall utilize existing political and geographical boundaries. *See* art. III, § 21(b), Fla. Const. The order in which the constitution lists the standards in tiers one [**56] and two is "not [to] be read to establish any priority of one standard over the other within that [tier]." Art. III, § 21(c), Fla. Const.

We interpret HN17[↑] the specific constitutional directive that tier two is subordinate to tier one in the event of conflict to mean that the Legislature's obligation is to draw legislative districts that comport with all of the requirements enumerated in Florida's constitution. However, should a conflict in application arise, the Legislature is obligated to adhere to the requirements of section 21(a) (tier one) and then comply with the considerations in section 21(b) (tier two) to the extent "practicable" or "feasible," depending on the wording of the specific constitutional standard. With this basic framework in mind, we interpret the standards, beginning with the newly enacted tier-one standards and then moving to the newly enacted tier-two standards. After we explain and interpret the standards, we set forth how the standards interact for purposes of evaluating the apportionment plans.

*1. Tier-One Standards*

**a. Intent to Favor or Disfavor a Political Party or an Incumbent**

The first of the new and significantly different requirements in our state constitution [**57] is the provision in article III, section 21(a), providing that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Although this requirement is entirely new to this state, at least five other states share a similar constitutional or statutory requirement.[19] Florida's constitutional provision, like the constitutional provision requiring protection of racial and language minorities against discrimination, is a tier-one requirement under the state constitution, meaning that the voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process.

This new requirement in Florida prohibits what has previously been an acceptable practice, such as favoring incumbents and the political party in power. *See, e.g.*, In re Apportionment Law—1992, 597 So. 2d at 285 [**58] . The desire of a political party to provide its representatives with an advantage in reapportionment is not a Republican or Democratic tenet, but applies equally to both parties.[20] Thus, in 1992, when [*616] the Democrats were in control of the Legislature and, by default, the redistricting process, we rejected a claim of impermissible political gerrymandering, stating in full:

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[19] States that share a similar constitutional provision include California and Washington. *See, e.g.*, art. XXI, § 2(e), Cal. Const.; Wash. Const. art. II, § 43(5). Idaho, Iowa, Montana and Oregon codify similar provisions by statute. *See* Idaho Code § 72-1506; Iowa Code § 42.4(5); Mont. Code § 5-1-115; Or. Rev. Stat. § 188.010(2).

[20] The observation made by journalist Bill Cotterell highlights past redistricting practices by quoting a politically powerful Democratic senator and Senate president: "The legendary Senator Dempsey Barron once said running redistricting was like owning a prized hunting dog about to have puppies." Bill Cotterell, *A Process Free of [**59] Politics (Wink, Wink)*, Tallahassee Democrat (Feb. 22, 2012), *available at* http://www.tallahassee.com/article/20120223/COLUMNIST03/202230328/Bill-Cotterell-process-free-politics-wink-wink.

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> Finally, several of the opponents observe that the Joint Resolution is nothing more than a gerrymandering effort by the Democratic majority of the legislature to protect Democratic incumbents. We have little doubt that politics played a large part in the adoption of this plan. However, the protection of incumbents, standing alone, is not illegal, and none of the opponents seriously contend that the Joint Resolution is invalid because of political gerrymandering.

*Id.*

A decade later, when faced with a claim that the Republican majority of the Legislature had improperly limited input from Democratic members, the United States District Court for the Southern District of Florida similarly observed that the "raw exercise of majority legislative power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around the country." *Martinez v. Bush, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002)*.

*HN18*[↑] "The term 'political gerrymander' has been defined as '[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.'" *Vieth v. Jubelirer, 541 U.S. 267, 271 n.1, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004)* (plurality opinion) (quoting *Black's Law Dictionary* 696 (7th ed.1999)). While some states have sought to minimize the political nature of the apportionment process by establishing independent redistricting [**60] commissions to redraw legislative districts,[21] Florida voters have instead chosen to place restrictions on the Legislature by constitutional mandate in a manner similar to the constitutions of other states.

The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process. *See, e.g., Vieth, 541 U.S. at 286* (plurality opinion) ("[P]artisan districting is a lawful and common practice . . . ."); *Miller v. Johnson, 515 U.S. 900, 914, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)* ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . . .").

Florida's express constitutional standard, however, differs from equal protection political gerrymandering claims under either the United States or Florida Constitutions. Political gerrymandering claims under the *Equal Protection Clause of the United States Constitution* [**61] focus on determining when partisan districting as a permissible exercise "has gone too far," *Vieth, 541 U.S. at 296* (plurality opinion), so as to "degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer, 478 U.S. at 132* (plurality opinion); *see also Fla. Senate v. Forman, 826 So. 2d 279 (Fla. 2002)* (relying on the *Bandemer* test for political gerrymandering claims [*617] under Florida's *equal protection clause* and overturning trial court finding of political gerrymandering).

*HN19*[↑] In contrast to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. It does not reference the word "invidious" as the term has been used by the United States Supreme Court in equal

[21] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(3) (added by initiative measure in 2000); *Cal. Const. art. XXI, § 2* (added by initiative measure in 2008); *Idaho Const. art. III, § 2(2)* (created in 1994); *Wash. Const. art. II, § 43* (added by constitutional amendment in 1982).

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protection discrimination cases, *see, e.g.,* Brown v. Thomson, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983), and Florida's provision should not be read to require a showing of malevolent or evil purpose. Moreover, by its express terms, Florida's constitutional provision prohibits intent, not effect, and applies to both the [**62] apportionment plan as a whole and to each district individually.

We recognize that any redrawing of lines, regardless of intent, will inevitably have an *effect* on the political composition of a district and likely whether a political party or incumbent is advantaged or disadvantaged. In fact, a plurality of the Supreme Court has quoted "one of the foremost scholars of reapportionment" as observing that "*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*." Bandemer, 478 U.S. at 129 n.10 (quoting Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts* 7-8, *in Representation and Redistricting Issues* (Bernard Grofman, et al. eds. 1982)). In short, redistricting will inherently have political consequences, regardless of the intent used in drawing the lines. Thus, the focus of the analysis must be on both direct and circumstantial evidence of intent. *See, e.g.,* Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

The Senate argues that "it is a Sisyphean task to discern whether the Legislature had . . . an [improper] [**63] intent."[22] To the extent that the Senate argues that our task is futile, endless, or impossible, we reject this argument. Rather, the Senate's approach to permit each trial court to define the standards in a discrete proceeding, to make findings of fact based on the trial court's interpretation of the standards, and to eventually have the cases work their way up to this Court would itself be an endless task.

This Court has before it objective evidence that can be reviewed in order to perform a facial review of whether the apportionment plans as drawn had the impermissible intent of favoring an incumbent or a political party. HN20[↑] While we agree that the standard does not prohibit political effect, the effects of the plan, the shape of district lines, and the demographics of an area are all factors [**64] that serve as objective indicators of intent. *See, e.g.,* Diaz v. Silver, 978 F. Supp. 96, 104 (E.D.N.Y. 1997) (concluding that because of the lack of compactness and the fact that incumbents were protected in 87% of the new districts, "[d]espite its conspicuous absence from any direct discussion, incumbency appears to have been the unacknowledged third-most-significant factor used when redistricting"), *aff'd*, *522 U.S. 801, 118 S. Ct. 36, [*618] 139 L. Ed. 2d 5 (1997)*, *and aff'd sub nom. Acosta v. Diaz, 522 U.S. 801, 118 S. Ct. 36, 139 L. Ed. 2d 5 (1997)*, *and aff'd sub nom. Lau v. Diaz, 522 U.S. 801, 118 S. Ct. 36, 139 L. Ed. 2d 5 (1997)*. One piece of evidence in isolation may not indicate intent, but a review of all of the evidence together may lead this Court to the conclusion that the plan was drawn for a prohibited purpose.

With respect to intent to favor or disfavor an incumbent, the inquiry focuses on whether the plan or district was drawn with this purpose in mind. As explained by the Eleventh Circuit Court of Appeals in upholding this specific constitutional provision as applied to Florida's

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[22] A "Sisyphean" task is one synonymous with futile and endless labor. The term "Sisyphean" derives from "Sisyphus," a "cruel King of Corinth condemned forever to roll a huge stone up a hill in Hades only to have it roll down again on nearing the top." *The American Heritage Dictionary of the English Language* (4th ed. 2000). A "Sisyphean task," then, is one that is "[e]ndlessly laborious or futile." *Id.*

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congressional redistricting, "the incumbency provision is neutral on its face, explicitly requiring that lines not be designed to help or handicap particular candidates based on incumbency [**65] or membership in a particular party. Far from 'dictat[ing] electoral outcomes,' the provision seeks to maximize electoral possibilities by leveling the playing field." *Brown, 2012 U.S. App. LEXIS 1775, 2012 WL 264610, at *12*.

At the outset, objective indicators of intent to favor or disfavor a political party can be discerned from the Legislature's level of compliance with our own constitution's tier-two requirements, which set forth traditional redistricting principles. A disregard for these principles can serve as indicia of improper intent. *See, e.g., Sims, 377 U.S. at 578* (noting that a "desire to maintain integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory" undermines opportunities for political favoritism); *Pearson v. Koster, No. SC92200, 359 S.W.3d 35, 2012 Mo. LEXIS 7, 2012 WL 131425, at *2 (Mo. Jan. 17, 2012)* (stating that the purpose of the constitutional requirements that districts be contiguous, compact, and nearly equal in population is "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander'" (quoting *State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40, 61 (Mo. 1912)*)).

*HN21*[↑] The tier-two [**66] requirements of *article III, section 21(b)*, are meant to restrict the Legislature's discretion in drawing irregularly shaped districts; strict compliance with their express terms may serve to undercut or defeat any assertion of improper intent. *Cf. Miller, 515 U.S. at 916* (stating that in racial gerrymandering context where race-neutral considerations are the basis for redistricting, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines"); *Vieth, 541 U.S. at 335* (Stevens, J., dissenting) (stating in proposing a standard for political gerrymandering claims that "[j]ust as irrational shape can serve as an objective indicator of an impermissible legislative purpose, other objective features of a districting map can save the plan from invalidation"). However, where the shape of a district in relation to the demographics is so highly irregular and without justification that it cannot be rationally understood as anything other than an effort to favor or disfavor a political party, improper intent may be inferred.

In making this assessment, we evaluate the shapes of districts together with undisputed objective data, such as the [**67] relevant voter registration and elections data, incumbents' addresses, and demographics, as well as any proffered undisputed direct evidence of intent. We note that the Court has access to the same voter registration and election data used by the House in its redistricting software.

Similar to the partisan inquiry, *HN22*[↑] the inquiry for intent to favor or disfavor an incumbent focuses on the shape of the district in relation to the incumbent's legal residence, as well as other objective evidence [*619] of intent. Objective indicators of intent may include such factors as the maneuvering of district lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent's former district. When analyzing whether the challengers have established an unconstitutional intent to favor an incumbent, we must ensure that this Court does not disregard obvious conclusions from the undisputed facts.

The Court emphasizes that *HN23*[↑] mere access to political data cannot presumptively demonstrate prohibited intent because such data is a necessary component of evaluating whether a minority group has

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the ability to elect representatives [**68] of choice—a required inquiry when determining whether the plan diminishes a protected group's ability to elect a candidate of choice. *See* Guidance Concerning Redistricting Under Section 5 of the *Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)* (DOJ Guidance Notice) (United States Department of Justice guidance notice requiring a functional analysis of voting behavior to determine whether retrogression has occurred). Likewise, the fact that the Senate or House, or their staff, may or may not have had the incumbents' addresses is not determinative of intent or lack of intent. And, as discussed in the challenges section below, the fact that there were more registered Democrats than registered Republicans in this state, but that there are more Republican-performing districts than Democratic-performing districts in both the newly drawn Senate and House plans, does not permit a conclusion of unlawful intent in this case. Rather, when the Court analyzes the tier-two standards and determines that specific districts violate those standards without any other permissible justification, impermissible intent may be inferred.

**b. Minority Voting Protection**

*HN24*[↑] The next newly added provision in [**69] *article III, section 21(a)*, provides that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process *or* to diminish their ability to elect representatives of their choice." (Emphasis added.) The emphasized "or" separates two clauses in the preceding sentence, and each clause shares the same negative verb, "shall not be drawn." As a plurality of this Court explained in *Standards for Establishing Legislative District Boundaries, 2 So. 3d at 189* (plurality opinion), "[t]his verb modifies both clauses, thereby indicating that both clauses impose a restrictive imperative, *each of which must be satisfied*." Accordingly, this portion of *section 21(a)* imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice.

The dual constitutional imperatives "follow[] almost verbatim the requirements embodied in the [Federal] Voting Rights Act." *Brown, 2012 U.S. App. LEXIS 1775, 2012 WL 264610, at *8*. The first imperative, that [**70] "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process," *art. III, § 21(a), Fla. Const.*, is essentially a restatement of Section 2 of the Voting Rights Act (VRA), which prohibits redistricting plans that afford minorities "less opportunity than other members of the electorate to participate in the political process." *42 U.S.C. § 1973(b) (2006)*. Section 2 relates to claims of impermissible vote dilution.

Florida's second imperative, that "districts shall not be drawn . . . to diminish [*620] [racial or language minorities'] ability to elect representatives of their choice," *art. III, § 21(a), Fla. Const.*, reflects the statement codified in Section 5 of the VRA prohibiting apportionment plans that have "the purpose of or will have the effect of diminishing the ability of any citizens . . . on account of race or color . . . to elect their preferred candidates of choice." *42 U.S.C. § 1973c(b) (2006)*. Section 5 attempts to eradicate impermissible retrogression in a minority group's ability to elect a candidate of choice. Although Section 5 applies only to "covered jurisdictions," [**71] Florida's constitutional prohibition applies to the entire state.

Consistent with the goals of Sections 2 and 5 of the VRA, Florida's corresponding state provision aims at safeguarding the voting strength of minority groups

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against both impermissible dilution and retrogression. Interpreting Florida's minority voting protection provision in this manner gives due allegiance to the principles of constitutional construction, under which the Court considers "the purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in our constitutional document." *In re Apportionment Law—1982, 414 So. 2d at 1048*. Before its placement on the ballot and approval by the citizens of Florida, sponsors of this amendment, including the Florida State Conference of NAACP Branches (NAACP) and Democracia Ahora, acknowledged that Florida's provision tracked the language of Sections 2 and 5 and was perfectly consistent with both the letter and intent of federal law. *See* Amici Curiae Br. of Fla. State Conference of NAACP Branches & Democracia Ahora, Inc., at 3-5, *Roberts v. Brown, 43 So. 3d 673 (Fla. 2010)* (No. SC10-1362). Those groups further contended that viewing "the [**72] requirements of [Florida's provision as being] thoroughly consistent with the Voting Rights Act's text and [placing an] emphasis on protecting the equal opportunities of minorities" did "not require extended analysis to see." *Id.* at 8.

Moreover, all parties to this proceeding agree that Florida's constitutional provision now embraces the principles enumerated in Sections 2 and 5 of the VRA. Because Sections 2 and 5 raise federal issues, our interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent. This approach not only corresponds to the manner in which this Court addressed Federal VRA claims in 1992, *see In re Apportionment Law—1992, 597 So. 2d at 280-82*, but it squares with how other jurisdictions have interpreted comparable state provisions.[23]

Florida's provision is unique among the states in that it incorporates language from the VRA but does not explicitly reference the VRA.[24] We therefore review the [*621] language of Sections 2 and 5, and how each has been judicially interpreted, to give meaning to our state counterpart. The Court nonetheless recognizes our independent constitutional obligation to interpret our own state constitutional provisions.

In our review, we conclude that in applying the federal provisions to the challenges and legislative justifications, the Court must necessarily approach the application of each federal provision differently due to the manner in which the Court reviews Florida's constitutional provisions in a facial review of the apportionment plans. For example, in this case, the House and Senate use Florida's minority voting protection provision as a justification for the manner in which they drew specific

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[23] Several jurisdictions require the state's redistricting body to expressly comply with the VRA when drawing district lines. *See* Ariz. Const. art. IV, pt. 2, § 1(14)(A); *Cal. Const. art. XXI, § 2(d)(2).*; *Colo. Rev. Stat. § 2-1-102(1)(a)(II)*; *10 Ill. Comp. Stat. 120/5-5(a)*, *(d)*; *Iowa Code § 42.4*; *Mich. Comp. Laws § 3.63(b)(ii)*; *Mich. Comp. Laws § 4.261a*; *Mont. Code Ann. § 5-1-115(2)*; *N.C. Gen. Stat. § 163-132.1B(a)*; [**73] *Or. Rev. Stat. § 188.010*; *Tenn. Code. Ann. § 3-1-103(b)*. Courts interpreting these standards have not departed from prevailing United States Supreme Court precedent. *See, e.g., Vandermost v. Bowen, 53 Cal. 4th 421, 137 Cal. Rptr. 3d 1, 269 P.3d 446, 2012 WL 246627, at *27 n.39 (Cal. 2012)* (relying on Supreme Court precedent to discuss Sections 2 and 5 in relation to state provision requiring compliance with the VRA).

[24] Like Florida's, the District of Columbia's provision does not expressly reference the VRA, but the District of Columbia's appellate court has construed it in conformity with Section 2 of the VRA. *See Kingman Park Civic Ass'n v. Williams, 924 A.2d 979, 987 (D.C. 2007)* (relying on Section 2 precedent from the Supreme Court to review a claim under provision disallowing redistricting plans that have "the [**74] purpose and effect of diluting the voting strength of minority citizens" (quoting *D.C. Code § 1-1011.01(g)*).

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districts. The challengers, on the other hand, urge the Court to conclude that many of the districts were drawn to impermissibly dilute the voting strength of minorities and, in turn, the voting strength of the Democratic Party.

In contrast to the posture of the case in which this Court reviews Florida's minority voting protection provision, Section 2 claims under the VRA are brought by plaintiffs who challenge the apportionment plan on the grounds of impermissible vote dilution. Section 5 of the VRA applies only to covered jurisdictions that must obtain preclearance by the Department of Justice [**75] before an apportionment plan goes into effect; in Florida, only five counties are covered, not the entire state.

As explained by the United States Supreme Court, HN25[] the VRA "was designed by Congress to banish the blight of racial discrimination in voting," South Carolina v. Katzenbach, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), and to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be denied or abridged . . . on account of race, color, or previous condition of servitude." Voinovich v. Quilter, 507 U.S. 146, 152, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993) (quoting U.S. Const. amend. XV). Sections 2 and 5 of the VRA "combat different evils," Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 477, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997), and "differ in structure, purpose, and application." Georgia v. Ashcroft, 539 U.S. 461, 478, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003) (quoting Holder v. Hall, 512 U.S. 874, 883, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994) (plurality opinion)). Section 2, specifically, applies nationwide and provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account [**76] of race or color." 42 U.S.C. § 1973(a) (2006).

A denial or abridgement of the right to vote in violation of Section 2 occurs when

> HN26[] based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

*Id.* § 1973(b). HN27[] Section 2 thus prohibits any practice or procedure that, when "'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." Voinovich, [*622] 507 U.S. at 153 (quoting Thornburg v. Gingles, 478 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)). Importantly, Section 2 employs a "results" test, under which proof of discriminatory intent is not necessary to establish a violation of the section. Chisom v. Roemer, 501 U.S. 380, 395, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991); *see also* Bossier Parish Sch. Bd., 520 U.S. at 482 ("[P]roof of discriminatory intent is not required to establish a violation [**77] of Section 2.").[25]

The United States Supreme Court has commonly

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[25] The United States Supreme Court has recognized that vote dilution claims can be brought separate and apart from statutory claims based on the VRA. The Equal Protection Clause prohibits racial vote dilution where the plaintiff establishes that the electoral scheme was adopted with the intent to racially discriminate. *See* City of Mobile v. Bolden, 446 U.S. 55, 62, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (plurality opinion); *see also* Clark v. Putnam Cnty., 293 F.3d 1261, 1266 (11th Cir. 2002) (citing *Bolden* for the proposition that "[i]n order to state a racial vote dilution claim under the Constitution, intent to racially discriminate must be shown").

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referred to one such prohibited practice or procedure under Section 2 as "vote dilution," which is the practice of reducing the potential effectiveness of a group's voting strength by limiting the group's chances to translate the strength into voting power. *Shaw, 509 U.S. at 641*. "[T]he usual device for diluting the minority voting power is the manipulation of district lines" by either fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them or "packing" [**78] them into one or a small number of districts to minimize their influence in adjacent districts. *Voinovich, 507 U.S. at 153-54*. For instance, under the interpretation of federal law, impermissible "packing" might occur when a minority group has "sufficient numbers to constitute a majority in three districts" but is "packed into two districts in which it constitutes a super-majority." *Id. at 153*.

The Supreme Court's leading case interpreting Section 2, *Gingles, 478 U.S. at 50*, *HN28*[⬆] set out three "necessary preconditions" that a plaintiff is required to demonstrate before he or she can establish that a legislative district must be redrawn to comply with Section 2. These preconditions require an individual challenging the plan to show that: (1) a minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population is "politically cohesive"; and (3) the majority population "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id. at 50-51*. When the three *Gingles* preconditions are met, courts must then assess the totality of the circumstances to determine if the [**79] Section 2 "effects" test is met—that is, if minority voters' political power is truly diluted. *Johnson v. De Grandy, 512 U.S. 997, 1013, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994)*.

*HN29*[⬆] A successful vote dilution claim under Section 2 requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed. *See id. at 1008* ("[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice."). Majority-minority districts are ones "in which a majority of the population is a member of a specific minority group." *Voinovich, 507 U.S. at 149*; *see also Bartlett v. Strickland, 556 U.S. 1, 13, 129 S. Ct. [*623] 1231, 173 L. Ed. 2d 173 (2009)* (plurality opinion) ("In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population.").

By contrast, a crossover or coalition district "is one in which minority voters make up less than a majority of the voting-age population" but are, at least potentially, "large enough to elect the candidate of [their] choice with help from voters who are members of the majority and [**80] who cross over to support the minority's preferred candidate." *Bartlett, 556 U.S. at 13*. Influence districts are districts in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. *Id.*

The showing of either an additional minority influence district or a crossover district, as opposed to an actual majority-minority district, is insufficient for Section 2 purposes; what is required is that "the minority population in the potential election district [be] greater than 50 percent." *Id. at 19-20*. Moreover, while "there is no § 2 right to a [minority] district that is not reasonably compact, the creation of a noncompact district does not compensate for the dismantling of a compact [minority] opportunity district." *League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 430-31, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006)*. As the United States Supreme Court has explained, "[t]he practical consequence of drawing a district to cover two distant, disparate communities is

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that one or both groups will be unable to achieve their political goals." *Id. at 434*. Therefore, with respect to the compactness inquiry for Section 2 purposes specifically, there would be "no basis to [**81] believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *Id. at 433*.

Most recently, in *Perez, 132 S. Ct. at 944*, an eight-justice majority of the Supreme Court cited to the plurality decision in *Bartlett, 556 U.S. at 13-15* (declining to recognize a Section 2 claim where the district was composed of only 39% black voting-age population), to hold that a federal district court would have no basis for drawing a districting plan to create a "minority coalition opportunity district." The *Perez* decision is of course binding precedent only as to the interpretation of Section 2 jurisprudence under the VRA and was specifically concerned with limiting the circumstances under which a federal district court could draw an interim apportionment plan.

Unlike the posture of a Section 2 VRA claim before a federal court, the Florida Supreme Court is charged with analyzing the apportionment plan to determine compliance with all constitutional provisions. Florida's provision now codifies these Section 2 principles, but the question is whether those principles set a floor, [**82] as well as a ceiling, for our interpretation of Florida's constitution— whether there would be a violation of Florida's minority protection provision with respect to vote dilution if the plan could be drawn to create crossover districts or even influence districts. The challengers assert that by overly packing minorities into single districts, the Legislature has acted to minimize the influence of not only minorities, but also Democrats in the surrounding districts. Where that claim has been made, we will consider that specific argument when reviewing the district challenges below.

In contrast to vote dilution claims under Section 2, *HN30*[] Section 5 of the VRA is limited to particular "covered jurisdictions" and [*624] relates to claims of retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Ashcroft, 539 U.S. at 478*. Section 5 "suspend[s] all changes in state election procedure," including redistricting plans, in jurisdictions covered by the VRA "until they are submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General" of the United States. *Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 129 S. Ct. 2504, 2509, 174 L. Ed. 2d 140 (2009)*; [**83] *see also Beer v. United States, 425 U.S. 130, 133, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976)*. Florida is not a covered jurisdiction for the purposes of Section 5, but the state does include five covered counties: Collier, Hardee, Hendry, Hillsborough, and Monroe. Florida's new constitutional provision, however, codified the non-retrogression principle of Section 5 and has now extended it statewide. In other words, Florida now has a statewide non-retrogression requirement independent of Section 5.

*HN31*[] Preclearance under Section 5 is granted only if the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Nw. Austin, 129 S. Ct. at 2509* (quoting *42 U.S.C. § 1973c(a) (2006)*). A violation can be shown where the drawing of the district lines has "the purpose of or will have the effect of diminishing the ability of any citizens . . . on account of race or color, or [membership in a language minority group], to elect their preferred candidates of choice." *42 U.S.C. § 1973c(b)*.[26]

[26] While Florida's provision borrows language from Section 5, it does not incorporate the portion of Section 5 placing the burden of proof on the covered jurisdiction to establish the requirements necessary to obtain preclearance.

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The primary objective of Section 5 is to avoid retrogression. "[A] plan has an impermissible [retrogressive] 'effect' under § 5 only if it 'would lead to a retrogression in the position [**84] of racial minorities with respect to their effective exercise of the electoral franchise.'" *Bossier, 520 U.S. at 478* (quoting *Beer, 425 U.S. at 141*). The existing plan of a covered jurisdiction serves as the "benchmark" against which the "'effect' of voting changes is measured." *Id.*

In its 2006 reauthorization, Congress amended Section 5 to add the express prohibition against "diminishing the ability" of minorities "to elect their preferred candidate" as a response to the United States Supreme Court's 2003 decision in *Ashcroft*. This amended language mirrors the language of Florida's provision. Before the amendment to Section 5, the *Ashcroft* Court concluded that Section 5 granted to covered jurisdictions the discretion to trade off "safe" districts with "influence or coalition districts," particularly if the new plan did not "change[] the minority group's opportunity to participate in the political process." *539 U.S. at 482*.

Disagreeing with the United States [**85] Supreme Court's interpretation, Congress overruled *Ashcroft*, concluding that "trade-offs" that "would allow the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give 'influence' to the minority community while removing that community's ability to elect candidates" were "inconsistent with the original and current purpose of Section 5." H.R. Rep. No. 109-478, at 44 (2006). As Congress explained, the new "Section 5 [was] intended to be specifically focused on whether the electoral power of the minority community [was] more, less, or just [*625] as able to elect a preferred candidate of choice after a voting change as before." *Id.* at 46. That is, "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5." *Id.* The United States Supreme Court has yet to interpret this aspect of Congress's 2006 amendment.

Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' [**86] ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5. However, the Court must remain mindful that we are interpreting an independent provision of the state constitution.

Certainly, *HN32*[⬆] by including the "diminish" language of recently amended Section 5, Florida has now adopted the retrogression principle as intended by Congress in the 2006 amendment. Accordingly, the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates. In other words, in addition to majority-minority districts, coalition or crossover districts that previously provided minority groups with the ability to elect a preferred candidate under the benchmark plan must also be recognized. *See Texas v. United States, No. 11-1303 (TBG-RMC-BAH), 831 F. Supp. 2d 244, 2011 U.S. Dist. LEXIS 147586, 2011 WL 6440006, at *18-19 (D.D.C. Dec. 22, 2011)* (concluding that minority coalition districts are also included in the calculation of whether a new districting plan diminishes the ability of a minority group to elect a candidate of choice). We nonetheless conclude that under Florida's [**87] provision, a slight change in percentage of the minority group's population in a given district does not necessarily have a cognizable effect on a minority group's ability to elect its preferred candidate of choice. This is because a minority group's ability to elect a candidate of choice depends upon more than just population figures.

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HN33[] To undertake a retrogression evaluation requires an inquiry into whether a district is likely to perform for minority candidates of choice. This has been termed a "functional analysis," requiring consideration not only of the minority population in the districts, or even the minority voting-age population in those districts, but of political data and how a minority population group has voted in the past. The United States Department of Justice (DOJ) has defined what a functional analysis of electoral behavior entails:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral [**88] behavior within the particular jurisdiction or election district [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.
>
> Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data [*626] in the submission is often helpful in making the requisite Section 5 determination. . . . Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan.

DOJ Guidance Notice, 76 Fed. Reg. at 7471; *see also Texas, 2011 U.S. Dist. LEXIS 147586, 2011 WL 6440006, at *15-18* (proposing a functional test similar to that of the DOJ).

We recognize that in certain situations, compactness and other redistricting criteria, such as those codified in tier two of *article III, section 21, of the Florida Constitution*, [**89] will be compromised in order to avoid retrogression. Indeed, the DOJ has even noted that "compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria that require the jurisdiction to . . . follow county, city, or precinct boundaries . . . or, in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression." DOJ Guidance Notice, 76 Fed. Reg. at 7472. Tier two of *article III, section 21*, specifically contemplates this need, but only to the extent necessary. Therefore, as does the DOJ, in making our own assessment, we will rely upon "alternative or illustrative plans . . . *that make the least departure from [Florida's] stated redistricting criteria needed to prevent retrogression*." *Id.* (emphasis added).

The Attorney General, the Senate, and the House all argue that an inquiry under Florida's provision, like an inquiry under the Federal VRA, is too fact-intensive to be resolved in the instant original proceeding, which is limited to a narrow thirty-day window. In fact, the Senate takes the position that [**90] this Court should outright decline to review whether the Senate plan complies with this provision.

In oral argument, the attorney for the Senate stated that "[n]o rational person could expect seven appellate-court justices to resolve these extraordinarily tough factual issues." This argument was in support of the Senate's position that challenges based on the new constitutional

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provisions, including the minority voting protection provision, should await challenges brought in the trial court after validation of the plans.

We acknowledge that in 2002, this Court declined ruling on Federal VRA claims and race-based discrimination claims, instead leaving those claims to be brought on an "as-applied" basis. *See In re Apportionment Law—2002, 817 So. 2d at 825*. Of course, as we have mentioned previously, at that time, there was no explicit state constitutional requirement, and it was entirely logical to defer such claims until after this Court determined the facial validity of the plans under the Florida Constitution.

Further, the Legislature, in its defense of the reason for drawing certain districts in a particular configuration, relies on the need to comply with the Federal VRA and the corresponding [**91] provision of the Florida Constitution. The Legislature asserts that it is far too difficult for this Court to review claims regarding diminishment of voting strength, but it nevertheless justifies the drawing of a number of districts on this basis.

If the Legislature is utilizing its interest in protecting minority voting strength as a shield, this Court must be able to undertake a review of the validity of that reason. Therefore, by the very nature of the challenges and the reasons advanced for the shape of the districts, it is necessary to perform a facial review and analyze the objective data that we have available. Because [*627] a minority group's ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision.

To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment. However, the United States Supreme Court has cautioned: "[W]e do not read . . . any of our other § 5 cases to give covered jurisdictions *carte blanche* to engage [**92] in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw, 509 U.S. at 655*. This is especially true in light of the United States Supreme Court's admonition:

> *HN34*[↑] Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the *Fourteenth* and *Fifteenth Amendments* embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

*Id. at 657*.

*HN35*[↑] In a manner consistent with what is required to determine whether a district is likely to perform for minority candidates of choice, the Court's analysis [**93] of this claim and any defense for the manner in which the district was drawn will involve the review of the following statistical data: (1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history.[27] This

[27] The Court utilized the House political data and software in analyzing all of these figures.

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approach is analogous to the review we undertook in 1992 of objective statistical data in order to facially decide Section 2 claims. There, when analyzing whether the joint resolution complied with Section 2 of the VRA, this Court held that its "analysis [would] include a consideration of all statistical data filed herein, including a breakdown of white, black, and Hispanic voting-age populations and voting registrations in the legislative districts contained in the Joint Resolution and in other proposed plans, none of which [were] disputed." *In re Apportionment Law—1992, 597 So. 2d at 282* (footnotes omitted).

Based on the foregoing, we analyze Florida's minority voting protection provision as safeguarding the voting strength of minority groups against impermissible dilution and retrogression.

**c. Contiguity**

The third of the [**94] tier-one standards is contiguity. *HN36*[] The requirement that districts shall consist of contiguous territory exists in both *sections 16(a)* and *21(a) of article III*.[28] By including this standard in the [*628] first subsection of the new amendment, the voters made clear their intention to establish that the *section 21(b)* standards of compactness, nearly equal population, and utilizing political and geographical boundaries are subservient to the contiguity requirement.

This Court has defined contiguous as "being in actual contact: touching along a boundary or at a point." *In re Apportionment Law—2002, 817 So. 2d at 827* (quoting *In re Apportionment Law—1992, 597 So. 2d at 279*). "A district lacks contiguity 'when a part is isolated from the rest by the territory of another district' or when the lands 'mutually touch only at a common corner or right angle.'" *Id.* (quoting *In re Apportionment Law—1992, 597 So. 2d at 279*). No party has advocated that the interpretation of this constitutional provision has changed, and we interpret the clause in *section 21(a)* consistent with our previous interpretation of whether a district is contiguous under *section 16(a)*.

***2. Tier-Two Standards***

We now turn to a discussion of the tier-two standards, which require that "districts shall be as nearly equal in population as is practicable," that "districts shall be compact," and that "districts shall, where feasible, utilize existing political and geographical boundaries." *Art. III, § 21(b), Fla. Const.* Strict adherence to these standards [**96] must yield if there is a conflict between compliance with them and the tier-one standards.

**a. As Nearly Equal in Population as Practicable**

Although the express requirement of equal population is new to the Florida Constitution, this Court's precedent establishes the importance of the federal one-person,

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[28] *Section 16(a)* specifically requires that that districts be "of either contiguous, overlapping or identical territory." Neither of the latter two requirements in this standard, that districts must be of overlapping or identical territory, is at issue in the instant petition. This Court has never defined the term "overlapping," and it has never come into play under the Constitution of 1968. The phrase "identical territory" refers to multi-member districts. *See In re Apportionment Law—1972, 263 So. 2d at 806-07*. A multimember district is a district in which the same voters elect more than one representative to serve a geographical area that could be divided into several areas, each represented by a single person. *See Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971)*. [**95] As has been the case since 1982, the 2012 apportionment plan consists solely of single-member districts as to both the House and Senate plans.

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one-vote requirement as both an apportionment principle and a proper starting point in judicial analysis. We evaluate this federal principle in conjunction with the newly enacted state constitutional requirement set forth in *article III, section 21(b)*, requiring districts to be "as nearly equal in population as is practicable."

As interpreted by the United States Supreme Court, the *Equal Protection Clause of the Fourteenth Amendment* mandates that "state legislatures be apportioned in such a way that each person's vote carries the same weight—that is, each legislator represents the same number of voters." *In Apportionment Law— 1992, 597 So. 2d at 278* (citing *Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)*). This concept, commonly referred to as the one-person, one-vote requirement, is determined "by analyzing the population figures in each district." *In re Apportionment Law—2002, 817 So. 2d at 825*. [**97] In construing the one-person, one-vote requirement, this Court explained:

> *HN37*[] The Constitutions of Florida and the United States require that one man's vote in a district be worth as much as another. Mathematical exactness is not an absolute requirement in state apportionment plans; however, deviations, when unavoidable, must be de minimis. Whether a deviation is de minimis must be determined on the facts of each case.

*In re Apportionment Law—1972, 263 So. 2d at 802*.

When discussing the one-person, one-vote requirement in 2002, this Court relied [*629] on the United States Supreme Court and defined equal protection as

> "requir[ing] that a State make an honest and good faith effort to construct districts . . . *as nearly of equal population as is practicable*." [*In re Senate Joint Resolution 2G, 597 So. 2d at 279*] (quoting *Reynolds, 377 U.S. at 577*). In *White v. Regester, 412 U.S. 755, 764, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973)*, the Supreme Court held that "minor population deviations among state legislative districts [do not] substantially dilute the weight of individual votes in larger districts so as to deprive individuals in these districts of fair and effective representation."

*In re Apportionment Law—2002, 817 So. 2d at 826* (emphasis [**98] added).

Although requiring mathematical exactness for congressional districts,[29] the United States Supreme Court has also explained that mathematical precision under the one-person, one-vote requirement is not paramount for state legislative districts when it must yield to other legitimate redistricting objectives, such as compactness and maintaining the integrity of political subdivisions:

> [S]ome deviations from population equality may be necessary to permit States to pursue other legitimate objectives such as "maintain[ing] the integrity of various political subdivisions" and "provid[ing] for compact districts of contiguous territory." *Reynolds, supra at 578*. As the Court stated in *Gaffney*, "a[n] unrealistic overemphasis on raw population figures, a mere nose count in the

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[29] Congressional districts fall under a stricter standard under the federal constitution. Any variance, no matter how small, [**99] must be justified, unless it can be shown that the variance occurred despite an effort to achieve precise mathematical equality. *Karcher v. Daggett, 462 U.S. 725, 730, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983)*. The United States Supreme Court has noted that "congressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts and that, as compared with the latter, they are relatively enormous." *White v. Weiser, 412 U.S. 783, 793, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973)*.

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> districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *412 U.S. at 749*.

*Brown v. Thomson, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983)* (alterations in original).

Applying that body of law during the 2002 apportionment cycle before the most recent constitutional amendment, this Court rejected the argument that the one-person, one-vote standard would require the Legislature to utilize advanced computer technology to design districts "in exactly the same numerical size." *In re Apportionment Law—2002, 817 So. 2d at 826*. We concluded that "[e]ven if the advent of computer-based redistricting software [had] lowered the maximum permissible deviation, . . . the relatively minor deviation before us in [that] case [did] not lead to the conclusion that either the House or Senate plans [were] facially in violation of the one-person, one-vote requirement." *Id. at 827*. There, the House plan had a maximum [**100] percentage deviation between the largest and smallest number of people per representative (statistical overall range) of 2.79%, and the Senate plan had a maximum percentage deviation between the largest and smallest number of people per representative (statistical overall range) of 0.03%. *Id. at 826*.

Now, the Florida voters have expressly spoken on the issue of population equality [*630] in Florida's redistricting process. *Article III, section 21(b)*, requires districts to be "as nearly equal in population as is practicable." To interpret this provision, we apply the principles governing constitutional construction. The Court "endeavors to construe a constitutional provision consistent with the intent of the framers and voters," *Zingale, 885 So. 2d at 282*, and in construing the language of the Florida Constitution, "[e]very word of the Florida Constitution should be given its intended meaning and effect." *In re Apportionment Law— 1972, 263 So. 2d at 807*.

Florida's standard unmistakably uses the same language that the Supreme Court has used when interpreting the federal equal protection one-person, one-vote standard. *See In re Apportionment Law—2002, 817 So. 2d at 826* (describing the federal [**101] one-person, one-vote criteria as requiring the Legislature to construct districts "as nearly of equal population as is practicable" (quoting *In re Apportionment Law—1992, 597 So. 2d at 279*)). Further, this Court has relied on Supreme Court precedent to interpret the one-person, one-vote standard in a like manner.

The FDP and the Coalition assert that Florida's equal population requirement imposes a stricter standard than this Court has previously employed. The challengers' assertion therefore raises the question of whether compliance with the standard under the Florida Constitution is measured differently than how it has been measured under the United States Constitution; in other words, whether the Legislature has less room for flexibility in population deviation among the legislative districts because the requirement is now enshrined in the Florida Constitution.

We resolve this question by concluding that *HN38*[↑] the voters' inclusion of this standard in the second tier of *article III, section 21*, recognizes that, as under the federal constitution, strict and unbending adherence to the equal population requirement will yield to other redistricting considerations, but that those considerations [**102] must be based on the express constitutional standards. The Florida Constitution embraces this construction, expressly mandating that the equal population requirement give way to contiguity,

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the prohibition against the intent to favor an incumbent or political party, and the need to comply with the minority-protection provision. In addition, *article III, section 21*, instructs that Florida's equal population requirement be balanced with both compactness and the use of political and geographical boundaries.

The United States Supreme Court has long recognized that although *HN39*[⬆] the *Equal Protection Clause* requires state legislatures to make an "honest and good faith effort" to construct districts "as nearly of equal population as is practicable," there are legitimate reasons for states to deviate from creating districts with perfectly equal populations, including maintaining the integrity of political subdivisions and providing compact and contiguous districts. *Sims, 377 U.S. at 577*; *see also Brown, 462 U.S. at 842*.

We imbue Florida's provision with the same meaning, subject to this important caveat. Because obtaining equal population "if practicable" is an explicit and important constitutional [**103] mandate under the Florida Constitution, any deviation from that goal of mathematical precision must be based upon compliance with other constitutional standards. Accordingly, compliance with Florida's equal population standard must be assessed in tandem with the other constitutional considerations.

**b. Compactness**

Compactness is the second of the tier-two standards. Because the requirement that districts "shall be compact" is a new [*631] constitutional requirement, the Court begins by defining it. Before 2010, "neither the United States nor the Florida Constitution require[d] that the Florida Legislature apportion legislative districts in a compact manner." *In re Apportionment Law—2002, 817 So. 2d at 831*. Now, however, the Florida Constitution expressly requires that "districts shall be compact." *Art. III, § 21(b), Fla. Const.* Although compactness is a new constitutional requirement in Florida, compactness is a well-recognized and long-standing constitutional standard in at least twenty state constitutions[30] and at least six state statutes.[31]

In [**105] defining this standard, as with the other standards, we start with the proposition that *HN40*[⬆] in interpreting constitutional provisions,

> [f]irst and foremost, this Court must examine the actual language used in the constitution. "If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." The words of the constitution "are to be interpreted

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[30] States that constitutionally require compactness during reapportionment include Alaska, California, Colorado, Hawaii, Illinois, Maine, Maryland, Missouri, [**104] Montana, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia, and Wisconsin. *See Alaska Const. art VI, § 6*; Ariz. Const. art. IV, pt. 2, § 1(14); *Cal. Const. art. XXI, §§ 2(d), (e)*); ***Colo. Const. art. V, § 47***; *Haw. Const. art. IV, § 6(4)*; *Ill. Const. art. IV, § 3(a)*; *Me. Const. art. IV, pt. 1, § 2*; *Md. Const. art. III, § 4*; *Mo. Const. art. III, § 2*; *Mont. Const. art. V, § 14(1)*; *Neb. Const. art. III, § 5*; N.J. Const. art. IV, § 2; *N.Y. Const. art. III, § 4*; *Ohio Const. art. XI, § 9*; *Pa. Const. art. II, § 16*; *R.I. Const. art. VII, § 1*; *art. VIII, § 1*; *S.D. Const. art. III, § 5*; *Vt. Const. ch. II, §§ 13*, 18; *Va. Const. art. II, § 6*; *Wash. Const. art. II, § 43(5)*; *W.V. Const. art. VI, § 4*; *Wis. Const. art. IV, § 4*.

[31] States that codify a compactness requirement by statute include Idaho, Michigan, Minnesota, Mississippi, New Mexico, and North Dakota. *See Idaho Code Ann. § 72-1506*; *Iowa Code § 42.4(4)*; *Mich. Comp. Laws §4.261*; *Minn. Stat. § 2.91(2)*; *Miss. Code Ann. § 5-3-101*); ***N.M. Stat. §§ 2-8D-2***, 2-7C-3; *N.D. Cent. Code Ann. § 54-03-01.5*. The District of Columbia also statutorily requires compactness in redistricting. *See D.C. Code § 1-1011.01*.

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> in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense." Additionally, this Court "endeavors to construe a constitutional provision consistent with the intent of the framers and the voters." Constitutional provisions "must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied."

*Lewis v. Leon Cnty., 73 So. 3d 151, 153-54 (Fla. 2011)*. Thus, a fundamental tenet of constitutional construction applicable in our analysis is that the Court will construe a constitutional provision in a manner consistent with the intent of the framers and the voters and will interpret its terms in their most usual and obvious meaning.

The Senate contends that this Court should not undertake to define compactness and [**106] instead leave that task to the Legislature. The Senate asserts that "compactness is . . . the paradigmatic example of an elusive concept with no precise meaning." However, as is universally recognized, it is the exclusive province of the judiciary to interpret terms in a constitution and to define those terms. *See Lawnwood Medical Ctr., Inc. v. Seeger, 990 So. 2d 503, 510 (Fla. 2008)* ("[I]t is the duty of this Court to determine the meaning of this constitutional provision."); *Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 384 (N.C. 2002)* (noting during the review of a legislative apportionment plan that "it is emphatically the province and duty of the [*632] judicial department to say what the law is" (quoting *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803))*).

This is particularly the case with the new constitutional standards on apportionment because the standards serve as a limit on the exercise of the Legislature's authority. Further, it is incumbent upon this Court to define the term in accordance with the intent of the voters, which, in this case, was to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination. *See Ervin v. Collins, 85 So. 2d 852, 855 (Fla. 1956)* [**107] ("We are called on to construe the terms of the Constitution, an instrument from the people, and we are to effectuate their purpose from the words employed in the document.").

*HN41*[↑] A compactness requirement serves to limit partisan redistricting and racial gerrymanders. In fact, as the Illinois Supreme Court recognized, "compactness is 'almost universally recognized' as an appropriate anti-gerrymandering standard." *Schrage v. State Bd. of Elections, 88 Ill. 2d 87, 430 N.E.2d 483, 486, 58 Ill. Dec. 451 (Ill. 1981)* (quoting James M. Edwards, *The Gerrymander and "One Man, One Vote"*, 46 N.Y.U. L. Rev. 879, 893 (1971)); *Pearson, 2012 Mo. LEXIS 7, 2012 WL 131425, at *34* (holding that the purpose of the constitutional requirements that districts be contiguous, compact, and nearly equal in population is "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander'" (quoting *Hitchcock, 146 S.W. at 61*)).

Courts around the country have generally defined the term "compactness" on a geographical basis. *See, e.g., Hickel v. Se. Conference, 846 P.2d 38, 45 (Alaska 1992)* (defining compactness as "having a small perimeter in relation to the area encompassed"); *Schrage, 430 N.E.2d at 486* [**108] (defining compactness simply as meaning "closely united"); *Acker v. Love, 178 Colo. 175, 496 P.2d 75, 76 (Colo. 1972)* (defining the term as "a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered"); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 211 Ariz. 337, 121 P.3d 843, 869 (Ariz. Ct. App. 2005)* ("'Compactness' refers to length of the district's borders. The shorter the distance around the district, the more compact the district."); *see also Kilbury v. Franklin Cnty. ex rel. Bd. of Cnty. Comm'rs,*

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*151 Wn.2d 552, 90 P.3d 1071, 1077 (Wash. 2004)* (reviewing various legislative redistricting cases like *Hickel* and *Acker*, and concluding that the phrase "as compact as possible" does not mean "as small in size as possible," but rather "as regular in shape as possible," when reviewing a local government redistricting case).

Defining compactness geographically also conforms to the ordinary dictionary definition of the term. For example, the *Merriam-Webster's Collegiate Dictionary* defines the word "compact" as "having a dense structure or parts or units closely packed or joined." *Black's Law Dictionary* defines "compact" as "closely [**109] or firmly united or packed . . . having a small surface or border in proportion to contents or bulk." *Black's Law Dictionary* 281 (6th ed. 1990).

The Senate asserts, however, that the term includes both a geographical component and a functional component and should be construed to include such concepts as communities of interest. The Senate further refers this Court to other courts that have analyzed the term by examining functional factors such as whether constituents in the district are able to relate to and interact with one another, whether constituents in the district [*633] are able to access and communicate with their elected representatives, or whether the district is united by commerce, transportation, and communication.[32]

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[32] *Wilson v. Eu, 1 Cal. 4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545, 552 (Cal. 1992)*; *In re 2003 Legislative Apportionment of House of Representatives, 2003 ME 81, 827 A.2d 810, 815 (Me. 2003)*; ***In re Legislative Districting of State, 475 A.2d at 443***; *Schneider v. Rockefeller, 31 N.Y.2d 420, 293 N.E.2d 67, 340 N.Y.S.2d 889 (N.Y. 1972)*; *Parella v. Montalbano, 899 A.2d 1226, 1252 (R.I. 2006)*; *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor, 160 Vt. 9, 624 A.2d 323, 330-31 (Vt. 1993)*.

Those cases defining compactness as a functional concept derive [**110] from states that, for the most part, have different constitutional provisions from those in Florida and discuss the numerous requirements in tandem, including contiguity, geographical compactness, and respecting communities of interest and common interests. *See, e.g., Wilson, 823 P.2d at 552* (discussing in tandem California's state constitution's requirements of contiguity and geographical compactness while also respecting communities of interest and considering constituents' shared interests such as transportation facilities, similar work opportunities, and access to the same media of communication); *In re 2003 Legislative Apportionment of House of Representatives, 2003 ME 81, 827 A.2d 810, 815 (Me. 2003)* (analyzing a claim where by statute, the apportionment plan districts were required to be a "functionally contiguous and compact territory," and to facilitate representation by minimizing impediments to travel within the district); *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor, 624 A.2d at 330-31* (addressing Vermont's constitutional mandates that seek to maintain "geographical compactness and contiguity" together with additional statutory requirements to consider and maintain [**111] "patterns of geography, social interaction, trade, political ties and common interests").

Moreover, this position appears to be at odds with the Legislature's prior position that the term "compact" under the Fair Districts Amendment did not include factors regarding functional compactness, where courts look to transportation links, communication, jobs, and other aspects that involve a community of interest analysis. *See* Initial Brief at 13-14, *Fla. Dep't of State v. Fla. State Conference of NAACP Branches, 43 So. 3d 662 (Fla. 2010)* (No. SC10-1375) ("*A district that becomes less compact in order to promote a community of interest*—or which deviates from a local boundary to

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further minority interests— might reflect a rational harmonization of such relative standards." (emphasis added) (footnote omitted)).

We conclude that the language of the Florida Constitution does not give the term "compact" such an expansive meaning. If we were to include "communities of interest" within the term "compactness," the Court would be adding words to the constitution that were not put there by the voters of this state. HN42[↑] In construing the words used in the constitution, the Court is not at liberty to add words [**112] and terms that are not included in the text of the constitution. *See* Pleus, 14 So. 3d at 945 ("We remain mindful that in construing a constitutional provision, we are not at liberty to add words that were not placed there originally or to ignore words that were expressly placed there at the time of adoption of the provision.").

HN43[↑] Expanding the definition of compactness to include factors such as the ability to access and communicate with elected officials and their ability to relate and interact with one another would be contrary to the average voter's understanding of compactness [*634] and would be contrary to the usual and ordinary meaning of the word. In fact, using such a broad definition of this term would almost read out the requirement of compactness—enlarging this term to such a degree that it would frustrate the will of the people in passing this constitutional amendment. Accordingly, we hold that when reviewing compactness, the term should be construed to mean geographical compactness.

Our consideration of the term "compact" as a geographical concept raises the issues of how it is to be measured and how other constitutional considerations will impact that measurement. The Senate and [**113] the Attorney General again urge the Court not to undertake a compactness assessment because determining whether an apportionment plan complies with this principle exceeds the scope of this Court's limited review. The Senate specifically contends that compactness has no precise definition and, further, that this Court is incapable of determining whether the shape of the district is irregular due to other considerations that must go into the apportionment process, like equal population, protecting minority voting rights, and utilizing geographical and political boundaries. Since all of these policies must be balanced, the Senate maintains, Florida courts should simply defer to the Legislature's judgment.

Contrary to the Senate's and the Attorney General's assertions, compactness does not require such a unique and factual determination that appellate courts are completely unable to review the matter absent a trial record. A significant number of states mandate that during the apportionment process districts be drawn compactly, and at least fourteen of those states vest original jurisdiction to review legislative apportionment in the state supreme court.[33] Given that other state supreme [**114] courts have accomplished a similar task without much difficulty, we reject any suggestion that this Court lacks a similar ability to evaluate whether the Legislature complied with the compactness requirement in Florida. Having made that determination, we decide how this Court will go about measuring

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[33] States requiring compactness and that vest original jurisdiction in the Supreme Court include California, Colorado, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Vermont, and Washington. *See* Cal. Const. art. XXI, § 3(b); ***Colo. Const. art. V, § 48(1)(e)***; Haw. Const. art. IV, § 10; Idaho Const. art. III, § 2(5); Ill. Const. art. IV, § 3(b); Iowa Const. art. III, § 36; Me. Const. art. 4, pt. 1, § 3; ***Md. Const. art. III, § 5***; Mich. Comp. Laws §§ 3.71, 4.262; N.J. Const. art. II, § 2, § 7; Ohio Const. art. XI, § 13; Pa. Const. art. II § 17(d); Vt. Stat. Ann. tit. 17, § 1909(a), (f); Wash. Rev. Code § 44.05.130.

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compactness.

HN44[] As a geographical inquiry, a review of compactness begins by looking at the "shape of a district"; the object of the compactness criterion is that a district should not yield "bizarre designs." *Hickel, 846 P. 2d at 45*; *see also Kilbury, 90 P.3d at 1077* [**115] ("[T]he phrase 'as compact as possible' does not mean 'as small in size as possible,' but rather 'as regular in shape as possible.'"). Compact districts should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement. *Hickel, 846 P.2d at 45* ("Compact districting should not yield 'bizarre designs.'"); *Schrage, 430 N.E.2d at 487* ("A visual examination of Representative District 89 reveals a tortured, extremely elongated form which is not compact in any sense."); *In re Livingston, 96 Misc. 341, 160 N.Y.S. 462, 469-70 (N.Y. Sup. Ct. 1916)* (noting that the challenged district was "most irregular in shape [and] really grotesque," and holding [*635] that "[i]f the constitutional provision relating to compactness means anything, this district, as laid out, manifestly does not conform to it"); *see also Shaw, 509 U.S. at 635-36* (describing a snake-like district that was drawn so bizarrely that it "inspired poetry: 'Ask not for whom the line is drawn; it is drawn to avoid thee'" (quoting Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing'?*, *14 Cardozo L. Rev. 1237, 1261 n.96 (1993)*)).

In [**116] addition to a visual examination of a district's geometric shape, quantitative geometric measures of compactness have been used to assist courts in assessing compactness.[34] In fact, there is commonly used redistricting software that includes tools designed to measure compactness. The House actually used two such measurements. First, the House utilized the Reock method (circle-dispersion measurement), which measures the ratio between the area of the district and the area of the smallest circle that can fit around the district. This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale.

Second, the House used the Area/Convex Hull method in its analysis, which measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district. The measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness. A circle, square, or any other shape with only convex angles has a score of 1. Both measures used by the House have gained relatively broad acceptance in redistricting.

Despite this Court's use of visual and numerical measurements of geographic compactness, our review of that mandate cannot be considered in isolation. Other factors influence a district's compactness, including geography and abiding by other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice.

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[34] *See, e.g., League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 455 n.2, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006)* (Stevens, J., concurring in part and dissenting in part) ("[T]wo standard measures of compactness are the perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district."); *Vieth, 541 U.S. at 348* (Souter, J., dissenting) ("[C]ompactness . . . can be measured quantitatively in [**117] terms of dispersion, perimeter, and population ratios, and the development of standards would thus be possible.").

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The Florida Constitution does not mandate, and no party urges, that districts within a redistricting plan achieve the highest [**118] mathematical compactness scores. Given Florida's unique shape, some of Florida's districts have geographical constraints, such as those located in the Florida Keys, that affect the compactness calculations. Other times, lower compactness measurements may result from the Legislature's desire to follow political or geographical boundaries or to keep municipalities wholly intact. *See, e.g.,* *Commonwealth ex rel. Specter v. Levin, 448 Pa. 1, 293 A.2d 15, 19 (Pa. 1972)* ("[A]ttempts to maintain the integrity of the boundaries of political subdivisions . . . will in reality make it impossible to achieve districts of precise mathematical compactness. A great many if not most of the counties, cities, towns, boroughs, townships and wards in this Commonwealth [*636] have a geographical shape which falls far short of ideal mathematical compactness.").

Thus, if an oddly shaped district is a result of this state's "irregular geometry" and the need to keep counties and municipalities whole, these explanations may serve to justify the shape of the district in a logical and constitutionally permissible way. Nevertheless, non-compact and "bizarrely shaped districts" require close examination. As explained by the Supreme [**119] Court of Alaska in *Hickel*, if

> "corridors" of land that extend to include a populated area, but not the less-populated land around it, [the district] may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.

*Hickel, 846 P. 2d at 45-46*.

*HN45*[↑] Since compactness is set forth in *section 21(b)*, the criteria of *section 21(a)* must predominate to the extent that they conflict with drawing a district that is compact. However, if a district can be drawn more compactly while utilizing political and geographical boundaries and without intentionally favoring a political party or incumbent, compactness must be a yardstick by which to evaluate those other factors. Among the *section 21(b)* criteria, the standard for compactness is that the district "shall be compact" without qualification.

In sum, we hold that compactness is a standard that refers to the shape of the district. The goal is to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. Compactness can be evaluated both visually and by employing standard mathematical measurements.

**c. Utilizing Existing Political and Geographical [**120] Boundaries**

*HN46*[↑] In tandem with compactness, *article III, section 21(b)*, requires that "districts shall, where feasible, utilize existing political and geographical boundaries." Unlike the mandate of compactness, this requirement is modified by the phrase "where feasible," suggesting that in balancing this criterion with compactness, more flexibility is permitted. We begin by interpreting the terms "political and geographical boundaries," remaining mindful that, as with all of the constitutional provisions, our goal is to construe the provision in "such manner as to fulfill the intent of the people, never to defeat it." *Zingale, 885 So. 2d at 282*. Further, we construe the provision by looking to the "purpose of the provision, the evil sought to be remedied, and the circumstances leading to its inclusion in our constitutional document." *In re Apportionment Law—1982, 414 So. 2d at 1048*.

The interpretation given by a plurality of the Court explains the purpose of this provision and the proper interpretation:

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> *The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, [**121] and bizarrely shaped districts*—such as one senate district that was challenged in *Resolution 1987, 817 So. 2d at 824-25* are avoided. Since *the "city" and "county" terminology honors this community-based standard for drawing legislative and congressional boundaries*, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

*Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d at 187-88* (emphasis added). In that case, we accepted [*637] the argument that the term "political boundaries" primarily encompasses municipal or county boundaries. The FDP likewise in its brief argues that the "basic purpose of this provision is to keep communities together and sensibly adhere to natural boundaries across the state." Certainly, cities and counties would be existing political boundaries.

Consistent with this approach, the House in its brief emphasizes that the House plan was drawn with respect for county integrity, stating as follows:

> [C]ounty lines were usually preferable to other boundaries, because county lines are the most readily understood, consistently compact, [**122] functional, and stable. County boundaries are substantially less likely to change than municipal boundaries, and—unlike municipalities—all counties are contiguous. Moreover, although all Floridians have a home county, millions live outside any incorporated area. Additionally, by using a strategy of keeping counties whole, the House Map necessarily keeps many municipalities whole within districts. And importantly, numerous Floridians advocated an emphasis on county boundaries at the twenty-six public meetings during the summer of 2011.

House Brief at 12-13 (footnotes omitted). The House additionally asserts that there is an advantage in using county lines in order to further other constitutional goals such as compactness:

> [T]he House's consistent respect for county boundaries provided the additional benefit of creating compact districts. And many testified to the Legislature that their idea of compactness supported preserving county integrity where practicable. Where county lines could not serve as the district line, the House relied on municipal boundaries and geographic boundaries such as railways, interstates, state roads, and rivers. Consistent with other public testimony, the House [**123] resolved to draw accessible districts with understandable shapes— without fingers, bizarre shapes, or "rat tails."

*Id.* at 13-14 (citations omitted).

On the other hand, the Senate takes the position that the "political and geographical boundaries requirement directly presents the kind of 'fact-intensive' issues that cannot be meaningfully reviewed in this truncated proceeding." Ironically, in contradiction to the position of the House, the Senate asserts that "it is a 'plain fact' that boundary requirements tend[] to conflict with compactness norms." The Senate argues that the requirement of utilizing political boundaries is "internally inconsistent," necessitating choices between political boundaries and geographical boundaries. Although the House in its brief points to the "numerous Floridians" who advocated an emphasis on county boundaries at the twenty-six public meetings, the Senate does not

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acknowledge that public viewpoint.[35]

The Senate argues that since Florida's Constitution [**124] provides the Legislature with the choice of political or geographical boundaries, the choice of boundaries was a matter that should be left entirely to the discretion of the Legislature. During oral argument, counsel for the Senate further alleged that Florida was "unique among the fifty states to count geographical boundaries." In actuality, many other states have constitutional requirements that require the consideration of geographical [*638] boundaries.[36] Again, consistent with the holding of other states, this Court is likewise able to evaluate whether the Legislature complied with that requirement in Florida. Accordingly, we turn to our construction of the meaning of "political and geographical boundaries" as contained within our state constitution.

The Senate argues [**125] for a pick-and-choose legislative discretion regarding which boundaries to choose from, including a very broad list that encompasses not only easily ascertainable political boundaries, such as counties and municipalities, but extending even to "man-made demarcations," such as "well-traveled roadways." While discretion must be afforded to accommodate for well-recognized geographical boundaries, the decision to simply use any boundary, such as a creek or minor road, would eviscerate the constitutional requirement—as well as the purpose for the requirement, which is aimed at preventing improper intent.

The Senate's approach that almost anything can be a "geographical boundary" may be why the opponents of the Senate's plan criticize the Senate's plan for not only lack of compactness but also for containing the same "finger-like extensions," "narrow and bizarrely shaped tentacles," and "hook-like shape[s]," which are constitutionally suspect and often indicative of racial and partisan gerrymandering.

We reject the Senate's view because it would render the new constitutional provision virtually meaningless and standardless. We accept the House's view of *HN47*[⬆] geographical boundaries that are easily [**126] ascertainable and commonly understood, such as "rivers, railways, interstates, and state roads." Together with an analysis of compactness, an adherence to county and city boundaries as political boundaries, and rivers, railways, interstates and state roads as geographical boundaries will provide a basis for an objective analysis of the plans and the specific districts drawn. In addition, we also reject the contention that following a municipal boundary will necessarily violate the compactness requirement. In a compactness analysis, we are reviewing the general shape of a district; if a district has a small area where minor adjustments are made to follow either a municipal boundary or a river, this would not violate compactness.

There will be times when districts cannot be drawn to follow county lines or to include the entire municipalities within a district. The City of Lakeland in its challenge to the Senate plan asserts a violation of this provision because the Senate plan splits the City of Lakeland into two state Senate districts. We will analyze this argument

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[35] At each of the twenty-six hearings held at different locations around the State, the public gave recommendations for the House, Senate, and congressional plans, and preserving county boundaries was a common request.

[36] At least five state constitutions require geographical boundaries or features to be considered, including Alaska, Arizona, Hawaii, Maryland, and Washington. *See, e.g.*, *Alaska Const. art VI, § 6*; ***Ariz. Const. art. IV, pt. 2, § 1(14)***; *Haw. Const. art. IV, § 6*; *Md. Const. art. III, § 4*; *Wash. Const. art. II, § 43(5)*. In all except Hawaii, the state constitutions also require consideration of political or county boundaries.

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further, but certainly not every split of a municipality will violate this prohibition; the constitutional directive is [**127] only that "existing political and geographical boundaries" should be used "where feasible."

*3. How These Standards Interact*

Having set forth the constitutional standards, we must now decide the appropriate framework in which to evaluate how these standards interact. This includes a determination of how best to approach challenges to the joint resolution of apportionment.

An examination of the explicit language used in the Florida Constitution is the [*639] necessary starting point for any analysis of constitutional provisions. *See Zingale, 885 So. 2d at 282*. The text of the constitution provides unambiguous direction for the analysis of how these constitutional standards interact. It provides that the tier-two standards are subordinate and shall give way where compliance "conflicts with the [tier-one] standards or with federal law." *Art. III, § 21(b), Fla. Const.* Although the tier-two standards are subordinate to the tier-one requirements, the constitution further instructs that no standard has priority over the other within each tier. *See art. III, § 21(c), Fla. Const.* Consequently, the Legislature is tasked with balancing the tier-two standards together in order to strike a constitutional [**128] result, but this Court remains "sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller, 515 U.S. at 915-16*.

Florida's tier-two standards—that districts shall be as nearly equal in population as is practicable, shall be compact, and shall utilize existing political and geographical boundaries where feasible—circumscribe the Legislature's discretion in drawing district lines, requiring it to conform to traditional redistricting principles. *See id. at 916* (defining "traditional" redistricting principles to include "compactness, contiguity, and respect for political subdivisions"); *Bush v. Vera, 517 U.S. 952, 959-60, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996)* (plurality opinion) (noting federal district court's conclusion that "traditional redistricting principles" include "natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions"). Indeed, the extent to which the Legislature complies with the sum of Florida's traditional redistricting principles serves as an objective indicator of the impermissible legislative purpose proscribed under tier one (i.e., intent to favor or disfavor a political party or an incumbent).

In other words, the [**129] goal of the tier-two requirements is "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander.'" *Pearson, 2012 Mo. LEXIS 7, 2012 WL 131425, at *2* (quoting *Hitchcock, 146 S.W. at 61*). There is no question that the goal of minimizing opportunities for political favoritism was the driving force behind the passage of the Fair Districts Amendment. *See Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d at 181* (plurality) ("The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations.").

Both the Coalition and the FDP maintain that Florida's tier-two principles are not only independent constitutional requirements, but provide the Court with indicators of how well the Legislature complied with the tier-one criteria. They allege that population deviations, lack of compactness, and failure to utilize political and geographical boundaries serve as tools used by the Legislature to engage in the intentional act of favoring (or disfavoring) a political party or an incumbent. The

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House agrees with [**130] this position: "Indeed, the purpose of other standards—such as compactness, equal population, and adherence to political boundaries—was to prohibit political favoritism by constraining legislative discretion." House Brief at 22.

Likewise, this Court held the new standards to have "a natural relation and connection," all directed at the "overall goal of . . . requir[ing] the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations." *Standards for Establishing Legislative Dist. Boundaries, [*640] 2 So. 3d at 181*. We agree that in the context of Florida's constitutional provision, a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms. *See Vieth, 541 U.S. at 335* (Stevens, J., dissenting) ("[I]rrational shape can serve as an objective indicator of an impermissible legislative purpose . . . ."); *Schrage, 430 N.E.2d at 486* ("[C]ompactness is 'almost universally recognized' as an appropriate anti-gerrymandering standard." (quoting James M. Edwards, *The Gerrymander and "One Man, One Vote*," 46 N.Y.U.L. Rev. 879, 893 (1971))).

As was stated in [**131] *Reynolds, 377 U.S. at 578*, a "desire to maintain integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory" undermines opportunities for political favoritism. Of course, the correlation between a lack of compliance with traditional redistricting principles and impermissible intent cannot be considered in isolation. In addition to prohibiting improper intent, tier one forbids the Legislature to draw districts that diminish minorities' ability to elect representatives of choice or deny minorities an equal opportunity to participate in the political process. *See art. III, § 21(a), Fla. Const.* Given this requirement, efforts to preserve or create minority districts could be misinterpreted as an action intended to favor (or disfavor) a political party or an incumbent.

The challengers assert that minority protection has been used as a pretext for drawing districts with the intent to favor a political party or an incumbent. This is, of course, a troubling assertion because that would frustrate rather than further the overarching purpose of the Fair Districts Amendment.

In examining the reasoning behind drawing a district in a [**132] particular way, we remain cognizant that both federal and state minority voting-rights protections may require the preservation or creation of non-compact districts or may help to explain the shape of a challenged district. Therefore, the reason for drawing lines a certain way may be the result of legitimate efforts by the Legislature to comply with federal law or Florida's tier-one imperative. *Cf. DOJ Guidance Notice, 76 Fed. Reg. 470 at 7472* ("[C]ompliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria.").

The fact that the tier-two principles expressly yield to this requirement in tier one demonstrates that the Florida Constitution specifically contemplates this need, but only to the extent necessary. Where it can be shown that it was possible for the Legislature to comply with the tier-two constitutional criteria while, at the same time, not diminishing minorities' ability to elect representatives of choice or denying minorities an equal opportunity to participate in the political process, the Legislature's plan becomes subject to a concern that improper intent was the motivating factor [**133] for the design of the district. It is critical that the requirement to protect minority voting rights when drawing district lines should not be used as a shield against complying with Florida's other important constitutional imperatives; the Court's obligation is to ensure that "every clause and every part" of the language of the constitution is given

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effect where "an interpretation can be found which gives it effect." *In re Apportionment Law—1972, 263 So. 2d at 807*.

Because compliance with the tier-two principles is objectively ascertainable, it provides a good starting point for analyzing [*641] challenges to the Legislature's joint resolution. *HN48*[⬆] Where adherence to a tier-one requirement explains the irregular shape of a given district, a claim that the district has been drawn to favor or disfavor a political party can be defeated. Where it does not, however, further inquiry into the Legislature's intent becomes necessary.

In determining whether the plans are constitutionally valid, we have considered the role of the alternative plans submitted by the Coalition. If an alternative plan can achieve the same constitutional objectives that prevent vote dilution and retrogression of protected minority [**134] and language groups and also apportions the districts in accordance with tier-two principles so as not to disfavor a political party or an incumbent, this will provide circumstantial evidence of improper intent. That is to say, an alternative plan that achieves all of Florida's constitutional criteria without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan.

It is with this global approach to determining the validity of the Legislature's House and Senate apportionment plans in mind that we turn to the challenges raised to the apportionment plans before this Court.

### *C. Challenges to the Apportionment Plans*

#### *1. General Challenges*

We next proceed to examine the Coalition's and the FDP's arguments that they claim demonstrate improper intent on the part of the Legislature in drawing the apportionment plans.

**a. Partisan Imbalance as Demonstrative of Intent**

At the time the apportionment plans were drawn in 2012, of the 120 seats in the House, 39 were held by Democrats and 81 by Republicans, and of the 40 seats in the Senate, 12 were held by Democrats and 28 by Republicans. The position of Governor was held by a [**135] Republican. The Coalition and the FDP essentially allege that with the Republicans in charge of drawing the apportionment plans, the plans were drawn with the intent to favor the Republican Party.

One of the primary challenges brought by the Coalition and the FDP is that a statistical analysis of the plans reveals a severe partisan imbalance that violates the constitutional prohibition against favoring an incumbent or a political party. The FDP asserts that statistics show an overwhelming partisan bias based on voter registration and election results. Under the circumstances presented to this Court, we are unable to reach the conclusion that improper intent has been shown based on voter registration and election results.

We further note that in the two cases cited by the FDP, *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission, 220 Ariz. 587, 208 P.3d 676 (Ariz. 2009)*, and *Good v. Austin, 800 F. Supp. 557 (E.D. Mich. 1992)*, the courts were discussing political fairness or competitiveness, not the *intent* of the drafting party to favor or disfavor a political party. As discussed in *Arizona Minority Coalition, 220 Ariz at 598*, the Arizona Constitution requires [**136] the commission drafting the plan to favor competitive districts when doing so is practicable and would not cause significant detriment to other goals. In *Good, 800 F. Supp. at 561-62*, a federal court tasked with drawing the congressional districts in Michigan

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outlined testimony given by dueling experts in a trial, which included descriptions of the statistical analyses done to determine whether a plan was politically fair; political fairness is one of [*642] the many "relevant secondary criteria" recognized by federal courts in congressional apportionment. Here, although effect can be an objective indicator of intent, mere effect will not necessarily invalidate a plan. With this in mind, we review the FDP's claim that the partisan imbalance of the Legislature's plan reflects an intent to favor Republicans and to disfavor Democrats.

We first address voter registration and acknowledge the reality that based on the 2010 general election data, of the voters in the state who registered with an affiliation with one of the two major parties, 53% were registered as Democrats and 47% were registered as Republicans. The challengers point out that in contrast to the statewide statistics showing that [**137] registered Democrats outnumber Republicans, the Senate and House plans contain more districts in which registered Republicans outnumber registered Democrats than vice versa. As of 2010, in the Senate plan there were 18 of 40 Senate districts (45.0%) in which registered Democrats outnumbered registered Republicans, and 22 Senate districts (55.0%) in which registered Republicans outnumbered registered Democrats. In the House plan, there were 59 of 120 House districts in which the registered Democrats outnumber registered Republicans (49.2%), and 61 districts in which registered Republicans outnumber registered Democrats (50.8%).

While Democrats outnumber Republicans statewide in voter registration, this fact does not lead to the conclusions asserted by the challengers that these statistics demonstrate that the plans were drawn with intent to favor Republicans. Although there are more registered Democrats than Republicans, as of 2010, there were over 2.5 million voters who are not registered as Democrats or Republicans. Further, voter registration is not necessarily determinative of actual election results. The actual election results show that the existence of more registered Democrats [**138] than registered Republicans statewide has not necessarily translated into Democratic Party victories in statewide elections. To illustrate, Florida last elected a Democratic governor, Lawton Chiles, in 1994.

In further support of their argument that the apportionment plan shows partisan imbalance reflective of impermissible intent to favor a political party, the challengers rely on actual statewide election results. In the 2010 gubernatorial election, Governor Rick Scott, a Republican, received 48.7% of the overall vote and Alex Sink, a Democrat, 47.6% of the overall vote. Of the major-party-affiliated voters, Scott received 50.6% of the vote, and Sink 49.4%. However, under the Senate plan, Governor Scott would have won in 26 Senate districts (65.0%), and Sink in 14 Senate districts (35.0%). Similarly, under the House plan, Scott would have won in 73 House districts (60.8%), and Sink in 47 House districts (39.2%).

In the 2008 presidential election, President Barack Obama, a Democrat, received 50.9% of the overall state vote and Senator John McCain, a Republican, received 48.1% of the overall state vote. Of the major-party-affiliated voters, 51.4% voted for Obama and 48.6% for McCain. [**139] Yet in the Senate plan, Obama would have won in 16 Senate districts (40.0%), while McCain would have won in 24 Senate districts (60.0%). Likewise, in the House plan, Obama would have won in 53 House districts (44.2%), while McCain would have won in 67 House districts (55.8%).

We do not agree that the partisan imbalance in the Senate and House plans demonstrates an overall intent to favor Republicans in this case. Explanations other than intent to favor or disfavor a political party could

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account for this imbalance. [*643] First, it has been observed that HN49[↑] Democrats tend to cluster in cities, which may result in a natural "packing" effect, regardless of where the lines are drawn. A plurality of the United States Supreme Court has explained:

> HN50[↑] Whether by reason of partisan districting or not, party constituents may always wind up "packed" in some districts and "cracked" throughout others. *See* R. Dixon, Democratic Representation 462 (1968) ("All Districting Is 'Gerrymandering'"); Schuck, *87 Colum. L. Rev. at 1359*. Consider, for example, a legislature that draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions. Under that system, political [**140] groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a "natural" packing effect. *See Bandemer, 478 U.S. at 159* (O'Connor, J., concurring in judgment).

*Vieth, 541 U.S. at 289-90* (plurality). Second, the imbalance could be a result of a legitimate effort to comply with VRA principles or other constitutional requirements. Although the FDP summarily argues that the partisan imbalance cannot be a result of such attempts, it fails to explain why.

We reject any suggestion that the Legislature is required to compensate for a natural packing effect of urban Democrats in order to create a "fair" plan. We also reject the suggestion that once the political results of the plan are known, the Legislature must alter the plan to bring it more in balance with the composition of voters statewide. The Florida Constitution does not require the affirmative creation of a fair plan, but rather a neutral one in which no improper intent was involved.

Although we have rejected the challenge that statewide voter registration and election results demonstrate an overall intent to favor the Republican party, we evaluate these statistics [**141] when examining individual districts.

**b. History of Resistance to the Amendments**

The Coalition next takes issue with the fact that the Legislature "attempted every possible legal maneuver to keep the FairDistricts Amendments from becoming law" and then attempted to invalidate the congressional amendment in federal court. However, evidence that the Legislature resisted efforts to make the new constitutional standards enforceable law does not equate to evidence that the Legislature would then intentionally disregard that law once it was in effect.

**c. "Gentlemen's Agreement" as Indicative of Intent**

The Coalition next points to a "gentlemen's agreement" between the House and Senate, by which each chamber would "rubber stamp" the other chamber's plan, allowing each to protect its own incumbents without interference from the other. Although the Joint Resolution was passed with both chambers voting to approve the other chamber's plan, it is uncontroverted that each chamber agreed to draft its own plan without input from, debate from, or interference by the other. The challengers assert that this "gentlemen's agreement" is indicative of improper intent. The fact that the House did not debate or [**142] amend the Senate's plan or that the Senate did not debate or amend the House plan is legally irrelevant. From the beginning of the process, it was clear that each chamber would embark on its separate approach to redistricting, using different software and inputting different data. The fact that the process occurred on two different tracks without formal communication or coordination [*644] between the two chambers or that

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there was a "gentlemen's agreement" does not provide circumstantial evidence of improper intent.

**d. Failure to Adopt the Coalition's Alternative Plans**

The Coalition takes issue with the Legislature's treatment of its proposed alternative plans, which the Coalition also submitted to this Court. Specifically, the Coalition states that the Senate and House did not properly consider the Coalition's plans, which the Coalition argued contained less population deviation, were more compact, and better utilized political and geographical boundaries. We do not consider the failure of the Legislature to adopt the Coalition's alternative plans to be indicative of an improper intent.

**e. Legislature's Failure to Introduce Proposed Plans at Public Hearings**

In this claim, the Coalition appears [**143] to ascribe improper motive to the failure of the Legislature to introduce proposed apportionment plans during the public hearings to ensure that the plans were fully aired in public. Although a review of the public hearing testimony reveals that many individuals were upset that the Legislature was soliciting their comments in the absence of a plan, some individuals recognized that there may be legitimate reasons for the Legislature's approach. *Compare* Public Hrg. Tr. 1140 ("[W]hy couldn't the Legislature have come up with a map that we could then look at and see how it affects Wakulla County and Lafayette County and then have them testify and see what is going on[?]"); Public Hrg. Tr. 1153-54 ("This process and these hearings are very troubling. The Legislature has invited the public to comment, but you don't give us anything to comment on. Where are the maps? This isn't a conversation."); *with* Public Hrg. Tr. 1154-55 ("[I]f you would come in with maps drawn then we would be hearing from all of the naysayers that . . . you met in a back room, smoke filled room and drew the maps yourself and now you are just wanting us to rubber stamp them."); Public Hrg. Tr. 2798 ("You have correctly [**144] taken a common sense approach by seeking public input before the maps are drawn and not afterwards."). More importantly, the Florida Constitution imposes no such requirement on the Legislature, and we conclude that this aspect of the process is not indicative of intent to produce partisan plans.

Having determined that none of the above general challenges should be used in this facial review of the validity of the House and Senate plans, we proceed to analyze the compliance of the House plan as a whole with the constitutional standards and then examine the challenges to the individual House districts. We then analyze the Senate plan and districts in the same manner.

*2. The House Plan*

**a. Overall Challenges**

**Tier-One Requirements**

**Intent to favor or disfavor a political party or an incumbent**. The first requirement that we address in looking at the overall plan is this important constitutional requirement, the purpose of which is to prevent the drawing of districts designed to protect a political party or an incumbent. We see no overall objective indicia of improper intent with respect to the House plan. It is undisputed that the House plan pits both Democratic and Republican incumbents against [**145] each other. While we recognize that the new districts on average retain 59.7% of the population of their predecessor districts, this fact standing alone does not demonstrate intent to favor incumbents.

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[*645] Finally, as discussed below, the House plan has complied with the tier-two standards, making improper intent less likely. Indeed, the purpose of the tier-two standards—equal population, compactness, and utilizing political and geographical boundaries—is to prohibit political favoritism by constraining legislative discretion.

**Florida minority voting protection provision**. The FDP generally alleges that the House plan improperly over-packs black voters into minority districts to dilute their vote elsewhere. To the extent this argument is made, it is without merit. Under the House plan, there are twelve black majority-minority districts[37] and sixteen Hispanic majority-minority districts.[38] None of the black majority-minority districts is a super-majority district requiring the Legislature to "unpack" it on this record. As to the sixteen Hispanic majority-minority House districts, eleven do have large percentages: District 103 (82.1%), District 105 (69.0%), District 110 (89.5%), District 111 [**146] (93.0%), District 112 (73.0%), District 113 (66.8%), District 114 (66.0%), District 115 (65.5%), District 116 (84.4%), District 118 (81.2%), and District 119 (86.8%). These high percentages could be explained by the fact that the Hispanic population in Miami-Dade County, where these districts are located, is densely populated. The challengers have failed to establish that another majority-minority district for either black or Hispanic voters potentially could have been created. We conclude that on this record, any facial claim regarding vote dilution under Florida's constitution fails. While the Court does not rule out the potential that a violation of the Florida minority voting protection provision could be established by a pattern of overpacking minorities into districts where other coalition or influence districts could be created, this Court is unable to make such a determination on this record.

To the extent that the opponents contend that the overall House plan amounts to retrogression under the Florida Constitution, we conclude that this argument is also without merit. The record reveals that the House undertook a functional analysis when drawing its plan in order to guard against retrogression. As to black majority and crossover House districts, the fact that there is one fewer black crossover district as compared to the benchmark plan does not alter this conclusion because one additional black majority-minority district has emerged from a previously existing crossover district. *HN51*[↑] Apportionment plans that increase minority voting strength are entitled to preclearance [**148] under Section 5, *see Ashcroft, 539 U.S. at 477*, and we conclude that the same principle applies under Florida law.

With respect to House districts with sizeable Hispanic populations, we likewise conclude that there has been no unconstitutional retrogression under the Florida Constitution. Because three new Hispanic majority-minority districts have emerged [*646] from previously existing influence or crossover districts, the Hispanic influence in the remaining number of districts has shifted. No challenger has established or alleged that

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[37] These House districts, with their corresponding black voting-age populations (VAPs) are as follows: District 8 (50.0%), District 13 (50.7%), District 14 (50.7%), District 46 (52.1%), District 61 (51.3%), District 88 (51.8%), District 94 (54.6%), District 95 (57.7%), District 102 (52.1%), [**147] District 107 (56.9%), District 108 (62.9%), and District 109 (50.6%).

[38] These House districts, with their corresponding Hispanic voting-age populations are as follows: District 43 (54.9%), District 48 (53.0%), District 62 (51.9%), District 87 (50.0%), District 103 (82.1%), District 105 (69.0%), District 110 (89.5%), District 111 (93.0%), District 112 (73.0%), District 113 (66.8%), District 114 (66.0%), District 115 (65.5%), District 116 (84.4%), District 117 (55.2%), District 118 (81.2%), and District 119 (86.8%).

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this change has affected the Hispanic voters' ability to elect a person of their choice in the respective districts.

**Contiguity**. No party challenges contiguity as to the House plan. Upon a review of the plan, we conclude that this plan does not violate the contiguity requirement under *article III, sections 16(a)* and *21(a), of the Florida Constitution.*

Tier-Two Requirements

**Equal population**. In looking at this constitutional requirement, the 2010 census data shows that Florida has a total population of 18,801,310, and the ideal population for each House district is 156,678 individuals. The most populated district in the House plan is District 75, which has a population [**149] of 159,978 (an additional 3,300 individuals than the ideal, or a deviation of 2.11%), and the least populated district is District 76, which has a population of 153,745 (2,933 fewer individuals than the ideal, or a deviation of -1.87%). Thus, the total deviation is 3.97%. This is 1.18% higher than the 2.79% population deviation the Court approved in 2002.

The House aptly acknowledges that "[c]onsiderations of compactness and emphasis on county integrity, of course, had to be weighed against other considerations, including population equality." For example, the House explains that it set a population deviation upper limit that would allow Charlotte County, whose population deviated only slightly from the ideal, to remain whole.

**Compactness**. A visual inspection of the plan reveals that it as a whole appears to be compact and that only a few districts are highly irregular. A visual inspection of the plan reveals that there are districts that are clearly less compact than other districts, with visually unusual shapes. These include Districts 70, 88, and 117. Under the House plan, only three districts have significantly low compactness scores using both Reock and Area/Convex Hull: House Districts [**150] 88, 117, and 120. We note that Districts 70, 88, and 117 are majority-minority or minority-opportunity districts, and they are discussed more thoroughly below in conjunction with challenges to individual districts. We also note that District 120 includes the unusual geography of the Florida Keys and will therefore necessarily score low on the compactness scales.

**Political and geographical boundaries**. The House explains that in considering the appropriate balance of equal population, compactness, and adherence to existing boundaries, it emphasized county integrity while adhering to other tier-two standards. As explained in the House's brief: "Where practicable, it sought to keep counties whole within districts, or to wholly locate districts within counties, depending on county populations. Where not feasible, the House sought to 'anchor' districts within a county—tying the geography representing a majority or plurality of the district's residents to one county." The House also considered municipal boundaries and geographical features, but decided that "county lines were usually preferable to other boundaries." The underlying reason for this approach as expressed in the House's brief [**151] was that

> [c]ounty boundaries are substantially less likely to change than municipal boundaries, and—unlike municipalities—all counties are contiguous. Moreover, although all Floridians have a home county, millions live outside any incorporated area. Additionally, by using a strategy of keeping counties whole, the House Map necessarily keeps many municipalities whole within districts. And importantly, numerous Floridians advocated [*647] an emphasis on county boundaries at the twenty-six public meetings during the summer of 2011.

(Footnote omitted.) A review of the House plan reveals

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that it consistently used county boundaries where feasible, leaving thirty-seven of sixty-seven counties whole.

The House further explained that "[w]here county lines could not serve as the district line, the House relied on municipal boundaries and geographic boundaries such as railways, interstates, state roads, and rivers." As previously discussed, we have adopted the House's view of geographical boundaries as those that are easily ascertainable and commonly understood (e.g., rivers, railways, interstates, and state roads).

**Conclusion as to Overall Challenges to the House Plan**

A review of the House plan and the [**152] record reveals that the House engaged in a consistent and reasoned approach, balancing the tier-two standards by endeavoring to make districts compact and as nearly equal in population as possible, and utilizing political and geographical boundaries where feasible by endeavoring to keep counties and cities together where possible. Although the House plan has a higher population deviation than in the past, the House has explained that this deviation was necessary to achieve other required objectives, such as consistent use of county boundaries. The House further asserts that its "consistent respect for county boundaries provided the additional benefit of creating compact districts."

In addition, the House approached the minority voting protection provision by properly undertaking a functional analysis of voting strength in minority districts. A facial review of the House plan reveals no dilution or retrogression under the Florida Constitution. Further, we find no objective plan-wide indicia of improper attempt to favor or disfavor a political party or incumbent.

**b. Challenges to Individual House Districts**

We discuss the challenges to the individual House districts in turn. We conclude [**153] that the challengers have not demonstrated that any of these districts violate the Florida Constitution.

**House District 38**

The FDP summarily alleges that District 38 retains a high percentage of the population from its predecessor district in order to benefit the incumbent in that district. However, the FDP does not point to any additional indicators of improper intent, and we deny this claim.

**House District 70**

The FDP contends that District 70 is non-compact and fails to utilize boundaries because it cuts across four counties (Pinellas, Hillsborough, Manatee, and Sarasota) as well as three major metropolitan areas (St. Petersburg, Bradenton, and Sarasota) and splits the town of Palmetto. The FDP also contends that District 70 is overly packed with minorities and that the House should have drawn the district with more natural boundary lines in order to allow those minorities to have a greater influence in neighboring District 71. The Coalition, on the other hand, raises no objection to this district.

District 70 is a black-opportunity district (black VAP of 45.1%; Hispanic VAP of 15.3%). It extends into four counties, taking in the areas with the highest concentration of minorities from [**154] St. Petersburg, Bradenton, and Sarasota. Significantly, part of District 70 extends into Hillsborough County, which is a covered jurisdiction under Section 5 of the VRA, and must obtain preclearance from the DOJ. District 70 is depicted below.

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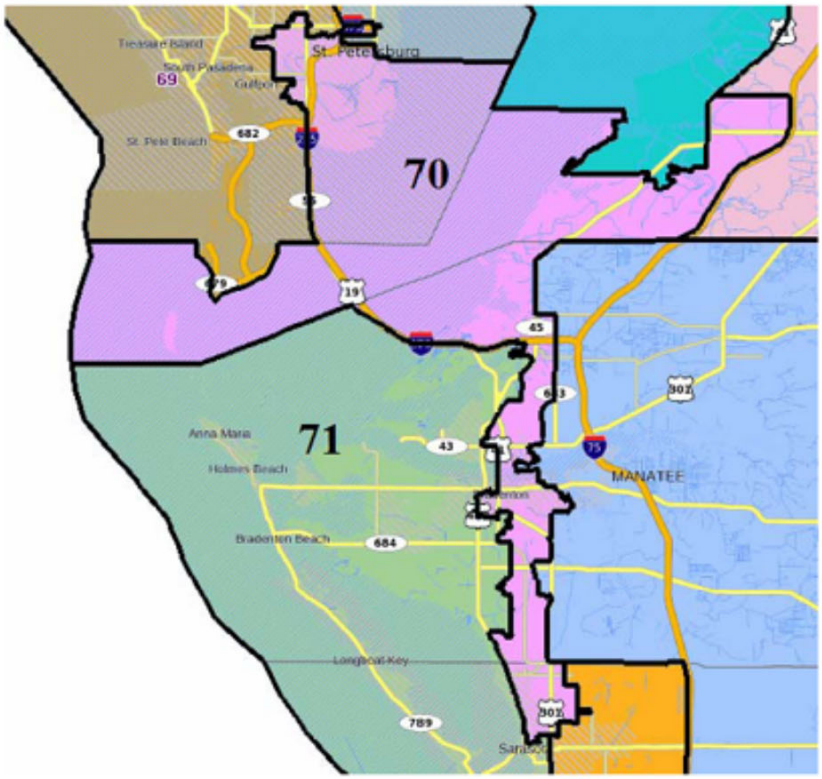



[*648] District 70 is strikingly similar to its predecessor district, old District 55, which has a black VAP of 49.4% and a Hispanic VAP of 13.6% and which also reached into St. Petersburg, Bradenton, and Sarasota. In adopting District 70, the Legislature stated that its intent was to comply with Section 5 of the VRA:

> [I]t is the intent of the Legislature to establish State House District 70, which is consistent with Section 5 of the federal Voting Rights Act; does not deny or abridge the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice . . . .

Fla. S.J. Res. 1176, at 22 (Reg. Sess. 2012) (SJR 1176).

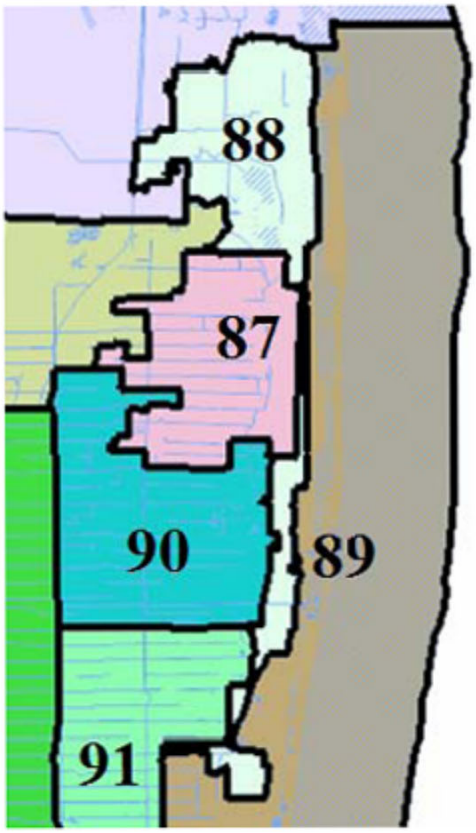
Tier-two requirements must yield when necessary to comply with federal law (here, Section 5 of the VRA) and Florida's minority voting protection provision. Although the FDP summarily asserts that District 70 is overly packed with minorities and that [**155] it could have been drawn differently to be more compact and to

e boundaries, the FDP has not demonstrated n be done without causing retrogression.

rict 88

ontends that District 88, located near the east alm Beach County, was drawn to benefit the n Party under the guise of preserving that a black majority-minority district. To prove this FDP claims that new District 88 is the least f all the House districts, asserting that non- districts are often a sign of partisan ers. The Coalition, on the other hand, does ge this district.

strict 88 is an odd-shaped, long, and thin h jagged edges. It is contained entirely in Palm Beach County, running adjacent to coastal District 89 through the county, stretching from Lake Park and Riviera Beach south to Delray Beach.

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District 88 is clearly visually non-compact, and the compactness measures confirm this with a Reock score of 0.08 and an Area/Convex Hull score of 0.34. Under either scale, this district has the lowest compactness measurements of all the districts in the 2012 House plan.

District 88 is a black majority-minority [**156] district, with a black VAP of 51.8%. The predecessor to District 88, old District 84 in the benchmark plan, was also a black majority-minority district, with a black VAP of 53.5%. This district was drawn differently in 2002, oriented westward and inland from West Palm Beach rather than southward.

The Legislature formed this district with the stated intent to preserve minority voting opportunities. The Legislature explained that its intent was

> to establish State House District 88, which is consistent with Section 2 of the federal Voting Rights Act; does not deny or abridge the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice; is more compact than the comparable district in the benchmark plan; is nearly equal in population as practicable . . . .

[*650] SJR 1176 at 27. The House Staff Analysis further explains that "Palm Beach County has produced a majority-minority Black district in years past and this district recreates that opportunity. However, this district does it in a different manner than the current district." Fla. H. Comm. on Reapp., CS/HJR 6011 (2012) Staff Analysis at 33-34 (Jan. 30, 2012) [**157] (House Staff Analysis).

The tier-two requirement of compactness must yield if it conflicts with the requirement to adhere to Florida's minority voting protection provision. Here, the record reflects that the House considered this interplay. When questioned about whether this district violated the compactness requirement, the record shows the House determined that the configuration of District 88 was more compact than the configuration of its predecessor district and more compact than two potential alternatives. Further, the House conducted an analysis of the voting behavior of minority districts. The FDP does not assert or demonstrate that the district can be drawn more compactly while also adhering to Florida's minority voting protection provision. Accordingly, this claim fails.

**House District 99**

The Coalition alleges that the Legislature drew District 99 with the intent to disfavor a black Democratic incumbent who currently represents District 93 under the 2002 House plan, a black majority-minority district with a black VAP of 50.9%. Old District 93 is now the equivalent of District 94, which remains a black majority-minority district (black VAP of 54.6%) under the 2012 House plan. [**158] The Coalition contends that the incumbent's residence was intentionally placed one block outside of his current district and instead placed in District 99, which neighbors new District 94 to the south, to pit him against another Democratic incumbent. Our review reveals that he has indeed now been drawn into District 99, a majority-white district (white VAP of 54.3% and Hispanic VAP of 29.1%).

However, this may be incidental to wide-sweeping changes made by the House in this region of the state. As compared to the 2002 plan, the 2012 House plan is much more compact with respect to District 94 and its neighboring districts. The 2002 and 2012 plans for this region of the state are depicted below.

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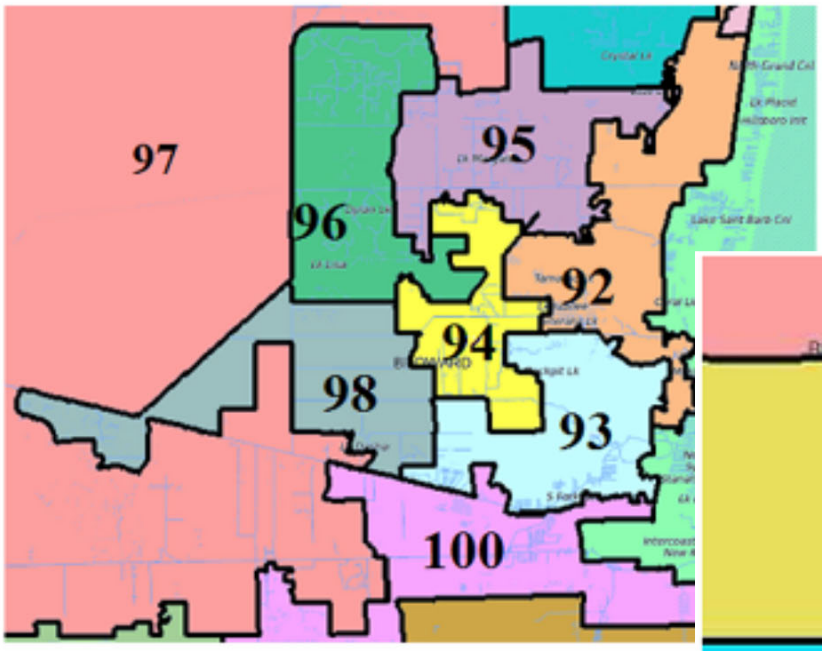
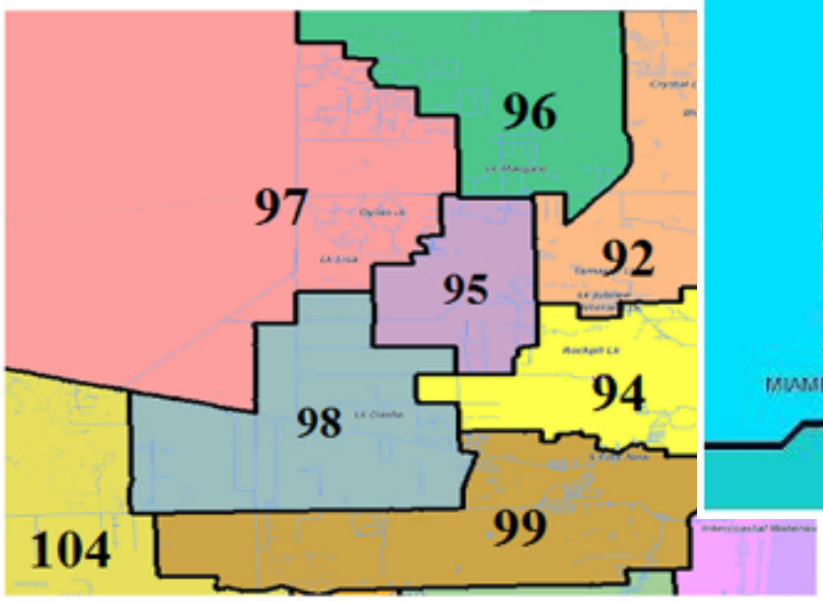
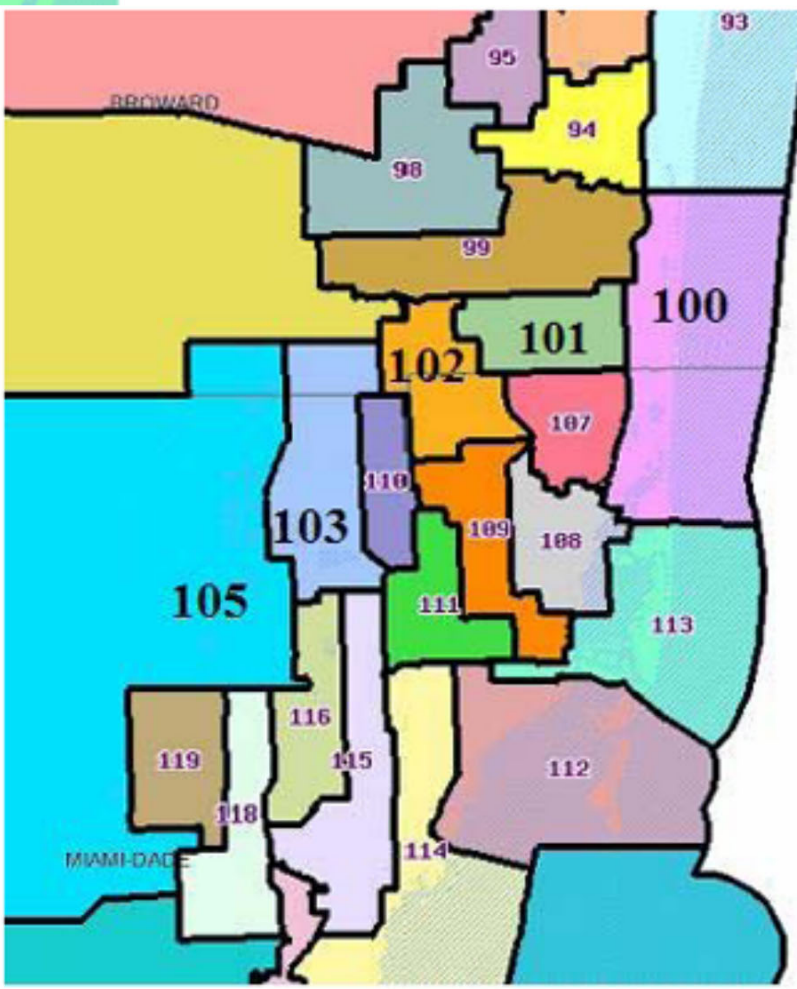
2002:




2012:




jenerally alleges that Districts 100, 101, 102, 05 do not utilize political boundaries because irough various cities in Miami-Dade County. also alleges that District [**159] 105 divides nties and therefore fails to utilize political . The area is depicted below:




hile these House districts do cut through multiple cities, they keep other cities intact. Importantly, this area of Miami-Dade County is heavily and densely populated with numerous cities adjacent to each other.

[*651] The Coalition does not contend that the districts violate the standards of equal population, compactness, or utilizing political and geographical boundaries. We conclude that there are no objective indicia of intent to disfavor an incumbent on this record.

**House Districts 100, 101, 102, 103, and 105**

Moreover, the minority voting protection provision comes into play, because several of the objected-to districts are minority districts. District 101 is a black and Hispanic coalition district (black VAP of 36.4% and Hispanic VAP of 33.7%). District 102 is a black majority-minority district with a black VAP of 52.1%. District 103

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is a Hispanic majority-minority district with a Hispanic VAP of 82.1%. The FDP has not shown that it was feasible for the Legislature to keep more municipalities together in this heavily populated area while comporting with Florida's minority voting protection provision.

District 105 is located in Collier, Broward, and Miami-Dade Counties; it is a Hispanic majority-minority district with a Hispanic VAP of 69.0%. The predecessor to District 105 (old District 112) was also a Hispanic majority-minority district with a Hispanic VAP of 71.4%. Collier [**160] County, a county in which part of District 105 is located, is one of the five Florida counties that must obtain preclearance from the DOJ under Section 5 of the VRA. As previously explained, Section 5 prohibits diminishing a minority group's ability to elect the representative of its choice; however, it differs from Florida's minority voting protection provision in terms of territory covered. It therefore alters the geographical scope of the retrogression analysis. Because Section 5 applies only to the five covered counties, it protects [*653] from retrogression minority voting strength in only those counties. *See* 42 U.S.C. § 1973c. Therefore, Section 5 is violated unless the ability of a minority group to elect a representative of its choice in that covered county does not diminish. District 105's predecessor also included portions of Collier County and drew from Hispanic populations in Miami-Dade and Broward Counties. As explained by the House Staff Analysis: "A similarly built district [to District 105] has been a majority-minority Hispanic district in years past and this district recreates that opportunity." House Staff Analysis at 35.

The FDP has not demonstrated that it was feasible [**161] for the Legislature to configure District 105 differently while comporting with Section 5 of the VRA and Florida's minority voting protection provision.

**House Districts 115 and 117**

The FDP summarily alleges that Districts 115 and 117, both of which are located in Miami-Dade County, are non-compact and do not utilize political and geographical boundaries. Districts 115 and 117 are Hispanic majority-minority districts, with Hispanic VAPs of 65.5% and 55.2%, respectively. District 117 also has a black VAP of 37.0%. We have recognized that the tier-two requirements of compactness and utilizing existing political and geographical boundaries must yield when necessary in order to avoid conflict with tier-one requirements. The FDP does not allege how either district could be drawn differently to be more compact without violating Florida's minority voting protection provision. Accordingly, the FDP has failed to satisfy its burden of proof with respect to these two districts.

**c. Conclusion as to the House Plan**

We conclude that the Coalition and the FDP have not successfully demonstrated that the House plan violates one or more of the constitutional standards. In making this determination, we have [**162] reviewed the challenges to the House plan as a whole and the challenges to individual districts. Based on the nature of the review that this Court is able to perform in a facial challenge, we find that there has been no demonstrated violation of the constitutional standards in *article III, section 21*, and we conclude that the House plan is facially valid.

***3. The Senate Plan***

**a. Overall Challenges**

In reviewing the Senate plan, we begin by evaluating overall adherence to the constitutional requirements.

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Then we evaluate a claim that the Senate plan was renumbered for the purpose of favoring incumbents by allowing them to be eligible to serve for longer than they would have otherwise. Finally, we consider the challenges to individual districts brought by the Coalition, the FDP, and the City of Lakeland. We emphasize that our analysis takes into consideration both the overall challenges and the results of our analysis of challenges to individual districts. In addition, in looking at the approach used in developing the Senate plan, where appropriate, we compare it to the approach used in developing the House plan, which we have upheld. We make that comparison not because the process used by [**163] the House and its approach on compliance with the standards is the only way to approach apportionment, but because overall the House's approach to ensuring compactness and utilizing consistent political and geographical boundaries led to a plan that has withstood the challenges to its validity. Further, the House's use of political and elections data to engage in protecting minority districts allowed the House to engage in the appropriate functional analysis of the districts. Finally, we [*654] note that the process employed by the House included openly considering different plans that the Redistricting Subcommittee analyzed for factors such as compactness and note the fact that the House plan pits incumbents against one another.

Tier-One Requirements

**Intent to favor or disfavor a political party or an incumbent**. In evaluating the Senate plan, we first address this important constitutional requirement, the purpose of which is to prevent the drawing of a plan or districts designed to protect a political party or an incumbent. We conclude that the Senate plan is rife with objective indicators of improper intent which, when considered in isolation do not amount to improper intent, but when viewed [**164] cumulatively demonstrate a clear pattern.

First, the Coalition alleges that the Senate plan does not pit incumbents against each other, and the Senate has not contested this. This Court was provided with the addresses of 21 incumbents and has confirmed that of the addresses provided, none of the incumbents would run against another incumbent.

Second, the new districts on average are composed of 64.2% of their predecessor districts. While this percentage is just an average, our below analysis of the individual district challenges reveals that at least some incumbents appear to have been given large percentages of their prior constituencies. These percentages are of even greater concern given that the 2002 Senate plan was drawn at a time when intent to favor a political party or an incumbent was permissible and there were no requirements of compactness or utilizing existing boundaries.

Third, as discussed further below, the Senate admittedly renumbered the Senate plan in order to allow incumbents to be eligible to serve longer than they would have otherwise. Not only do we conclude that this renumbering was improper as it was intended to favor incumbents, but we note that the renumbering [**165] process indicates that the Senate specifically considered incumbent information when renumbering the districts.

Fourth, although we do not consider the partisan balance of the plan as evidence of intent, the FDP alleges that the 2012 Senate plan has two *fewer* Democratic districts than the 2002 plan based on voter registration. However, because voter registration alone is not an accurate measure of how districts perform, we do not consider this as conclusive evidence of improper intent.

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Fifth, the majority (70.0%) of under-populated districts are Republican-performing districts when the 2010 gubernatorial and 2008 presidential elections are considered. Population deviations are at the heart of the requirement of one-person, one-vote, which generally requires that district populations be nearly equal to ensure that every individual's vote counts as much as any other's. Under-populated districts are comparatively over-represented. Thus, it appears that under the Senate plan, individuals residing in Republican-performing districts are over-represented as compared to individuals living in Democratic-performing districts.

**Florida's minority voting protection provision**. The FDP and the Coalition [**166] contend that the Senate's overall plan amounts to vote dilution and retrogression under the Florida Constitution. The Coalition further asserts that when engaging in its retrogression analysis, the Senate interpreted Florida's provision too strictly by limiting the data upon which it relied and failing to conduct the required functional analysis. While this failure is relevant to other defects in the plan, we conclude [*655] on this record that the Senate plan does not facially dilute a minority group's voting strength or cause retrogression under Florida law.

No opponent has demonstrated that the Senate plan facially dilutes minority voting strength as a whole under the Florida Constitution. The FDP has not submitted any alternative plans, and the Coalition's alternative Senate plan does not demonstrate that an additional majority-minority district can be created. While the Court does not rule out the potential that a violation of the Florida minority voting protection provision could be established by a pattern of overpacking minorities into districts where other coalition or influence districts could be created, this Court is unable to make such a determination on this record.

Nor has any [**167] challenger demonstrated that the Senate plan retrogresses as a whole under Florida law. There are as many Senate minority districts as there were under the 2002 Senate benchmark plan with what appears to be commensurate voting ability. Although there is one fewer Hispanic influence district, there are now two additional Hispanic majority-minority districts when compared to the 2002 benchmark. Districts that increase minority voting strength when compared to the benchmark are entitled to preclearance under Section 5, *see* *Ashcroft, 539 U.S. at 477*, and we conclude that the same principle applies under Florida law.

**Contiguity**. The FDP contends that the Senate plan "stretches [contiguity] to its limits," but notably does not argue that any of districts under the Senate plan are not contiguous. In looking at the Senate plan, it is clear that this plan does not violate the contiguity requirement under *article III, sections 16(a)* and *21(a), of the Florida Constitution.*

**Tier-Two Requirements**

**Equal population**. In looking at this constitutional requirement, the 2010 census data shows that Florida has a total population of 18,801,310, and the ideal population for each Senate district is 470,033 [**168] individuals. The most populated district in the Senate plan is District 3, which has a population of 474,685 (an additional 4,652 individuals, or a deviation of 0.99%), and the least populated district is District 23, which has a population of 465,343 (4,690 fewer individuals or a deviation of -1.00%). Thus, the total deviation is 1.99%. As to Florida's standard, we must view the population deviation in conjunction with the other tier-two standards.[39]

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[39] Citing *Larios v. Cox, 300 F. Supp. 2d 1320, 1339 (N.D. Ga. 2004)*, *aff'd*, ***542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004)***, the FDP also raises a separate claim as to equal

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**Compactness**. The Senate contends that the Court should find that the Senate plan is facially compact because the plan is now more compact than the 2002 plan. We reject this comparison as evidence of compliance because the 2002 Senate plan had no requirement for compactness and thus [*656] cannot serve as an adequate benchmark in establishing adherence to the newly added compactness requirement.

A visual inspection of the plan reveals a number of districts that are clearly less compact than other districts, with visually bizarre and unusual shapes. These districts include Districts 1, 3, 6, 9, 10, 12, 14, 19, 27, 29, 30, and 34. Districts with the lowest Reock and Area/Convex Hull scores are Districts 1, 6, 12, 19, 34, and 40. As explained above in our discussion of the standards, we reject the Senate's definition of compactness as including communities of interest.

**Political and geographical boundaries**. Unlike the House, the Senate did not use any consistent definition of political [**170] and geographical boundaries. Some districts adhere to county boundaries (e.g., District 5), while others freely split counties and follow a variety of roads and waterways, including minor residential roads and creeks (e.g., District 1). In some districts, the Senate constantly switched between different types of boundaries within the span of a few miles.

**Conclusion as to Overall Challenges to the Senate Plan**

We recognize that the Senate did not have the benefit of our opinion when drawing its plan. However, it is clear from a facial review of the Senate plan that the "pick and choose" method for existing boundaries was not balanced with the remaining tier-two requirements, and certainly not in a consistent manner. We again note that while the existing boundaries requirement is stated as "where feasible" and the equal population requirement is stated in terms of "as is practicable," the compactness requirement does not contain those modifiers; rather, the constitutional expression is that "districts *shall* be compact." The concept of "communities of interest" is not part of the constitutional term "compactness."

Although we hold that the Senate plan does not facially dilute or retrogress [**171] under Florida law as a whole, we further conclude that the Senate failed to conduct a functional analysis as to retrogression in order to properly determine when, and to what extent, the tier-two requirements must yield in order to avoid conflict with Florida's minority voting protection provision. Although the Senate touts its adherence to the recommendations of the Florida NAACP and LatinoJustice PRLDEF regarding minority districts, this does not absolve the Senate of its independent responsibility to draw an apportionment plan that adheres to *all* of the constitutional requirements.

The record is clear that in drawing districts for the 2012 apportionment cycle, the Senate employed an incorrect and incomplete retrogression analysis. Based on the record, the Senate formulated its apportionment plan without reference to election results or voter-registration

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population, arguing that the Senate plan deviates from equal population not to serve any rational purpose, but rather to discriminate against Democrats, minorities, and certain regions of the state. The FDP argues that this is done by systematically over-populating Democratic and minority districts. Having examined the numbers, we conclude that the FDP has not established a violation of the equal population provision on this basis alone. This case stands in contrast to *Larios*, where the population deviations were only barely within the 10% overall range and the evidence was clear that the deviation [**169] was the result of the Legislature's belief that the 10% overall range was a "safe harbor," within which it could engage in a systematic and express strategy to over-represent rural areas and Democrats, the party in power.

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and political party data; instead, it relied on voting-age population data and attempted to maintain the core of a new Senate district's predecessor district (which the Senate apparently knew had performed for a certain minority group in the past).[40] Although it [*657] was acknowledged during the February 9, 2012, Senate floor debate that [**172] the use of voter and election performance data to safeguard minority voting opportunities is consistent with accepted practice in other states and is a data set that the DOJ uses when evaluating whether to preclear a covered jurisdiction under Section 5 of the VRA, it was also stated that the Senate need not rely on such data when undertaking its retrogression analysis. Not only does this position ignore the DOJ's guidance on this issue requiring a functional approach, *see* DOJ Guidance Letter, at 7471 ("[C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination."), but it has been squarely rejected by at least one federal court. *See* *Texas, 2011 U.S. Dist. LEXIS 147586, 2011 WL 6440006, at *12* ("[S]imple voting-age population analysis cannot accurately measure minorities' ability to elect and, therefore, Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans."). As a result, the Senate did not properly consider when tier-two requirements must yield in order to avoid conflict with Florida's minority voting protection provision.

Finally, applying expansive definitions to the tier-two standards and failing to follow a consistent approach in applying the standards undermine the purpose of *article III, section 21*, which was intended to restrict legislative discretion in an effort to level the playing field and to prevent gerrymandering. *See* *Pearson, 2012 Mo. LEXIS 7, 2012 WL 131425, at *2* (explaining that the purpose of constitutional requirements that districts be contiguous, compact, and nearly equal in population is "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander'" (quoting *Hitchcock, 146 S.W. at 61*)).

A review of the individual districts, discussed below, reveals constitutional violations. These districts illustrate the Senate's inconsistent approach as to the tier-two standards and the ramifications of the failure to conduct a functional analysis as to retrogression.

**b. Numbering Scheme**

We first address the numbering of the Senate plan. *HN52*[↑] With respect to numbering, the [**175] Florida

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[40] *See* Senate Brief at 1 ("Staff prepared [**173] the proposal without reference to election results [or] voter-registration data . . . ."); *id.* at 4 ("The Senate also formulated the Senate Plan without reference to political party [or] voter registration . . . data . . . ."); Senate Comm. on Reapportionment Hrg. Tr. 6323-26 (Dec. 6, 2011) (explaining the use of voting-age population, but not the use of data regarding registered voters or election results); Senate Floor Debate Tr. 6613 (Jan. 17, 2012) (statement by the Chair of the Senate Committee on Reapportionment that to prevent backsliding, the Senate looked at the 2002 Senate plan and used voting-age population numbers to maintain majority-minority districts); *id.* at 6758 (statement by the Senate reapportionment committee chair that voting-age population rather than voting performance data were used); Senate Floor Debate Tr. 6831-33 (Feb. 9, 2012) (acknowledging that House used voter performance data to create effective minority-opportunity districts, but stating that the Senate "saw no need for this type of information" because it "know[s] that [its] minority opportunity districts do not diminish minority voting strength" by (1) preserving minority opportunity districts with [**174] little statistical/geographical change to ensure continued undiminished ability, and (2) following the districts proposed by the Florida NAACP and LatinoJustice organizations).

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Constitution states only that Senate districts shall be "consecutively numbered." Art. III, § 16(a), Fla. Const. However, because the Constitution requires that Senate terms must be staggered, the number of a Senate district determines the years in which elections must be held for that district. *See* art. III, § 15(a), Fla. Const. Here, the issue we must address is whether the Senate districts were renumbered with the intent to favor incumbents, in violation of article III, section 21(a). Specifically, the Coalition contends that by renumbering the apportionment plan so that incumbents eligible for reelection in 2012 would receive a chance to serve for a maximum of ten years, rather than eight, the Senate plan violates the prohibition on favoring incumbents.

[*658] Unquestionably, the numbering of a Senate district, whether given an odd or even number, directly affects the length of time a senator may serve. *See* art. III, § 15(a), Fla. Const. Article III, section 15(a), provides for staggered Senate terms. In accordance with that requirement, the constitution requires Senate elections to occur in particular districts in alternating general election years, with the year of the election [**176] to be determined by whether the district is designated by an odd or even number. *Id.* ("Senators shall be elected for terms of four years, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four."). The constitution further provides that "at the election next following a reapportionment, some senators shall be elected for terms of two years when necessary to maintain staggered terms." *Id.*

Moreover, any senator who represents a district where a change in the district lines has resulted in a change in constituency must stand for reelection in the next general election after reapportionment. In our decision on the validity of the apportionment plan in 1982, we addressed the effect of reapportionment on "holdover Senate terms" as part of our "jurisdiction to resolve all issues . . . arising under Article III, section 16(c)." In re Apportionment Law—1982, 414 So. 2d at 1045. In that case, senators in several odd-numbered districts were elected to four-year terms in 1980. The question before this Court was whether the provisions of article III, section 15(a), [**177] required that the terms of these senators be truncated to two years or whether the terms would hold over until the next scheduled election for those districts in 1984. Id. at 1046. We concluded that "the Florida Constitution, by its provisions, requires, upon reapportionment, that senate terms be truncated when a geographic change in district lines results in a change to the district's constituency." Id. at 1047-48. Our conclusion was based on the language of article III, section 1, which mandates that senators be elected from the districts they represent, as well as the final clause of article III, section 15(a). Id. at 1050. Thus, whether a Senate district is given an even or odd number determines both whether a senator will serve a two-year term or a four-year term prior to reapportionment and whether the senator will serve a two-year term upon election following the reapportionment.

In 2002, the Court rejected the argument of several challengers who asserted that "the newly created Senate districts are invalid because the Legislature changed the numbering of the newly created Senate districts from the existing Senate districts in order to circumvent the constitutional legislative [**178] term limit provisions." In re Apportionment Law—2002, 817 So. 2d at 831. In rejecting the claim, the Court "conclude[d] that the theoretical possibility that some current senators may be able to serve ten years in the Florida Senate is not a sufficiently important dependent matter arising under article III, section 16, Florida Constitution, that we should address it at this time." *Id.*

The question we must first answer is whether, as a

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result of the new requirements in *article III, section 21(a)*, prohibiting apportionment plans that have the intent of favoring incumbents, the numbering of Senate districts is now a matter for this Court's review under *article III, section 16*. In light of the addition of the *article III, section 21(a)*, provision that no "apportionment plan . . . shall be drawn with the intent to favor or disfavor . . . an incumbent," the challengers assert that the Senate's apportionment plan was renumbered for the benefit of incumbents, in [*659] violation of the Florida Constitution. The Senate has asserted that the provisions of *article III, section 21*, apply only to the drawing of district lines and not the numbering scheme.

We reject the Senate's assertion that numbering [**179] is excluded from the evaluation under the standards set forth in *article III, section 21*. This Court "endeavors to construe a constitutional provision consistent with the intent of the framers and the voters." *Zingale, 885 So. 2d at 282*; *see also Gray, 125 So. 2d at 852*. "Moreover, *HN53*[] in construing multiple constitutional provisions addressing a similar subject, the provisions 'must be read in pari materia to ensure a consistent and logical meaning that gives effect to each provision.'" *Caribbean Conservation Corp., 838 So. 2d at 501* (quoting *Advisory Op. to the Governor—1996 Amendment 5 (Everglades), 706 So. 2d 278, 281 (Fla. 1997)*).

While the introductory clause of *article III, section 21*, states that the provision applies "[i]n establishing legislative district boundaries," *subsection (a)* then states that "no apportionment *plan* or district shall be drawn with the intent to favor or disfavor . . . an incumbent." (Emphasis added.) The numbers of the Senate districts are unquestionably part of the "apportionment plan" for purposes of reviewing whether the plan is designed with the intent to favor or disfavor an incumbent. The Joint Resolution necessarily defines the boundaries of each [**180] district by its number. *See, e.g.*, SJR 1176 at 52 ("District 1 is composed of: (a) That part of Escambia County consisting of: 1. All of voting tabulation districts 15, 18, 19, 20, 21 . . . ."). Further, the numbering of the districts determines the length of the terms senators will serve following apportionment, *see art. III, § 15(a), Fla. Const.*, as well as the maximum length of time each senator will be eligible to serve, *see art. VI, § 4(b)(1)-(2), Fla. Const.* Thus, not only is it a matter for our review in determining the validity of the apportionment plan in light of the addition of *article III, section 21*, but the Legislature is prohibited from numbering the districts with the intent to favor or disfavor an incumbent. *See art. III, § 21(a), Fla. Const.*

In this case, the clear intent of the constitutional provisions is to prevent the Legislature from passing an apportionment plan that has a built-in bias favoring an incumbent. Adopting a renumbering system that significantly advantages incumbents by increasing the length of time that they may serve by two years most assuredly favors incumbents. Further, purposefully manipulating the numbering of the districts in order to allow [**181] incumbents to serve in excess of eight years would also appear to frustrate the intent of the voters when the term limits amendment was adopted. *See Advisory Op. to Atty. Gen.—Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991)* (discussing the purpose of the term limit amendment prior to its placement on the ballot).[41]

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[41] *Article VI, section 4(b)(1)-(2)*, is the current term limit provision of the Florida Constitution and was adopted by citizen initiative in 1992. The initiative petition itself stated:

> The people of Florida believe that politicians who remain in office too long may become preoccupied with re-election and become beholden to special interests and bureaucrats, and that present limitations on the President

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We now turn to the Coalition's allegation that the Senate plan was in fact renumbered to benefit incumbents. Clearly, the [*660] numbering of a district determines not only the length of each [**182] senator's individual term, but also determines the length of the maximum consecutive period of time a senator will be eligible to serve in the Senate. HN54[] Under article VI, section 4(b), of the Florida Constitution, "No person may appear on the ballot for re-election" to the office of Florida senator "if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years." It should first be emphasized that the Florida Constitution does not limit senators to a maximum of eight consecutive years. Rather, the constitution prohibits anyone who has already served for eight years from standing for reelection. Conversely, any senator who has served for less than eight years is not prohibited from seeking reelection.

The interaction between the term-limit provision of article VI, section 4(b), and the staggering of Senate terms under article III, section 15(a), determines the overall length of time a senator will be eligible to serve. Under these provisions, most senators who are first elected in general election years as scheduled by article III, section 15(a), will be eligible to serve for a maximum of [**183] eight consecutive years in the Senate. An exception applies to senators who are first elected to two-year terms in the election following reapportionment; these senators, if subsequently reelected, will have served only six years at the conclusion of their second terms, making them eligible for reelection to a third term of four years, thereby allowing them to serve up to ten years. A senator may also be eligible to serve longer than eight years if the senator was first elected in a special election. *See* § 100.101, Fla. Stat. (2011) (providing that a special election or special primary election shall be held "[i]f a vacancy occurs in the office of state senator or member of the state house of representatives").

The Coalition's claim is based on the fact that by altering the district numbers of certain incumbents during reapportionment, the Senate has changed the year certain senators must stand for reelection, the length of the terms of office these senators will serve, and, ultimately, the maximum length of time such senators will be eligible to serve. Thus, a senator elected in an even-numbered district in 2006 would, if subsequently reelected in 2010 and 2012,[42] serve a final term [**184] of two years from 2012 to 2014. By changing the district number from even to odd, that senator's final term would not expire until 2016, allowing the senator to serve for a maximum of ten years. Similarly, a senator elected from an odd-numbered district in 2008, by running in an even-numbered district in 2012, would be eligible to serve for a maximum of ten years. Without the reversal of numbers from odd to even, or from even to odd, each of these senators would have served for a maximum of eight years.

In this case, there is no question that district numbers were assigned with the intent to favor incumbents. The Senate Committee on Reapportionment published its first proposed plan on November 28, 2011. The plan

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of the United States and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office.

*Political Terms in Certain Elective Offices, 592 So. 2d at 226*.

[42] As all of the district lines for each Senate district have changed in the 2012 Senate plan, resulting in a change in constituency, all senators must stand for reelection in the next general election after the 2012 reapportionment. *See* *In re Apportionment Law—1982, 414 So. 2d at 1047-48*.

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was formally introduced at the committee's next meeting on December 6, 2011, as Senate Joint Resolution 1176. In this version of the Senate plan, the distribution of district numbers across [**185] the state was essentially unchanged from [*661] the 2002 Senate plan. Under that original numbering, at least 16[43] out of the 29 non-term-limited incumbents would have been eligible to serve a maximum of eight years and three incumbents would have been eligible to serve a maximum of nine years.

On December 30, 2011, however, the Committee on Reapportionment published a Committee Substitute to the plan proposed on November 28. Under the new plan, 39 districts were assigned new numbers. The Coalition asserts that as a result of the renumbering, 28 out of 29 incumbents would be eligible for ten-or eleven-year terms. Because the Court was not provided the addresses for every incumbent senator, the Court cannot verify the correctness of that statement although it does not appear to be a disputed fact. We can verify that at least the 16 senators that were previously eligible for eight years will now be eligible to serve a maximum of ten years, and the three incumbents originally eligible for nine years will be eligible to serve for eleven years.[44] None of the senators for whom this Court was provided addresses [**186] will be limited to a maximum of eight years under the new numbering scheme.

In the bill analysis attached to the Committee Substitute, Senate staff wrote that the changes in numbering were based on whether each senator had served a two-year or a four-year term prior to redistricting. Specifically, staff wrote that the Committee Substitute "[a]ssigns odd-numbered districts in a manner equitable to senators elected to terms of two years or less prior to redistricting and assigns even-numbered districts in a manner equitable to senators elected to four year terms prior to redistricting." Fla. S. Comm. on Reapp., CS for SJR 1176 (2012), Staff Analysis 13 (rev. Jan. 16, 2012). In a section entitled "Effect of Proposed Changes," the analysis stated:

> Reapportionment in 2012 will change the constituencies of all senate districts, and many senate terms will be truncated. Twenty-five (25) senators elected in 2010, or in special elections thereafter, will have served terms shortened to two [**187] years or less. Two of those 25 senators not only will get truncated terms but also will be disqualified from appearing on the ballot for reelection (Senator from the 26th District and Senator from the 34th District).
>
> An equitable method for numbering would be to assign odd numbers to districts represented by senators serving shortened two-year terms prior to redistricting; allowing them to seek election to full four-year terms after redistricting. Such a balance avoids the inequity of some senators having terms shortened to two years (or less) both before and after redistricting, while others have the opportunity to serve full four-year terms both before and after redistricting. Only 20 odd numbers are available, however, and assigning 23 is not possible.
>
> *To reconcile the provisions cited above and achieve an equitable result, professional staff considered not only the incidence of shortened senate terms but also when senators were first elected to the Senate (and when they would be disqualified from appearing on the ballot for reelection).*

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[43] This Court was provided with the addresses for only 21 of the 29 non-term-limited senators.

[44] Two senators were eligible to serve for 10 years under the November 28 numbering. The district numbers for those incumbents have not changed from odd to even, and they remain eligible to serve for 10 years.

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*Id.* at 10-11 (emphasis added).

*Article III, section 21(a)*, prohibits any apportionment plan from being drawn with [*662] the intent to favor an incumbent. [**188] The Senate has argued that the renumbering of its plan does not in fact "favor" incumbents; rather, the Senate maintains that the result of the numbering was merely to compensate certain incumbents who served truncated, two-year terms prior to redistricting by allowing them to serve longer terms if they are reelected. As the Senate conceded in a prior reapportionment case, however, *HN55*[] "elected officials have no property rights to the office to which they have been elected." *In re Apportionment Law—1982, 414 So. 2d at 1046*. To the contrary, it is the voters who have the rights in the process by which their representatives are elected.

The Senate's plan plainly favors certain incumbents by renumbering districts to allow them to serve longer than they would otherwise be eligible to serve. Because we conclude that the plan was drawn with the intent to favor incumbents, in violation of *article III, section 21(a)*, we declare the renumbering in the apportionment plan to be invalid.

### c. Challenges to the Senate Districts

We now turn to an examination of the challenges raised as to specific Senate districts. We first discuss the districts that we find to be in violation of the Florida Constitution. [**189] Then we discuss the district challenges that the Court rejects. Finally, we discuss the challenge brought by the City of Lakeland.

#### Northwest Florida: Senate Districts 1 and 3

The FDP and the Coalition contend that Districts 1 and 3 in the Panhandle violate the constitutional standards of compactness, utilizing political and geographical boundaries where feasible, and no intent to favor incumbents. Our facial review of both of these districts confirms that at least two constitutional standards were violated: compactness and utilizing existing political and geographical lines where feasible. The Senate's failure to adhere to these constitutional standards appears to be based on the erroneous belief that, in the drawing of the districts, the factor of "communities of interest" could be elevated above the constitutional mandates.

Although the Senate's stated motivation was a desire to keep coastal communities together and separate from rural communities, it is also significant that District 1 keeps 86.1% of its predecessor district (old District 4), and District 3 keeps 82.6% of its predecessor district (old District 2). Both of these percentages are far greater than the average for the Senate [**190] plan (64.2%). Because there is no constitutionally valid justification for the deviation from the constitutional standards, we are obligated to declare these districts invalid.

As the below map shows, Districts 1 and 3 are horizontal districts in northwest Florida. District 1 stretches east to west through the coastal areas of five counties, and District 3 takes in the non-coastal areas to the north of District 1.

[*663] Both districts contain a majority-white voting-age

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population.[45] Thus, no considerations with respect to Florida's minority voting protection provision come into play.

Both districts are visually non-compact as they stretch through the Panhandle, and the compactness measures confirm this. District 1 received a Reock score of 0.12 (closer to 1 is better), and an Area/Convex Hull score of 0.46 (closer to 1 is better). District 3 received a 0.24 Reock score and a 0.74 Area/Convex Hull score.

The districts are bounded to the east by Gulf, Calhoun, and Gadsden Counties. The more critical and [**191] constitutionally suspect boundary is the boundary between Districts 1 and 3, which follows no consistent political or geographical boundary. Instead, the district dividing line follows a variety of boundaries, switching between major roads (Interstate 10), minor roads, county lines, city boundaries, major waterways, rivers, and even creeks. It is evident that although the Senate followed numerous different boundaries when drawing Districts 1 and 3, often switching between different types of boundaries within the span of a few miles, it sacrificed compactness not to comply with the requirements of equal population or utilizing political or geographical boundaries, but rather to create a coastal district and an inland rural district.

In passing the Joint Resolution, the Legislature stated its intent was to "establish Senate District 1, which ties coastal communities of the Florida Panhandle in Escambia, Santa Rosa, Okaloosa, Walton, and Bay Counties," and to "establish Senate District 3, which ties rural Panhandle communities in Escambia, Santa Rosa, Okaloosa, Walton, Bay, Washington, Holmes, and Jackson Counties." SJR 1176 at 38. The Senate staff analysis indicates that the coastal and [**192] rural districts were created based on public testimony received by the Legislature.[46]

[*664] TAlthough the Senate staff analysis points to selected testimony in favor of the horizontal orientation, a review of the public hearings demonstrates that the public testimony in support of horizontal coastal and rural districts was by no means unanimous. While members of the public testified that they wanted coastal areas together and separate from rural areas because of common interests, other members of the public testified in support of vertical districts that would unite counties.

We commend the Legislature for holding multiple public hearings and obtaining public input. However, the Legislature is required to follow the requirements in the constitution, including the requirements that districts be drawn "as nearly equal in population as is practicable,"

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[45] The voting-age populations of the two districts are as follows. District 1: black VAP 12.5%; Hispanic VAP 5.2%; white VAP 77.5%. District 3: black VAP 14.4%; Hispanic VAP 3.5%; white VAP 78.1%.

[46] *See* New Senate Districts, District Descriptions (S000S9008) (Senate Staff Document), *in* Petition for Declaratory Judgment, Appendix at 1006, *In re Senate Joint Resolution of Legislative Apportionment 1176*, No. SC12-1 (Fla. Feb. 10, 2012) (Senate District Descriptions) ("The committee heard testimony at the . . . public hearings and at the October 5, 2011, Senate Reapportionment Committee meeting that rural and agricultural interests in the northern part of the Panhandle have different traditions and representational needs than the urban and tourism interest in the southern part of the Panhandle. Additionally, the committee heard testimony pointing out that commerce and communication flow east and west along the main transportation corridors of the region, Interstate 10 and U.S. Highway 98, not north and south. . . ."); *id.* ("District 1 is supported by the same testimony as District 3. Its horizontal configuration recognizes the differences between the rural North and the urban South. District 1 honors the request of members of the public who called for representation that reflects their distinct [**193] communities.").

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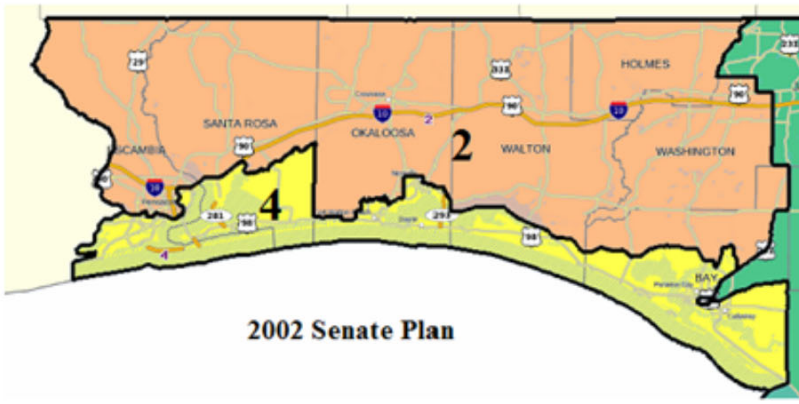
to be "compact," and to "where feasible, utilize existing political and geographical boundaries." *Art. III, § 21(b), Fla. Const.* While the equal population and political and geographical boundaries requirements are stated in terms of "as nearly as is practicable" or "where feasible," the compactness requirement is not modified by such qualifiers but framed in terms of "shall." As explained above, maintaining communities [**194] of interest is not a constitutional requirement, and comporting with such a principle should not come at the expense of complying with constitutional imperatives, such as compactness.

A review of the Coalition's alternative plan reveals that it was possible to draw districts in the Panhandle that are more visually compact and keep more counties together; only one county, Okaloosa County, is split in the Coalition's plan. Further, when drawing the districts to be compact and utilize consistent political boundaries, the Coalition districts also retain less of the core population of predecessor districts—66.2% and 58.4%—closer to the average (64.2%) of the Senate plan.

The orientation of Districts 1 and 3 is in fact very similar to the composition of Districts 2 and 4 in 2002, depicted below. Although part of Okaloosa County is now included in District 1, that area consists in large part of the Eglin Air Force Base. The incumbents in Districts 1 and 3 both live in Okaloosa County and would represent largely the same constituencies as they did under the 2002 plan.



2002 Senate Plan

[*665] The drawing of the districts sacrificed compactness—a constitutional imperative—in order to keep coastal communities together. [**195] Further, although the Senate followed numerous different boundaries when drawing Districts 1 and 3, often switching between different types of boundaries within the space of a few miles, it sacrificed compactness, not in a reasoned balancing effort to comply with the requirements of equal population or to utilize political or geographical boundaries such as municipal or county boundaries, but rather to create a coastal district and an inland rural district.

We also consider it significant that in doing so, a high percentage of population from predecessor districts was retained to the benefit of the incumbents. While it is not only the fact that the districts maintained overwhelming percentages of the former core constituencies in isolation, in the context of our overall analysis of this district, it is significant. There is no valid constitutional justification for the decision to draw Districts 1 and 3 in this configuration, and we conclude that Districts 1 and 3 are constitutionally invalid.

**Northeast Florida: Senate Districts 6 and 9**

The FDP and the Coalition challenge District 6 on the grounds that the Senate used Florida's minority voting protection provision as a pretext for partisan [**196] favoritism and violated the requirements of

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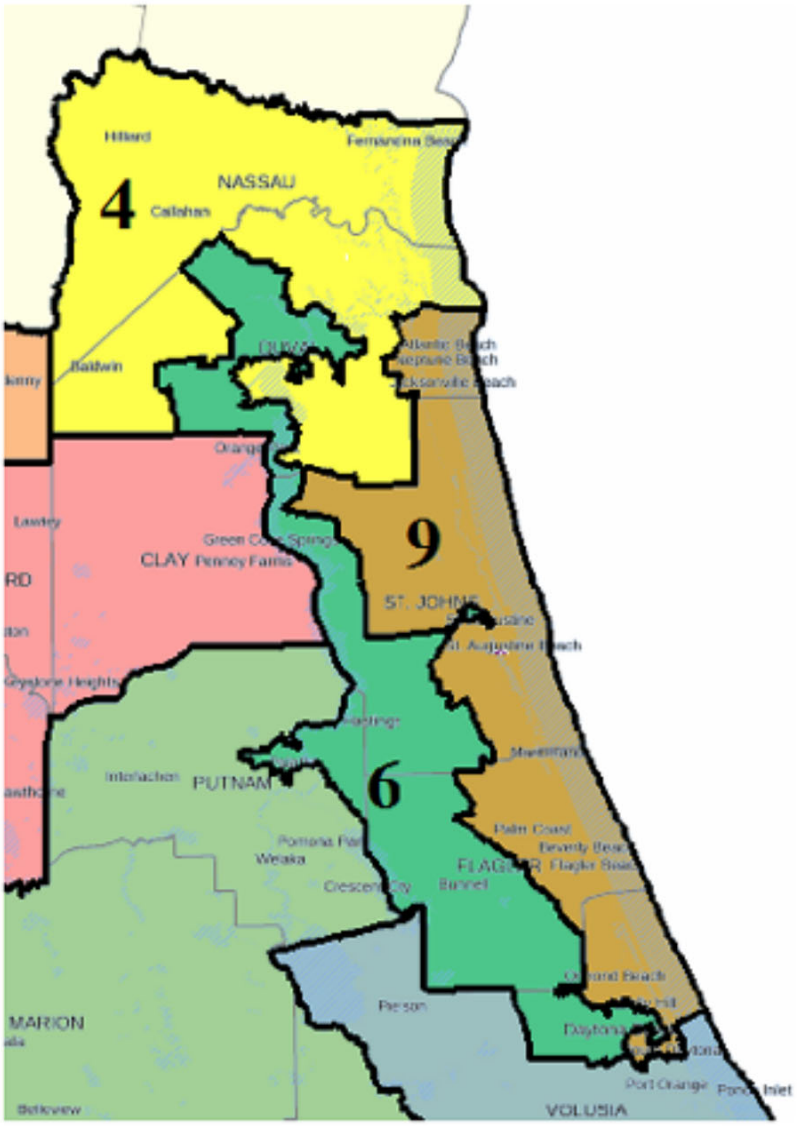
compactness and utilizing political and geographical boundaries. Based on the objective data before this Court, we conclude that District 6 violates constitutional mandates by sacrificing compactness and utilizing boundaries when not necessary to do so to avoid conflict with the minority voting protection provision.

District 6 begins at the northern edge of Duval County, meanders through Jacksonville, and then stretches southward across five counties to Daytona Beach, with arms to Palatka and St. Augustine. District 6 is adjacent to neighboring District 9, which stretches along the coast from north of Jacksonville Beach to South Daytona Beach with District 6 on its western border. Districts 6 and 9 are depicted below.




[*666] District 6 is not compact visually, and the mathematical measures of compactness confirm this. District 6 received a Reock score of 0.12 (closer to 1 is better), and an Area/Convex Hull score of 0.43 (closer to 1 is better). Although part of District 6's western border follows the St. Johns River, it is evident that its non-compactness is not a result of attempting to utilize an existing political or geographical boundary. Neighboring [**197] District 9 is also visually not compact as a result of having District 6 on its western border, and it received a Reock score of 0.15 and an Area/Convex Hull score of 0.61.[47]

[47] Newly created District 9 would perform Republican; it would

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The stated justification for the configuration of District 6 is minority voting protection. As we have explained previously, because the Senate never performed an appropriate functional analysis, the reliability of this justification is questionable. District 6 is a black opportunity district, with a black VAP of 47.7%. District 6 is not a majority-minority district, and neither was its predecessor in the benchmark [*667] Senate plan. The benchmark district, old District 1, had a black VAP of 46.9%. In short, this is not a district where the Senate's goal was to create a majority-minority district.

While the percentage falls short of a majority, District 6 is one in which an analysis of voting behavior that this Court is [**198] able [**199] to perform using the House's redistricting software and the House's voter registration and election data reveals that black voters are likely able to elect their representative of choice. District 6 would perform Democratic; it would have voted 58.7% for Sink (D) in the 2010 gubernatorial election, 63.3% for Obama (D) in the 2008 presidential election, and 52.0% for Davis (D) in the 2006 gubernatorial election. Democrats would make up 58.0% of registered voters, and 69.4% of the registered Democrats would be black (showing opportunity for black voters among Democrats). Further, 87.2% of the black voters would be registered Democrats (showing voting cohesion among black voters in general). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 57.6% of registered voters, 69.2% of the Democrats would be black, and 92.2% of the black voters would be Democrats. Black voters would have also controlled the Democratic primary, with 67.3% of the Democrats voting in the primary being black. This analysis indicates that the district will likely afford black voters the ability to elect candidates of their choice.

The [**200] Legislature formed this district with the stated intent to preserve minority voting opportunities. The Legislature stated that it intended to "tie[] communities of similar socioeconomic characteristics in the northeastern portion of the state from the St. Johns River basin to Interstate 95 between Daytona Beach and Jacksonville, consistent with traditional, race-neutral redistricting principles" and to create a district with "a near majority black voting-age population, comparable to that of the existing district." SJR 1176 at 39.[48] District 6 retains 70.3% of its predecessor district (old District 1). However, as discussed above, the Senate in drawing this district did not perform a functional analysis, but rather focused on keeping the core of old District 1. Old District 1, however, was drawn at a time when compactness was not a constitutional imperative. Because compactness is now a requirement, the Legislature is permitted to violate compactness only when necessary to avoid conflict with tier-one standards, including the minority voting protection provision.

In support of its argument, the Coalition submitted a proposed alternative plan that includes a black opportunity district contained entirely within Duval County (Coalition District 1). That district is depicted below.

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have voted 57.5% for Scott ® in the 2010 gubernatorial election, 57.2% for McCain ® in the 2008 presidential election, and 59.6% for Crist ® in the 2006 gubernatorial election. Of the registered voters in District 9, 44.5% would be Republican.

[48] The Senate staff analysis further explains that "District 6 preserves the core of an existing district that has long elected [**201] an African-American member to the Senate. The district connects communities in the northeastern portion of the state from the St. Johns River basin to Interstate 95 between Daytona Beach and Jacksonville." Senate District Descriptions at 1007.

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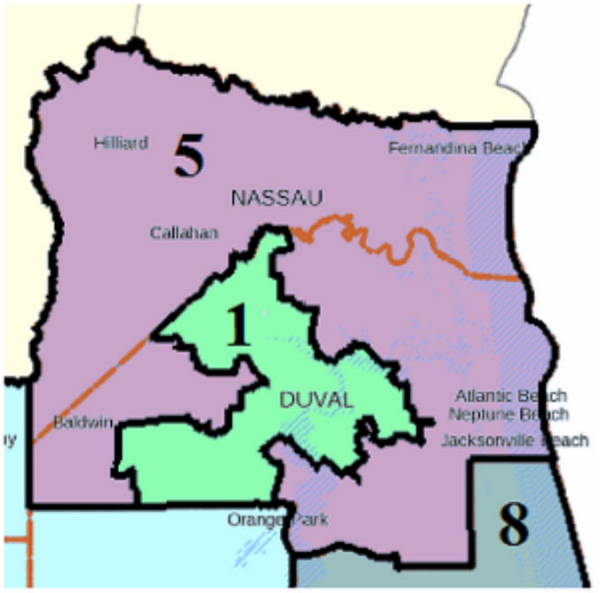


[*668] Coalition District 1 has a black VAP of 42.4%. While we recognize that this is lower than the black VAP of the benchmark District 1 (which has a black VAP of 46.9%), our inquiry does not end there. An examination of voting strength must be conducted. The equivalent district under the Coalition's alternative plan would perform Democratic; it would have voted 57.3% for Sink (D) in the 2010 gubernatorial election, 61.0% for Obama (D) in the 2008 presidential election, and 49.1% for Davis (D) in the 2006 gubernatorial election. Democrats would make up 56.1% of registered voters, and 66.4% of the registered Democrats would be black (showing opportunity for black voters among Democrats). Further, 86.8% of the black voters would be registered [**202] Democrats (showing voting cohesion among black voters in general). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 55.8% of registered voters, 65.8% of the Democrats would be black, and 91.6% of the black voters would be Democrats. Black voters would have also controlled the Democratic primary, with 64.3% of the Democrats voting in the primary being black. This analysis indicates that the district will likely afford black voters the ability to elect candidates of their choice.[49]

[*669] Thus, the Coalition has demonstrated that District 6 can be drawn much more compactly and remain a minority-opportunity district. In addition to being much more visually compact, the compactness measurements are much better. Coalition District 1 scores a 0.32 on Reock and a 0.66 on Area/Convex Hull, compared to Senate District 6, which scores a 0.12 on Reock and 0.43 on Area/Convex Hull.

We recognize that our role is not to select the "best plan." However, the Coalition's plan demonstrates that Senate District 6 violates the constitutional standards of compactness and utilizing existing political and geographical boundaries. The alternative plan shows how political and geographical boundaries can be better utilized and demonstrates how District 6 can be made more compact by placing it entirely within Duval County rather than stretching southward across five counties to Daytona Beach, without [**204] violating Florida's minority voting protection provision.

Further, although adjoining District 9, standing alone, is

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[49] Contrary to the Senate's representations at oral argument, the federal district court order in *Martinez v. Bush, 234 F. Supp. 2d 1275, 1298-99 (S.D. Fla. 2002)*, does not require this Court to reach an opposite conclusion. *Martinez* involved Section 2 vote dilution claims based on the Legislature's 2002 House, Senate, and congressional apportionment plans; it did not address claims regarding Section 5 diminishment. *See id. at 1298-1324*. The district court in *Martinez* most certainly never found that reducing the black voting-age population from 46.9% (the percentage under the 2002 benchmark) in District 6 to 42.4% (the percentage [**203] in the equivalent district under the Coalition's alternative plan) would diminish the ability of black voters in this part of the state to elect candidates of choice. The Senate's after-the-fact reliance on *Martinez* to justify its decision to draw District 6 in this manner is therefore unavailing.

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not invalid, the reason for its lack of compactness and failure to utilize political and geographical boundaries was its location adjacent to District 6. As a result of District 6 being made more compact, District 9 becomes more compact as well.

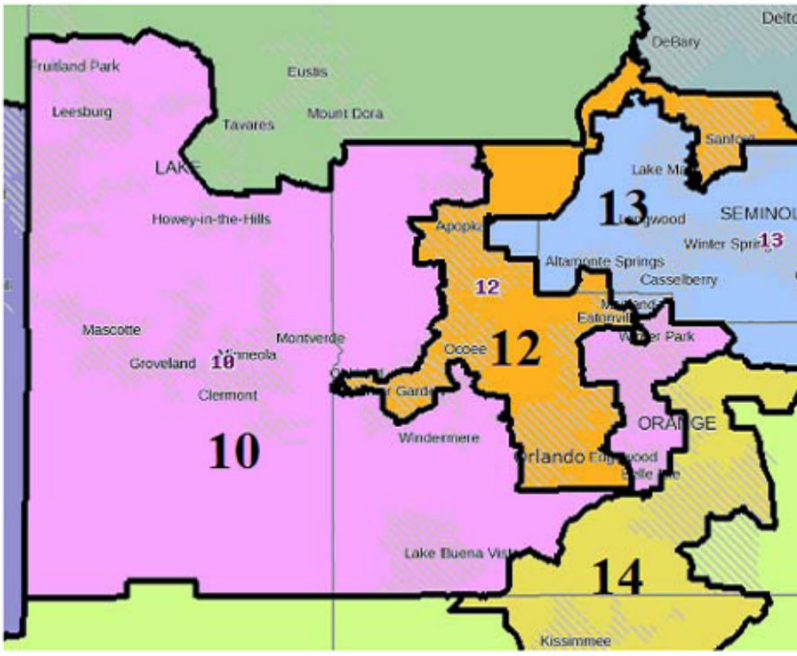
The Senate violated the compactness standard in drawing Districts 6 and 9, and it failed to perform the functional analysis necessary to properly determine when compactness should yield because of a conflict with the tier-one standard of minority voting protection. This is also indicative of intent to favor incumbents and a political party. By keeping District 6 in the same configuration of old District 1, the Senate retained a high percentage of the population of predecessor districts not only for new District 6, which retains 70.3%, but for new District 9, which retains 69.7%. Moreover, the configuration of District 6 draws in Democratic neighborhoods that would otherwise be contained in the surrounding districts. There is no valid justification for Districts 6 and 9. Contrary to any arguments presented either in the Senate's [**205] briefs or during oral argument, there is no constitutional impediment to the alternatives set forth in the Coalition plan, which comply with the constitutional requisites. Accordingly, we conclude that Districts 6 and 9 are constitutionally invalid.

### Central Florida: Senate Districts 10 and 12

The Coalition next asserts that District 10 was drawn to favor an incumbent, and the FDP contends that District 12 uses Florida's minority voting protection provision as a pretext for partisan favoritism. While the challenges are based on different grounds, we consider these claims in tandem because the Senate justifies the boundaries of District 10 based in part on its assertion that it was required to draw District 12 in the manner that it did in order to ensure minority voting protection. Thus, we start with District 10, then review District 12, and conclude that District 10, as drawn, violates the constitution.

The Coalition asserts that District 10 violates *article III, section 21*, because this district was gerrymandered into a bizarre shape in order to include a particular incumbent's residence and provide him with a safe Republican seat. The Coalition further asserts that the district barely [**206] misses another incumbent's residence that is located on the border between District 10 and District 13, preventing two incumbent Republicans from running against each other.

A visual examination of the challenged districts is set forth below:




[*670] As shown in the above map, District 10 is located mostly on the west side of Orlando, and this portion of the district is fairly compact, following county lines on its west and south sides, continuing until it reaches District 12 on the eastern side, and District 14, which is a Hispanic majority-minority district, on the southeastern side. At that point, District 10 squeezes in between Districts 12 and 14 through a small stretch of

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land less than half of a mile wide in order to create an odd-shaped appendage that reaches out toward District 13, picking up Belle Isle, Edgewood, and Winter Park. The appendage is approximately 12 miles long at its longest portion and 8.5 miles wide at its widest, with the majority of the portion being between two and five miles in width. Based on undisputed information provided to this Court in conjunction with this review, an incumbent lives in the appendage.[50] The district line between Districts 10 and 13 stops just [**207] short of another Republican incumbent's residence by following the boundary between the cities of Winter Park and Maitland for approximately 3.5 miles.

Although the compactness measures for District 10 reflect that the district is, overall, relatively compact (Reock: 0.36; Area/Convex Hull: 0.75), District 10 is visually non-compact as a result of the bizarrely [*671] shaped appendage. *See, e.g., Hickel, 846 P.2d at 46* ("[A]ppendages attached to otherwise compact areas may violate the requirement of compact districting.").[51]

The dividing line between the District 10 appendage and surrounding Districts 12, 13, and 14 does not consistently follow any particular political [**208] or geographical boundary, sometimes following parts of the city boundaries for Belle Isle, Winter Park, and Edgewood, but other times constantly shifting from major roads to minor roads to railroad tracks. In looking to the population deviation, we note that District 10 is one of the most populated districts with 3,995 people above the ideal population.

Of course, tier-two standards must yield if the Legislature cannot comply with the requirements of both tier one and tier two. The Legislature asserts that District 10 was drawn in this manner because of Districts 12 and 14. District 14 is a new Hispanic majority-minority district with a Hispanic VAP of 50.5%; there was no predecessor Hispanic majority-minority district in the 2002 Senate plan. District 12 is a coalition district with a 40.0% black VAP and 20.9% Hispanic VAP. Notably, District 12 is not a black majority-minority district, nor was its predecessor in the benchmark Senate plan.

District 12, which is located in the western and northern portions of the Orlando area, takes in the areas with the highest concentration of black residents from Orlando, Ocoee, Winter Garden, Apopka, Maitland, Winter Park, and Sanford. It is not [**209] a visually compact district, and the compactness measures confirm this (Reock: 0.24; Area/Convex Hull: 0.41). It extends into two counties, running in a relatively narrow path on the west end of Orlando and extending upwards and to the east, hugging the top of the area, with a few portions reaching out.

The Legislature formed this district with the stated intent to preserve minority voting opportunities. The Legislature explained that its intent was to "tie[] urban communities of similar socioeconomic characteristics in Orange and Seminole Counties, consistent with traditional, race-neutral redistricting principles" and create a district with "a majority-minority voting-age population, comparable to that of the existing district." SJR 1176 at 41. The predecessor to District 12 was old District 19, a coalition district with a black VAP of 33.1%

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[50] When a senator asked during the January 17, 2012, floor debate if any incumbent lived in the appendage of newly numbered Senate District 10, the response given was that if an incumbent lived there it was "news to me," even though the incumbent who lived there was present during the debate.

The incumbent addresses provided to the Court verify that an incumbent does in fact live in the part of District 10 that we refer to as the appendage.

[51] The rest of the district is relatively compact, which is reflected in the compactness scores.

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and a Hispanic VAP of 35.5%. District 12 retained 49.0% of its predecessor district.

As discussed above, the Senate in drawing this district did not perform a functional analysis. Here, the Senate in essence asserts that the districts in the Orlando area do not need to be compact because of a focus on increasing minority voting strength. However, [**210] the Senate failed to consider whether this goal could be obtained by performing an analysis that adheres to all of the constitutional criteria.[52]

In reviewing both Districts 10 and 12, we conclude that District 10, which is visually non-compact and clearly encompasses an incumbent in an appendage, is constitutionally defective. Although the Legislature contends that District 10 was drawn because of concerns of not diluting minority voting strength in surrounding districts or causing unlawful retrogression, the Senate never performed the functional analysis necessary to ensure that the reasoning was constitutionally valid. Nothing in the [*672] record reflects that the process of drawing the districts in this area recognized the importance of balancing the constitutional values.

After reviewing the compactness of District 10, as well as its failure to observe boundaries and the location of incumbents in this area, and in light of the Senate's failure to conduct a functional analysis as to District 12, we conclude that there is no valid constitutional justification for District [**211] 10. Based on the objective data before this Court, we conclude that District 10 violates constitutional mandates because it is visually non-compact with an appendage that reaches out to clearly encompass an incumbent, and this bizarre shape cannot be justified based on concerns pertaining to ensuring minority voting strength. District 10 is constitutionally invalid.

**Southwest Florida: Senate District 30**

The FDP argues that District 30 was drawn with the intent to favor an incumbent in violation of the Florida Constitution. As evidence, the FDP points to the fact that District 30 contains a high percentage of its former constituency, is non-compact, and fails to utilize political and geographical boundaries. After examining all the constitutional requirements, we conclude that the district as drawn violates the Florida constitutional standards that districts "shall be compact" and utilize political and geographical boundaries where feasible. Further, the failure to comply with the tier-two standards, in the absence of any constitutionally valid justification, objectively indicates intent to favor an incumbent.

District 30 is located in Collier and Lee Counties. It stretches from Cape Coral, [**212] extends over water to Sanibel Island and back over water to Fort Meyers Beach, and then travels down the west coast all the way to the Everglades, encompassing Naples and Marco Island as it winds its way down. The map of District 30, below, best shows its odd-shaped configuration, which resembles an upside-down alligator.

[52] While no party challenges District 14, the Senate likewise should perform the necessary analysis on that district as well.

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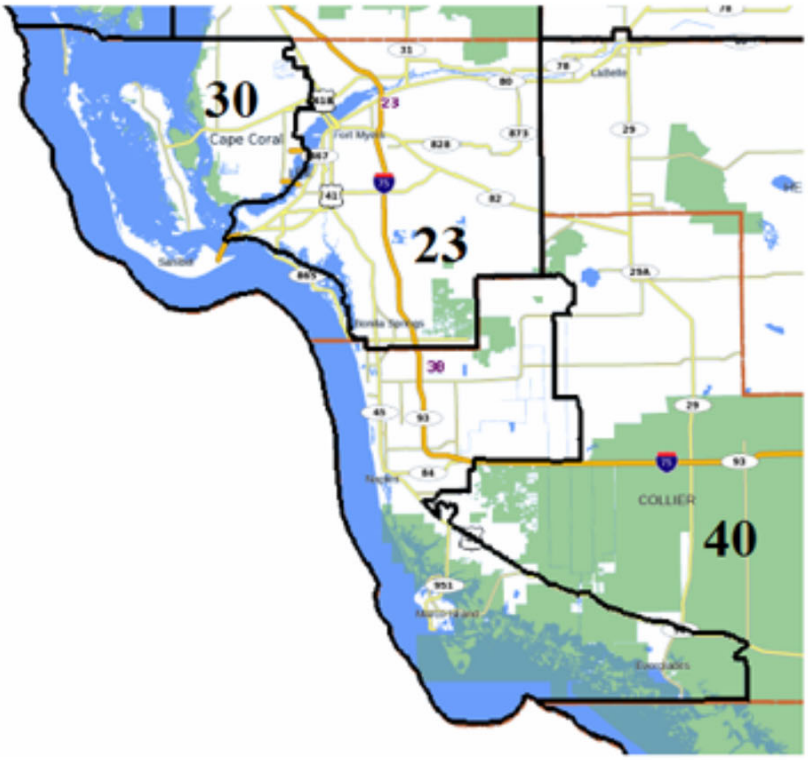


y much more compact than District 30[53] and ed to comply with Florida's minority voting provision. District 40, on the other hand, is in county under Section 5 of the VRA.

xception of the boundary it shares with District t 30 does not need to be configured to avoid g minority voting strength, and thus the e is required to draw District 30 to be "as ual in population as is practicable," to be ' and to "where feasible, utilize existing ıd geographical boundaries." *Art. III, § 21(b),*

rementioned stated legislative intent tes that in creating District 30, the Legislature o tie coastal communities together. However, as we have discussed in [**214] analyzing the constitutional phrase "compactness" and our discussion of Districts 1 and 3, maintaining communities of interest is not required by the constitution, and comporting with such a principle must not come at the expense of complying with constitutional imperatives. We also consider it significant that District 30 maintained a large percentage of the same constituency as the predecessor district. On this record, there is no valid constitutional justification for the Legislature's decision to draw District 30 in this manner. District 30 is constitutionally invalid.

[*673] District 30 is a white-majority district (white VAP of 78.4%). District 30 retains 84.9% of its constituency from old District 37 and a shape nearly identical to its predecessor district. It is visually non-compact, and the mathematical measures of compactness support this conclusion, with a Reock score of 0.18 and an Area/Convex Hull score of 0.56 (closer to 1 is better).

In terms of political and geographical boundaries, District 30 is bounded to the north and south by county lines, but the district cuts through the city of Bonita Springs, and the mainland's only connection to Sanibel Island is a bridge that is cut in half by the district line. Thus, in addition to being non-compact, District 30 splits counties, municipalities, and geographical features.

In passing the joint resolution, the Legislature stated its intent with respect to this district was to "tie[] coastal [**213] communities in Lee and Collier Counties." SJR 1176 at 47. The Senate districts surrounding coastal District 30 are Districts 23, 28, and 40. Districts 23 and 28 are both white-majority districts (white VAPs of 75.2% and 87.9%, respectively). They are visually and

**Southeast Florida: Senate Districts 29 and 34**

The FDP and the Coalition contend that Districts 34 and 29 are not compact. Additionally, the Coalition argues that the Senate plan keeps the black voting-age

[53] District 23 has a Reock score of 0.45 and an Area/Convex Hull score of 0.81. District 28 has a Reock score of 0.37 and an Area/Convex Hull of 0.89.

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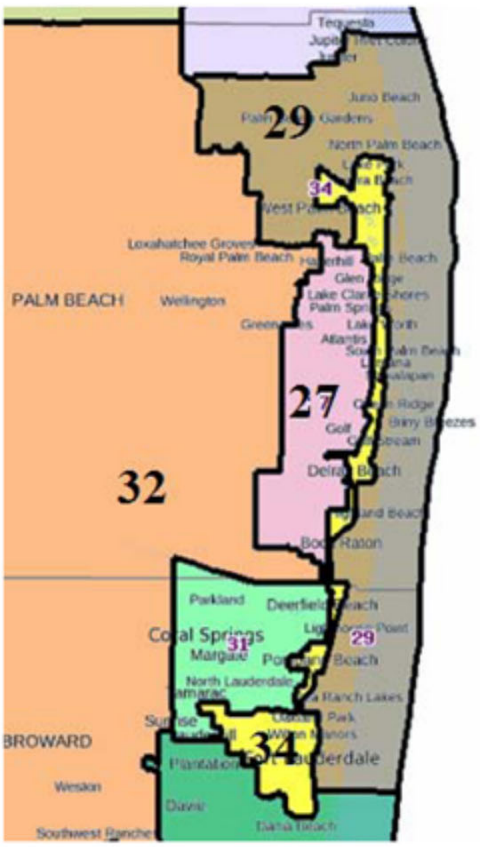
population in District 34 the same as it was in the predecessor district, without undertaking the required functional analysis. The Coalition argues that the Senate included as many Democrats as possible into this district in order to dilute their votes elsewhere. The Coalition asserts that this evidences intent to favor an incumbent and a political party. Specifically, the Coalition contends that the decision to [**215] draw District 34 this way was a ploy to keep the neighboring Republican incumbent seat safe in District 29 by using minority protection as a pretext for partisan favoritism. We conclude that both districts are constitutionally invalid because they are not compact, do not utilize political and geographical boundaries where feasible, and [*674] appear to have been drawn with the intent to favor an incumbent and a political party.

District 34 is a narrow district stretching approximately fifty miles from Riviera Beach and Lake Park in Palm Beach County southwards in a narrow strip to Fort Lauderdale in Broward County. At its narrowest point, which is in Boca Raton, District 34 is less than a mere tenth of a mile wide, connected by the I-95 corridor. Following a jagged path south, District 34 slices through cities and neighborhoods, often gathering up residents on one side of a residential street but not the other.

District 29, which is adjacent to District 34, is a long and narrow coastal district that snakes along the outer banks and eastern shoreline to the east of District 34. District 29 begins in Jupiter, wraps around the top of District 34 to take in Palm Beach Gardens, then travels south [**216] in a narrow sliver along the coast through Lake Worth, Palm Beach, Boca Raton, and Pompano Beach to Fort Lauderdale. These districts are depicted in the map below.




Districts 34 and 29 are clearly not compact, and the mathematical measurements confirm this. Under the Reock method of measurement, District 34 scores a low 0.05 (closer to 1 is better)—the least compact of all of the Senate districts; District 34 does not fare much better under the Area/Convex Hull method of measurement, scoring 0.25 (closer to 1 is better). As a result of the shape of District 34, District 29 is also visually non-compact, and it has a Reock score of just 0.15 and an Area/Convex Hull [*675] score of 0.56. In addition, these districts do not adhere to a consistent boundary as they travel through counties and cities.

Unquestionably, minority protection was an important factor in considering how to draw District 34 because it is a black majority-minority district with a black VAP of 55.8%. As it travels down the coast, the district takes in the neighborhoods with the highest concentrations of black residents in Broward and Palm Beach Counties. The incumbent for this district is a Democrat. In the

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benchmark plan, the [**217] predecessor to District 34 (old District 29) was also a black majority-minority district, having a black voting-age population of 60.7%.[54] District 34's shape is similar to the shape it had under the 2002 Senate plan, and the district retains 79.4% of its prior population.

Neighboring District 29's shape is also similar to the shape it had under the 2002 Senate plan, and it retains 82.1% of its prior population. The incumbent for this district is a Republican. It is a white-majority district, having a white VAP of 79.4%. Its predecessor (old District 25) was also a white-majority district under the 2002 benchmark plan, having a white VAP of 78.0%.

The Legislature's stated intent with respect to District 34 was to preserve minority voting opportunities. The Legislature explained that its intent was to "tie[] communities of similar socioeconomic characteristics along Interstate 95 and U.S. 1 in Palm Beach and Broward Counties, consistent with traditional, race-neutral redistricting principles" and to create the district with "a majority black voting-age population, comparable [**218] to that of the existing district." SJR 1176 at 48. The Senate staff analysis further explains that the configuration of District 34 "preserves the core of a district that has consistently elected candidates preferred by minority voters." Senate District Descriptions at 1014. Under the 2012 Senate plan, District 34 would be solidly Democratic, and an analysis of voting behavior indicates that the district will likely afford black voters the ability to elect candidates of their choice.[55]

As to District 29, the Senate acknowledged that the district was adjacent to a minority-opportunity district, stating that it was creating a district that "ties the coastal communities of Broward and Palm Beach Counties; is equal in population to other districts; follows political and geographical boundaries; [and] *is adjacent to a minority-opportunity district to its west* and the Atlantic Ocean to the east." SJR 1176 at 46 (emphasis added).[56]

Of course, the requirement of compactness must yield when necessary to avoid a conflict with the tier-one standard of protecting minority voting. However, as we [*676] have previously discussed, the Senate in drawing minority districts did not perform a functional analysis, but rather focused on keeping the core of the minority districts under the 2002 Senate plan. The 2002 Senate plan, however, was drawn at a time when compactness was not a constitutional imperative.

We also consider the partisan favoritism claim. Every Senate district immediately surrounding [**220] District 34 (Districts 27, 31, 32, and 36), *except* for District 29, is a majority-white district that would perform Democratic.[57] Unlike the surrounding districts, District

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[54] The opponents do not contend that the change from 60.7% to 55.8% resulted in retrogression under Florida law.

[55] District 34 would have voted 82.1% for Sink (D) in the 2010 gubernatorial election, 84.9% for Obama (D) in the 2008 presidential election, and 77.0% for Davis (D) in the 2006 gubernatorial election. Democrats would make up 67.7% of registered voters, 67.0% of the Democrats would be black (showing opportunity for black voters among Democrats), and 85.2% of black voters in this district would be Democrats (showing voting cohesion among black voters in general). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 73.1% of voters; 69.7% of the Democrats would be black (opportunity); and 90.9% of the black voters would be [**219] Democrats (cohesion).

[56] The Senate staff analysis likewise recognizes that District 29 "is adjacent to a minority-opportunity district (District 34) to its west." Senate District Descriptions at 1012.

[57] District 27 has a white VAP of 65.9% and would perform Democratic. District 31 has a white VAP of 53.3% and would

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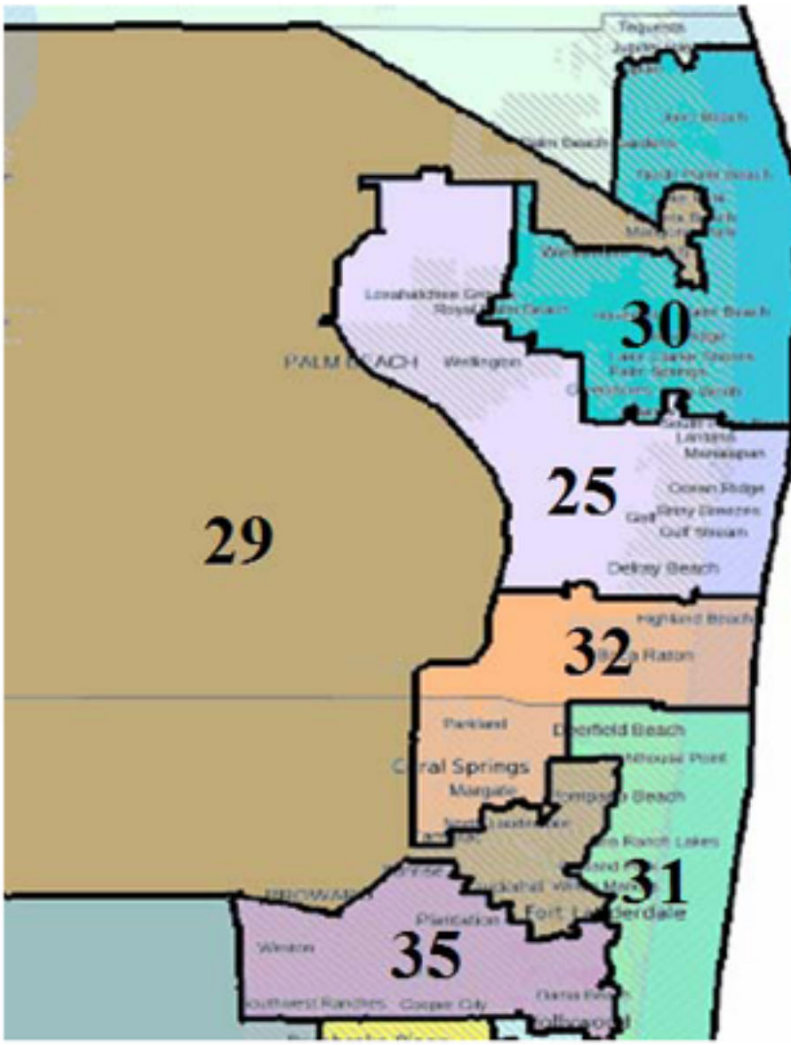
29 would remain competitive, but lean Republican in terms of election results,[58] and the incumbent in this district is a Republican. The challengers essentially maintain that District 34 was drawn to take Democratic voters out of District 29 to keep it competitive under the guise of maintaining District 34 as a black majority-minority district. The current configuration would, in effect, favor a Republican incumbent.

The Coalition has submitted an alternative plan that shows a different configuration [**221] for this area that is more compact overall.




[*677] For a point of reference, the Coalition District 29 is equivalent to the Senate District 34 (black majority-minority districts under both plans with black VAPs of 55.7% and 55.8%, respectively), and an analysis of voting behavior likewise reveals that Coalition District 29 will likely afford black voters the ability to elect candidates of their choice.[59] We note that the non-

perform Democratic. District 32 has white VAP of 57.7% and would perform Democratic. District 36 has a white VAP of 50.7% and would perform Democratic.

[58] District 29 would have voted 47.7% for Sink (D) and 49.9% for Scott ® in the 2010 gubernatorial election, 51.0% for Obama (D) and 48.2% for McCain ® in the 2008 presidential election, and 48.7% for Davis (D) and 49.1% for Crist ® in the 2006 gubernatorial election.

[59] Coalition District 29 would be Democratic and would have voted 79.8% for Sink (D), 82.6% for Obama (D), and 75.1% for Davis (D) in the 2010 gubernatorial, 2008 presidential, and 2006 gubernatorial elections, respectively. In that district, 68.3% of registered voters would be Democrats, 65.5% of registered Democrats would be black (showing opportunity among black voters), and 85.1% of registered black voters would be Democrats (showing cohesion among black voters).

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diminishment standard does not prohibit any change to existing boundaries or to population percentages of a previously existing black majority-minority district. The Coalition's plan makes the area, as a whole, more compact than the corresponding area under the Senate plan.

Under the Senate plan, the districts surrounding District 34 have the following compactness measurements (closer to 1 is better): District 27 (Reock: 0.23; [*678] Area/Convex Hull: 0.82); District 29 (Reock: 0.15; Area/Convex Hull: 0.56); District 31 (Reock: 0.43; Area/Convex Hull: 0.85); District 32 (Reock: 0.49; Area/Convex Hull: 0.92); and District 36 (Reock: 0.25; Area/Convex Hull: 0.63). Including the scores for District 34, the average Reock score of these districts is 0.27, and the average Area/Convex Hull score is 0.67.

As a comparison, under the Coalition's plan, the districts surrounding its District 34 equivalent (Coalition District 29), including that district itself, have the following compactness measurements: District 25 (Reock: 0.32; Area/Convex Hull: 0.67); District 29 (Reock: 0.42; Area/Convex Hull: 0.76); District 30 (Reock: 0.37; Area/Convex Hull: 0.77); District 31 (Reock: 0.18; Area/Convex Hull: 0.77); District 32 (Reock: 0.35; Area/Convex Hull: 0.75); and District 35 (Reock: 0.38; [**223] Area/Convex Hull: 0.78). These districts in the Coalition's plan have, on average, a Reock score of 0.34 and an Area/Convex Hull score of 0.75, improving upon the Senate plan's compactness. While the role of alternative plans is not to select the "best plan," the Coalition's plan demonstrates that the Senate was able to draw districts in this region of the state to better comply with Florida's compactness requirement while, at the same time, maintaining a black majority-minority district.

In order to evaluate the partisan favoritism claim, we further evaluate the effect of this more compact configuration on the political composition of the districts. As a result of the black Democratic voters in the long narrow strip of District 34 between West Palm Beach and Pompano Beach being dispersed into surrounding districts under the Coalition's plan, rather than being concentrated in District 34, the equivalent to District 29 in the Coalition plan—Coalition District 31—becomes Democratic.[60] The Coalition's plan creates five Democratic districts in this area, as opposed to the four Democratic districts in the 2012 Senate plan.[61] The Democratic voters in this area of the state are concentrated [**224] and the area is largely Democratic; the Coalition's plan does not appear to purposefully draw Democratic districts but rather to draw logical, compact districts in a neutral manner.

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In terms of actual voters based on [**222] 2010 general election data, Democrats would make up 73.0% of voters, 68.2% of the Democrats who voted would be black (opportunity); and 90.5% of the black voters would be Democrats (cohesion).

[60] Coalition District 31 would be solidly Democratic and would have voted 54.9% for Sink (D), 58.2% for Obama (D), and 56.5% for Davis (D).

[61] The comparable districts surrounding Coalition District 29 (Coalition Districts 25, 30, 31, 32, and 35) are majority-white districts (white VAP of 71.0%, 55.9%, 61.2%, 68.0%, and 56.0%, respectively). Each of these districts would be solidly Democratic. The election results for these districts are as follows: Coalition District 25 (61.4% Sink (D), 36.0% Scott ®; 63.3% Obama (D), 36.0% McCain ®; 63.4% Davis ®, 34.6% Scott ®); Coalition District 30 (55.7% Sink, 41.6% Scott; 60.0% Obama, 39.3% McCain; 56.6% Davis, 41.2% Crist); Coalition District 31 (54.9% Sink, 42.7% Scott; 58.2% Obama, 41.0% McCain; 56.5% Davis, 41.2% Crist); Coalition District 32 (56.7% Sink, 40.9% Scott; 59.9% Obama, 39.5% McCain; 58.6% Davis, 39.6% Crist); Coalition District 35 (59.8% Sink, 37.8% Scott; 61.4% Obama, 37.8% McCain; 60.1% Davis, 38.0% Crist).

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We conclude that the Senate's decision to draw [**225] this region in a less compact manner is indicative of intent to favor an incumbent and a political party by keeping District 29 essentially the same as its predecessor district. Further, in drawing this area of the state, the Senate violated the compactness requirement by simply keeping the cores of the previously existing districts without performing a functional analysis and endeavoring to draw compact districts that also adhere to Florida's minority voting protection provision.

There is no constitutionally valid justification for Districts 29 and 34. Although the Senate's stated intent in drawing these districts was also to "tie[] communities of similar socioeconomic characteristics along [*679] Interstate 95 and U.S. 1 in Palm Beach and Broward Counties," SJR 1176 at 48, there is no demonstrated community of interest that is being maintained, and, importantly, utilizing political and geographical boundaries and mandating compactness are constitutional requirements, whereas maintaining communities of interest is not. In this case, we conclude that the only reason for maintaining this configuration based on the 2002 Senate plan was to benefit an incumbent and a political party in general. [**226] Districts 29 and 34 are constitutionally invalid.

### Remaining Challenged Districts

We now briefly discuss the remaining challenged districts, all of which we reject because no constitutional violation has been shown.

**Senate District 4**. The FDP summarily challenges District 4, alleging that it could have been drawn in a manner such that the district lines crossed fewer county boundaries. District 4 includes all of Nassau County and then reaches into Duval County twice, stopping at the Duval county line and including any portions of Duval County that are not within Districts 6 or 9. However, in order to satisfy the equal population requirement, the district cannot be contained entirely within Nassau County. Thus, this claim fails.

**Senate District 15**. The Coalition challenges District 15 on the basis that it was configured to favor an incumbent by removing from his district parts of Hillsborough County because he is unpopular in that county. Regardless of whether the facts relied upon by the Coalition are true, there are simply no objective indicators of improper intent. District 15 is not oddly shaped or strangely contorted and the objected-to portion of the district now follows a county boundary [**227] where it did not before. The Coalition has failed to carry its burden with respect to this district.

**Senate Districts 25 and 26**. The FDP summarily asserts that Districts 25 and 26 fail to utilize political and geographical boundaries, because they split multiple counties and cities and because District 26 extends across most of the peninsula from near the Atlantic Ocean to near the Gulf of Mexico. While it may be possible that Districts 25 and 26 could have been drawn to split fewer counties and cities while adhering to the remaining constitutional requirements, the FDP does not demonstrate that this can be done.

**Senate Districts 28 and 33**. The FDP summarily alleges that Districts 28 and 33 retain high percentages of the populations from their predecessor districts in order to benefit the incumbents in those districts. In challenging these districts, the FDP does not point to any other indicators of improper intent, and we deny these challenges.

**Senate District 38**. The Coalition argues that the Legislature over-packed this district with Democrats in order to dilute the Democratic vote elsewhere. District 38 is a black majority-minority district located in Miramar, Miami Gardens, and North [**228] Miami with

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a black VAP of 58.3%. Its predecessor district under the 2002 benchmark plan (old District 33) is also a black majority-minority district with a black VAP of 59.2%. District 38 is visually compact, and the compactness measurements reflect this with a Reock score of 0.55, and an Area/Convex Hull score of 0.83 (closer to 1 is better). The comparable district under the Coalition's alternative plan, Coalition District 33, is not a black majority-minority district, containing a black VAP of just 48.3%, and is visually less compact, with correspondingly lower compactness scores (Reock: 0.33; Area/Convex Hull: 0.69). The Coalition has not carried its burden to demonstrate [*680] that District 38 violates constitutional mandates.

**Senate Districts 35 and 36**. The Coalition contends that Districts 35 and 36 were both drawn to protect the incumbents in those districts in that the Senate plan consolidates black and Hispanic voters into neighboring districts in order to retain in Districts 35 and 36 much of the same population the incumbents in these districts now serve. We conclude that the Coalition has not satisfied its burden of proof, as it appears there could be valid justifications for [**229] the shape of each district. Both districts are defined by their surrounding districts, which include minority districts. Further, neither district is contorted or strangely shaped given these considerations.

District 35 is a coastal district bounded to the east by the Atlantic Ocean and to the west by two majority-minority districts, District 37 (Hispanic VAP of 83.7%), and District 38 (black VAP of 58.3%), as well as District 40, which has a black VAP of 35.1% and a Hispanic VAP of 39.8%. The predecessors to Districts 37 and 38 are also majority-minority districts in the benchmark plan,[62] and District 40's predecessor in the benchmark plan, old District 39, contains similar voting-age populations with a black VAP of 29.1% and a Hispanic VAP of 43.0%. Significantly, District 40 includes three covered counties (Monroe, Collier, and Hendry Counties) for purposes of Section 5 preclearance under the VRA. District 40 reaches around District 37 and District 35 and necessarily affects the configuration of the districts in the Miami-Dade County area.

District 36 is bounded to the east by the Atlantic [**230] Ocean, to the north by District 34, a black majority-minority district (black VAP of 55.8%), and to the south by District 38, black majority-minority district (black VAP of 58.3%). As discussed in more detail above, the predecessor districts to Districts 34 and 38 were also black majority-minority districts. However, as previously discussed, although the Coalition offers an alternative configuration for this area, the corresponding district to District 38 in the Coalition's plan reduces the black VAP below that of a majority and makes the district less compact. We conclude that the Coalition has not carried its burden of proof with respect to these districts.

**d. City of Lakeland**

In the final individual challenge to the 2012 Senate plan, the City of Lakeland alleges that the Legislature violated the requirement of *article III, section 21(b)*, to utilize existing political boundaries where feasible. Lakeland claims that the Senate plan ignored Lakeland's municipal boundaries and bifurcated the city into two Senate districts, District 24 and District 16. Lakeland contends that the record of legislative proceedings is devoid of any factual predicate upon which the Senate could have relied [**231] when it determined that it was not feasible to utilize Lakeland's existing municipal

[62] Old District 36 with a Hispanic VAP of 79.2% and old District 33 with a black VAP of 59.2%.

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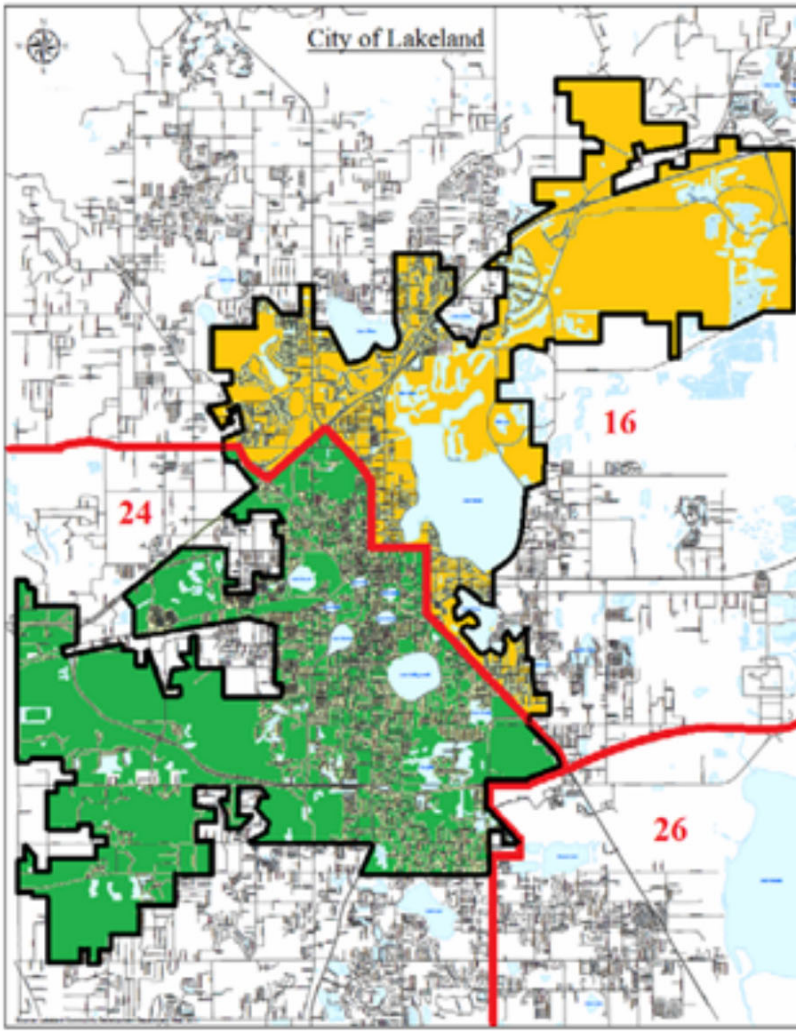
boundaries.[63] In contrast to other areas of the state where the splitting of municipalities was necessitated by population sizes and the close proximity between major municipalities, Lakeland has asserted that such a justification does not apply to it because of its location.

[*681] As argued by Lakeland, the Senate's failure to utilize Lakeland's municipal boundary split the city into two pieces. Lakeland asserts that the western piece consists of approximately 40.9 square miles, contains 63,292 citizens, and is included in District 24 (old District 21). The eastern piece consists of approximately 33.8 square miles, contains 34,130 citizens of Lakeland and is included in District 16 (old District 15). In addition, the southwest portion of Lakeland also borders District 26 (old [**232] District 17), but that district does not dissect any part of Lakeland.

The below map from the Lakeland's brief depicts graphically the split of Lakeland:




As described in Lakeland's brief:

> Senate District 24 includes portions of western Polk and eastern Hillsborough counties, along with a substantial majority of Manatee County. Beginning in the northwest corner of the district in eastern Hillsborough County, the district includes *all* of the municipal boundaries of Plant City. Heading approximately ten (10) miles east from Plant City into western Polk County, *the northeastern corner of the district boundaries cuts directly through the center of the City of Lakeland, taking the more populated southwestern portion of the City, while leaving the northeastern half behind*. Heading south from Plant City and Lakeland, the district captures an approximately fifteen (15) to twenty (20) mile

[63] Although the City of Lakeland also claims that the Senate plan favors incumbents by giving each incumbent a protected district, it does not rely on any specific allegations regarding the two districts in which Lakeland is split. Instead, it relies on an argument made by the Coalition, which does not reference Lakeland specifically.

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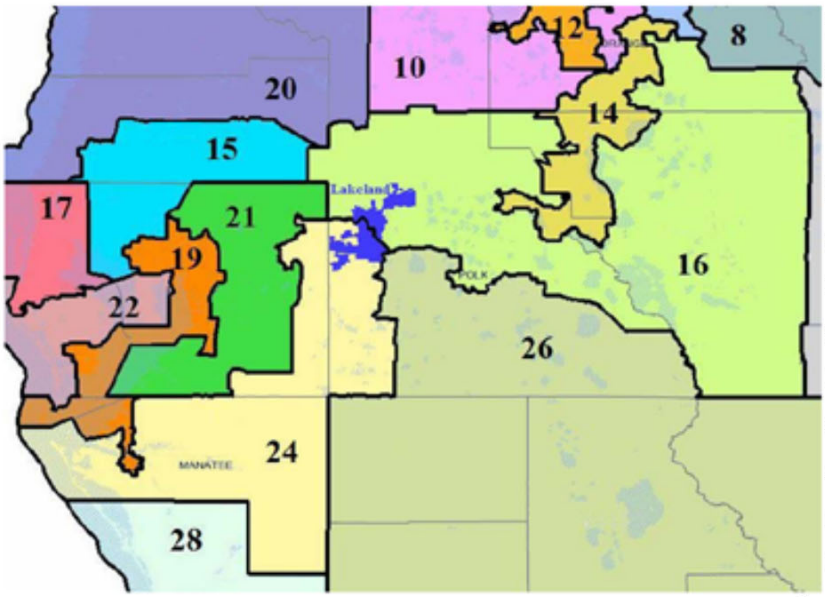
wide swath of mostly rural land in eastern Hillsborough and western Polk counties, widening on the Hillsborough side just before the Manatee County border. Upon [*682] reaching the southern borders of Polk and Hillsborough counties, the district expands to include virtually all of Manatee County. The district boundaries [**233] follow the entire eastern, western, and southern borders of Manatee County, with only a small portion in the northwest of the county omitted from this district. Along the Manatee County coast, the district captures the entire city limits of several beachfront cities, including Anna Maria, Holmes Beach, and Bradenton Beach, and the vast majority of Bradenton and Palmetto. Overall, Senate District 24 is approximately forty-five (45) miles wide at its widest point (the entirety of Manatee County), with a maximum height of approximately fifty-five (55) miles (from Lakeland to the southern border of Manatee County).

The below map depicts the City of Lakeland in context of the surrounding districts (Lakeland is on the border between Districts 16 and 24, near the center of the map):




While Lakeland asserts that the Senate plan does not comply with *article III, section 21(b)*, because it failed to utilize its municipal boundary, the Florida Constitution does not require the Legislature to use every municipal boundary. The requirement of *section 21(b)* is that the Legislature should utilize political and geographical boundaries where feasible.

As we discussed in our analysis of this standard, unlike [**234] the House's approach, the Senate failed to adhere to any consistent definition of "political and geographical boundary." This is especially evident because in the case of District 24, the Senate placed part of inland Lakeland with the coastal communities of Manatee County, whereas in Districts 1 and 3, the Senate justified the split of five counties by claiming it wanted to keep the coastal communities together.

[*683] The only explanation for the splitting of Lakeland on this record occurred during the Senate floor debate when a senator inquired as to why the City of Lakeland had been divided. In response, the Chair of the Senate Committee on Reapportionment replied that the Senate's first consideration was creating two minority districts in Orlando and one minority district in Tampa and from there, he described the various boundaries of including those places where the political and al boundaries were utilized. He concluded,

istricting as you have suggested in your on requires us to balance priorities and this of the state as you have suggested does ent a convergence and a reconciliation of different priorities. . . . And I think [**235] you an excellent argument . . . that we could have hat, but at this point any change to this part region would have ripple [effects] throughout tire area and in the bordering districts, and we believe that this arrangement that is in the

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proposal represented the best reconciliation of priorities.

Because the Senate operated under an inconsistent definition of "political and geographical boundaries" and did not have the benefit of this Court's interpretation of this important constitutional requirement, we conclude that when the Senate drew this portion of the plan, it did so with an incorrect understanding of both compactness and utilizing political and geographical boundaries. Also, to the extent that the ripple effect referred to was a result of concerns for minority protection, because no functional voting analysis was undertaken, the Senate's conclusions as to that constitutional principle are questionable. Because we are declaring the Senate plan invalid based on a number of reasons, the Senate will have the opportunity to review Districts 16 and 24 and, after applying the correct definitions of these terms, determine whether it is feasible to utilize the [**236] municipal boundaries of Lakeland.

### e. Conclusion as to the Senate Plan

We hold that the Senate plan is invalid. In doing so, we consider the fact that the Senate failed to conduct a functional analysis as to regression in order to properly determine when, and to what extent, the tier-two requirements must yield to avoid conflict with Florida's minority voting protection provision. Moreover, as to the requirements of compactness and utilization of existing boundaries, the Senate's expansive interpretations—interpretations we reject—and inconsistent use of these standards undermined the purpose of these requirements. Additionally, we conclude that the Senate plan is rife with objective indicators of improper intent.

We have examined and declared Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 to be in violation of constitutional requirements. We have also expressed our concerns with respect to the City of Lakeland. Finally, we declare the numbering scheme to be invalid because it was intended to benefit incumbents by making them eligible to serve for longer periods of time than they would have otherwise been eligible to serve. Accordingly, the Senate plan does not pass constitutional muster, [**237] and it is our duty under the Florida Constitution to declare it invalid.

## IV. CONCLUSION

The Fair Districts Amendment changed the constitutional framework for apportionment, introducing significant reforms in the drawing of legislative districts. Before the passage of the Fair Districts Amendment in 2010, there is no question that the House and Senate plans would have passed constitutional muster and [*684] both would have been validated by this Court.

The citizens, through our state constitution, have now imposed upon this Court a weighty obligation to measure the Legislature's Joint Resolution with a very specific constitutional yardstick. The constitutional imperatives set forth in *article III, sections 16* and *21, of the Florida Constitution* are the instructions given to the Legislature by the citizens, mandating how apportionment plans are to be drawn. These instructions are a further expression of the will of this state's citizens to ensure that their right to elect representatives is not frustrated as a result of partisan favoritism or incumbent protection.

The citizens have expressed their will, requiring the Legislature to "redistrict in a manner that prohibits favoritism or discrimination, [**238] while respecting geographic considerations" and "to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts . . . are avoided." *Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d at 181, 187-88*

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(plurality opinion). The new constitutional provisions seek to level the playing field in how legislative districts are drawn. These mandates are specific, and the citizens of this state have entrusted to the Supreme Court of Florida the constitutional obligation to interpret the constitution and ensure that legislative apportionment plans are drawn in accordance with the constitutional imperatives set forth in *article III, sections 16* and *21*. A failure to define these constitutional imperatives in a manner consistent with the will of the voters would frustrate the intended purpose of this new amendment.

We conclude that the challengers have demonstrated that the Senate plan, but not the House plan, violates the constitutional requirements. We therefore declare the Senate plan constitutionally invalid and the House plan constitutionally valid. The language of Senate Joint Resolution 1176 establishes [**239] that the Legislature intended the Senate and House plans to be severable from each other in the event either plan was held invalid. *See* SJR 1176, § 7, at 669.

The Court recognizes that this opinion represents the first time since the passage of the Fair Districts Amendment that this Court has judicially interpreted the newly added constitutional provisions of *article III, section 21*. While we commend the Legislature for its efforts to interpret these standards, we also acknowledge that the Legislature lacked the benefit of our guiding construction. This Court understands that its obligations are not just to rule on the facial validity of the standards in this case, but to ensure that this decision charts a reliable course for the Legislature and the judiciary to follow in the future.

We have interpreted each of the new standards in this opinion, which are set forth in the two tiers of *article III, section 21(a)*, *(b)*. The first tier, contained in *section 21(a)*, lists the following three requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of [**240] denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. We have explained as follows with respect to these standards. The Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. By its express terms, Florida's [*685] constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually. The minority voting protection provision imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice. Finally, districts must be contiguous.

The second tier, contained in *section 21(b)*, lists the following three requirements: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) districts [**241] shall utilize existing political and geographical boundaries where feasible. These requirements circumscribe the Legislature's discretion in drawing district lines to guard against gerrymandering, requiring it to conform to traditional redistricting principles. The Legislature is required to make districts as nearly of equal population as is practicable, but deviations from equal population may be based on compliance with other constitutional standards. Compactness refers to the shape of the district; the goal is to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. Compactness can be evaluated both visually and by

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employing standard mathematical measurements. As to utilizing political and geographical boundaries, we accept the House's view of geographical boundaries as those that are easily ascertainable and commonly understood, such as "rivers, railways, interstates, and state roads." Strict adherence to these standards must yield if there is a conflict between compliance with them and the tier-one standards. Importantly, the extent to which the Legislature complies with the requirements contained in tier two serves as an objective indicator [**242] of impermissible legislative purpose proscribed under tier one (e.g., intent to favor or disfavor a political party or an incumbent).

Because we have now defined Florida's new constitutional standards through this opinion, this Court has provided the Legislature with parameters for the application of the standards to the apportionment plan. Through our interpretation and review, we have attempted to provide the Legislature with direction as to the specific constitutional problems that we conclude have been proven and to the general problems with the entire Senate plan, including the renumbering of the districts. As the next phase of this apportionment process begins, we are confident the Legislature will apply these standards in a manner consistent with the interpretation we have heretofore provided, keeping as its goal a Senate plan that would pass constitutional muster. The Court views its constitutional obligation of drawing a plan to be the course of last resort.

In accordance with *article III, section 16(d)*, the Governor and the Legislature must now follow the procedures enumerated therein, which govern the process that ensues when the Supreme Court of Florida declares an apportionment [**243] plan to be constitutionally invalid. The Legislature is now tasked by the Florida Constitution with adopting a new joint resolution of apportionment conforming to the judgment of this Court. Because we have declared the House's apportionment plan to be valid, the only plan that needs to be redrawn by the Legislature is the Senate plan.[64]

[*686] SeThe Coalition has requested that this Court provide "clear instructions as to how to remedy the breach" if the Court were to find the plans to be "non-compliant." However, the Court's role at this time is not to dictate the apportionment plan that the Court would draw, but to provide the Senate with sufficient guidance in our interpretation of the standards and our application of those standards.

We have held that Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 are constitutionally invalid. The Legislature should remedy the constitutional problems with respect to these districts, redrawing these [**244] districts and any affected districts in accordance with the standards as defined by this Court, and should conduct the appropriate functional analysis to ensure compliance with the Florida minority voting protection provision as well as the tier-two standards of equal population, compactness, and utilization of existing political and geographical boundaries. As to the City of Lakeland, the Legislature should determine whether it is feasible to utilize the municipal boundaries of Lakeland after applying the standards as defined by this Court. In redrawing the apportionment plan, the Legislature is by no means required to adopt the Coalition's alternative Senate plan. Finally, we have held that the numbering scheme of the Senate plan is invalid. Accordingly, the Legislature should renumber the districts in an incumbent-neutral manner.

Given the absolute urgency in complying with the strict

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[64] Accordingly, any ultimate responsibility of the Court regarding reapportionment would be limited to the redrawing of the Senate plan, and this would occur only if the revised Senate apportionment plan is declared to be invalid. *See art. III, §16(f), Fla. Const.*

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time limits set forth in *article III, section 16(c)*, stating that this Court "shall enter its judgment" within thirty days from the filing of the Attorney General's petition, our prior practice when determining the validity of the Legislature's joint resolution of apportionment has been to not allow [**245] a motion for rehearing.

In accordance with *article III, section 16(c), of the Florida Constitution*, the Court enters this declaratory judgment declaring the apportionment plan of the House of Representatives as contained in Senate Joint Resolution 1176 to be constitutionally valid under the Florida Constitution and declaring the apportionment plan of the Senate as contained in Senate Joint Resolution 1176 to be constitutionally invalid under the Florida Constitution. As contemplated by the Florida Constitution, in accordance with *article III, section 16(d)*, the Legislature now has the task to "adopt a joint resolution conforming to the judgment of the supreme court." *Art. III, § 16(d), Fla. Const.*

No motion for rehearing shall be entertained. This case is final.

It is so ordered.

LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

LEWIS, J., concurs with an opinion.

LABARGA, J., concurs with an opinion.

PERRY, J., concurs with an opinion.

CANADY, C.J., concurs in part and dissents in part with an opinion, in which

POLSTON, J., concurs.

**Concur by:** LEWIS; LABARGA; PERRY; CANADY (In Part)

## Concur

LEWIS, J., concurring.

While I concur with the majority decision, I write separately to address two aspects of this process, [**246] the second of which also applies to the entire reapportionment process in general. First, I commend the parties for superb briefing of the issues, as well as the professional demeanor and articulate presentations during oral argument. The quality of legal representation has been exemplary and served to crystallize the issues presented to enable this Court and the parties to engage in a thoughtful and intelligent dialogue.

[*687] Second, it must be recognized that the elements and standards that must be utilized in review of legislative plans for reapportionment have been expanded dramatically by the recent adoption of *article III, section 21 of the Florida Constitution.* Thus, the redistricting process now involves a complex series of elements that this Court must evaluate to determine the validity of reapportionment plans. We have the constitutional obligation to conduct, to the best of our ability, the heightened review contemplated and expressed by the citizens of Florida who voted to add this amendment to our constitution. Further, in this first review under the new constitutional standards, we necessarily must engage in an analysis and application of those new standards in the context [**247] of this redistricting. However, despite our duty to review legislative reapportionment plans for constitutional compliance, I write to again reiterate and emphasize that this Court is limited to resolving only *facial* challenges to such plans.

In my concurrence to the majority decision approving the 2002 legislative reapportionment plans, I presented the historical background of the drafting of the 1968

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Florida Constitution. *See* *In re Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 834-36 (Fla. 2002)* (Lewis, J., concurring). This history revealed the intent of the drafters at that time in two respects with regard to the scope of this Court's review pursuant to *article III, section 16 of the Florida Constitution.* First, the Constitutional Revision Commission sought to remove the bulk of litigation with regard to redistricting from the federal court system and to place it within the state court system. *See id.* (Lewis, J., concurring).[65] Second, and more pertinent to the plan we consider today, this history revealed that beyond the consecutive and territorial requirements enunciated in *section 16(a)*, the drafters envisioned the scope of this Court's review of legislative [**248] reapportionment plans to be limited solely to whether the plans complied with the one person, one vote requirement of the *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution*. *See* *House Joint Resolution 1987, 817 So. 2d at 834-36* (Lewis, J., concurring). For this reason, the strict time limit of thirty days could be considered facially reasonable for this Court to complete the review required by *article III, section 16*, as contemplated by the drafters.

In my earlier concurrence, I addressed this structural temporal concern and concluded that the perception of the public [**249] with regard to this Court's ability to review plans of reapportionment conflicted with the time and structural limits placed upon this Court by the Florida Constitution:

> Based upon the knowledge and expectations of the drafters, there would be no need for this Court to engage in the acceptance and adversarial testing of evidence, fact finding, or any other significant factual examinations of reapportionment plans.
>
> In truth, this Court is not designed, nor is it structured, to engage in these types of activities. . . .
>
> [*688] The issue today, therefore, is how this Court should address the collision of the framework of limited review enacted by the drafters of the 1968 Constitution, and the factual depth and complexity of the challenges brought by the opponents of the 2002 reapportionment plan. Certainly, the opponents' claims are based upon allegations of extraordinarily involved, fact-specific wrongs effected by the Legislature in drawing the proposed legislative districts. To be sure, advancing technology has also driven the process. This Court, however, is constrained by the limitations and parameters of *article III, section 16(c)*. Due to the time restrictions and structural limitations imposed [**250] by the Florida Constitution, and absent clear error, *we have been afforded neither the constitutional time nor constitutional structure to engage in the type of fact-intensive, intricate proceedings required to adjudicate the vast majority of the claims presented by the opponents here or the responses of the legislative bodies. The parameters of our review simply do not allow us to competently test the depth and complexity of the factual assertions presented by the opponents*.

*Id. at 835-36* (Lewis, J., concurring) (emphasis added). Although ten years have elapsed since I first suggested the concerns with regard to fact-intensive challenges to reapportionment plans, nothing has improved and,

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[65] The drafting of the 1968 Florida Constitution occurred after three successive reapportionment plans were invalidated by the federal courts on the basis of equal protection violations. A federal district court ultimately assumed the responsibility for redistricting the State of Florida. *See* *id. at 833-34* (Lewis, J., concurring); *see also* *Swann v. Adams, 263 F. Supp. 225, 226-28 (S.D. Fla. 1967)* (noting the "[j]udicial apportionment of the Florida Legislature is required" and delineating a reapportionment plan that provided for 48 Senate districts and 119 House of Representative districts).

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indeed, with the addition of multiple new constitutional requirements than were mandated ten years before, *see art. III, § 21, Fla. Const.*, my concerns are equally, if not more, applicable in 2012.

I authored the opinion that authorized that the amendment that delineated additional standards for legislative redistricting be placed on the 2010 election ballot. *See Advisory Op. to Att'y Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 175 (Fla. 2009)* (plurality opinion). This [**251] amendment, which has now become *article III, section 21 of the Florida Constitution*, was intended to rectify the absence of constitutional standards to safeguard against alleged political gerrymandering and to respect geographic boundaries and compactness. Notably, in 2002, this Court rejected an equal protection challenge to a redistricting plan that at that time divided Marion County into four Senate districts. *See Florida Senate v. Forman, 826 So. 2d 279, 280 (Fla. 2002)*. This Court reversed the circuit court's determination that the Senate plan constituted an impermissible political gerrymander. In reaching this decision, the Court noted that, unlike other state constitutions, the Florida Constitution contained no provisions requiring that the Legislature draw districts that treat similarly situated communities in a similar matter or give consideration to local boundaries:

> The appellees' actual complaint is that the Senate plan should be declared unconstitutional because the Legislature ignored traditional principles of redistricting such as compactness and preservation of communities of interest. . . . However, in *House Joint Resolution 1987*, this Court specifically rejected this [**252] type of claim: "[N]either the United States nor the Florida Constitution requires that the Florida Legislature apportion legislative districts in a compact manner or that the Legislature preserve communities of interest." *817 So. 2d at 831*. *See also Shaw v. Reno, 509 U.S. 630, 647, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993)* ("[T]raditional districting principles such as compactness . . . and respect for political subdivisions . . . are important not because they are constitutionally required—they are not . . . ."); [*In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session, [*689] 263 So. 2d 797, 801 (Fla. 1972)]* ("[T]here is no requirement that district lines follow precinct or county lines.").

*Id. at 282*.

The 2010 amendment reversed those legal principles and incorporated political and geographic boundary and compactness standards, along with others, into the Florida Constitution. *See Establishing Legislative Dist. Boundaries, 2 So. 3d at 181* ("The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations."). By adopting additional redistricting [**253] standards to the Florida Constitution, it is clear that the citizens of Florida intended that this Court review legislative apportionment plans for constitutional compliance in greater detail than ever before. *See id. at 183* (noting that *article III, section 21*, "change[s] the standard of review to be applied when either the attorney general seeks a 'declaratory judgment' with regard to the validity of a legislative apportionment, or a redistricting plan is challenged").

It was the decision of the citizens of Florida to implement the desired changes to our state constitution through the constitutional initiative process. We must never understate that the Florida Constitution belongs to the people of Florida. Therefore, we as a Court are required to conduct the heightened review envisioned by the citizens of our State when they voted to amend our state constitution. Thus, *to the extent possible*, we must evaluate the legislative reapportionment plans to

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determine whether they comply with the standards delineated in *article III, section 21*, e.g., whether the plans were drawn with the intent to favor or disfavor a political party or an incumbent; whether the plans were drawn with the intent [**254] or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process; whether the plans diminish the ability of language or racial minorities to elect representatives of their choice; whether the districts in the plans are compact; whether the plans utilize existing political and geographical boundaries where feasible; and whether the districts are as nearly equal in population as is practicable.

At the same time, I emphasize, as I did in 2002, that our current constitutional structure, with the thirty-day time limitation, does not permit this Court to develop, consider, and address all factual challenges to the legislative plans. Challenges that require expert testimony and complex factfinding are neither workable nor appropriate in this Court. Nothing in *article III, section 21*, expanded the authority or jurisdiction of this Court to adjudicate as-applied challenges in the redistricting process. Were the opposite true, challenges that may warrant and should receive adversarial testing in a judicial forum would be relegated to hollow legal arguments without substance before this Court. The deadline and structural limitations [**255] placed upon this Court would inevitably result in the frustration of an intelligent, purposeful review of any factual challenge to reapportionment plans proposed by the Legislature.

This Court is not structurally equipped to conduct complex and multi-faceted analyses with regard to many factual challenges to the 2012 legislative reapportionment plan. As was the case in 2002, we can only conduct a facial review of legislative plans and consider facts properly developed and presented in our record. *See House Joint Resolution 1987, 817 So. 2d at 824* (emphasizing that the Court would only pass "upon the facial validity of the plan and not upon any as-applied challenges"). In *Brown v. Butterworth, 831 So. 2d 683 [*690] (Fla. 4th DCA 2002)*, the Fourth District Court of Appeal articulated the distinction between a facial challenge to a reapportionment plan and an as-applied challenge:

> First, there is the facial challenge, in which a party seeks to show that, *as written*, the plan explicitly violates some constitutional principle. Second, there is an as-applied challenge, in which a party seeks to establish that, *based on facts existing outside the plan*, and as applied to one or more districts, the [**256] plan violates the federal or state constitutions, or the Voting Rights Act of 1965 (VRA).

*Id. at 686* (footnote omitted) (emphasis added). In the context of a challenge to a statute, the First District Court of Appeal explained that, "A facial challenge considers only the text of the statute, *not its application to a particular set of circumstances*, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards." *Ogborn v. Zingale, 988 So. 2d 56, 59 (Fla. 1st DCA 2008)* (emphasis added) (quoting *Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004))*.

Thus, our proper scope of review encompasses those challenges that may be determined from the reapportionment maps themselves and objective statistical data before us. During these expedited proceedings, modern technology has provided this Court with an abundance of information in a very short period of time. Nevertheless, despite the ease of access to data, the constitutional time limit under which this Court is constitutionally required to operate continues to provide a less than optimum forum to address for the first time extremely complex issues related [**257] to

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whether the reapportionment plans comply facially with the standards articulated in *article III, section 21 of the Florida Constitution.*

However, because we have been provided sophisticated technology, we are able to recognize patterns—or a lack thereof—when we evaluate the facial validity of the plans before us. We are also able to draw conclusions based upon those observations. The majority decision today reflects that while a variety of different rationales and concepts may be available for application in redistricting, the rationales or concepts actually used must be applied *consistently*. Applying a particular rationale in one part of Florida, but a completely different rationale in another part of the state, creates legitimate constitutional questions as to the boundaries drawn and the justifications for those boundaries as asserted by the drafters. Where a reapportionment plan adheres consistently to generally acceptable rationales and concepts with regard to the drafting of district boundaries, that plan is less likely to be called into question based upon a facial examination of the maps and objective statistical data.

The dissent contends that the Florida Constitution does [**258] not require consistency in the drawing of legislative reapportionment maps, and consistency need not be considered in the redistricting process. However, the dissent overlooks that where there is a marked absence of consistent logic in the drawing of legislative boundaries, the asserted reasons for constitutional deviations become excuses to avoid the standards mandated by our constitution. In this way, a lack of consistency directly contravenes the legitimacy of a plan.

Today's decision also demonstrates that terms used within the newly adopted constitutional standards need definitional parameters. In *Establishing Legislative District Boundaries*, we stated the following with regard to the constitutional standard [*691] that "districts shall, where feasible, utilize existing political and geographical boundaries":

> Although the phrase "political and geographical boundaries" used in the proposed amendments may be technically broader than the "city, county, and geographical boundaries" phrase used in the [ballot] summaries, we conclude that this differing use of terminology could not reasonably mislead voters. The sponsor asserts that the terms "city" and "county" are utilized in the summaries [**259] because they are more understandable to the average citizen than the legal concept of "political" boundaries. We agree that most voters clearly understand the concept of a city or county boundary, but may be perplexed to define exactly what a "political boundary" may encompass. *See Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982)* (noting that voters "must be able to comprehend the sweep of each proposal" (quoting *Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976))*). The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts—such as one senate district that was challenged in *Resolution 1987, 817 So. 2d at 824-25* are avoided. Since the "city" and "county" terminology honors this community-based standard for drawing legislative and congressional boundaries, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

*2 So. 3d at 187-88* (footnote omitted). The majority decision further clarifies that [**260] the term "geographical boundaries" does not encompass every

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tree, creek, railroad track, or road—no matter how small or obscure. Instead, the boundaries relied upon by legislators to draw district boundaries must be both logical and objectively reasonable.

The dissent asserts that the decision of the majority to reject the Senate reapportionment plan is based upon pure speculation and conjecture. I disagree and find that such political rhetoric does not assist an intelligent analysis and discussion. In the majority decision today, this Court rejects the Senate plan based *only* upon a facial examination of the reapportionment maps and the objective data provided. Therefore, contrary to the contention of the dissent, the Court has properly exercised judicial restraint in a manner that was both warranted and constitutionally necessary. It is obvious from the face of the maps and the data in our record that serious violations of *article III, section 21 of the Florida Constitution* have occurred. Moreover, we have a constitutional duty to recognize these violations and require that the Senate plan be amended so that the new standards adopted by the citizens of Florida are effectuated. Indeed, [**261] we would be derelict in our obligation under the Florida Constitution if we were to ignore these violations. Contrary to the suggestion by the dissent, there is no joy or pleasure in this exercise; we follow the constitution as the will of the people of Florida.

In conclusion, I recognize that the Florida Constitution of 2012 contains more elements and standards for redistricting than it did a decade ago, and the citizens of Florida expect this Court to conduct a more detailed and probing review of legislative plans of reapportionment than ever before. While we as a Court must fulfill our constitutional obligations to the citizens of Florida to the fullest extent possible, our review must not extend beyond [*692] that which our constitutional structure and the limited time allotted under the constitution permits. Today, this Court has attempted to maintain that delicate, proper balance and conducted only a limited facial review of the joint resolution through examination of the reapportionment maps and objective statistical data. Therefore, I concur with the decision of the majority to approve the plan submitted by the Florida House of Representatives, but reject the plan submitted by the [**262] Florida Senate.

LABARGA, J., concurring.

I wholeheartedly concur with the scholarly and well-reasoned majority opinion which, in painstaking detail, fulfills the mandate set forth by the Constitution of Florida and its new redistricting amendment. It is important to keep in mind that the majority opinion approved the House plan because it met constitutional muster. It disapproved the Senate plan, not in haphazard fashion, but after carefully examining each district and detailing the reasons for disapproving specific districts. I write primarily to respond to the dissent's position that the thirty-day period provided for this proceeding by *article III, section 16*, does not afford this Court sufficient opportunity to examine the plans.

While it would have been preferable to have the luxury of more time, we were able, given advances in technology, to carefully examine both plans and make a facial determination based on this undisputed data within the time allotted by the constitution. It would be a complete and unjustified derogation of our constitutional obligation if we ignore our constitutional mandate to examine the plans to determine whether they meet constitutional muster by simply [**263] saying we do not have the time. Moreover, it is illogical to conclude that we should ignore a clear mandate now contained in the Florida Constitution to address these new provisions, especially where a different process is not available within the constitutional time frame. This reasoning renders the new constitutional amendment essentially meaningless and runs counter to the intent of *article III,*

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section 16(c), that the validity of the plans be timely determined to provide for a more orderly election process.

The dissent also states that we conduct this constitutional proceeding as an appellate court and should therefore avoid consideration of factual matters. This ignores the provision in article III, section 16(c), that requires this proceeding to be brought as an original proceeding in this Court. In this original proceeding, we have before us a plethora of census and other undisputed data upon which to evaluate the actions of the Legislature in creating these plans. Based on this data, the majority has, in a careful and considered fashion, determined that the House plan is valid and that the Senate plan suffers constitutional flaws that require us to declare it invalid. Our responsibility [**264] to the citizens to faithfully carry out our constitutional duty to the fullest extent possible—with the data and resources available to us in the proceeding dictated by the constitution—is made more pressing by the additional standards now contained in the newly enacted Fair Districts amendment. For these reasons, I write to concur.

PERRY, J., concurring.

I concur fully with my esteemed colleague, Justice Pariente, but write to highlight concern regarding the appearance that "the Legislature is utilizing its interest in protecting minority voting strength as a shield." Majority op. at 65. While nothing in the record before us has proven that the Legislature so acted, I write to caution against even the appearance of the [*693] Legislature diminishing the ability of minority voters to elect effective representation. The appearance of impropriety is as bad as impropriety itself. I am fearful that we have cloaked ourselves in a permissive standard of review where the Legislature need not demonstrate its adherence to each of the new constitutional mandates.

It concerns me that under the guise of minority protection, there is—at the very least— an appearance that the redistricting process sought [**265] to silence the very representatives of the people the Legislature indicates it is trying to protect.[66] For example, during floor debate one such representative, Senator Arthenia Joyner, rose in opposition to the redistricting plan, stating:

> I believe that [the reapportionment plan] was prepared in violation of Florida's Redistricting standards. Specifically I believe the Legislature is poised to use the pretext of minority protection to advance an agenda that seeks to preserve incumbency and pack minority seats in order to benefit a particular party.
>
> Packing a district with more minority voters than is necessary to create an opportunity to elect representatives of choice bleaches surrounding districts and limits the influence of minorities overall.
>
> . . . .
>
> Our maps actually fail to create new opportunities for minorities to participate in the political process and elect their representatives of choice. While this plan does guarantee a certain number of black Legislators will be elected, it also ensures that we will be in a perpetual minority in the House and the Senate with little ability to advance an agenda that will benefit the very people we represent.
>
> I believe this approach will, [**266] as it has in the past, continue to diminish the ability of our

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[66] I note that each of the House members of the Florida Conference of Legislative Black State Legislators voted against the reapportionment plan. Floor Vote on SJR 1176, 2012 Session (Fla. Feb. 3, 2012), http://www.myfloridahouse.gov/Sections/Bills/floorvote.aspx?VoteId=12689&Bill [**267] Id=48155&&.

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> communities of color to impact the legislative process. The Legislature has shown a clear indifference to many of the issues we have fought for because we are a part of such a small minority. They just do not have to listen to our constituents.
>
> . . . .
>
> . . . Ironically at precisely the same time so many were declaring their support of the Voting Rights Act. I am not aware of a single member of the Legislature who spoke out against the current Secretary of State's efforts to declare Section V of the Voting Rights Act inapplicable to the regions in Florida that have had heightened histories of racism.

Having thus expressed her concerns that minorities were packed into districts in numbers greater than necessary for them to elect the representative of their choice, thereby limiting their ability to influence adjacent districts, she was told "tough luck."

Likewise, Senator Nan Rich rose in opposition, stating eloquently:

> Two years ago . . . the voters could not have spoken louder or with more clarity. They said they were tired of elected officials drawing seats that favored themselves or their party of choice and their voices could not have been stronger.
>
> In an election when our Governor failed to get even a majority of the [*694] electorate, Floridians agreed on the Fair District standards by 63 percent, yet we are here today considering maps that I believe are drawn in violation of Fair District standards.
>
> . . . .
>
> While everybody professed their great desire to support minority voters, I agree with my friend, Senator Joyner, who believes that for too long the so-called protection of minority voters has been used by this Legislature as a pretext to draw seats that preserve incumbency and advance the interest of a particular political party.
>
> Bleaching seats in the name of minority protection is a practice that must be resisted. It ultimately diminishes the impact minority voters have in the governance of this state and makes it easy for communities of color to be neglected by the vast majority of elected officials.
>
> . . . .
>
> In spite of [**268] all of that I believe the maps that are being passed out today look a lot like the ones the voters were hoping would be gone when they passed Amendment 6. This plan still protects incumbents. It still gerrymanders, it still has districts that meander around the state with no apparent logic and it will still very likely result in a Congressional delegation that is grossly disproportionate to the partisan makeup of this state.

Certainly, the Senate was tasked with maintaining the delicate balance between righting an historical, racist wrong and moving forward into an era of racial equality where one person, one vote is not quantified by the color of the voter. However, as stated by Justice Pariente:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal [**269] that the *Fourteenth* and *Fifteenth Amendments* embody, and to which the Nation

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> continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

Majority op. at 66 (quoting *Shaw, 509 U.S. at 657*).

Further, while I also agree that "a minority group's ability to elect a candidate of choice depends upon more than just population figures," majority op. at 62, 66, I cannot agree that there was a rational basis for the Senate to decide to turn a blind eye to population data when drawing their plan, *see* concurring in part and dissenting in part op. at 209. By refusing any attempt to draw more compact districts while maintaining the required racial proportions, there is at least the appearance that the Senate thumbed its nose at the will of the people. This Court finds that on this record, "the Senate plan does not facially dilute a minority group's voting strength or cause retrogression under Florida law," majority op. at 126; however, when the outcome appears to be antithetical to minority interest, I am skeptical when the burden is not on the Legislature to demonstrate that despite such appearance, the underlying intent is ultimately [**270] valid. Because the Senate now has "the benefit of our opinion when drawing its plan[,]" majority op. at 129, it is my hope that there is no further appearance of misuse of Florida's minority voting protection provision.

[*695] With all due respect, Justice Canady's reliance on *Perry* is misplaced. Significantly, there the federal court was tasked with redrawing the districts for the State of Texas; it was not a state court review under the state constitution. Secondly, the claims were presented under the Federal Voting Rights Act and the United States Constitution. The Supreme Court was balancing the right of the State of Texas to undergo the redistricting process without substituting its policies for that of the United States Supreme Court. *Perry, 132 S. Ct. at 941* ("This Court has observed before that 'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'") (quoting *Abrams v. Johnson, 521 U.S. 74, 79, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997)*).

Here, we are tasked with reviewing [**271] the reapportionment plan by interpreting Florida's new constitutional minority protection provision. The people of Florida voted to add these new redistricting mandates. They "could not have spoken louder or with more clarity." As recognized by the majority, the citizens of Florida have entrusted us to interpret and apply these constitutional standards. We cannot simply be a rubber stamp for the Legislature's interpretation of the constitution. We therefore "recognize[] our independent constitutional obligation to interpret our own state constitutional provisions." Majority op. at 52.

**Dissent by:** CANADY (In Part)

## Dissent

CANADY, C.J., concurring in part and dissenting in part.

I concur in the majority's ruling that the redistricting plan for the House of Representatives is valid, but I dissent from the ruling that the plan for the Senate is invalid. With respect to the Senate plan, I conclude that the opponents have failed to overcome the presumption that a redistricting plan adopted by the Legislature is constitutional. Because it has not been shown that the Legislature's choices in establishing the district lines in the Senate plan are without a rational basis under the applicable constitutional requirements, [**272] I would validate that plan.

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I.

This Court has recognized that legislative enactments are ordinarily "clothed with a presumption of constitutionality." *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008)*. When the constitutional validity of a legislative enactment is challenged, "[t]o overcome the presumption [of constitutional validity], the invalidity must appear beyond reasonable doubt." *Id.* (quoting *Franklin v. State, 887 So. 2d 1063, 1073 (Fla. 2004)*). We applied this presumption of constitutionality in our review of legislative redistricting plans in 1972, when we considered the first case in which we exercised our authority under *article III, section 16 of the Florida Constitution.* In that decision we specifically acknowledged the controlling principle that a legislative enactment should not be declared unconstitutional "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." *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session, (In re Apportionment—1972), 263 So. 2d 797, 805-06 (Fla. 1972)* [**273] (quoting *City of Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, 772 (Fla. 1914)*). We also "emphasize[d] that legislative reapportionment is primarily a matter for legislative consideration and determination" [*696] and that "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." *Id. at 799-800*.

In 2002—in our most recent decision under *article III, section 16*—we rejected the argument "that the Legislature's joint resolution of apportionment is not presumptively valid." *In re Constitutionality of House Joint Resolution 1987*, (*In re Apportionment—2002*), *817 So. 2d 819, 825 (Fla. 2002)*. We unequivocally reaffirmed the view we adopted in 1972, holding "that the joint resolution of apportionment identified in *article III, section 16, Florida Constitution*, upon passage is presumptively valid." *In re Apportionment—2002, 817 So. 2d at 825*.

In our 2002 decision we also stated that under *article III, section 16*, our review "is extremely limited." *In re Apportionment—2002, 817 So. 2d at 824*. Recognizing the inherent [**274] limitations of a review process conducted by an appellate court during a thirty-day period, we acknowledged that we can "only pass upon the facial validity of the plan." *Id.* We specifically held that the *article III, section 16*, "proceeding before this Court is not the proper forum to address such a fact-intensive claim" as that presented by a claim under the Voting Rights Act of 1965, *42 U.S.C §§ 1973-1973q (2006)*, or by a claim of political gerrymandering. *In re Apportionment—2002, 817 So. 2d at 831*. The majority of the panel took the view that under *article III, section 16*, the Court had "not been afforded a structure to competently address claims that cannot be determined from the [redistricting] plan itself." *In re Apportionment—2002, 817 So. 2d at 836* (Lewis, J., concurring).

With today's decision, the majority of this Court effectively abrogates these precedents that recognized the circumscribed nature of the thirty-day review process under *article III, section 16*, and the presumption of constitutionality with which a legislative redistricting plan is clothed. The Court has now transformed the nature of the constitutional review process and cast aside the presumption of constitutionality. [**275] And it has done so in the absence of any argument from the opponents of the redistricting plan that we should recede from our precedent applying the presumption of constitutionality to redistricting plans.

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The majority's departure from our precedents is not justified by the adoption in 2010 of *article III, section 21, Florida Constitution*, which created certain additional "[s]tandards for establishing legislative district boundaries." *Art. III, § 21, Fla. Const.* Although *section 21* unquestionably altered the scope of the issues to be considered in our review of a legislative redistricting plan, nothing in *section 21* changed the structure or nature of the thirty-day review process previously existing under *section 16*. The text of *section 21* does not explicitly address the judicial review process. And it is unwarranted to conclude that *section 21* implicitly altered the structure or nature of the existing constitutional review process.

It may well be that some of those who supported the adoption of *section 21* desired to transform the redistricting process from what this Court has previously acknowledged it to be—"primarily a matter for legislative consideration and determination"—into a [**276] matter controlled by the largely discretionary rulings of the majority of this Court. *In re Apportionment—1972, 263 So. 2d at 799-800*. A different constitutional amendment to effect such a transformation in the redistricting process [*697] might have been proposed for the consideration of Florida's voters. But the voters who adopted *section 21* could not have known—from the text of the proposed amendment, much less the ballot summary—that such a transformation would be brought about by the adoption of *section 21*.

Weighty reasons support adhering to our precedent establishing that redistricting plans adopted by the Legislature are presumed to be constitutionally valid and that this Court should "act with judicial restraint" in our review of such plans. *In re Apportionment—1972, 263 So. 2d at 800*. In *Perry v. Perez, 132 S. Ct. 934, 941, 181 L. Ed. 2d 900 (2012)* a case that was decided in January of this year presenting claims under the Voting Rights Act and the United States Constitution—the Supreme Court of the United States observed that "experience has shown the difficulty of defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and [**277] evaluated by the elected branches." The Supreme Court recognized the importance of ensuring that the lower court act to vindicate federal rights "without displacing legitimate state policy judgments with the court's own preferences." *Id.* Although these observations in *Perry* are no doubt based in part on federalism concerns, it is clear that *Perry's* concern about the "difficulty of defining neutral legal principles" to ensure that the "policy judgments" of the "the elected branches" are not displaced by judicial "preferences" is applicable to not only federal but also state judicial intervention. *Id.*

The concerns voiced by the Supreme Court in *Perry* echo concerns articulated in prior decisions where the Supreme Court considered the definition of "discernible and manageable standards by which political gerrymander cases are to be decided." *Davis v. Bandemer, 478 U.S. 109, 123, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986)*. Although a narrow majority of the Supreme Court has recognized the possibility of articulating such standards, a majority of the Supreme Court has never been able to agree on a particular test or set of tests.

In *Vieth v. Jubelirer, 541 U.S. 267, 306-07, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004)* (Kennedy, J., concurring in the judgment), Justice [**278] Kennedy recognized the "obstacle[]" presented by the continuing "absence of rules to limit and confine judicial intervention" in the adjudication of political gerrymandering claims: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." In his opinion for the

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plurality in *Vieth*, Justice Scalia emphasized the importance of a solid and demonstrable criterion "to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." *541 U.S. at 291* (plurality).

"The term 'political gerrymander' has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape to give one political party an unfair advantage by diluting the opposition's voting strength." *Id. at 271 n.1* (quoting *Black's Law Dictionary* 696 (7th ed. 1999)). A political gerrymandering claim is thus akin to a claim under *section 21* [**279] that a district has been "drawn with the intent to favor or disfavor a political party or an incumbent." *Art. III, § 21(a), Fla. Const.* And the concerns regarding "discernible and manageable standards," *Bandemer, [*698] 478 U.S. at 123*, to be utilized by judges in determining the validity of political gerrymandering claims are directly applicable to the context of an improper intent claim under *section 21*.

The justification for the rule of deference embodied in the presumption of constitutionality is not vitiated by the adoption of the particular standards contained in *section 21*. As the foregoing discussion shows, the justification for deference has a firm, widely acknowledged grounding with respect to the portion of *section 21(a)* that prohibits conduct akin to the conduct at issue in a political gerrymandering claim. The justification for deference also has a compelling basis with respect to the parts of *section 21(b)* concerning compactness and the use of existing political and geographical boundaries. Those standards do not embody inflexible, determinate requirements eliminating the exercise of legislative policy judgments in making the choices necessary to draw district lines.[67] By their [**280] very nature, those standards permit a range of choice by the Legislature in the drawing of district boundaries. Given that reality, the application of nondeferential review to the plan drawn by the Legislature after the Legislature has "weighed and evaluated" the proper balancing of the different "criteria and standards" of *section 21(b)*, creates the danger of "displacing legitimate [legislative] policy judgments with the court's own preferences." *Perry, 132 S. Ct. at 941*.

The circumscribed nature of the thirty-day constitutional review process provides an additional compelling reason for not abandoning the rational-basis review

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[67] The requirement from *section 21(b)* that "districts shall be as nearly equal in population as is practicable" does lend itself to a determinate test. In *Brown v. Thomson, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983)* (quoting *Reynolds v. Sims, 377 U.S. 533, 577, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)*), the Supreme Court determined that the requirement from the *Equal Protection Clause of the Fourteenth Amendment* that electoral districts be "as nearly of equal population as is practicable" allowed "minor deviations from mathematical equality." The Supreme Court then concluded that "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Id.* In adopting the amendment that has been codified in *section 21*, the [**281] people of Florida chose to add to their constitution the well-defined phrase "of nearly equal population as practicable." Because it uses the identical language as the prior cases interpreting the equal population requirement under the *Fourteenth Amendment*, the equal population standard of *section 21(b)* must be interpreted in accordance with those well-established precedents. *Cf. Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 263 (Fla. 2005)* ("In the absence of any indication in the Constitution to the contrary, we conclude that the term 'municipal or public purposes' [as used in a newly enacted statute] should be construed in accordance with the definition utilized by the Court in its prior decisions.").

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required by our precedent and the acknowledgement that our review "is extremely limited." *In re Apportionment—2002, 817 So. 2d at 824*. We conduct the constitutional review process as an appellate court without the benefit of any fact-finding proceedings. We can only rely on facts that are undisputed. It is impossible [**282] for us to thoroughly evaluate disputed fact-intensive issues. We have previously recognized that the adjudication of claims arising from the provisions of the Voting Rights Act—which are analogous to the provisions of *section 21(a)* protecting the rights of "racial or language minorities"—often involve a "fact-intensive" inquiry which cannot be undertaken within the limits of our review pursuant to *section 16*. *In re Apportionment—2002, 817 So. 2d at 829*. We are similarly constrained in the evaluation of factual issues relevant to a determination of improper intent. Given the structural [*699] limitations imposed on our review, adherence to the presumption of constitutionality helps ensure that we avoid reliance on suspicion and surmise—rather than adjudicated facts—as a basis for declaring a redistricting plan constitutionally invalid.

These considerations point to the wisdom of adhering to our precedent that clothes a redistricting plan with a presumption of constitutionality and prevents us from declaring a plan invalid unless it is clear that "under any rational view that may be taken of the [redistricting plan], it is in positive conflict with" the requirements of our constitution. *In re Apportionment—1972, 263 So. 2d at 806* [**283] (quoting *Bowden, 64 So. at 772*). Failing to adhere to that precedent creates the risk of having our decisions adjudicating the validity of redistricting plans decline into a species of "'it-is-so-because-we-say-so' jurisprudence."[68]

II.

Reasonable questions and concerns can certainly be raised about certain choices the Legislature made in drawing district lines. But the proper analysis of constitutionality cannot be driven by questions and concerns. Instead, under our precedents, the analysis of constitutionality must focus on whether there is a rational relationship between the choices made by the Legislature and the constitutional standards. The majority, however, takes a very different approach than the approach required by our precedents.

The foundation of the majority's decision is constructed from three interrelated elements: (1) the effective repudiation of the presumption of constitutionality and the rational-basis scrutiny it entails; (2) the imposition of judicially created extra-constitutional constraints on the Legislature's [**284] utilization of political and geographical boundaries in the drawing of district lines; and (3) conclusions of fact based solely on suspicion and surmise.

The majority acknowledges the presumption of constitutionality but carries out its review of the Senate district plan in a manner that is heedless of the limits imposed by that presumption. The majority thus applies a strict-scrutiny analysis rather than the rational-basis review required by our precedents.

The majority imposes a requirement to use "consistent" boundaries, majority op. at 129, 145, in the drawing of district lines—a requirement that is nowhere to be found in the text of *section 21* and that cannot reasonably be implied from the text. This judicial requirement of "consistent" utilization of boundaries has far-reaching consequences and is subject to no "rules to limit and confine judicial intervention." *Vieth, 541 U.S. 267, 307,*

[68] *Webster v. Reprod. Health Servs., 492 U.S. 490, 552, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989)* (Blackmun, J., concurring in part and dissenting in part).

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*124 S. Ct. 1769, 158 L. Ed. 2d 546* (Kennedy, J., concurring in the judgment).

Based on nothing more than suspicion and surmise, the majority concludes that certain district lines were drawn with improper intent—when there is an evident, rational, permissible basis for the drawing of those lines. The majority fails to recognize the [**285] structural limitations of our review process, which preclude the adjudication of fact-intensive claims.

The most salient legal consequence of the majority's decision is that we can no longer say that the "primary responsibility for [redistricting] . . . rests with the Legislature." *In re Apportionment—1972, 263 So. 2d at 800*. The most salient practical consequence of the majority's decision is the unsettling of four minority Senate districts— [*700] Districts 6, 12, 14, and 34—drawn by the Legislature to ensure compliance with the requirement of the constitution that districts "not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." *Art. III, § 21(a), Fla. Const.* The majority's opinion leaves much in a state of uncertainty. As the majority acknowledges, in their initial brief, the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida ("Coalition") stated that if "this Court finds that any or all of [the constitutional] standards are breached, the non-compliant plans should be returned [**286] to the Legislature with *clear instructions as to how to remedy the breach*." Brief of the Coalition at 16, *In re Joint Resolution of Reapportionment*, No. SC12-1 (Feb. 17, 2012) (emphasis added). As the discussion to follow shows, the majority has failed to consistently provide such clarity.

III.

I now turn to the grounds relied on by the majority for invalidating the Senate Plan. First, I will address why the majority's decision to invalidate the numbering of Senate districts adopted by the Legislature is unwarranted under *section 21*. Next, I will discuss the specific districts in the Senate plan with which the majority finds fault. With respect to each of these districts, neither the opponents nor the majority have shown the absence of a rational basis under the constitutional standards for the lines drawn by the Legislature. Finally, I will explain my disagreement with the majority's comments regarding the City of Lakeland's challenge.

**Senate District Numbering**

I would reject the challenge to the numbering of districts in the Senate plan. *Section 21* is a limitation on the power of the Legislature only with respect to "establishing legislative district boundaries." *Art. III, § 21, Fla. Const.* [**287] The prohibition on action to "favor or disfavor . . . an incumbent" applies only to the manner in which district lines are "drawn." *Art. III, § 21(a), Fla. Const.* The numbering of the Senate districts is totally unrelated to any advantage incumbent senators will obtain vis-á-vis challenger candidates. The majority stretches the text of *section 21* to reach legislative decisions that are not within the scope of *section 21*.

**Senate Districts 1 and 3**

The majority contends that Senate Districts 1 and 3 were drawn without respecting any consistent political or geographical boundary lines and that the districts are not compact. The majority rejects as illegitimate the Legislature's asserted interest in maintaining a coastal community of interest in one district and a rural community of interest in the other district. The majority also asserts that the configuration of the districts shows

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that they were drawn improperly to favor the incumbent senators from each of the districts. The majority's analysis with respect to these districts illustrates how it has cast aside the presumption of constitutionality and departed from the proper confines of our limited review.

*Section 21* provides that "districts [**288] shall, where feasible, utilize existing political and geographical boundaries." *Art. III, § 21(b), Fla. Const.* This provision does not require that the Legislature make a choice between using either political boundaries or geographical boundaries. Indeed, the text clearly contemplates that both political and geographical boundaries will be utilized. The majority, however, [*701] imposes a requirement of consistency that is designed to limit the exercise of policy judgment by the Legislature under *section 21*. *See* majority op. at 129, 145. This is a purely judicially created extra-constitutional requirement. It amounts to a judicial assertion that the constitution is violated if political boundaries and geographical boundaries are not utilized in a fashion that suits judicial sensibilities. It cannot be reconciled with the text of *section 21*.

In the context of legislative districting, compactness will necessarily be a matter of degree. It is not a standard that is subject to a neat, objective test. On the contrary, the requirement is inherently vague. (The requirement that districts be compact is akin in its vagueness to a rule of court requiring that appellate briefs be brief.) In *section 21*, [**289] the compactness standard is on an equal footing with the standards related to equal population and the utilization of political and geographical boundaries. The Legislature thus may exercise its policy judgment to utilize political and geographical boundaries even when doing so may result in a district that is less compact than it might otherwise be.

In the case of Senate Districts 1 and 3, the Legislature's choice to utilize certain political boundaries and geographical boundaries has resulted in the creation of districts that are less compact than many other districts in the Senate plan. It cannot be said, however, that the drawing of the district lines for Districts 1 and 3 has no rational basis related to the constitutional standards.

The majority's rejection of the Legislature's consideration of communities of interest is wholly unwarranted. Nothing in *section 21* provides that the standards set forth there—along with those in *section 16*—are the exclusive, legitimate considerations that may be taken into account by the Legislature in drawing district lines. "[M]aintaining communities of interest" has been recognized as a "traditional districting principle[]." *Bush v. Vera, 517 U.S. 952, 977, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996)*. [**290] Although the Legislature is not constitutionally required to maintain communities of interest, nothing in the constitution precludes the Legislature from giving consideration to such a traditional districting principle. The voters adopting *section 21* would have had no way of knowing—either from the text of the amendment or the ballot summary—that the proposed amendment would preclude the Legislature from considering existing communities of interest. Such a limitation on legislative authority should not be read into the constitution by implication.

Finally, the majority's conclusion that these districts were drawn with an improper intent to favor the incumbent senators is based on suspicion and surmise. It is indeed ironic that the majority relies on this factor as a ground for invalidating these districts when the only alternative Senate district map submitted to the Court reconfigures these districts but in a way that also maintains the two incumbent senators in different districts.

**Senate Districts 6 and 9**

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The Senate cogently describes the challenge to Senate District 6 as based on the assertion that

> the Legislature (or this Court) should engage in a deliberate effort to dismantle functioning [**291] minority districts and replace them with districts with cognizably lower minority voting age population (VAP), without a shred of evidence either that the lower numbers will not "diminish" minority voters['] "ability to elect" or any evidence (or even credible allegation) that these gratuitous reductions will enhance *minority* (as opposed to Democratic) opportunities elsewhere.

[*702] Reply Brief of the Florida Senate at 6-7, *In re Joint Resolution of Reapportionment*, No. SC12-1 (Feb. 23, 2012).

In accepting this unwarranted challenge, without the benefit of any fact-finding proceeding on the contested retrogression issue, the majority decides that— based on the subordinate compactness standard—it is empowered to make an ad hoc determination concerning how much minority voting strength can be diminished without transgressing the unequivocal constitutional prohibition on drawing district lines "to diminish" the "ability" of "racial or language minorities" "to elect representatives of their choice." *Art. III, § 21(a), Fla. Const.* This can be reconciled with neither the plain meaning of *diminish*—"to make less or cause to appear less," *Webster's Third International Dictionary* 634 (1993)—nor the [**292] law interpreting the analogous provision in section 5 of the Voting Rights Act, *42 U.S.C. § 1973c (2006)*.

Relying on an alternative proposed by the Coalition, the majority thus concludes that District 6 could be reconfigured by reducing its black VAP from 47.7 percent in the Legislature's plan to a black VAP of 42.4 percent in the Coalition's plan. Majority op. at 151, 153. Under the majority's approach, the current functioning minority district will be replaced by a district in which the 2006 Democrat candidate for governor received less than a majority of the vote. By comparison, in both the benchmark district and the district adopted by the Legislature the 2006 Democrat candidate for governor obtained a majority. The differences in performance admittedly are not large, but the differences are at the margin where many elections are decided.[69] The Legislature undoubtedly had a rational basis for the conclusion that the configuration of District 6 as adopted was necessary to avoid prohibited retrogression in the ability of blacks to elect a representative of choice.[70]

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[69] Pursuant to calculations performed by the software purchased by this Court, in District 1 of the 2002 Benchmark Senate Plan, 54.49 percent of voters selected the Democrat candidate for governor (Jim Davis) in the 2006 gubernatorial election, while 43.28 percent of voters selected the Republican candidate (Charlie Crist). In the Legislature's proposed District 6, 52.02 percent of voters selected the Democrat in that election and 45.71 percent selected the Republican. In contrast, in the Coalition's District 1, only 49.06 percent of voters selected the Democrat and 48.61 percent selected the Republican. And, ironically, in its appendix, the Coalition offered an even less persuasive figure. The Coalition asserted that only 48.1 percent of voters in its proposed District 1 voted for the Democrat in the 2006 gubernatorial election.

[70] I wholeheartedly agree with the view—cited by the majority— articulated [**294] in *Shaw v. Reno, 509 U.S. 630, 657, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993)*, that "[r]acial classifications of any sort pose the risk of lasting harm to our society." I also agree with the majority's rejection of "any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision." Majority op. at 66. Although the nonretrogression provision of *section 21(a)* does not require the Legislature to draw covered minority districts in a manner that rigidly preserves or increases the minority VAP with each redistricting, the doctrine of

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Blithely observing that the justification for Senate District 6 under the nonretrogression rule is "questionable," the [**293] Court substitutes its determination for the judgment of the Legislature. Majority op. at 183. In doing so, the majority ignores the presumption of constitutionality and the constitutional priority given to the protection of "racial or language minorities." *See* Art. III, § 21(a), Fla. Const.

[*703] The majority also ignores the findings of the three-judge panel in *Martinez v. Bush, 234 F. Supp. 2d 1275, 1298-99 (S.D. Fla. 2002)*, that "[t]here is a substantial degree of racially polarized voting in . . . northeast Florida" and that

> [i]n any district in [that area] in which blacks do not comprise a majority or near majority of actual voters, it is likely that the black candidate of choice (if different from [**295] the candidate of choice of non-black voters) will not often prevail; instead, the candidate of choice of non-black voters will prevail.

Such findings are highly relevant to the "functional analysis" of retrogression to which the majority refers. *See, e.g.*, majority op. at 63, 126, 130. Contrary to the majority's conclusion, there is no reliable functional analysis establishing that the alternative district mandated today by this Court is a district that ensures that the ability of black voters to elect a senator "of their choice" is not diminished. *Art. III, § 21(a), Fla. Const.* And the majority has cited no case authority under section 5 of the Voting Rights Act in which a district plan was upheld against a retrogression challenge where a choice was made to reduce the minority VAP in a performing minority district in a manner similar to that mandated by the Court today.

The alternative district proposed by the Coalition is unquestionably more compact than Senate District 6. But the compactness standard of *section 21(b)* is unquestionably subordinate to the requirements of *section 21(a)* that protect the rights of minority voters. By mandating the creation of a more compact district in [**296] which the voting influence of black voters is diminished, the majority fails to give effect to the constitutional protection for minority voters required by *section 21(a)*.

The majority recognizes that the configuration of District 9 flows from the configuration of District 6 in the Legislature's plan and invalidates District 9 based on the conclusion that Districts 6 is invalid. Because I disagree with the conclusion regarding District 6, I also disagree with the conclusion regarding District 9.

**Senate Districts 10 and 12**

The majority invalidates Senate District 10 based on suspicion, surmise, and speculation. Suspicion and surmise are the predicates for the conclusion that District 10 was drawn with an improper intent to favor the incumbent senator. Speculation is the predicate for the conclusion that District 12—drawn to protect the rights of minority voters in a performing minority district—might have been drawn in a different manner without retrogressing.

The reality is that the configuration of Senate District 10 can reasonably be understood to result directly from the drawing of District 12 as a nonretrogressive district where there is currently a performing black district, together [**297] with the drawing of District 14 as a new Hispanic-majority district with a Hispanic VAP of 50.5 percent. No one has challenged and the majority does not question the configuration of District 14, the new Hispanic-majority district. With respect to District 12, the majority faults the Legislature for failing to perform a

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nonretrogression does require the Legislature to draw the boundaries of performing minority ability districts so that the districts will continue to perform as minority ability districts.

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"functional analysis." Majority op. at 160. In contrast with what it offered as a rationale for its decision with respect to District 6, the majority provides no analysis with respect to the maintenance of black voters' ability to elect the candidate of their choice in District 12 and fails to suggest any alternative configuration for District 12 that it would deem to be nonretrogressive.

The majority's opinion with respect to Districts 10 and 12 can only be described as conclusory. It illustrates as vividly as [*704] anything in the opinion how the majority's acknowledgment of the presumption of constitutionality is meaningless. Rather than reviewing the persuasiveness of the opponents' allegations of unconstitutionality, the majority puts the burden on the Legislature to affirmatively prove constitutionality and then invalidates District 10 because "[n]othing in the record [**298] reflects that the process of drawing the districts in this area recognized the importance of balancing the constitutional values." Majority op. at 161. And by failing to articulate a clear rationale that would guide the Legislature in remedying the supposed constitutional violation, the majority makes it more likely that the Court will ultimately determine that it must draw the district lines for the Florida Senate.

### Senate District 30

The majority invalidates Senate District 30 based on the conclusion that the district is not compact and was drawn with an improper intent to favor the incumbent senator. The majority faults the district for having an "odd-shaped configuration." Majority op. at 162. As it did with respect to Districts 1 and 3, the majority dismisses the legitimacy of the Legislature's consideration of a coastal community of interest in the fashioning of District 30. I reject the majority's conclusion with respect to the utilization of a coastal community of interest for the reasons I previously expressed in the discussion of Districts 1 and 3. In addition, the majority gives short shrift to the impact on District 30 of the configuration of adjoining District 40, which flows [**299] from the requirements of section 5 of the Voting Rights Act. The boundary between Districts 30 and 40 constitutes roughly one-third of the 313-mile perimeter of District 30. And the majority fails to reckon with the reality that the coastal geography of Florida will necessarily result in some districts with an odd-shaped configuration. The objectors have not overcome the presumption of constitutionality with which Senate District 30 is clothed.

### Senate Districts 29 and 34

The majority declares Senate Districts 29 and 34 invalid on the ground that they are not compact. The majority concludes that the configuration of both districts is driven by an improper intent to favor the incumbent senator in District 29. The majority relies on an alternative majority black district suggested by the Coalition to show that District 34 could have been drawn in a different fashion to meet the requirement of nonretrogression. This alternative majority black district has a configuration which is itself far from neatly compact. Here, the majority once again—based on suspicion and surmise regarding improper intent—simply substitutes its judgment for the Legislature's judgment, without any showing that the [**300] judgment of the Legislature is not rationally related to the requirements of the constitution.

### The City of Lakeland

The majority has neither accepted nor rejected the challenge made to the Senate district plan by the City of Lakeland. Instead, the majority expresses its "concerns." Majority op. at 184. This is no way to adjudicate a claim of constitutional invalidity.

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The City essentially argues that *section 21* precluded the Legislature from dividing the City into two different Senate districts. I would reject this argument. Nothing in *section 21* prohibits the Legislature from drawing district lines through municipalities. The reality is that many municipalities will necessarily be divided by legislative district lines. The district line drawn through the City of Lakeland largely follows geographical boundaries—including Interstate 4 and United States Highway 98. In order to accept the City's argument, [*705] this Court would simply have to substitute its preference for the policy choice made by Legislature. The presumption of constitutionality enjoyed by the districting plan precludes this result. The City has failed to establish that the Senate district line which traverses the City is not [**301] rationally related to the standards of Florida's Constitution.

For reasons I have already explained, I disagree with the majority's condemnation—in its discussion of the City of Lakeland's claim—of the Senate's use of "an inconsistent definition of 'political and geographical boundaries.'" Majority op. at 183. I also disagree with the majority's condemnation of the Senate's supposed "incorrect understanding of both compactness and utilizing political and geographical boundaries." *Id.* Any suggestion that the use of geographical boundaries is somehow less acceptable than the use of political boundaries is totally at odds with the text of *section 21*, which establishes no preference for political over geographical boundaries. Any suggestion that the Legislature must choose between political and geographical boundaries and consistently follow that choice is likewise totally at odds with the text of *section 21*, which does not expressly require such consistency and cannot reasonably be understood as implying a requirement of such consistency.

IV.

In the majority's analysis, the presumption that redistricting plans adopted by the Legislature are constitutional—a presumption that this Court unanimously [**302] reaffirmed ten years ago—is a quickly vanishing presumption. "As the cloud is consumed and vanisheth away,"[71] so goes the presumption of constitutionality— consumed by the majority's strict-scrutiny analysis. I dissent from this unwarranted expansion of the power of this Court.

POLSTON, J., concurs.

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[71] *Job* 7:9 (King James).

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# League of Women Voters of Fla. v. Detzner

Supreme Court of Florida

July 9, 2015, Decided

No. SC14-1905

**Reporter**
172 So. 3d 363 *; 2015 Fla. LEXIS 1474 **; 40 Fla. L. Weekly S 432

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, etc., et al., Appellants/Cross—Appellees, vs. KEN DETZNER, et al., Appellees/Cross—Appellants.

**Subsequent History:** Later proceeding at *League of Women Voters v. Detzner, 170 So. 3d 800, 2015 Fla. LEXIS 1471 (Fla., 2015)*

Motion granted by, in part, Motion denied by, in part, Request denied by *League of Women Voters of Fla. v. Detzner, 2015 Fla. LEXIS 2947 (Fla., Sept. 4, 2015)*

Decision reached on appeal by *League of Women Voters of Fla. v. Detzner, 179 So. 3d 258, 2015 Fla. LEXIS 2658 (Fla., 2015)*

**Prior History:** [**1] Certified Judgments of Trial Courts in and for Leon County — Terry Powell Lewis, Judge - Case Nos. 372012CA000412XXXXXX and 372012CA000490XXXXXX - An Appeal from the District Court of Appeal, First District, Case No. 1D14-3953.

*League of Women Voters of Fla. v. Detzner, 178 So. 3d 6, 2014 Fla. App. LEXIS 15265 (Fla. Dist. Ct. App. 1st Dist., 2014)*

## Core Terms

map, districts, redistricting, trial court, Republican, partisan, consultants, configuration, compactness, Apportionment, challengers, drawing, tier-two, invalidated, incumbent, voters, political party, elect, e-mail, staff, candidates, trial court's finding, East-West, split, tier-one, appendage, gerrymandering, redrawn, circumstantial evidence, deference

## Case Summary

### Overview

HOLDINGS: [1]-In finding that the 2012 congressional redistricting plan was drawn in violation of the Fair Districts Amendment, Art. III, § 20, Fla. Stat., the trial court properly evaluated the actions of individual legislators and legislative staff members; [2]-The trial court was justified by the legislature's failure to preserve records in drawing an adverse inference against the legislature; [3]-The trial court erred in finding that there was no distinction between a challenge to the redistricting plan "as a whole" and a challenge to individual districts; [4]-Having found unconstitutional intent, the trial court erred in analyzing the legislature's map as it had not found such intent, when instead the burden should have shifted to the legislature to justify its decisions; [5]-The appropriate remedy was to require the legislature to withdraw specified districts.

### Outcome

Affirmed in part, vacated in part, and remanded.

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## LexisNexis® Headnotes

Governments > Federal Government > Elections

Governments > State & Territorial
Governments > Elections

*HN1*[] **Federal Government, Elections**

Neither the "Elections Clause" of the United States Constitution, *U.S. Const. art. I, § 4, cl. 1*, nor federal law, *2 U.S.C.S. § 2a(c)*, prohibits the people of a state, through the citizen initiative process, from directing the way in which its congressional district boundaries are drawn. As the United States Supreme Court explained, banning lawmaking by initiative to direct a state's method of apportioning congressional districts would stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage.

Governments > State & Territorial
Governments > Elections

*HN2*[] **State & Territorial Governments, Elections**

See *Art. III, § 20, Fla. Const.*

Governments > State & Territorial
Governments > Elections

*HN3*[] **State & Territorial Governments, Elections**

Under *Art. III, § 20, Fla. Const.*, there is no acceptable level of improper intent. The prohibition on improper partisan intent in redistricting applies, by its express terms, to both the apportionment plan as a whole and to each district individually and does not require a showing of malevolent or evil purpose. A finding of partisan intent therefore renders the legislature's redistricting plan constitutionally invalid, as the Florida Constitution expressly outlaws partisan political gerrymandering.

Constitutional Law > Equal Protection > General Overview

Governments > State & Territorial
Governments > Elections

*HN4*[] **Constitutional Law, Equal Protection**

The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process. Florida's express constitutional standard, however, differs from equal protection political gerrymandering claims under either the United States or Florida Constitutions. Political gerrymandering claims under the *Equal Protection Clause of the United States Constitution* focus on determining when partisan districting as a permissible exercise has gone too far, so as to degrade a voter's or a group of voters' influence on the political process as a whole. In contrast to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. It does not reference the word "invidious" as the term has been used by the United States Supreme Court in equal protection discrimination cases, and Florida's provision should not be read to require a showing of malevolent or evil purpose.

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Evidence > Admissibility > Circumstantial & Direct Evidence

Governments > State & Territorial
Governments > Elections

HN5[] Admissibility, Circumstantial & Direct Evidence

Florida's constitutional provision prohibits intent, not effect, which is to say that a map that has the effect or result of favoring one political party over another is not per se unconstitutional in the absence of improper intent. Thus, the focus of the analysis must be on both direct and circumstantial evidence of intent. One piece of evidence in isolation may not indicate intent, but a review of all of the evidence together may lead the court to the conclusion that the plan was drawn for a prohibited purpose. The relevant inquiry for discerning improper partisan intent focuses on whether the plan or district was drawn with this purpose in mind.

Civil Procedure > Appeals > Standards of Review > General Overview

HN6[] Appeals, Standards of Review

It is not the function of the court to substitute its judgment for that of the trier of fact. An appellate court should not substitute its judgment for that of the trier of fact as long as there is competent, substantial evidence to support the findings.

Evidence > Admissibility > Circumstantial & Direct Evidence

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN7[] Admissibility, Circumstantial & Direct Evidence

Circumstantial evidence is often essential in proving a conspiracy—and indeed may be the only type of evidence available.

Governments > State & Territorial
Governments > Elections

HN8[] State & Territorial Governments, Elections

A finding of unconstitutional intent to favor a political party or incumbent does not necessarily mean that those who made the decisions acted with malevolent or evil purpose, which is not required for a finding of unconstitutional intent under the Fair Districts Amendment.

Governments > State & Territorial
Governments > Elections

HN9[] State & Territorial Governments, Elections

*Art. III, § 20, Fla. Const.*, prohibits an apportionment plan or individual district from being drawn with the intent to favor or disfavor a political party or an incumbent. § 20(a).

Governments > State & Territorial
Governments > Elections

HN10[] State & Territorial Governments, Elections

The Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent. There is no acceptable level of improper intent. The "intent" standard applies to both the apportionment plan as a whole and to each district individually. Improper intent, particularly if part of a broader process to develop portions of the map, may

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directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent.

Governments > State & Territorial
Governments > Elections

HN11[] State & Territorial Governments, Elections

Determining whether the legislature acted with the type of improper "intent" that is prohibited by the specific constitutional mandate of Art. III, § 20(a), Fla. Const., is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction. Specifically, because the decision-making process itself is the case, the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, can directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent. The existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits, and evidence of this separate process will clearly be important to help support a claim that the legislature thwarted the constitutional mandate.

Governments > State & Territorial
Governments > Elections

HN12[] State & Territorial Governments, Elections

The intent of individual legislators and legislative staff members involved in the drawing of the redistricting plan is relevant in evaluating legislative intent for purposes of Art. III, § 20(a), Fla. Const. The United States Supreme Court, for example, has recognized that the actions of individual legislators and staff members may be relevant in discerning legislative intent in the context of redistricting.

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN13[] Preservation of Relevant Evidence, Spoliation

Florida courts have found a duty to preserve evidence in circumstances when a party should reasonably foresee litigation. A defendant can be charged with a duty to preserve evidence where it could reasonably have foreseen the claim.

Governments > State & Territorial
Governments > Elections

HN14[] State & Territorial Governments, Elections

The purpose behind the voters' enactment of the Art. III, § 20(a), Fla. Const. standards will be undermined if the legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery.

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN15[] Preservation of Relevant Evidence, Spoliation

Even in the absence of a legal duty, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. Florida courts may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have

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contained indications of liability. If the evidence was negligently destroyed, a rebuttable presumption of liability may arise. In other words, an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

Governments > State & Territorial Governments > Elections

*HN16*[] **Presumptions, Particular Presumptions**

Although a legislative redistricting plan comes before the court with an initial presumption of validity, the operation of the court's process in apportionment cases is far different than the court's review of ordinary legislative acts, including a commensurate difference in its obligations. Noting that the new requirements of the Fair Districts Amendment dramatically altered the landscape with respect to redistricting, the Florida Supreme Court held that its scope of review had plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance. The framers and voters of the Fair Districts Amendment clearly desired more judicial scrutiny of the legislature's decisions in redistricting.

Governments > State & Territorial Governments > Elections

*HN17*[] **State & Territorial Governments, Elections**

It is the Florida Supreme Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid. However, the court will defer to the legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements. The court emphasized that its responsibility was limited to ensuring compliance with constitutional requirements. Endeavoring to be respectful to the critically important role of the legislature, the court stated that its duty was not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.

Governments > State & Territorial Governments > Elections

*HN18*[] **State & Territorial Governments, Elections**

Unlike a legislative act promulgated separate and apart from an express constitutional mandate, the legislature adopts a joint resolution of legislative apportionment solely pursuant to the instructions of the citizens as expressed in specific requirements of the Florida Constitution governing this process. Just as there is a difference in evaluating legislative intent with respect to the specific constitutional mandate of *Art. III, § 20(a), Fla. Const.* outlawing improper partisan intent in redistricting, so too is there a difference between the court's role in reviewing a legislative apportionment plan to determine compliance with constitutionally mandated criteria and the court's role in interpreting statutes. The reason for the different standard is that the inquiry is into the process, the end result, and the motive behind the legislation —not a question of searching for a reasonable interpretation of a statute which would make it constitutional.

Governments > State & Territorial Governments > Elections

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HN19[] State & Territorial Governments, Elections

While the legislature is generally entitled to deference as a result of its role in the redistricting process, that deference applies only so long as its redistricting decisions do not violate the constitutional requirements of Art. III, § 20(a), Fla. Const.

Evidence > Burdens of Proof > Burden Shifting

Governments > State & Territorial Governments > Elections

HN20[] Burdens of Proof, Burden Shifting

Once a tier-one violation of the constitutional intent standard is found, there is no basis to continue to afford deference to the legislature. To do so is to offer a presumption of constitutionality to decisions that have been found to have been influenced by unconstitutional considerations. The existence of unconstitutional partisan intent is contrary to the very purpose of the Fair Districts Amendment and to the Florida Supreme Court's pronouncements regarding the state constitutional prohibition on partisan political gerrymandering. Accordingly, after reaching the conclusion that the redistricting process and the resulting map have been tainted by unconstitutional intent, the burden shifts to the legislature to justify its decisions, and no deference should be afforded to the legislature's decisions regarding the drawing of the districts. In other contexts, states have placed the burden on their legislatures to justify the validity of a redistricting plan when the plan has raised sufficient issues with respect to state constitutional requirements.

Civil Rights Law > Protection of Rights > Voting Rights > Vote Dilution

HN21[] Voting Rights, Vote Dilution

The language of the Voting Rights Act that protects against adopting a redistricting plan that has the purpose of or will have the effect of diminishing the ability of the minority group to elect their preferred candidates of choice—language incorporated into Florida's tier-one state constitutional standards—does not require maintaining the same population percentages. Instead, the United States Supreme Court has stated, this requirement is satisfied if minority voters retain the ability to elect their preferred candidates. Providing an example, the Supreme Court stated that it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70 percent to 65 percent would have a significant impact on the black voters' ability to elect their preferred candidate.

Governments > State & Territorial Governments > Elections

HN22[] State & Territorial Governments, Elections

Length is just one factor to consider in evaluating compactness of an election district.

Governments > State & Territorial Governments > Elections

HN23[] State & Territorial Governments, Elections

The object of the compactness criterion is that an election district should not yield bizarre designs. And the phrase "as compact as possible" does not mean "as small in size as possible," but rather "as regular in shape as possible."

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Governments > State & Territorial Governments > Elections

HN24[] State & Territorial Governments, Elections

Following county lines may result in a reduction in compactness scores. The compactness of the election districts cannot be considered in isolation because other factors influence a district's compactness, including the legislature's desire to follow political or geographical boundaries or to keep municipalities wholly intact.

Civil Rights Law > Protection of Rights > Voting Rights > Preclearance

HN25[] Voting Rights, Preclearance

Preclearance concerns are no longer applicable after the United States Supreme Court's decision in Shelby County v. Holder. In that case, the Supreme Court invalidated the "coverage formula" in Section 4 of the Voting Rights Act, thereby effectively invalidating the preclearance process established by Section 5 of the Act unless and until Congress creates another formula.

Governments > State & Territorial Governments > Legislatures

HN26[] State & Territorial Governments, Legislatures

It is true that the judiciary is generally without authority to review the internal workings of the legislature. But it is also true that Florida has a strong public policy, as codified in its state constitution, favoring transparency and public access to the legislative process.

Governments > State & Territorial Governments > Elections

HN27[] State & Territorial Governments, Elections

One of Florida's state constitutional values is a strong and well-established public policy of transparency and public access to the legislative process. This transparency is critical in light of the purpose of the Fair Districts Amendment to outlaw partisan manipulation in the redistricting process.

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LatinoJustice PRLDEF, Florida New Majority, and Mi Familia Vota.

**Judges:** PARIENTE, J. LABARGA, C.J., and QUINCE and PERRY, JJ., concur. LEWIS, J., concurs in result. CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

**Opinion by:** PARIENTE

## Opinion

[*369] PARIENTE, J.

In this appeal involving legal issues of first impression, we review a trial court's finding that the 2012 "redistricting process" and the "resulting map" apportioning Florida's twenty-seven congressional districts were "taint[ed]" by unconstitutional intent to favor the Republican Party and incumbent lawmakers.[1] Cognizant that this Court's role is not to select a redistricting map that performs better for one political party or another, but is instead to uphold the purposes [**3] of the constitutional provision approved by Florida voters to outlaw partisan intent in redistricting, the crux of what we must decide is whether the trial court gave the appropriate legal effect to its finding that the Florida Legislature drew the state's congressional districts in violation of the Florida Constitution.

Added to the Florida Constitution in 2010, the Fair Districts Amendment sought to eliminate the age-old practice of partisan political gerrymandering—where the political party and representatives in power manipulate the district boundaries to their advantage—by forbidding the Florida Legislature from drawing a redistricting plan [**4] or an individual district with the "intent to favor or disfavor a political party or an incumbent." *Art. III, § 20(a), Fla. Const.* "The desire of a political party to provide its representatives with an advantage in reapportionment is not a Republican or Democratic tenet, but applies equally to both parties." *In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I), 83 So. 3d 597, 615 (Fla. 2012)*. As observed when a three-judge panel of a federal district court examined Florida's last decennial congressional redistricting plan in 2002, the "raw exercise of majority legislative [*370] power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around the country." *Martinez v. Bush, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002)*.

With the voters' approval of the Fair Districts Amendment, that unfortunate fact of political life was banned in Florida. Our citizens declared that the Legislature must "redistrict in a manner that prohibits favoritism or discrimination." *Apportionment I, 83 So. 3d at 632*. And the Eleventh Circuit Court of Appeals similarly declared that "[f]ar from dictat[ing] electoral outcomes, the provision seeks to maximize electoral possibilities by leveling the playing field." *Brown v. Sec'y*

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[1] This Court previously considered two issues arising out of the pre-trial discovery process—one concerning the legislative privilege and the other concerning the discovery of documents in the possession of non-party political consultants—and released three opinions while the litigation was pending. *See League of Women Voters of Fla. v. Fla. House of Representatives (Apportionment IV), 132 So. 3d 135, 138 (Fla. 2013)* (addressing and largely rejecting claims of legislative privilege); *League of Women Voters of Fla. v. Data Targeting, Inc. (Apportionment V), 140 So. 3d 510, 514 (Fla. 2014)* (permitting the use during trial of evidence obtained from non-party political consultants, pending further appellate review); *Bainter v. League of Women Voters of Fla. (Apportionment VI), 150 So. 3d 1115, 1117 (Fla. 2014)* (upholding trial court ruling ordering production of documents in the possession of non-party political consultants).

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of State of Fla., 668 F.3d 1271, 1285 (11th Cir. 2012)* (internal quotation marks omitted).

Like the voters of Arizona, who adopted an independent redistricting [**5] commission recently upheld by the United States Supreme Court as consistent with the "fundamental premise that all political power flows from the people," the Florida voters endeavored "to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, 135 S. Ct. 2652, 192 L. Ed. 2d 704, 2015 U.S. LEXIS 4253, 2015 WL 2473452, at *4, 21 (U.S. June 29, 2015)*. As the United States Supreme Court has recognized, "partisan gerrymanders . . . [are incompatible] with democratic principles." *2015 U.S. LEXIS 4253, [WL] at *4* (alteration in original) (quoting *Vieth v. Jubelirer, 541 U.S. 267, 292, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004)* (plurality opinion)). In short, the Fair Districts Amendment was designed "to restore 'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *2015 U.S. LEXIS 4253, [WL] at *21* (quoting Mitchell N. Berman, *Managing Gerrymandering*, *83 Texas L. Rev. 781, 781 (2005)*).[2]

Presented in this case with a first-of-its-kind challenge under the Fair Districts Amendment, the trial court found that the Legislature's 2012 congressional redistricting plan was drawn in violation of the Florida Constitution's prohibition on partisan intent. We affirm that finding. We conclude, however, that the trial court failed to give proper legal effect to its determination that the Fair Districts Amendment was violated.

In reaching this conclusion, we recognize that the trial court had scant precedent to guide it in approaching the legal issues presented. And, we commend the trial court for the tremendous effort that was expended in deciding this novel challenge under the Fair Districts Amendment.

Nevertheless, we conclude that two legal errors significantly affected the trial [*371] court's determination of the appropriate legal effect of its finding of unconstitutional intent. First, the trial court [**7] erred in determining that there was no distinction between a challenge to the "plan as a whole"—a challenge, in effect, to the map produced from the unconstitutional "process"—and a challenge to individual districts. Second, the trial court erred in the standard of review it applied, which was improperly deferential to the Legislature's decisions after finding a violation of the Fair Districts Amendment's prohibition on partisan intent. Although it found the existence of unconstitutional intent, the trial court relied solely on objective "tier-two" constitutional indicators, such as compactness and the use of political or geographical boundaries, rather than on the direct and circumstantial evidence of "tier-one" unconstitutional intent presented

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[2] We reject the Legislature's federal constitutional challenge to the Fair Districts Amendment. The Supreme Court's recent opinion in the Arizona case confirms that *HN1*[↑] neither the "Elections Clause" of the United States Constitution, *U.S. Const. art. I, § 4, cl. 1*, nor federal law, *2 U.S.C. § 2a(c)*, prohibits the people of a state, through the citizen initiative process, from directing the way in which its congressional district boundaries are drawn. As the Supreme Court explained, "[b]anning lawmaking by initiative to direct a State's [**6] method of apportioning congressional districts" would "stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage." *Ariz. State Legislature, 2015 U.S. LEXIS 4253, 2015 WL 2473452, at *20*; *see also Brown, 668 F.3d at 1280* (rejecting a federal constitutional challenge to the Fair Districts Amendment based on reasoning wholly consistent with the Supreme Court's reasoning in *Arizona State Legislature*).

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at trial.

In other words, the trial court analyzed the Legislature's map as if it had not found the existence of unconstitutional intent, affording deference to the Legislature where no deference was due. Once a direct violation of the Florida Constitution's prohibition on partisan intent in redistricting was found, the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines.

Relying on the finding of unconstitutional [**8] intent, the challengers have urged that the entire plan should be redrawn. Certain factors support this approach, which would require the Legislature to begin the redistricting process anew on a blank slate. For example, we are aware that the starting point for drawing the 2012 congressional redistricting map was the 2002 map, which was drawn prior to the Fair Districts Amendment with, at that time, legally permissible partisan intent. In fact, the Legislature itself had, in defending against a racial gerrymandering claim directed at the 2002 map, "stipulated" that its intent "was to draw the congressional districts in a way that advantages Republican incumbents and potential candidates." *Martinez, 234 F. Supp. 2d at 1340*. We also acknowledge that a three-judge federal district court panel concluded that the Florida Legislature's "overriding goal with respect to congressional reapportionment" in 2002 was to "maximize the number of districts likely to perform for Republicans." *Id. at 1300-01*. These are considerations now explicitly outlawed by the Florida Constitution's prohibition on partisan political gerrymandering.

Based on the findings and evidence in this case, however, we ultimately reject the challengers' request that the entire plan must be redrawn [**9] or that this Court should, at this time, perform the task of redrawing the districts. Although we conclude that the trial court's finding of unconstitutional intent required the burden to shift to the Legislature to justify its decisions regarding where to draw the lines, we also conclude that the challengers still must identify some problem with the Legislature's chosen configuration. They did so in this case with respect to Districts 5, 13, 14, 26, and 27—showing a nexus between the unconstitutional intent and the district—as well as for Districts 21, 22, and 25, which they contended were problematic either for "tier-two" reasons or because the Legislature unjustifiably rejected a less favorable configuration.

Accordingly, while we affirm the trial court's finding that the Legislature's enacted map was "taint[ed]" by unconstitutional intent, we reverse the trial court's order upholding the Legislature's remedial redistricting plan. We relinquish this case to the trial court for a period of 100 days from the date of this opinion, with directions that it require the Legislature to redraw, on an expedited basis, Congressional [*372] Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected [**10] by the redrawing, pursuant to the guidelines set forth in this opinion. We emphasize the time-sensitive nature of these proceedings, with candidate qualifying for the 2016 congressional elections now less than a year away, and make clear that we take seriously our obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts. Upon the completion of the redrawing of the map, the trial court shall hold a hearing where both sides shall have an opportunity to present their arguments and any evidence for or against the redrawn map, and the trial court shall then enter an order either recommending approval or disapproval of the redrawn map.

We commend both parties for their professionalism in presenting the case to this Court and now proceed to discuss in detail the legal issues that have been raised on appeal, the background of this case, the evidence

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presented, and our legal reasoning.

## I. CHALLENGE TO TRIAL COURT'S FINDINGS

On appeal in this Court, the challengers seek affirmance of the trial court's finding of unconstitutional partisan intent in drawing the state's congressional districts—a finding that was based on both direct and [**11] circumstantial evidence. Their primary contention of error, however, is that the trial court applied an unduly deferential standard of review, thereby precluding it from imposing a more meaningful remedy for its finding of unconstitutional intent to favor the Republican Party and incumbents.[3]

The Legislature, while seeking affirmance of the trial court's approval of the remedial redistricting plan, nevertheless takes issue with the trial court's finding of unconstitutional intent.[4] In particular, the [*373] Legislature contests, first, the trial court's finding of a connection between the evidence and the Legislature itself, including the trial court's decision to ascribe the intent of a few individuals to the Legislature as a collective body. Second, the Legislature asserts that, even assuming the existence of unconstitutional intent, the trial court's finding pertains solely to the two invalidated districts and not to the broader process or map as a whole. Accordingly, the Legislature argues that any remedy [**13] that may have been necessary has already been provided through the enactment of the remedial redistricting plan.

We address these issues in the following way. After setting forth a comprehensive overview of the factual and legal background of the case, including a review of the evidence relied on by the trial court [**14] in finding unconstitutional intent, our analysis begins by considering the "intent" standard and the trial court's application of that standard in this case. Upon

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[3] The issues raised on appeal by the challengers are: (1) the trial court erred in requiring only two districts to be redrawn after finding constitutionally improper intent in the enacted congressional redistricting plan; (2) Congressional Districts 5, 13, 14, 21, 22, 25, 26, and 27 are independently unconstitutional; (3) this Court should craft a meaningful remedy, either by adopting a constitutionally valid plan or assisting the Legislature so that it can adopt a plan that complies with the Florida Constitution; and (4) the trial court erred in rejecting the challengers' attempt to re-open the evidence to introduce additional allegations of improper partisan intent.

We summarily reject the challengers' claim regarding the trial court's denial of their motion to re-open the evidence. Although the e-mail the challengers sought to introduce after the close of evidence did provide some additional circumstantial [**12] support for their claim of improper intent, the challengers themselves have conceded that it was cumulative to other evidence. Thus, while it may have been relevant evidence and properly introduced during the trial if the challengers had been able to obtain it sooner, the trial court did not abuse its discretion in denying the motion to re-open the case, and the challengers were not, in any event, prejudiced since the trial court found the existence of unconstitutional intent.

[4] The Legislature also raises the following three issues on cross-appeal: (1) the trial court's order improperly discourages public participation in the redistricting process; (2) under the Florida Constitution, the controlling intent is the intent of the Legislature as a collective body; and (3) *article III, section 20, of the Florida Constitution* is invalid because it violates the United States Constitution.

As to the claim regarding public participation, we clarify that we do not read the trial court's order as discouraging public input in redistricting. There is nothing inherently in violation of the law or the Florida Constitution for an individual to anonymously submit a map to the Legislature for consideration or to submit a map through a third party. We conclude that any comments by the trial court to the contrary were made in the specific context of the facts and circumstances of this case and do not amount to error.

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determining that the trial court appropriately framed the "intent" inquiry, we turn to the legal sufficiency of the trial court's finding of unconstitutional intent. We conclude that competent, substantial evidence supports the trial court's finding and that this finding pertains to the plan as a whole and not solely to the two invalidated districts. We then proceed to consider the proper legal effect of this finding as we review each challenged district. Finally, we address the remedy.[5]

## II. THE FLORIDA CONSTITUTION'S PROHIBITION ON PARTISAN POLITICAL GERRYMANDERING

In February 2012, "the Florida Legislature approved the decennial plan apportioning Florida's twenty-seven congressional districts, [**15] based on population data derived from the 2010 United States Census." *League of Women Voters of Fla. v. Fla. House of Representatives (Apportionment IV), 132 So. 3d 135, 139 (Fla. 2013)*. After the adoption of the Legislature's 2012 congressional redistricting plan, two separate groups of plaintiffs ("the challengers")[6] filed civil complaints in the Second Judicial Circuit Court in and for Leon County, challenging the validity of the plan under new state constitutional redistricting standards approved by the Florida voters in 2010 and now enumerated in *article III, section 20, of the Florida Constitution.* "Those standards, governing the congressional reapportionment process, appeared on the 2010 general election ballot as [*374] 'Amendment 6' and, together with their identical counterparts that apply to legislative reapportionment ('Amendment 5'), were generally referred to as the 'Fair Districts' amendments." *Id.*[7] As this Court has previously noted, "[t]here is no question that the goal of minimizing opportunities for political favoritism was the driving force behind the passage of the Fair Districts Amendment." *Apportionment I, 83 So. 3d at 639*.

In *Apportionment I*, during this Court's first review involving the new constitutional standards, we commended the Legislature for what it claimed at that time to be an unprecedented [**17] transparent redistricting process, in which the Legislature engaged in twenty-six public hearings around the state and obtained public input as it went about its task of

[5] We conclude—as agreed by both parties—that amici curiae LatinoJustice PRLDEF, Florida New Majority, and Mi Familia Vota lack standing to challenge the validity of Congressional District 9. Amici curiae did not appear in the trial court to raise this claim, and it is well-settled that amici are not permitted to raise new issues. *See Riechmann v. State, 966 So. 2d 298, 304 n.8 (Fla. 2007)*.

[6] We use the term "challengers," which has been used by this Court in prior opinions during the course of this litigation, to refer collectively to the plaintiffs in the trial court, who are the Appellants/Cross—Appellees in this Court. These litigants that challenged the constitutionality [**16] of the congressional redistricting plan enacted in 2012 include two separate groups, which have described themselves as the "Coalition plaintiffs" and the "Romo plaintiffs." The "Coalition plaintiffs" consist of the League of Women Voters of Florida, Common Cause, and four individually named parties. The National Council of La Raza was formerly a member of the "Coalition plaintiffs" but later voluntarily dismissed all claims and withdrew as a party in the case prior to the trial. The "Romo plaintiffs" consist of lead plaintiff Rene Romo and six other individually named parties. There has rarely been a need to distinguish between the two groups for purposes of the issues to come before this Court, and the circuit court consolidated the two lawsuits filed by these groups that challenged the Legislature's 2012 congressional redistricting plan.

[7] "Amendment 5 is now codified in *article III, section 21, of the Florida Constitution.* The standards in *article III, section 20*—governing congressional reapportionment—and those in *article III, section 21*—governing legislative reapportionment—are identical." *Id. at 139 n.1*.

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redistricting. *See* 83 So. 3d at 637 n.35, 664. In truth, public input in redistricting was not unique to the 2012 process. The Legislature held thirty-three public hearings during the 1992 redistricting and twenty-four public hearings prior to the enactment of the 2002 map. *See* Martinez, 234 F. Supp. 2d at 1288.

Based on the new constitutional standards that applied for the first time to the 2012 process, transparency became legally significant under the Florida Constitution. This Court explained that "if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate." *Apportionment IV, 132 So. 3d at 149*. Indeed, the challengers' principal claim in this litigation challenging the constitutional validity of the Legislature's 2012 congressional redistricting plan involved evidence of the type of "entirely different, [**18] separate process" this Court warned would be "important evidence" of a constitutional violation.

Specifically, the challengers argued that the Legislature cooperated and collaborated with partisan political operatives aligned with the Republican Party to produce a redistricting plan that was drawn in contravention of *article III, section 20*, with the intent to favor incumbents and the Republican Party, which was the controlling political party in the Legislature at the time of the 2012 redistricting. Before the approval of the Fair Districts Amendment, this Court had previously acknowledged, in 1992, that there was "little doubt that politics played a large part" in the adoption of prior redistricting plans in this state, explaining that the protection of incumbents and favoritism of one party over another was inevitable—and certainly "not illegal." *In re Senate Joint Resolution 2G, Special Apportionment Session 1992 (In re Apportionment Law—1992), 597 So. 2d 276, 285 (Fla. 1992)*. But at that time, such partisan intent was not legally prohibited.

The acceptability of partisan political gerrymandering in this state dramatically changed in 2010. With "fairness" as its "focus," the Fair Districts Amendment now "expressly prohibits" redistricting "practices that have been acceptable [**19] in the past, such as crafting a plan or district with the intent to favor a political party or an incumbent." *Apportionment I, 83 So. 3d at 605, 607, 616*. These "express new standards" thus afford Florida citizens [*375] "explicit constitutional protection" under *article III, section 20, of the Florida Constitution*, "against partisan political gerrymandering." *Apportionment IV, 132 So. 3d at 138-39*.

Specifically, *article III, section 20, of the Florida Constitution*, provides in its entirety as follows:

> *HN2*[↑] In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

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(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read [**20] to establish any priority of one standard over the other within that subsection.

Art. III, § 20, Fla. Const.

HN3[] Under article III, section 20, "there is no acceptable level of improper intent." Apportionment I, 83 So. 3d at 617. The prohibition on improper partisan intent in redistricting applies, "by its express terms," to "both the apportionment plan as a whole and to each district individually" and does not "require a showing of malevolent or evil purpose." Id. A finding of partisan intent therefore renders the Legislature's redistricting plan constitutionally invalid, as the Florida Constitution expressly "outlaw[s] partisan political gerrymandering." Apportionment IV, 132 So. 3d at 137. As we explained in Apportionment I:

> HN4[] The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process.
>
> Florida's express constitutional standard, however, differs from equal protection political gerrymandering claims under either the United States or Florida Constitutions. Political gerrymandering claims under the Equal Protection Clause of the United States Constitution focus on determining when partisan districting as a permissible exercise "has gone too far," so as to "degrade a voter's or a group of voters' influence on the political process as a whole."
>
> In contrast [**21] to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. It does not reference the word "invidious" as the term has been used by the United States Supreme Court in equal protection discrimination cases, and Florida's provision should not be read to require a showing of malevolent or evil purpose.

83 So. 3d at 616-17 (citations omitted).

HN5[] "Florida's constitutional provision prohibits intent, not effect," which is to say that a map that has the effect or result of favoring one political party over another is not per se unconstitutional in the absence of improper intent. Id. at 617. "Thus, the focus of the analysis must be on both direct and circumstantial evidence of [*376] intent." Id. "One piece of evidence in isolation may not indicate intent, but a review of all of the evidence together may lead this Court to the conclusion that the plan was drawn for a prohibited purpose." Id. at 618. The relevant inquiry for discerning improper partisan intent "focuses on whether the plan or district was drawn with this purpose in mind." [**22] Id.

## A. TRIAL COURT'S FINDING OF UNCONSTITUTIONAL INTENT

The challengers' claim of unconstitutional intent in the enacted congressional redistricting plan was that the Legislature communicated and collaborated with partisan political operatives, in the shadow of the Legislature's purportedly open and transparent redistricting process, to produce a map favoring Republicans and incumbents. After hearing all the evidence presented during a twelve-day bench trial held from late May to early June 2014, and evaluating the credibility of all the witnesses, the trial court found that the challengers had proven their case and concluded that the Florida Legislature's enacted 2012 congressional redistricting plan was drawn in violation of

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*article III, section 20*.

The introductory paragraph of the trial court's judgment stated that "districts 5 and 10 were drawn in contravention of the constitutional mandates of *article III, section 20*," but, in its discussion throughout the course of its forty-one-page order, the trial court more generally referred to and found that a group of partisan political operatives "conspire[d] to manipulate and influence *the redistricting process*" and succeeded in "infiltrat[ing] and influenc[ing] the Legislature, to obtain the necessary cooperation [**23] and collaboration" to "taint *the redistricting process and the resulting map* with improper partisan intent." (Emphasis supplied.)

Specifically, the trial court stated, in pertinent part, as follows:

> *[The challengers'] theory of the case regarding improper intent is that Republican leadership in the House and the Senate, their key staff members, and a small group of Republican political consultants conspired to avoid the effective application of the Fair District Amendments to the redistricting process and thereby successfully fashioned a congressional map that favors the Republican Party and its incumbents*. The strategy they came up with, according to the [challengers], was to present to the public a redistricting process that was transparent and open to the public, and free from partisan influences, but to hide from the public another secretive process. In this secretive process, the political consultants would make suggestions and submit their own partisan maps to the Legislature through that public process, but conceal their actions by using proxies, third persons who would be viewed as "concerned citizens," to speak at public forums from scripts written by the consultants and to submit proposed maps in their names [**24] to the Legislature, which were drawn by the consultants.
>
> *What is clear to me from the evidence, as described in more detail below, is that this group of Republican political consultants or operatives did in fact conspire to manipulate and influence the redistricting process*. They accomplished this by writing scripts for and organizing groups of people to attend the public hearings to advocate for adoption of certain components or characteristics in the maps, and by submitting maps and partial maps through the public process, *all with the intention of obtaining enacted maps for the State [*377] House and Senate and for Congress that would favor the Republican Party*.
>
> *They made a mockery of the Legislature's proclaimed transparent and open process of redistricting* by doing all of this in the shadow of that process, utilizing the access it gave them to the decision makers, but going to great lengths to conceal from the public their plan and their participation in it. *They were successful in their efforts to influence the redistricting process and the congressional plan under review here*. And they might have successfully concealed their scheme and their actions from the public had it not been for [**25] the [challengers'] determined efforts to uncover it in this case.
>
> *The closer question is whether the Legislature in general, or the leadership and staff principally involved in drawing the maps, knowingly joined in this plan, or were duped by the operatives in the same way as the general public*. The Defendants argue that if such a conspiracy existed, there is no proof that anyone in the Legislature was a part of it. If portions of the operatives' maps found their way into the enacted maps, they say, it was not because leadership or staff were told or knew they came

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from this group, but rather because the staff, unaware of their origins, saw the proposals as improving the draft maps they were working on.

*The most compelling evidence in support of this contention of the Defendants is the testimony of the staff members who did the bulk of the actual map drawing for the Legislature. I had the ability to judge the demeanor of Alex Kelly, John Guthrie and Jason Poreda at trial and found each to be frank, straightforward and credible. I conclude that they were not a part of the conspiracy, nor directly aware of it, and that significant efforts were made by them and their bosses to insulate [**26] them from direct partisan influence*. I accept that their motivation in drawing draft maps for consideration of the Legislature was to produce a final map which would comply with all the requirements of the Fair District Amendments, as their superiors had directed them.

*That being said, the circumstantial evidence introduced at trial convinces me that the political operatives managed to find other avenues, other ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration to ensure that their plan was realized, at least in part. They managed to taint the redistricting process and the resulting map with improper partisan intent. There is just too much circumstantial evidence of it, too many coincidences, for me to conclude otherwise*.

(Emphasis supplied.)

Having reviewed the trial court's factual findings and the record, and viewing the evidence in the light most favorable to the trial court's finding of unconstitutional intent, we set forth the following relevant factual background of the case. *See Berges v. Infinity Ins. Co., 896 So. 2d 665, 676 (Fla. 2004)* (explaining that HN6[⬆] it "is not the function of this Court to substitute its judgment for that of the trier of fact"); *Markham v. Fogg, 458 So. 2d 1122, 1126 (Fla. 1984)* (stating that an appellate court "should not substitute [**27] its judgment for that of the trier of fact" as long as there is competent, substantial evidence to support the findings, and concluding upon review of conflicting evidence that there was "ample credible evidence adduced at the trial to sustain the trial judge's findings"); *see also Hausdorff v. Hausdorff, 913 So. 2d 1267, 1268 (Fla. 4th DCA 2005)* (viewing the evidence in the light most favorable to [*378] the challenged judgment in evaluating whether competent, substantial evidence supported the trial court's rulings); *Mesick v. Loeser, 311 So. 2d 132, 136 (Fla. 2d DCA 1975)* (findings by the lower court as a trier of fact come to the appellate court "clothed with a heavy presumption of correctness and where there is substantial competent evidence to sustain the actions of the trial court," the appellate court cannot substitute its own opinion on the evidence but "must indulge every fact and inference in support of that judgment," which is the equivalent of a jury verdict). We note, given the nature of the challengers' claim, that HN7[⬆] circumstantial evidence is often essential in proving a conspiracy—and indeed may be the only type of evidence available. *See Anheuser-Busch, Inc. v. Campbell, 306 So. 2d 198, 199 (Fla. 1st DCA 1975)* ("It is a well settled rule that circumstantial evidence is admissible in civil conspiracy cases."); *see also Resnick v. State, 287 So. 2d 24, 26 (Fla. 1973)* (holding that a criminal conspiracy need not [**28] be proved by only direct evidence).

As we recount the facts, we emphasize that not every meeting held or every communication made was improper, illegal, or even violative of the letter of the Fair Districts Amendment. We set forth the pertinent facts in the record because, collectively, the evidence that the challengers were able to uncover after a protracted discovery process demonstrates a different scenario

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than the entirely open and transparent process touted by the Legislature when this Court considered the original apportionment challenges to the state Senate and House maps in *Apportionment I*. This is, indeed, what the trial court—which heard and considered all this evidence—found.

We also emphasize that since many of the e-mails were deleted or destroyed, we still may have only a partial picture of the behind-the-scenes political tactics. As the trial court found, "the Legislators and the political operatives systematically deleted almost all of their e-mails and other documentation relating to redistricting." The Legislature did so even though it had acknowledged that litigation over the redistricting plan was "a moral certainty." Indeed, if not for the production of some documents from the political consultants, [**29] including Marc Reichelderfer and Pat Bainter, there would be no record of the separate process undertaken by the consultants and no way to establish whether or not this process involved the collusion of the Legislature and ultimately affected the enacted map, as the trial court concluded.

We further understand that "taking the politics out of politics" is itself a difficult challenge, considering that partisan political gerrymandering was the norm for both political parties during prior redistricting processes in this state. Nevertheless, the facts that we recount provide the backdrop as to why we reject the Legislature's defense—which focuses on the political consultants' efforts to "influence the redistricting process" and "make themselves relevant" despite their "exclusion from the decision-making process"—that depicts the political consultants and a few errant staffers as independent, self-motivated culprits, individuals who did not have the ability to and did not, in fact, influence the Legislature's decisions regarding where to draw the lines. And, finally, we emphasize that HN8[↑] a finding of unconstitutional intent to favor a political party or incumbent does not necessarily mean [**30] that those who made the decisions acted with "malevolent or evil purpose," which is not required for a finding of unconstitutional intent under the Fair Districts Amendment. *Apportionment I, 83 So. 3d at 617*.

## B. EVIDENCE OF UNCONSTITUTIONAL INTENT

A month after the Florida voters approved the Fair Districts Amendment during [*379] the November 2010 general election, then-Speaker of the House Dean Cannon authorized a meeting in December 2010 at the headquarters of the Republican Party of Florida, involving Republican political consultants and legislative staffers, to discuss the upcoming redistricting process. This gathering was described by one of the consultants at trial as a meeting of "people that, prior to passage of the [new constitutional standards], would have generally been involved in the redistricting process."

The four key political consultants in attendance, who became major figures in the redistricting trial, were (1) Rich Heffley, (2) Frank Terraferma, (3) Marc Reichelderfer, and (4) Pat Bainter. Heffley is a consultant who has worked with many Republican legislators and candidates for public office, including Senator Don Gaetz, the Chairman of the 2012 Senate Committee on Reapportionment. Heffley had been involved in prior redistricting [**31] processes in Florida in 1992 and 2002 and, by the summer of 2011, was being paid $10,000 per month by the Republican Party of Florida for unspecified redistricting services. Terraferma is also a consultant who has worked for a number of Republican legislators and candidates, including Representative Will Weatherford, the Chairman of the 2012 House Redistricting Committee. Terraferma had previously been hired by Heffley to work for the Republican Party of Florida and went back to work for the party as Director of House campaigns in

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2011. He was described by employees of a national Republican organization, in an invitation for a meeting held in Washington, D.C., in June 2011 with key individuals involved in the redistricting process, as a "genius map drawer." Reichelderfer is another consultant who has worked with several Republican legislators and candidates, including former Speaker Dean Cannon. Reichelderfer is also one of Cannon's longtime personal friends, dating back over twenty years to their days together as Young Republicans. He was, at the time of the 2012 redistricting, considered part of Cannon's "inner circle," and he had a good working relationship with Heffley. Bainter [**32] is the owner of a Gainesville, Florida, based political consulting firm known as Data Targeting, Inc., which has as one of its largest clients the Republican Party of Florida. Between January of 2011 and November of 2012, the Republican Party of Florida paid Data Targeting, Inc., almost $3 million for consulting, polling, and direct mail services.

These four consultants, along with employees of the Republican Party of Florida, met in the initial December 2010 meeting with Alex Kelly, the staff director for the House Redistricting Committee; Chris Clark, the chief legislative aide for Senator Gaetz; and attorneys for the Legislature. At a second meeting the following month, in January 2011, the consultants met with Senator Gaetz, Representative Weatherford, Alex Kelly, and Kelly's Senate counterpart, John Guthrie.

These meetings were not open to the public and there is no record of what was discussed. As the trial court stated, "[n]o one who testified at trial about [the meetings] seemed to be able to remember much about what was discussed, though all seemed to agree that the political consultants were told that they would not have a 'seat at the table' in the redistricting process," as they [**33] had during redistricting in years past. According to the trial court, "[n]o one clearly articulated what that meant exactly, but there was testimony that they were told that they could still participate in redistricting through the public process 'just like any other citizen.'"

Reichelderfer, the consultant who has worked with then-Speaker Cannon, testified [*380] that one topic of discussion at the meetings, as the trial court noted, was "whether a privilege could be identified to prevent disclosure of redistricting-related communications among political consultants, legislators, and legislative staff members." The conclusion reached at the meetings, according to the trial court, was "that no privilege would apply." After the first meeting, in December 2010, Reichelderfer prepared a memorandum that included the following question: "Communication with outside non-lawyers—how can we make that work?"

Another question included in the Reichelderfer memorandum was, "Evolution of maps—Should they start less compliant and evolve through the process—or—should the first map be as near as compliant as possible and change very little?" Reichelderfer acknowledged at trial that it was "possible" he discussed [**34] with Speaker Cannon the issues identified in this initial memo he prepared. The trial court would later reference Reichelderfer's memo in rejecting part of the Legislature's argument that there could be "no improper partisan intent in the drafting of the maps" because, the Legislature asserted, "as things progressed, each succeeding map that was drawn was an improvement over the one before it in terms of compactness, leaving cities and counties intact and following geographical boundaries." "Coincidentally," the trial court stated, "that corresponds with a strategy suggested from Reichelderfer's notes, i.e., start with less compliant maps and work toward a more compliant map."

The trial court found that there was "no reason to

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convene two meetings just to tell active political partisans of the Republican Party that they would not 'have a seat at the table.'" The trial court also noted "a few curious things about these meetings and their connection to subsequent events that are troubling."

Specifically, even though the consultants supposedly had no "seat at the table," the trial court found that they continued to be involved in the process. In June 2011, an e-mail was sent from Senator [**35] Gaetz's e-mail address to legislators to provide information about upcoming public hearings regarding redistricting. A "blind copy" of this e-mail was sent to Heffley, the consultant under contract with the Republican Party of Florida, and to Terraferma, the "genius map drawer." The trial court found that this was evidence that either Senator Gaetz or "someone in his office" was "keeping these operatives in the loop."

Another e-mail, sent in October 2011 from Terraferma to Representative Weatherford, reported that Kirk Pepper, the Deputy Chief of Staff for then-Speaker Cannon, was "huddled on a computer" at the Republican Party of Florida's headquarters, working with consultant Heffley on "[c]ongressional redistricting if I had to guess?" Pepper acknowledged at trial that he must have been speaking with Heffley at the Republican Party of Florida's headquarters at the time, but stated that he "never met with Rich Heffley about redistricting." He had no explanation as to why Terraferma, whom Pepper had previously worked with at the Republican Party of Florida, would have thought otherwise. The trial court found that it was "possible that Terraferma was mistaken or simply speculating without any basis," [**36] but this communication caused the trial court to "wonder why [Terraferma] would make this assumption if Pepper really had nothing to do with the redistricting process."

As it turned out, Pepper acted as a conduit between the consultants and the Legislature. According to testimony relied on by the trial court, Cannon staffer [*381] Pepper "regularly" provided advance, non-public copies of draft redistricting maps to consultant Reichelderfer. The evidence, which came from document production by Reichelderfer since, as the trial court noted, neither Pepper nor Speaker Cannon preserved any records, demonstrated that between November 2011 and January 2012, Pepper transmitted to Reichelderfer—through his personal e-mail account, a "Dropbox" account he later deleted, and a thumb drive—at least twenty-four draft congressional redistricting maps prepared by the Legislature, mostly before they were released to the public. In some instances, Pepper sent Reichelderfer maps the Legislature prepared but *never* released to the public.

Although Pepper testified at trial that he acted "without Speaker Cannon's approval" and, in retrospect, considered his decision to provide Reichelderfer with maps to have been [**37] "a mistake," Pepper was later hired by Cannon's private firm after Cannon left office. Cannon described Pepper as "a loyal employee," but testified that he did not know about Pepper's transmission of maps to Reichelderfer until it was reported in the media during the litigation in this case.

While they denied doing so, the trial court found that Pepper and Reichelderfer "communicate[d] about the political performance of the maps." In one instance, after Reichelderfer expressed concerns that the draft of a Central Florida district occupied by incumbent Republican Representative Daniel Webster was "a bit messed up," Pepper asked Reichelderfer, "[p]erformance or geography?" Reichelderfer acknowledged during testimony at trial that "performance" in that context would "[g]enerally" refer to the political performance of the district, although there is no record of his response to Pepper. Reichelderfer testified that he could not recall whether or how he

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answered that question. He spoke on the phone "regularly" with Pepper but denied having "specific conversations about political performance."

Despite asking, "[p]erformance or geography?" Pepper testified at trial that he did not want to know from Reichelderfer if there was a problem with the [**38] political performance of that particular district. Instead, he provided a lengthy explanation that his question was a "sarcastic" response to remind Reichelderfer "to be quiet," because they were not supposed to talk about redistricting or the political implications of certain maps. Pepper stated of his question, "[i]t's like if you were talking to someone that you knew very well and had known for a long period of time, you could say something in writing that other people might take differently than you meant it." The trial court discredited Pepper's explanation as "very unusual and illogical."

After receiving maps from Cannon staffer Pepper, Reichelderfer modified the maps to increase the Republican performance of the districts, and he and the other consultants traded numerous maps back and forth with each other. Of significance, the trial court found that some of Reichelderfer's modifications corresponded to the actual decisions the Legislature ultimately made.

In one graphic example, cited by the trial court, Reichelderfer's revisions changed the performance of Districts 5, 7, 9, and 10 from four Democratic performing or leaning seats to two Democratic and two Republican performing seats, [**39] as eventually reflected in the actual map enacted by the Legislature. Another map, which was known to have been drawn by Terraferma, shared eleven identical districts with a map submitted through the public process by an individual named Alex Posada, [*382] who denied ever creating or submitting the map and stated that he had not authorized anyone to submit a map using his name.

For his part, Reichelderfer described his interest in the Legislature's maps as important to him "professionally" to "know the lay of the land," similar to Bainter's explanation that his interest was an "after-the-fact" one merely for the sake of his own "[k]nowledge"—even though the evidence presented at trial demonstrated that the consultants spent considerable time, including weekends, early mornings, and late nights, making revisions to draft maps, and even though communications between these consultants regarding the maps referred to having "a job to do," wanting to "spread" the maps "around," and "[h]ead[ing] up" to Tallahassee to "[t]ell[] folks to look at" certain maps.

The trial court found that the consultants "did their best to evade answering direct questions" at trial, "often using semantic distinctions to avoid admitting what [**40] they had done." As this Court previously noted with respect to documents produced by Bainter that included communications among the consultants regarding maps, "the documents support[ed] the challengers' claim that Bainter was not just drawing maps out of casual 'after-the-fact interest,' but was actively engaged in an extensive process to draw maps favorable to a particular political party or incumbent and facilitate the submission of those maps to the Legislature through 'shell people' without any indication that the maps were drawn by the political consultants." *Apportionment VI, 150 So. 3d at 1129*. For instance, one email produced by Bainter stated that a Republican activist in Gainesville was "getting" him "10 more people at least," while another e-mail indicated that if one of the consultants could "think of a more secure and failsafe way to engage our people, please do it."

The trial court found that the Bainter documents "evidenced a conspiracy to influence and manipulate the Legislature into a violation of its constitutional duty" to redistrict in a neutral, non-partisan fashion, and explained that those documents were "very helpful" in

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demonstrating not only that the consultants "were submitting maps to the legislature" [**41] through third parties, but "how extensive and organized that effort was, and what lengths they went to in order to conceal what they were doing." The trial court also found it "hard to imagine" that the legislative leaders and staffers who allegedly told these consultants that they could not be involved, other than through the public process, "would not have expected active participation in the public redistricting process by those political consultants at the meetings" and would not have questioned both why the consultants were not in attendance at the public hearings and why none of the maps coming from the public had any of the consultants' names on them. "I would think," the trial court opined, "that the staff and legislative leaders would find [this lack of public participation by the consultants] extremely strange, that they might even ask why not. But they didn't."

According to the trial court, however, the consultants had no need to publicly participate in order to influence the Legislature's redistricting plan. Throughout the process, Reichelderfer was in direct contact with Speaker Cannon. In one late November 2011 e-mail from Cannon to Reichelderfer, which copied Pepper, [**42] Cannon commented that "we are in fine shape" as long as "the Senate accommodates the concerns that you [Reichelderfer] and Rich [Heffley] identified in the map that they put out tomorrow."

Cannon testified at trial that these "concerns" he was referring to were that the [*383] House and Senate "not roll out maps that were either completely inconsistent with one another or designed to show some inadequacy in terms of either minority representation or defect in [the House's] maps," so that reconciliation between the two chambers would be difficult. The trial court found Cannon's explanation to be "a stretch given the language used."

The evidence also revealed that Cannon asked Reichelderfer and Heffley, who was described as being "close" to Senator Gaetz, to serve, as the trial court put it, "as go betweens for leadership of the two chambers regarding the redistricting process." According to testimony relied on by the trial court, the asserted reason for Reichelderfer's and Heffley's involvement was "purportedly because of a lack of a good working relationship between the Speaker of the House and the President of the Senate."

The trial court was skeptical of that explanation, however, stating [**43] that "by all accounts, the actual staff members of each chamber who were working on the maps got along well with each other, as did the chairmen of the redistricting committees." The trial court actually found the staff members who testified at trial to be "straightforward and credible" and "not a part of the conspiracy." In any event, the trial court specifically found that "in their insider roles, Heffley and Reichelderfer did not have to speak directly to staff map drawers, or even leadership, to infect and manipulate the map drawing and adoption process."

At trial, Reichelderfer admitted to discussing "global" redistricting concerns with Speaker Cannon, but denied talking to Cannon "specifically about individual maps." Reichelderfer lived near Cannon, their families spent time together, Reichelderfer saw Cannon on the weekends, and Reichelderfer met with Cannon to discuss issues he was dealing with as Speaker.

Reichelderfer also correctly informed other consultants about which of the Legislature's draft maps was most "relevant," meaning which was most likely to advance in the process. Among the seven congressional maps released to the public by the House on December 6, 2011, the [**44] map identified by Reichelderfer as the map most likely to advance was the map that was revised to become the House's final proposed

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congressional map. At trial, Reichelderfer could not "recall specifically" how he knew that map to be the most likely to advance in the process, simply stating that if he "had that information for sure," he wouldn't have used the qualifier "I think" in his response. He testified that he "could have" just thought it "was the easiest to pair up with the Senate version of the map."

Communications among the consultants revealed particular emphasis on certain areas of the map. For instance, in one e-mail referencing a configuration in a draft map that kept District 14 contained entirely within Hillsborough County—a configuration less favorable to Republicans than the configuration ultimately enacted, which crossed Tampa Bay to pick up voters from Pinellas County in District 14—Terraferma noted to Heffley that "Tampa is far from perfect." The enacted configuration of Districts 13 and 14—where District 14 includes a portion of Pinellas County, rather than being strictly within Hillsborough—produced one safe Democratic seat and one seat that either party could [**45] win, rather than two naturally-occurring seats favorable to Democrats. This was the configuration preferred by the consultants.

In another e-mail between Terraferma, Heffley, and Reichelderfer sent on the same day the Senate released a public map that did not divide the City of Homestead— [*384] a division considered by the consultants to be important to favor Republicans—Terraferma noted that District 26 was "pretty weak." Heffley responded, "The [H]ouse needs to fix a few of these," and Terraferma, copying Reichelderfer, responded, "yes." The enacted configuration did, indeed, split the City of Homestead between Districts 26 and 27, which turned one Republican district and one Democratic district into two Republican-leaning districts.

The decision to split Homestead was one of several key decisions made in a non-public meeting between Senator Gaetz, Representative Weatherford, and the two staff directors of the respective redistricting committees. While the meeting of two legislators in private does not result in a violation of *article III, section 4(e), of the Florida Constitution*—which requires all meetings between "more than two members" of the Legislature to be open to the public—the lengths to which the legislators went to avoid triggering the requirements [**46] for a public meeting in the final stages of negotiating and making changes to the districts raises questions as to the motivation of the Republican leadership. It also stands in stark contrast to statements from that leadership proclaiming that the 2012 redistricting process would be the most open and transparent in Florida's history. And, it can be readily distinguished from other legislative decisions where private negotiations are undertaken, since redistricting involves "a constitutional restraint on the Legislature's actions." *Apportionment IV, 132 So. 3d at 147*.

Indeed, many final revisions that affected numerous districts in some way—such as the decision to push the Black Voting Age Population (BVAP) of District 5 over 50%, add an appendage to District 10, split Homestead, and increase the Hispanic Voting Age Population (HVAP) of Districts 9 and 14—were made in this non-public meeting that occurred after the House and Senate had each passed their versions of the congressional map. The decisions regarding District 5 and District 10 specifically contributed to the trial court's decision to invalidate those two districts.

There was, in general, either conflicting or vague testimony as to why certain decisions were [**47] made in this meeting, including that the decisions were necessary to comply with the federal Voting Rights Act or some other policy concern. Because the meeting was not public, however, there is no official record of the reason for these decisions, which ultimately benefitted the Republican Party.

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One example of a key decision made during this non-public meeting was the decision to push the BVAP of District 5 over 50%. Although he could not recall specifics, Representative Weatherford testified that making District 5 a majority-minority district was "important to the Senate" and that the Senate made a "compelling case" for raising the BVAP of the district over 50%. The highest BVAP for District 5 in any of the House's draft maps was slightly over 48%. Senator Gaetz testified that the Senate believed it was important to increase the BVAP to over 50% to protect against a federal Voting Rights Act challenge, and that he also favored keeping the City of Sanford in the district, which the House's version of the map did not do.

Before Representative Weatherford met with Senator Gaetz, Speaker Cannon met separately with Representative Weatherford and staff in another non-public meeting. Speaker [**48] Cannon anticipated that the Senate would ask to make District 5 a majority-minority district and apparently instructed the House during this non-public meeting to agree to the Senate's request. Ensuring that the BVAP of District [*385] 5 ended up over 50% was of particular concern to Reichelderfer, the consultant who was part of Speaker Cannon's "inner circle."

At trial, Reichelderfer testified, without specificity, that he believed pushing the BVAP of District 5 over 50% was important "to comply with the Federal Voters Rights Act," based on a general recollection of discussions with lawyers whose names he could not recall. He thought it would be "politically damaging" if the map was invalidated because of a successful Voting Rights Act challenge, even though the 2002 version of District 5 did not have a BVAP of over 50% and was not invalidated during Voting Rights Act litigation. *See* *Martinez, 234 F. Supp. 2d at 1307* (noting that the BVAP of the 2002 version of District 5 was "only" 46.9%, but that the district "will afford black voters a reasonable opportunity to elect candidates of choice and probably will in fact perform for black candidates of choice"). At the same time, increasing the BVAP of District 5—as occurred [**49] from early versions of the Legislature's draft maps to the enacted version—decreased the Democratic performance of surrounding districts.

The trial court found the Legislature's justification for making District 5 a majority-minority district to be "not compelling" and invalidated the enacted version of District 5. The Legislature's decision—made in a non-public meeting, after Cannon's instruction in a separate non-public meeting, consistent with a concern Reichelderfer had long expressed—is therefore circumstantial evidence of collusion between the Legislature and the consultants, particularly where the trial court found there to have been no showing that it was legally necessary to create a majority-minority district.

There is no record from the time many of these key decisions were made to explain the Legislature's reasoning. This is, of course, partly because the final decisions were made in a non-public meeting. But it is also because the Legislature, as the trial court found, deleted almost all e-mails and documentation related to redistricting.

Former Speaker Cannon testified that his e-mails were automatically deleted after six months unless specifically saved as having "significant [**50] archival or legal significance." If that were the case, then exchanges between Speaker Cannon and consultant Reichelderfer that occurred in late November 2011—discovered from document production by Reichelderfer—would not have been deleted until May 2012 unless they were intentionally deleted before that time. But May 2012 was several months after the lawsuit was filed in this case, naming Cannon as a party and making a reality what the Legislature itself had

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previously acknowledged, as far back as December 2012, to have been "a moral certainty" from "start to finish" during the redistricting process—that records related to redistricting would be sought by the challengers and relevant to adjudicating the constitutionality of the Legislature's redistricting plan.

Ultimately, based on the evidence the challengers uncovered and presented at trial, the trial court found that there was "just too much circumstantial evidence" and "too many coincidences" to reach any conclusion other than that the political operatives had "infiltrate[d] and influence[d] the Legislature" in order to "obtain the necessary cooperation and collaboration" to "taint the redistricting process and the resulting map with improper partisan [**51] intent." While it is sometimes said that it is "hard to believe in coincidence," the trial court determined in this case that, as the saying goes, it was "even harder to believe in anything else." After reviewing all the [*386] evidence, both direct and circumstantial, the trial court thus concluded that the plan was drawn with improper partisan intent.

### C. STEPS AFTER FINDING UNCONSTITUTIONAL INTENT

Despite its finding of unconstitutional partisan intent, however, the trial court invalidated only Districts 5 and 10, rejecting challenges to seven other individual districts. The trial court determined that there was no "distinction" between a challenge to the plan as a whole and a challenge to specific districts, and therefore "focused on those portions of the map" that it found to be "in need of corrective action in order to bring the entire plan into compliance with the constitution."

Its finding of unconstitutional intent notwithstanding, the trial court applied a deferential standard of review in analyzing each challenged district, "deferring to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements." Believing [**52] that the "more reliable" indicators of whether the plan was drawn with the intent to favor a political party or incumbent were the tier-two constitutional measures, the trial court "first examine[d] the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries where feasible, then consider[ed] any additional evidence that supports the inference that such districts are also in violation of tier-one requirements."

Applying this analysis as to District 5, the trial court noted that the decision to increase the BVAP of District 5 over 50% was made at a non-public meeting at the end of the redistricting process and ultimately found that there was no showing "that it was legally necessary to create a majority-minority district." The trial court therefore concluded that the challengers had proved "that District 5 unnecessarily subjugates tier-two principles of compactness" and that "portions of District 5 were drawn to benefit the Republican Party, in violation of tier-one."

As to District 10, the trial court noted an "odd-shaped appendage" and found that the challengers had "shown that the district could be drawn in a more compact fashion, [**53] avoiding this appendage." The trial court therefore concluded, based in part on an inference it drew from the existence of the odd-shaped appendage that had no legal justification, that District 10 was drawn to benefit the Republican Party and the incumbent.

Accordingly, the trial court required Districts 5, 10, and "any other districts affected thereby" to be redrawn. But the trial court rejected the challenges to Districts 13, 14, 21, 22, 25, 26, and 27, concluding that the challengers had not met their burden to demonstrate unconstitutionality and had not shown more than "de minimis" tier-two violations.

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As a remedy, the challengers urged the trial court to adopt one of their remedial plans, draw its own remedial plan, or hire an independent expert to draw a remedial plan. After a hearing, the trial court declined the challengers' suggestions and determined that the Legislature should redraw the plan. The Legislature held a special session in August 2014 to enact a remedial redistricting plan.

During this session, the chairs of the respective redistricting committees again conducted non-public meetings with staff and counsel to negotiate the features of the revised plan. The Legislature [**54] made modest changes to correct the specific tier-two deficiencies identified in Districts 5 and 10,[8] and, after the plan was signed into [*387] law, the trial court held another hearing to consider the validity of the revised plan and whether it could be implemented in time for the 2014 elections.

Concluding that the challengers' objections to the validity of the remedial plan were without merit, the trial court approved the Legislature's remedial redistricting plan and ordered the then-impending 2014 elections to proceed under the unconstitutional 2012 plan due to time constraints, with the remedial plan to take effect for the 2016 elections. The 2016 effective date for the remedial plan has not been challenged.

The challengers appealed the trial court's initial order containing its factual findings and legal conclusions, as well as its subsequent order approving the remedial redistricting [**55] plan, and the Legislature cross-appealed, attacking certain aspects of the trial court's judgment but ultimately seeking affirmance of the order approving the remedial plan. The First District Court of Appeal then certified the trial court's judgment for direct review by this Court. *See* League of Women Voters of Fla. v. Detzner, No. 1D14-3953, 2014 Fla. App. LEXIS 15265, 2014 WL 4851707, at *2 (Fla. 1st DCA Oct. 1, 2014). We accepted jurisdiction under article V, section 3(b)(5), of the Florida Constitution, and heard oral argument. *See* League of Women Voters of Fla. v. Detzner, No. SC14-1905, 173 So. 3d 963, 2014 Fla. LEXIS 3223, 2014 WL 5502409, at *1 (Fla. Sup. Ct. order filed Oct. 23, 2014).

## III. ISSUES OF "INTENT"

Having set forth this comprehensive background, we now turn to the legal issues pertaining to the trial court's finding of unconstitutional intent. First, we consider the "intent" standard itself and whether the trial court correctly applied the standard in this case. Then, we review the legal sufficiency of the trial court's finding.

### A. THE "INTENT" STANDARD

HN9[↑] Article III, section 20, of the Florida Constitution, prohibits an apportionment plan or individual district from being "drawn" with the "intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const. All parties in the litigation, the trial court stated, "agreed that it is the Legislature's intent"—not the intent of, for instance, one rogue "staff member [**56] charged with actually drawing the map," or of political consultants with no influence on the Legislature—"that is at issue." But how to determine the Legislature's intent in this unique context, where the Florida Constitution contains an explicit prohibition on certain improper legislative intent in "draw[ing]" the redistricting plan, is a much more difficult proposition.

[8] In redrawing Districts 5 and 10, the Legislature's remedial redistricting plan also slightly altered the boundaries of five other congressional districts—Districts 6, 7, 9, 11, and 17. All of the remaining districts were unchanged from the configuration enacted in the Legislature's 2012 redistricting plan.

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In *Apportionment I, 83 So. 3d at 617*, this Court explained that *HN10*[↑] "the Florida Constitution prohibits drawing *a plan or district* with the intent to favor or disfavor a political party or incumbent." (Emphasis supplied.) There is, this Court held, "no acceptable level of improper intent." *Id.* The "intent" standard "applies to both the apportionment plan *as a whole* and to each district individually." *Id.* (emphasis supplied). This Court's precedent discussing the "intent" standard in the course of prior cases during this litigation has demonstrated this principle—that improper intent, particularly if "part of a broader process to develop portions of the map," may "directly relate to whether the plan [*388] *as a whole* or any specific districts were drawn with unconstitutional intent." *Apportionment IV, 132 So. 3d at 150* (emphasis supplied).

In a traditional lawsuit involving a challenge to a statutory enactment, [**57] courts determine legislative intent through statutory construction, looking to the actual language used and any other tools—such as the history of legislative changes and any appropriate interpretive canons—to assist in discerning the Legislature's intent in enacting the law. *See, e.g., Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 198-99 (Fla. 2007)* (setting forth the general principle of statutory interpretation that "legislative intent is determined primarily from the statute's text" and applying rules of statutory construction "to determine the legislative intent behind the provision," including reading related statutory provisions together to achieve a consistent whole and avoiding readings that would render part of a statute meaningless). As this Court has previously explained, however, *HN11*[↑] determining whether the Legislature acted with the type of improper "intent" that is prohibited by the "specific constitutional mandate of article *III, section 20(a)*, is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction." *Apportionment IV, 132 So. 3d at 150*.

Specifically, this Court held in largely rejecting claims of legislative privilege in *Apportionment IV* that, because the decision-making process itself is the case, "the communications [**58] 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.* This Court further stated that the "existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits," and that evidence of this separate process would "clearly" be "important" to help support a "claim that the Legislature thwarted the constitutional mandate." *Id. at 149*.

Following this Court's precedent, which "emphasize[s] that this case is wholly unlike the traditional lawsuit challenging a statutory enactment," *id. at 151*, the trial court framed the "intent" inquiry as determining "the motive in drawing" the districts. We agree that this was the correct approach. Under this framework, the trial court appropriately concluded that "the actions and statements of legislators and staff, especially those directly involved in the map drawing process[,] would be relevant on the issue of intent."

Case law supports the trial court's conclusion, which is consistent with [**59] our decision in *Apportionment IV*, that *HN12*[↑] the intent of individual legislators and legislative staff members involved in the drawing of the redistricting plan is relevant in evaluating legislative intent. The United States Supreme Court, for example, has recognized that the actions of individual legislators and staff members may be relevant in discerning legislative intent in the context of redistricting.

In *Easley v. Cromartie, 532 U.S. 234, 254, 121 S. Ct.*

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1452, 149 L. Ed. 2d 430 (2001), the Supreme Court reviewed "direct" evidence, relied on by a federal district court evaluating a claim of racial predominance in North Carolina's congressional redistricting plan, involving an e-mail sent from "a legislative staff member responsible for drafting districting plans" to two state senators. The Supreme Court noted that the e-mail's "reference to race" offered "some support" for the district court's conclusion that the [*389] North Carolina Legislature used race as the "predominant factor" in drawing the boundaries of a particular district. *Id.; see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (stating that the "specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes" and that "[d]epartures from the normal procedural sequence also might afford evidence that improper [**60] purposes are playing a role").

Other redistricting cases have confirmed this principle. In Texas v. United States, 887 F. Supp. 2d 133, 165 (D.D.C. 2012),[9] cited by the trial court, a three-judge federal district court panel stated that its "skepticism about the legislative process that created [a challenged district] [wa]s further fueled by an email sent between staff members on the eve of the Senate Redistricting Committee's markup of the proposed map." *See also* Smith v. Beasley, 946 F. Supp. 1174, 1210 (D.S.C. 1996) (stating that "the evidence [wa]s clear that the Reapportionment Subcommittee delegated to its staff . . . the responsibility of drawing the district lines," and subsequently evaluating the actions of those staff members). In other words, the federal district court looked to the actions of legislative staff members directly involved in the redistricting process to assist in evaluating whether the Legislature was acting with improper intent. Whether the actions of individual legislators or staffers ultimately signify constitutionally improper intent—as the trial court concluded in this case, despite finding the professional staff to be credible—is a separate question from whether their intent is relevant, in the first place, to evaluating the intent of the Legislature in drawing the redistricting [**61] plan.

In support of its contrary argument that "[c]ourts across the country . . . refuse to impute the personal motivations of individual legislators to the legislative body as a collective whole," the Legislature offers a catalogue of citations to cases from other jurisdictions. But, as the challengers have pointed out, these cases and the arguments made by the Legislature in this case closely mirror the exact cases and arguments this Court distinguished and rejected for the same basic principle in *Apportionment IV*.

In that case, this Court specifically stated that "this case is completely distinguishable from the various circuit court orders and cases outside the reapportionment context from other jurisdictions cited by the Legislature that have quashed subpoenas of legislators or legislative staff members where the testimony of an individual member of the Legislature was not directly relevant to any issue in the case." Apportionment IV, 132 So. 3d at 150. Indeed, in *Apportionment IV*, we determined [**62] that the actions of the individual legislators and legislative staff members involved in the drawing of the redistricting plan *were* directly relevant to assessing whether the plan itself was drawn with improper intent. *See* id. at 137 ("[T]he issue presented

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[9] The federal district court's opinion in *Texas* was subsequently vacated on other grounds by the United States Supreme Court after that Court issued its recent decision in Shelby County, Alabama v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), holding a portion of the Voting Rights Act unconstitutional. *See* ***Texas v. United States, 133 S. Ct. 2885, 186 L. Ed. 2d 930 (2013).***

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to the Court is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues *directly* relevant to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory 'intent.'").

[*390] Accordingly, we hold that the trial court correctly framed the "intent" inquiry and reject the Legislature's assertion that the finding of unconstitutional intent could not be ascribed to the Legislature as a whole. Having reached the conclusion that the trial court did not err in evaluating the actions of legislators and legislative staff members in finding unconstitutional "intent," as prohibited by *article III, section 20*, we turn next to the legal sufficiency of the trial court's finding.

## B. LEGAL SUFFICIENCY OF UNCONSTITUTIONAL INTENT

Our review of the trial court's finding of unconstitutional intent in the congressional redistricting plan takes place against the backdrop [**63] of the trial court's specific finding that the Legislature "systematically deleted almost all of their e-mails and other documentation relating to redistricting." The Legislature did so despite knowledge that litigation over the constitutionality of its redistricting plan was inevitable.

In fact, as far back as 2008, the Legislature argued to this Court that "litigation challenging reapportionment under the new standards" would increase as a result of the Fair Districts Amendment. *See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 161, 165 (Fla. 2009)*. And, the Legislature informed the trial court in this case that litigation "was 'imminent' long before the days preceding the filing of" the challengers' lawsuit. From "start to finish," the Legislature asserted, the 2012 redistricting process, "more than any other, was conducted in an atmosphere charged with litigation."

To be sure, the Legislature did preserve some records related to redistricting—documents showing, for instance, the time and location of public meetings or other generally benign details of the process. But the Legislature saved virtually no communications among legislators and staff and none of the communications—which, as a result of this case, we now know to have occurred involving the outside political [**64] consultants.

The Legislature had no specific policy requiring it to preserve communications regarding redistricting, even though it knew litigation was certain to occur, and admits that its record-retention policies applied in the same manner to redistricting as they applied to all types of legislative business. The House's policy, for example, specified that "records that are no longer needed for any purpose and that do not have sufficient administrative, legal, or fiscal significance to warrant their retention shall be disposed of systematically." Fla. H.R. Rule 14.2(b) (2010-2012).

To the extent the Legislature argues that it had no reason to know it needed to preserve these records because it could not have anticipated this Court's decision in *Apportionment IV* rejecting its broad claim of legislative privilege over communications related to redistricting, the Legislature had, according to testimony at trial, determined as early as January 2011 that no privilege would apply to any of its communications with outside political consultants. In other words, the Legislature clearly knew that communications between, for instance, Speaker Cannon and consultant Reichelderfer would not be privileged, [**65] that they would be sought in litigation, and that litigation was certain to occur. Yet, Speaker Cannon did not preserve these records—and the only reason we now know these

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communications occurred is because records were produced during the litigation by Reichelderfer. The same is true of non-public draft redistricting maps sent to Reichelderfer by legislative [*391] staffer Kirk Pepper, using a personal e-mail account and a since-deleted "Dropbox" account.

The trial court stated that there was "no legal duty on the part of the Legislature to preserve these records, but you have to wonder why they didn't," given that litigation was certain to occur. Although the Legislature's failure to preserve records apparently did not violate a specific rule of legislative procedure regarding records retention—even though at least some of these records likely did have sufficient legal significance to have warranted their retention—*HN13*[⬆] Florida courts have, in any event, found a duty to preserve evidence in other circumstances when a party should reasonably foresee litigation. *See Am. Hospitality Mgmt. Co. of Minn. v. Hettiger, 904 So. 2d 547, 549 (Fla. 4th DCA 2005)* (noting holdings that "a defendant could be charged with a duty to preserve evidence where it could reasonably have foreseen the [**66] claim"). And this Court, in rejecting the Legislature's broad claim of legislative privilege in *Apportionment IV*, clearly held that *HN14*[⬆] the "purpose behind the voters' enactment of the *article III, section 20(a)*, standards will be undermined" if "the Legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery." *132 So. 3d at 149*.

*HN15*[⬆] Even in the absence of a legal duty, though, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. As this Court explained in *Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342, 346 (Fla. 2005)*, Florida courts may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability. If the evidence was negligently destroyed, a rebuttable presumption of liability may arise. *Id. at 347*. In other words, as recognized by the Fourth District Court of Appeal, "an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence." *Golden Yachts, Inc. v. Hall, 920 So. 2d 777, 781 (Fla. 4th DCA 2006)* (quoting *Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003)*, *approved*, *908 So. 2d 342*); *see also Nationwide Lift Trucks, Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002)* (stating that "[c]ases in which [**67] evidence has been destroyed, either inadvertently or intentionally, are discovery violations" that may be subject to sanctions).

The trial court was, therefore, justified in drawing an adverse inference against the Legislature in adjudicating the challengers' claim of unconstitutional partisan intent. And we too must consider the Legislature's "systematic[] delet[ion]" of redistricting records in evaluating whether the trial court's finding is supported by competent, substantial evidence.

Turning to the merits of the trial court's finding, we have little trouble concluding that competent, substantial evidence of unconstitutional intent exists in the record. The Legislature asserts that the trial court did not find improper intent in the plan as a whole and, in particular, contends that there was no collaboration between partisan operatives and the Legislature in drawing the congressional redistricting plan. While acknowledging that partisan operatives "sought to influence the redistricting process," the Legislature states that "at no time did the Legislature participate in their efforts." If features from the operative-created maps made it into the enacted map, the Legislature says, it is simply [**68] because those features [*392] were

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obvious or the similarities "superficial," and not because the operatives' "frenetic efforts to make themselves relevant" were successful. In other words, the Legislature argues that it "did not conspire with the operatives, despite the operatives' efforts."

We reject the Legislature's attempt to water down the trial court's findings and the inferences the trial court drew from the circumstantial evidence presented by pointing to an alleged lack of connection between the "parallel" process and the Legislature. The trial court found that it was "convince[d]" by the "circumstantial evidence introduced at trial" that the political operatives "obtain[ed] the necessary cooperation and collaboration" from the Legislature to ensure that the "redistricting process and the resulting map" were "taint[ed]" with "improper partisan intent." Indeed, the trial court specifically found that the operatives "were successful in their efforts to influence the redistricting process and the congressional plan under review."

Nevertheless, the Legislature asserts that any conclusion that the whole plan was motivated by partisan intent "assumes the complicity of professional staff," which is an "assumption" it [**69] claims the trial court rejected. While the trial court did find the professional staff to be "credible" and not to have been "part of the conspiracy," the trial court immediately dismissed the Legislature's argument about the effect of the staff having been insulated from the improper intent—which it called the "most compelling evidence in support" of the Legislature's defense—by stating that the "political operatives managed to find other avenues, other ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration" to "taint the redistricting process and the resulting map with improper partisan intent." And while the trial court made no explicit credibility determinations regarding any of the legislators who testified, the trial court did specifically reject the innocuous explanations provided by former Speaker Cannon and his staffer, Pepper, for their communications with the political consultants.

There is also no doubt that the trial court's finding of unconstitutional intent pertained to the "process" of redistricting and the "enacted map" as a whole—to use the trial court's own words—rather than solely to the two specifically invalidated [**70] districts as the Legislature contends. In finding "too much circumstantial evidence" to reach any conclusion other than that the "redistricting process" and the "resulting map" were "taint[ed]" by "improper partisan intent," the trial court pointed specifically to the following evidence: the Legislature's destruction of "almost all" e-mails and "other documentation relating to redistricting"; early meetings between legislative leaders and staff with political consultants regarding the "redistricting process"; and the "continued involvement" of political consultants in the "redistricting process." None of this evidence relied on by the trial court was district-specific. The dissent's contrary interpretation of the trial court's finding of unconstitutional intent renders meaningless the trial court's extensive discussion of—and critical findings related to—this evidence.

We also reject the Legislature's suggestion that the trial court's determination, in its order approving the remedial redistricting plan, that the Legislature had corrected the identified deficiencies in the map is dispositive in evaluating the scope of its finding of unconstitutional intent. Instead, as detailed in the next sections, [**71] the trial court's decision to approve the Legislature's remedial redistricting plan flowed [*393] from the legal errors made in its original judgment.

Accordingly, for all these reasons, we affirm the trial court's finding of unconstitutional intent. We turn next to the trial court's two legal errors, which significantly affected its determination of the proper effect of its finding that the Legislature violated the Florida

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Constitution.

## IV. TRIAL COURT'S FIRST LEGAL ERROR: FAILING TO PROPERLY ANALYZE THE CHALLENGE TO THE PLAN "AS A WHOLE"

The first legal error committed by the trial court was its determination that there was no distinction between a challenge to the redistricting plan "as a whole" and a challenge to individual districts. This error led to the trial court's failure to give any independent legal significance to its finding of unconstitutional intent when examining the challenges to individual districts.

Specifically, the evidence presented and considered by the trial court—evidence that actually led the trial court to find the existence of constitutionally improper partisan intent—included evidence pertaining both to the plan "as a whole" and to "specific districts." Indeed, the [**72] trial court explicitly noted this, stating that "[o]ne of [the challengers'] claims is that *the entire redistricting process was infected by improper intent*." (Emphasis supplied.)

Yet, despite its findings that partisan political consultants had "made a mockery" of the *process* and "managed to *taint the redistricting process and the resulting map* with improper partisan intent," the trial court rejected the challengers' distinction between their challenge to improper intent in the redistricting plan "as a whole"—a challenge, in effect, to the map that was produced from *the process*—and their challenge to "individual districts," stating as follows:

> [The challengers] distinguish between their challenge to the redistricting plan as a whole, as being drawn with the intent generally to favor the Republican Party, and their challenge to several individual districts, as being specifically drawn with such intent. I find this to be a false dichotomy, a distinction without difference. The redistricting plan is the result of a single act of legislation. If one or more districts do not meet constitutional muster, then the entire act is unconstitutional. *The districts are part of an integrated indivisible [**73] whole. So in that sense, if there is a problem with a part of the map, there is a problem with the entire plan*. [FN 5]
>
> > [FN 5] This is consistent with the approach taken by [this] Court in *Apportionment I*. The Court invalidated the entire Senate plan but gave specific instructions as to which districts *required* corrective action. *Id. at 684-686*.
>
> *That does not mean, however, that portions of the map not affected by those individual districts found to be improperly drawn would need to be changed in a redrawn map, even if a general intent to favor or disfavor a political party or incumbents was proven. What would be the point if the other districts are otherwise in compliance? Such a remedy would go far beyond correcting the effect of such noncompliance, but rather would require a useless act that would encourage continued litigation. Therefore, I have focused on those portions of the map that I find are in need of corrective action in order to bring the entire plan into compliance with the constitution*.

(Emphasis supplied.)

The dissent asserts that "[a]t no point does the trial court indicate that it would [*394] permit some level of unconstitutional intent in the drawing of any district." Dissenting op. at 114. [**74] But the trial court specifically concluded that districts could be "in compliance" with the constitutional standards "even if a general intent to favor or disfavor a political party or incumbents was proven." This statement clearly indicates that the trial court considered a general improper intent to lack any independent legal

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significance unless it was accompanied by another constitutional violation, which is an interpretation that simply does not square with the Florida Constitution or this Court's precedent.

This Court has held that "the Florida Constitution prohibits drawing a plan" with improper intent. *Apportionment I, 83 So. 3d at 617*. This Court has also held that "there is no acceptable level of improper intent." *Id.* And, this Court has held that the "intent" standard "applies to . . . the apportionment plan as a whole." *Id.* Accordingly, under these holdings, the trial court's "general" finding of improper intent in the "process" must have some independent legal significance.

The trial court, however, failed to give effect to that finding of improper intent, in part because it never separately considered the challenge to the plan as a whole and, critically, never gave any weight to the general improper intent [**75] in analyzing the individual district challenges. The challengers correctly note that the trial court's finding of improper intent was based extensively on the existence of a "different, separate process that was undertaken contrary to the [Legislature's public] transparent [redistricting] effort in an attempt to favor a political party or an incumbent." *Apportionment IV, 132 So. 3d at 149*. And, as this Court stated in *Apportionment IV*, the existence of such a "parallel" process is "important evidence in support of the claim that the Legislature thwarted the constitutional mandate." *Id.*

In error, the trial court gave no legal weight to the existence of this separate process. The trial court's decision to invalidate District 5 was supported by numerous factors distinct from the "parallel" process, including that the district as enacted was "not compact," was "bizarrely shaped," and did not "follow traditional political boundaries as it winds from Jacksonville to Orlando," narrowing at one point to the width of a highway. The trial court found improper intent to benefit the Republican Party as to District 5 based on "the decision to increase the district to majority BVAP, which was accomplished in large part by creating [**76] [a] finger-like appendage jutting into District 7." Then, the trial court simply "buttressed" this "inference" of improper intent, based on the existence of the "oddly shaped appendage[]," through "the evidence of improper intent in the redistricting process generally, and as specifically related to the drawing of District 5," but did not independently rely on the "general" improper intent in any legally significant way.

In other words, aside from referencing the increase in the BVAP of District 5 over 50% during a non-public meeting at the end of the redistricting process, the trial court's decision to invalidate District 5 was based solely on blatant tier-two violations. While this Court had to resort to evaluating tier-two violations as a means to infer improper intent when considering the challenges to the Senate and House maps in *Apportionment I*, as we emphasized at that time, we were constrained because we had no factual record and no direct evidence of improper intent. Exactly the opposite was true in this case.

The trial court's decision to invalidate District 10 is analogous. Noting an "odd-shaped appendage which wraps under and [*395] around District 5, running between District 5 [**77] and 9," the trial court stated that the challengers had "shown that the district could be drawn in a more compact fashion, avoiding this appendage." The trial court's conclusion that District 10 "was drawn to benefit the Republican Party and the incumbent" was "based in part on the inference that the Florida Supreme Court suggested [in *Apportionment I*] could be drawn from oddly shaped appendages that had no legal justification"—an "inference" that, as with District 5, was simply "buttressed by the general

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evidence of improper intent" in the process and by objective indicators relied on by this Court in *Apportionment I*.

In rejecting challenges to seven other individual districts, the trial court never referred to the "general evidence of improper intent" that it found to exist in the "process." Rejecting the challenge to Districts 13 and 14, in the Tampa Bay area, the trial court stated that, "[u]nlike Districts 5 and 10, there are no flagrant tier-two deviations" from which the trial court could "infer" improper intent. "[U]nlike changes made to District 5 by the [legislative] leaders during conference committee"—the "evidence of partisan intent specifically related to District 5," where the House [**78] agreed with the Senate's request to push the BVAP over 50%—the trial court determined that it could not conclude, "on partisan effect alone," that certain decisions were made in drawing Districts 13 and 14 "with the intent to benefit the Republican Party or the incumbent member of Congress."

Likewise rejecting the challenge to Districts 21 and 22, the trial court concluded that the challengers had "not met their burden of showing unnecessary deviation from tier-two requirements," nor had they "shown that improper intent led to the adoption of Districts 21 and 22." Similarly, with respect to Districts 25, 26, and 27, the trial court determined that the challengers had "not proved invalidity" because the "totality of the evidence" did not establish that the "configuration" of these districts "was based on unlawful partisan intent." At no point in addressing the validity of any of these districts—in which the trial court rejected the challengers' contention that the districts were drawn with improper partisan intent—did the trial court address any effect of its findings regarding how the "process" had been "taint[ed]" with "improper partisan intent."

In determining that there was no distinction [**79] between a challenge to the "whole map" and a challenge to individual districts, the trial court relied on this Court's prior decision to invalidate the entire state Senate plan in *Apportionment I*. Citing this Court's decision as support, the trial court stated that this Court "invalidated the entire Senate plan but gave specific instructions as to which districts *required* corrective action."

The trial court was correct that this Court invalidated the whole Senate plan, to the extent that it determined the plan did "not pass constitutional muster" for the purposes of this Court's *article III, section 16*, declaratory judgment review. *Apportionment I, 83 So. 3d at 683*. But, unlike here, this Court in *Apportionment I* did not find a general improper intent in the state Senate plan, aside from the district numbering system that was manipulated to favor incumbents. Nor could we have, based on the nature of the limited record before us.

In *Apportionment I*, we expressed our conclusion regarding the Senate plan as follows:

> We have held that Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 are constitutionally invalid. The Legislature should [*396] remedy the constitutional problems with respect to these districts, redrawing these districts and any affected [**80] districts in accordance with the standards as defined by this Court, and should conduct the appropriate functional analysis to ensure compliance with the Florida minority voting protection provision as well as the tier-two standards of equal population, compactness, and utilization of existing political and geographical boundaries. As to the City of Lakeland, the Legislature should determine whether it is feasible to utilize the municipal boundaries of Lakeland after applying the standards as defined by this Court. In redrawing the apportionment plan, the Legislature is by no means required to adopt the

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> Coalition's alternative Senate plan. Finally, we have held that the numbering scheme of the Senate plan is invalid. Accordingly, the Legislature should renumber the districts in an incumbent-neutral manner.

*Id. at 686*.

In other words, this Court identified very specific deficiencies in the Senate plan—eight individual districts that were invalid, the failure to conduct a functional analysis, and the district numbering scheme. This Court did not conclude that the whole plan was unconstitutional because of improper intent in the whole plan, and this Court did not analyze—and could not have analyzed—the [**81] plan in that manner. Therefore, in relying on *Apportionment I* in this way, the trial court failed to give any actual effect to its finding in this case that the "whole plan" challenge had been proven through the direct and circumstantial evidence of improper partisan intent presented at trial.

Accordingly, for all these reasons, we conclude that the trial court erred in failing to recognize any distinction between a challenge to the redistricting plan "as a whole" and a challenge to individual districts. This error significantly affected the trial court's determination of the proper scope and legal effect of its finding of unconstitutional intent, particularly with regard to its analysis of the challenges to individual districts, and ultimately contributed to its decision to approve a remedy that was effectively no different than the remedy if there had been no finding of unconstitutional intent.

## V. TRIAL COURT'S SECOND LEGAL ERROR: APPLYING A DEFERENTIAL STANDARD OF REVIEW

The trial court's error in failing to properly analyze the challenge to the plan "as a whole" was compounded by its error in the deferential standard of review it applied after finding the existence of unconstitutional [**82] intent. Certainly, we recognize the difficult task the trial court faced, considering numerous issues of first impression and attempting to be faithful to this Court's redistricting decisions. And we commend the trial court for the superb and professional manner in which it handled this difficult litigation.

But, we conclude nevertheless that the trial court failed to recognize the critical differences between this Court's "facial" review of the state legislative redistricting plans in *Apportionment I* and the nature of the fact-based claims presented in this case. This legal error in the standard of review, as with the legal error in not recognizing the independent significance of the challenge to the plan "as a whole," led to the trial court's failure to give any independent legal significance to its finding of unconstitutional intent when examining the challenges to individual districts. Once the trial court found unconstitutional intent, there was no longer any basis to apply a deferential standard of review; instead, the trial court should have shifted [*397] the burden to the Legislature to justify its decisions in drawing the congressional district lines.

The trial court's error as to [**83] the standard of review can be traced to its analysis in evaluating the challengers' claims, which it set forth as follows:

> It seems that the more reliable focus in such an inquiry would be on what was actually produced by the Legislature, the enacted map. Specifically, an analysis of the extent to which the plan does or does not comply with tier two requirements is a good place to start. Can one draw a map that meets tier-two requirements but nonetheless favors a political party or an incumbent? Sure, but it is more difficult.
>
> Furthermore, a failure to comply with tier-two requirements not only supports an inference of

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improper intent, it is an independent ground for finding a map unconstitutional. *See* Apportionment I, 83 So. 3d at 640-641. Additional direct and circumstantial evidence of intent may serve to strengthen or weaken this inference of improper intent. *Therefore, I first examine the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries where feasible, then consider any additional evidence that supports the inference that such districts are also in violation of tier-one requirements*.

(Emphasis supplied.) [**84] In other words, the trial court began by asking whether there was any tier-two violation—whether the district was compact, and whether it followed existing political and geographical boundaries where feasible. Then, the trial court considered the direct and circumstantial evidence of tier-one improper intent only as "additional evidence" to "strengthen or weaken" an "inference of improper intent" that was identifiable from tier-two deficiencies. The trial court did so despite finding that the direct and circumstantial evidence itself had established a violation of the tier-one constitutional standards.

Although the trial court relied on *Apportionment I* as support for the standard of review it applied, the standard from that case—a facial review based on purely objective, undisputed evidence in the limited record before the Court—does not directly translate to this one—a fact-intensive challenge based on direct and circumstantial evidence developed during an adversarial trial. Discerning which aspects of the standard set forth in *Apportionment I* apply and which do not is thus of critical importance.

In *Apportionment I*, this Court rejected the arguments of the Attorney General and the [**85] House of Representatives "that a challenger must prove facial invalidity beyond a reasonable doubt," as is generally considered to be the standard applied to a typical lawsuit challenging the constitutionality of a legislative enactment outside the context of redistricting. 83 So. 3d at 607. This Court considered the "beyond a reasonable doubt" standard to be both "a departure from [its] precedent in legislative apportionment jurisprudence" and "ill-suited" to the nature of its review. *Id.* "Unlike a legislative act promulgated separate and apart from an express constitutional mandate," this Court stated, "the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the 'instructions' of the citizens as expressed in specific requirements of the Florida Constitution governing this process." Id. at 607-08.

HN16[↑] Although the legislative redistricting plan comes before this Court "with an initial presumption of validity," this Court explained that "the operation of this Court's process in apportionment cases is [*398] far different than the Court's review of ordinary legislative acts," including "a commensurate difference in [its] obligations." Id. at 606. Noting that the "new requirements" of the Fair Districts Amendment "dramatically [**86] alter[ed] the landscape with respect to redistricting," this Court held that its scope of review had "plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance." Id. at 607. As this Court would later reason, "the framers and voters" of the Fair Districts Amendment "clearly desired more judicial scrutiny" of the Legislature's decisions in redistricting. Fla. House of Representatives v. League of Women Voters of Fla. (Apportionment III), 118 So. 3d 198, 205 (Fla. 2013).

HN17[↑] "It is this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid." Apportionment I, 83 So. 3d at

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607. However, this Court acknowledged in the context of its review in *Apportionment I* that it would "defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements." *Id. at 608*. This Court emphasized that its "responsibility [wa]s limited to ensuring compliance with constitutional requirements." *Id.* "[E]ndeavoring to be respectful to the critically important role of the Legislature," this Court stated that its duty was "not to select the best plan, but rather to decide whether the one adopted by the legislature is valid." *Id.* (quoting *In re Apportionment Law—1992, 597 So. 2d at 285* [**87] ).

Echoing this Court's language in *Apportionment I*, the trial court determined—based on "the nature of the legislation and the nature of what is reviewed"—that it should apply the same standard to the challenge presented in this case. Therefore, reciting the principles from *Apportionment I*, the trial court set forth the standard for its review as follows:

> I will therefore, in this case, apply the standard of review articulated in *Apportionment I*, deferring to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements, with an understanding of my limited role in this process and the important role of the Legislature. My duty "is not to select the best plan" but to determine whether [the challengers] have proved the plan invalid. *Apportionment I, 83 So. 3d 597 at 608*.

The trial court then cited this standard, and its deferential review, in rejecting challenges to certain individual districts.

We conclude that the trial court was correct, initially, in rejecting the "beyond a reasonable doubt" standard, as this Court did in *Apportionment I*. As this Court stated, HN18[↑] "[u]nlike a legislative act promulgated separate and apart from an express constitutional [**88] mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the 'instructions' of the citizens as expressed in specific requirements of the Florida Constitution governing this process." *Apportionment I, 83 So. 3d at 607-08*. Just as there is a difference in evaluating legislative intent with respect to the specific constitutional mandate outlawing improper partisan intent in redistricting, so too is there "a difference between the Court's role in reviewing a legislative apportionment plan to determine compliance with constitutionally mandated criteria and the Court's role in interpreting statutes." *Id. at 607 n.5*. The "reason for the different standard," the trial court correctly noted, is that "the inquiry is into the process, the [*399] end result, and the motive behind the legislation"—not "a question of searching for a reasonable interpretation of a statute which would make it constitutional."

In this respect, the trial court was right to rely on *Apportionment I* in concluding that the nature of the legislation and the specific constitutional mandate outlawing partisan political gerrymandering require a different standard of review than applied in traditional cases challenging legislative enactments. [**89] Where the trial court erred, however, was in discounting the differences between *Apportionment I* and this case to conclude that the *same* standard must apply, even though this case involved direct and circumstantial evidence of tier-one constitutional violations that this Court had no ability to review in *Apportionment I*.

As this Court has explained, its review in *Apportionment I* was quite different than the challenge presented in this case. Unlike the fact-intensive challenge here, in which the parties had an opportunity to present extensive evidence during an adversarial trial pertaining to whether the plan and individual districts were drawn with improper intent, this Court's review in *Apportionment I* was "a facial review based on objective, undisputed

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evidence in the limited record before the Court." *Apportionment III, 118 So. 3d at 200*.

In *Apportionment I, 83 So. 3d at 634*, this Court looked to objective measures and tier-two requirements—such as the existence of "bizarre shape[s]" and "appendages"—in an effort to discern whether the map was drawn with improper intent. As this Court stated, "in the context of Florida's constitutional provision, a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida [**90] prohibits by absolute terms." *Id. at 640*.

The evidence of improper intent in this case, to the contrary, involved direct and circumstantial evidence of tier-one violations of the constitutional intent standard. Yet, despite the existence of testimony and fact-based claims regarding improper intent from a voluminous record that extended far beyond the legislative record to which this Court was constrained in *Apportionment I*, the trial court still determined that tier-two requirements—compactness and the use of political and geographical boundaries where feasible—were the "more reliable" indicators of improper intent, explaining that "a failure to comply with tier-two requirements" would "support[] an inference of improper intent," and that "[additional direct and circumstantial evidence of intent may serve to strengthen or weaken this inference of improper intent." Based on this assumption, the trial court proceeded to "first examine the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries where feasible, [and] then considered] any additional evidence that supports the inference that such districts are also in [**91] violation of tier-one requirements."

Not surprisingly under this framework of analysis, only where the trial court found a tier-two violation—the appendages in Districts 5 and 10—did the trial court conclude that a district had been drawn with improper intent to favor a political party or incumbent. The independent finding that the "redisricting process" and the "resulting map" were "taint[ed]" with "improper partisan intent" was relegated to "buttress[ing]" the "inference" of improper intent based on the tier-two violation.

We conclude that the trial court erred in focusing first on tier-two violations at the expense of the evidence of tier-one violations— [*400] violations it specifically found based on the evidence presented. The trial court's error was then exacerbated by its decision to apply an unduly deferential standard to its review of the map, even after finding the existence of unconstitutional partisan intent.

Certainly, this Court explained in *Apportionment I* that the judiciary's role in reviewing an apportionment plan enacted by the Legislature is "not to select the best plan, but rather to decide whether the one adopted by the legislature is valid." *Apportionment I, 83 So. 3d at 608* (quoting *In re Apportionment Law—1992, 597 So. 2d at 285*). At that [**92] time, this Court stated the general principle that it would "defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements." *Id.*

But, in *Apportionment I*, this Court was conducting a "facial" review of the legislative apportionment plan, without fact-finding, to determine *whether* any improper intent existed in the plan. Unlike that context, here, the trial court *found* the existence of improper intent, based on evidence presented during an adversarial trial, yet still applied a deferential standard of review. That was error.

The trial court conducted its review as if it were premature to directly address the impact of the tier-one violations the trial court itself specifically found. In particular, the trial court found that the Legislature had

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"cooperated]" and "collaborated]" with partisan political operatives to draft an apportionment plan favoring the Republican Party and incumbents—in other words, a finding of a tier-one constitutional violation. HN19[] While the Legislature is generally entitled to deference as a result of its role in the redistricting process, that deference applies only "so long as [its [**93] redistricting] decisions] do[] not violate the constitutional requirements." *Apportionment I, 83 So. 3d at 608*.

HN20[] Once a tier-one violation of the constitutional intent standard is found, there is no basis to continue to afford deference to the Legislature. To do so is to offer a presumption of constitutionality to decisions that have been found to have been influenced by unconstitutional considerations. The existence of unconstitutional partisan intent is contrary to the very purpose of the Fair Districts Amendment and to this Court's pronouncements regarding the state constitutional prohibition on partisan political gerrymandering.

Accordingly, after reaching the conclusion that the "redistricting process" and the "resulting map" had been "taint[ed]" by unconstitutional intent, the burden should have shifted to the Legislature to justify its decisions, and no deference should have been afforded to the Legislature's decisions regarding the drawing of the districts. In other contexts, states have placed the burden on their legislatures to justify the validity of a redistricting plan when the plan has "raised sufficient issues" with respect to state constitutional requirements. *In re Legislative Districting of State, 370 Md. 312, 805 A.2d 292, 325 (Md. 2002)*.

Because there are many ways in which to draw a district that complies with, for [**94] example, the constitutional requirement of compactness, which party bears the burden of establishing why a decision was made to accept or reject a particular configuration can ultimately be determinative. This can be seen in reviewing the seven maps initially released to the public by the House.

All of these maps were considered by the Legislature to be maps that complied with the tier-two constitutional standards. [*401] But, in one of the maps, designated as H000C9001, there were as few as 14 Republican districts based on 2008 presidential election data and 15 Republican districts based on 2012 presidential data. In the map chosen by the House to move forward in the process, designated as H000C9011, there were 16 Republican districts under both the 2012 and 2008 presidential results. And, after additional revisions, the Legislature's enacted map performed with 17 Republican districts under the 2008 data and 16 using the 2012 data—actually more favorable to Republicans than the performance of the admittedly gerrymandered 2002 districts under the same data.[10] This consistent improvement in the Republican performance of the map—even when comparing maps the Legislature itself produced and considered [**95] tier-two compliant—reveals that there are many ways to draw constitutionally compliant districts that may have different political implications.

Since the trial court found that the Legislature's intent was to draw a plan that benefitted the Republican Party, the burden should have been placed on the Legislature to demonstrate that its decision to choose one compact district over another compact district, or one tier-two compliant map over another tier-two compliant map, was not motivated by this improper intent. This is particularly true where the challengers presented evidence that the Legislature's choices ultimately

[10] The 2002 benchmark plan performed with 15 Republican districts under the 2008 presidential data and 14 Republican districts under the 2012 data, though there were only twenty-five total districts in that map, as compared to twenty-seven total districts in the 2012 map after Florida gained two districts based on the results of the 2010 Census.

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benefitted the Republican Party and also showed alternative maps that performed more fairly.[11] Unlike in *Apportionment I*, where this Court remained deferential to the Legislature's decisions in the absence of a finding of improper [**96] intent, there is no longer any basis for this Court to be deferential to the Legislature in fulfilling its own "solemn obligation to ensure that the constitutional rights of its citizens are not violated and that the explicit constitutional mandate to outlaw partisan political gerrymandering ... in redistricting is effectively enforced." *Apportionment IV, 132 So. 3d at 137*.

## VI. LEGAL EFFECT OF FINDING UNCONSTITUTIONAL INTENT

Having now concluded that the trial court erred in the standard of review it applied, we proceed to consider the legal effect of the trial court's finding of unconstitutional intent under the appropriate standard. In so doing, we reject the dissent's view that we have "transgressed the boundaries of proper appellate review" and "abandoned]" the "restraints of the appellate [*402] process." Dissenting op. at 122, 124. The Legislature vigorously defended the challenged districts. Rather than foster additional delay and risk another election under unconstitutional districts, we have all the record evidence necessary to evaluate now whether the Legislature's justifications can withstand legal scrutiny.

### A. DISTRICT 5

We begin with District 5, which has been a focal point of the challenge to the Legislature's redistricting plan. Initially, the trial court invalidated District 5 as "visually not compact, bizarrely shaped," and in contravention of "traditional political boundaries as it winds from Jacksonville [**98] to Orlando," narrowing at one point to the width of a highway. After the Legislature removed an appendage from Seminole County and widened the district, however, the trial court upheld the remedial version of District 5, concluding that while still "not a model of compactness," the revised district is "much improved." Deferring to the Legislature, the trial court summarily rejected the challengers' proposed East-West configuration of the district, determining that although this configuration was "somewhat more compliant" with the constitutional standards, there were "legitimate non-partisan policy reasons for preferring a North-South configuration for this district over an East-West configuration."

The trial court did not elaborate as to what any of these "non-partisan policy reasons" were. The only legal justification offered by the Legislature, with the support of the Florida State Conference of NAACP Branches, for preferring a North-South configuration to an East-West orientation is to comply with the minority voting protection requirements of the Florida Constitution and

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[11] The Legislature has strongly disputed the relevance of these alternative maps, going so far as to assert that this Court should not consider the alternative maps at all because they were either drawn by partisan operatives aligned with the Democratic Party or of unknown origin. But alternative maps are not on trial themselves, as is the Legislature's map, and they can provide "relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent"—as the trial court found the Legislature to have done in this case. *Apportionment I, 83 So. 3d at 611*. Nevertheless, we have reviewed only the alternative maps actually introduced into evidence during the trial and remedial proceedings, rather than any of the summary-judgment [**97] maps, and have relied on those maps only insomuch as they show alternate ways—not necessarily the best or legally required way—to configure the districts.

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the federal Voting Rights Act—specifically, that a North-South configuration is necessary to avoid diminishing [**99] the ability of black voters to elect a candidate of their choice.

The challengers contend, though, that the North-South configuration of this district is a linchpin to the Legislature's efforts to draw a map that favors the Republican Party. They allege that the North-South configuration overpacks Democratic-leaning black voters into the district—that is, places more black voters in the district than is necessary to ensure that they can elect a candidate of choice-thereby diluting the influence of Democratic minorities in surrounding districts. The challengers rely in part on a trilogy of cases in federal court that trace the unique history of this district, culminating in a 2002 decision from a three-judge panel finding that the Legislature's "overriding goal with respect to congressional reapportionment" was to adopt a plan that "would maximize the number of districts likely to perform for Republicans." *Martinez, 234 F. Supp. 2d at 1300-01*; *see also DeGrandy v. Wetherell, 794 F. Supp. 1076, 1087-88, 1090 (N.D. Fla. 1992)* (adopting a redistricting plan drawn by an independent expert, which created the predecessor to District 5 as a black majority-minority district); *Johnson v. Mortham, 926 F. Supp. 1460, 1466-67, 1472, 1495 (N.D. Fla. 1996)* (noting that the prior version of District 5 split every one of the fourteen counties that made up the district, and even [**100] split individual precincts, and declaring that the district was "racially gerrymandered" in violation of the *Equal Protection Clause*).

Even as redrawn by the Legislature and approved by the trial court, District 5 clearly does not strictly adhere to the Florida Constitution's tier-two requirements of compactness and the utilization of political or geographical boundaries where feasible. It splits seven counties and has numerical compactness scores of. 127 on the Reock measure and .417 on the Convex [*403] Hull measure, where 1 is the best score. The critical determination, then, is whether the North-South configuration of this district, which extends from Jacksonville to Orlando, is necessary to comply with either the federal Voting Rights Act or the tier-one state constitutional requirement that no district shall be drawn in such a way as to diminish the ability of black voters to elect a representative of their choice—the justifications offered by the Legislature.

Having reviewed the arguments of the parties in detail and studied the unique nature of this district, we conclude that the Legislature has failed to meet its burden to demonstrate that District 5, even as revised, passes constitutional muster. We further [**101] conclude that, because the trial court found that District 5 was a key component of the Legislature's unconstitutional intent in the drawing of the congressional redistricting plan, the trial court erred in conducting only a cursory review of the remedial district and deferring to the Legislature's North-South configuration on the basis of unstated "non-partisan policy reasons."

Since the Legislature cannot prove that the North-South configuration is necessary to avoid diminishing the ability of black voters to elect a candidate of their choice, we hold that District 5 must be redrawn in an East-West manner. While the dissent suggests that this holding displaces the Legislature's chosen configuration with a configuration drawn by operatives aligned with the Democratic Party, see dissenting op. at 121, the argument for an East-West orientation of this district is not exclusive to the Democratic Party. In fact, an East-West orientation is the only alternative option, and one that the Legislature's own map drawers—insulated, the dissent itself states, from partisan influence-considered during the redistricting process.

We reach our conclusion as to the continued

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unconstitutionality of District [**102] 5 for several reasons. First, the Legislature's configuration was entitled to no deference in light of the trial court's finding of unconstitutional intent. The trial court clearly found that the Legislature's intent in drawing the congressional redistricting plan generally, and District 5 specifically, was to benefit the Republican Party. The Legislature's configuration also had the effect of benefitting the long-time incumbent of the district, Congresswoman Corrine Brown, who previously joined with leading Republicans in actively opposing the Fair Districts Amendment and redistricting reform. See *Brown, 668 F.3d 1271*. Indeed, the remedial version of District 5 still retains approximately 80% of its 2002 benchmark—a redistricting map that was admittedly gerrymandered to favor the Republican Party and incumbents. See *Martinez, 234 F. Supp. 2d at 1340*.

Retaining the same basic shape, while merely tweaking a few aspects of the district, does not erase its history or undo the improper intent that the trial court found. The trial court's decision to defer to the Legislature's configuration is contrary to the proper standard that should have applied—shifting the burden to the Legislature to justify its enacted configuration—particularly where the trial court itself continued [**103] to acknowledge that the district is "not a model of compactness."

We conclude that the Legislature cannot justify its enacted configuration. Despite the Legislature's repeated contentions that a North-South orientation of the district is the only option and is essential to avoid diminishing the ability of black voters to elect a candidate of their choice, there is simply insufficient evidence to support that assertion. Indeed, legislative staffer Alex Kelly initially drew an East-West version of the district, with a BVAP of 44.96%, and [*404] concluded that such a configuration would be constitutionally compliant. The Legislature relies on the trial court's finding that Kelly was straightforward and credible elsewhere, but offers no persuasive explanation as to why this version of District 5 was rejected or why Kelly's assessment in this circumstance was incorrect.

During the trial, the Legislature argued that it had increased the BVAP of District 5 over 50%—a decision made during a non-public meeting at the end of the redistricting process—in order to prevent vote dilution and avoid retrogression. The trial court specifically found that argument to be "not supported by the evidence" and there [**104] to have been no showing that a majority-minority district was "legally necessary."

After redrawing the district, the BVAP of remedial District 5 is 48.11%. The Legislature continues to argue that any additional diminishment in the BVAP would prevent black voters from electing a candidate of their choice. But neither the evidence, nor the case law, bears this out.

As of 1996, following the decision in *Johnson* that required the predecessor district to be redrawn, the predecessor to District 5 had a total black population of 47.0% and a total BVAP of 42.7%. *Martinez, 234 F. Supp. 2d at 1308*. By 2000, the benchmark district had a total black population of 50.8% and a total BVAP of 46.7%. *Id.* The district performed for the black candidate of choice in every election from 1992 through 2000. *Id.*

In 2002, the total black population of the district was 51.4%. *Id. at 1307*. The total BVAP was 46.9%. *Id.* The federal court in *Martinez* determined that the BVAP of 46.9% "will afford black voters a reasonable opportunity to elect candidates of choice and probably will in fact perform for black candidates of choice." *Id.* The actual election results show this to be true—the district has continued to perform for the black candidate of choice in [**105] every election from 2000 through the present.

The challengers' proposed East-West configuration of

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the district has a BVAP of 45.12%—higher than the BVAP in the initial draft district drawn by Alex Kelly. This is well within the range of the 42.7%, 46.7%, and 46.9% BVAP percentages that were addressed by the federal court in *Martinez* and considered to be sufficient to "afford black voters a reasonable opportunity to elect candidates of choice" and to "in fact perform for black candidates of choice."[12] *Id.* "This is so in part because," the federal court in *Martinez* stated,

> blacks constitute 61.3% of registered Democrats in [the predecessor to District 5], and Democrats constitute 63.8% of registered voters. Republicans constitute only 22.7% of registered voters. Actual voting also is strongly Democratic; in the 2000 presidential election, voters in [the predecessor to District 5] voted 63.7% for Mr. Gore and 34.2% for Mr. Bush. The black candidate of choice is likely to win a contested Democratic primary, and the Democratic nominee is likely to win the general election.

*Id. at 1308*.

The same logic applies to an East-West configuration of the district. Black voters [*405] constitute 66.1% of registered Democrats under this configuration, and Democrats constitute 61.1% of registered voters. Republicans, by contrast, constitute only 23.0% of registered voters. This compares very favorably to the same respective numbers in the 2002 district upheld by the federal court in *Martinez*.

Thus, in an East-West orientation of the district, the black candidate of choice is still likely to win a contested Democratic primary, since black voters constitute 66.1% of registered Democrats. And the Democratic candidate is still [**107] likely to win the general election, since Democratic voters outnumber Republicans 61.1% to 23.0%. In other words, just as noted in *Martinez* as a basis for concluding that the prior version of District 5 afforded black voters a reasonable opportunity to elect a candidate of choice, "[t]he black candidate of choice is likely to win a contested Democratic primary, and the Democratic nominee is likely to win the general election."[13] *Martinez, 234 F. Supp. 2d at 1308*.

The Legislature's contrary argument rests entirely on the premise that the BVAP of the district cannot be decreased from 48.11% to 45.12%. Of course, the trial court already rejected the Legislature's argument, based on the same asserted interest [**108] in protecting black voters, that the BVAP needed to be over 50%, and in urging this Court to uphold the revised district, the Legislature has now tacitly conceded that 48.11% is sufficient.

But, beyond that, the United States Supreme Court has

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[12] Although the dissent states that our review of minority voting strength as to the East-West configuration of District [**106] 5 ultimately amounts to "we know retrogression when we see it," dissenting op. at 121, we clearly rely on long-standing precedent applied by the three-judge federal district court panel in *Martinez*—the last time this exact district was challenged. Our conclusion that a BVAP of 45.12% does not diminish the ability of black voters to elect a candidate of choice—a BVAP percentage squarely within the range of prior BVAP percentages that precedent has established not to diminish the ability of black voters to elect a candidate of choice—is hardly subjective or arbitrary.

[13] Contrary to the dissent's accusation that we fail to apply any objective standard to our retrogression review of the minority voting strength of an East-West district, *see* dissenting op. at 120-21, our analysis is consistent with the standard set forth by this Court in *Apportionment I*: "To undertake a retrogression evaluation requires an inquiry into whether a district is likely to perform for minority candidates of choice." *83 So. 3d at 625*. This is precisely what we have done with respect to a proposed East-West orientation of District 5.

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recently articulated—in a case with a similar claim of overpacking black voters to maintain the continued political dominance of the Republican Party in surrounding districts—that the BVAP itself cannot be viewed in a vacuum. In *Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1272, 191 L. Ed. 2d 314 (2015)*, the Supreme Court emphasized that it is the "ability to elect a preferred candidate of choice," not "a particular numerical minority percentage," that is the pertinent point of reference.

*HN21*[⬆] The language of the Voting Rights Act that protects against adopting a redistricting plan that "has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice"—language incorporated into our tier-one state constitutional standards—"does not require maintaining the same population percentages." *Id. at 1272-73*. Instead, the Supreme Court has told us, this requirement "is satisfied if minority voters retain the ability to elect their preferred candidates." *Id. at 1273*. Providing [**109] an example, the Supreme Court stated that "it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate." *Id.*

Accordingly, we reject the Legislature's argument that an East-West version of the district would diminish the ability of black voters to elect a candidate of their choice. We also reject the dissent's contention that an East-West district causes [*406] the redistricting map to become significantly less compact. *See* dissenting op. at 118-20. There is no doubt, as noted by the dissent, that the East-West orientation is longer, with a correspondingly greater perimeter and area. But *HN22*[⬆] length is just one factor to consider in evaluating compactness.

As this Court stated in *Apportionment I*, *HN23*[⬆] "the object of the compactness criterion is that a district should not yield 'bizarre designs.'" *83 So. 3d at 634*. And as the Supreme Court of Washington has recognized, in a decision cited favorably by this Court in *Apportionment I*, "the phrase 'as compact as possible' does not mean 'as small in size as [**110] possible,' but rather 'as regular in shape as possible.'" *Kilbury v. Franklin Cnty. ex rel. Bd. of Cnty. Comm'rs, 151 Wn.2d 552, 90 P.3d 1071, 1077 (Wash. 2004)*.

There is no doubt that an East-West version of District 5 is visually less "unusual" and "bizarre" than the meandering North-South version enacted by the Legislature. *Apportionment I, 83 So. 3d at 634*. There is also no doubt that the numerical compactness scores actually favor the East-West orientation: the different configurations have essentially the same Reock score (.12 for a proposed East-West version of the district, and .13 for the Legislature's North-South, where 1 is the most compact), while an East-West district fares significantly better on the Convex Hull measure (.71 for the East-West as compared to .42 for the North-South, where 1 is again the most compact). Further, an East-West orientation allows for fewer incorporated city and county splits than the Legislature's North-South district—another consideration in determining tier-two compliance.

The reality is that neither the North-South nor the East-West version of the district is a "model of compactness," as the trial court stated. Other factors account for this phenomenon, "including geography and abiding by other constitutional requirements such as ensuring that the apportionment plan does [**111] not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id. at 635*. And while the dissent cherry-picks a favorable statistic to highlight the supposed decrease in the compactness of District 2

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under an East-West version of District 5, *see* dissenting op. at 120, the challengers have demonstrated that the decrease in the compactness of District 2 is an outlier; in fact, as few as four and as many as seven other districts can be drawn in a more compact manner by drawing District 5 from East to West.

The bottom line is that none of the Legislature's justifications for its gerrymandered version of District 5, and none of its complaints about an alternative East-West configuration, can withstand legal scrutiny. Because the trial court erred in deferring to the Legislature's enacted North-South configuration, and because the Legislature cannot justify this configuration, District 5 must be redrawn in an East-West orientation.

**B. DISTRICTS 13 & 14**

We turn next to Districts 13 and 14, in the Tampa Bay area, which the challengers contended were drawn in violation of the constitutional requirements. [**112] In addition to relying on the trial court's finding that the entire map was tainted by unconstitutional intent, the challengers asserted specifically that the Legislature's configuration of Districts 13 and 14 mirrored the configuration known to have been favored by political operatives, in which District 14 was drawn to cross Tampa Bay from Hillsborough County, splitting [*407] Pinellas County and the City of St. Petersburg to move a portion of the black population from District 13 into District 14. In support, the challengers pointed to an e-mail communication from consultant Frank Terraferma to consultant Rich Heffley and an employee of the Republican Party of Florida, which described this region as "far from perfect" in a draft map where District 14 did not cross Tampa Bay.

The enacted configuration of these two districts, which crossed Tampa Bay, added more Democratic voters to an already safely Democratic District 14, while ensuring that District 13 was more favorable to the Republican Party.[14] The challengers thus contended that the Legislature's configuration of these districts was directly connected to the trial court's finding that the enacted map was unconstitutionally drawn to favor [**113] the Republican Party.

The trial court denied the challenge to these districts, reasoning that there were "no flagrant tier-two deviations from which" to "infer unlawful intent." The trial court stated that it "simply" could not "conclude, on partisan effect alone, that the decision to incorporate portions of South St. Petersburg into District 14 was done with the intent to benefit the Republican Party or the incumbent member of Congress."

We conclude that the trial court erred in rejecting the challenge to these districts. The trial court erroneously required a "flagrant tier-two deviation" in order to "infer unlawful intent," rather than viewing the configuration of these districts through the lens of the direct and circumstantial evidence of improper intent presented at trial. Once the trial court found unconstitutional intent, the Legislature's enacted configuration was no longer entitled to deference, and it becomes the Legislature's burden to justify its decision to draw [**114] the districts in a certain way.

The Legislature's asserted justification for picking up voters from Pinellas County in District 14 was to increase minority voting strength in that district, which the Legislature considered to be preferable—though not required—from a state constitutional tier-one and federal Voting Rights Act perspective. The trial court did

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[14] Indeed, although District 13 still leans Democratic under the elections data relied on by the parties, it actually elected Republican Representative David Jolly over Democrat Alex Sink in a close election in 2014.

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not, however, make any findings that it was necessary to add black voters from Pinellas County to District 14 in order to avoid diminishing the ability of black voters to elect a representative of their choice.[15]

During trial, the challengers showed that it is possible not to cross Tampa Bay and still maintain tier-two compliance. In fact, as the charts below indicate,[16] following the county boundary significantly increases the numerical compactness scores of District 13, although it does cause a decrease in the scores of surrounding districts.

[*408]

Go to table1

In rejecting the challenge to these districts, the trial court emphasized [**116] the decrease in the overall compactness scores in the region, ultimately determining that the Legislature "was not required to make this tradeoff in compactness to avoid splitting Pinellas County." However, as this Court has recognized, *HN24*[↑] following county lines may result in a reduction in compactness scores. *See Apportionment I, 83 So. 3d at 635* (explaining that the compactness of the districts "cannot be considered in isolation" [*409] because other factors influence a district's compactness, including the "Legislature's desire to follow political or geographical boundaries or to keep municipalities wholly intact").

The trial court's decision to defer to the Legislature's configuration was contrary to the proper standard that should have applied once the trial court found that the Legislature's intent in drawing the congressional redistricting plan was to benefit the Republican Party. Because the Legislature cannot justify its enacted configuration of these districts based on race—the only justification that was offered—the trial court should have invalidated these districts. Accordingly, Districts 13 and 14 must be redrawn to avoid crossing Tampa Bay.

### C. DISTRICTS 26 & 27

The challengers also mounted an individual attack against [**117] the validity of Districts 26 and 27, claiming that the enacted configuration of these two districts needlessly divided the City of Homestead to Republican gain—turning one Republican district and one Democratic district into two Republican-leaning districts.[19] In support, the challengers relied on the general evidence of improper intent in the plan as a whole, as well as specifically on an e-mail chain between consultants Heffley, Terraferma, and Reichelderfer that took place after the Senate released a draft map that did not split Homestead. In this e-mail chain, the operatives stated that the configuration of these districts was "pretty weak" and that the House "need[ed] to fix" it. The Senate's draft version, not splitting Homestead, is shown on the left below, with the enacted map on the right.

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[15] District 14 was, prior to 2012, and still is, under the 2012 map, represented by Kathy Castor, a white Democratic congresswoman.

[16] We use graphical depictions of maps that were included in the challengers' brief because those maps show the particular areas of concern. The Legislature did not contest [**115] the accuracy of these graphics. In any event, we include them only as visual aids and have, in our analysis, relied solely on the data and maps introduced into evidence during the trial.

[19] The two districts are actually represented by members of the Republican Party. The performance data relied on by the parties shows that these two districts are Republican under the 2008 presidential and 2010 gubernatorial elections but Democratic under the 2012 presidential election.

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The trial court denied the challenge to these two districts, stating that any tier-two differences between the enacted [**118] map and an alternative map introduced into evidence during trial by the challengers were de minimis since the enacted and alternative plans split about the same number of counties and cities in the region. The trial court stated that it would have been "selecting a plan that [it] found subjectively better rather than determining if [the challengers] have proved the enacted [*410] plan invalid," if it were to invalidate the enacted configuration of these districts "based on the objective tier-two evidence" presented. The trial court also summarily concluded that it did not find the enacted configuration to have been "based on unlawful partisan intent."

We conclude that the trial court erred in rejecting the challenge to these districts. Based on the trial court's finding of unconstitutional intent to benefit the Republican Party, the burden should have shifted to the Legislature to justify its configuration of these districts. Thus, instead of deferring to the Legislature's configuration and refraining from "selecting a plan [it] found subjectively better," the trial court should have required the Legislature to demonstrate that the decision to split Homestead between Districts 25 and 26 was [**119] not done to benefit the Republican Party. Because the Legislature's asserted justification for its configuration of these districts—to protect minority voting rights—simply cannot be justified, these districts must be redrawn to avoid splitting Homestead.

**D. DISTRICT 25**

Along with the individual challenge to Districts 26 and 27 based on the split of Homestead, the challengers also argued that nearby District 25 needlessly divided Hendry County, in violation of the constitutional requirements. The trial court summarily rejected this challenge, considering it in conjunction with the challenge to Districts 26 and 27 and concluding simply that the challengers had not proved invalidity because they had not demonstrated more than "de minimis" tier-two deficiencies.

This was error. Having found improper intent in the adoption of the redistricting plan, the trial court should not have deferred to the Legislature's configuration but should have, instead, shifted the burden to the Legislature to justify its decision to divide Hendry County.

The decision to adopt a configuration of District 25 that split Hendry County—as the Senate's map had done but the House's had not—was made in a non-public meeting [**120] at the end of the redistricting process. There is thus no record from the time this decision was made to explain why the Legislature chose the Senate's configuration of this district over the House's, even though the Senate's configuration rendered the district less numerically compact while splitting a county boundary and without improving the compactness of the adjacent district, District 20.

The Legislature's asserted justification at trial and on appeal in this Court for splitting Hendry County is chiefly based [*411] on concerns related to preclearance requirements under *Section 5* of the Voting Rights Act, since Hendry County was a "covered" jurisdiction to which *Section 5* applied—that is, a county for which the state had to obtain federal permission prior to enacting any law related to voting in that county. The Legislature argues that, if it had placed Hendry County entirely within District 25, the Department of Justice would have denied preclearance.

We reject the Legislature's justification for its decision to

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split Hendry County for at least two reasons. First, the House itself had drawn District 25 with Hendry County almost entirely included in the district, and the House considered its map to be [**121] constitutionally compliant. The Legislature's concerns about preclearance thus appear to be post-hoc rationalizations for the enacted configuration.

Second, to the extent preclearance is offered as a justification, HN25[] preclearance concerns are no longer applicable after the United States Supreme Court's decision in *Shelby County v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013)*. In that case, the Supreme Court invalidated the "coverage formula" in *Section 4* of the Voting Rights Act, thereby effectively invalidating the preclearance process established by *Section 5* of the Act unless and until Congress creates another formula. *Id. at 2631*. Although the Legislature could not have anticipated the Supreme Court's decision at the time of the 2012 redistricting, Hendry County was not subject to preclearance at the time the Legislature enacted the remedial plan it now urges this Court to approve. In any event, we conclude that the Legislature has not demonstrated that keeping Hendry County whole would diminish the ability of black voters to elect a candidate of choice or cause any other tier-one minority voting protection concerns.

Accordingly, based on its error in the standard of review, the trial court should not have deferred to the Legislature's enacted configuration, and that [**122] chosen configuration cannot be justified. District 25 must be redrawn to avoid splitting Hendry County.

### E. DISTRICTS 21 & 22

Finally, the challengers individually attacked the validity of Districts 21 and 22, contending that these districts could have been drawn in a more constitutionally compliant manner by "stacking" them on top of each other, in a horizontal configuration, rather than configuring the districts to run vertically, parallel to each other along the Atlantic coast. Below, the enacted vertical configuration is shown on the left, whereas the "stacked" alternative configuration is shown on the right.

[*412]

Again applying a deferential standard of review, the trial court rejected this challenge, concluding that the challengers had not "met their burden of showing unnecessary deviation from tier-two requirements given the various tradeoffs required to draw compact districts in the region as a whole." The trial court also stated that the challengers had not "shown that improper intent led to the adoption of Districts 21 and 22."

However, as with the other individual district challenges, the trial court applied the incorrect standard. Based on its finding of unconstitutional intent, [**123] the trial court should not have deferred to the Legislature's enacted configuration of these districts, but should have instead shifted the burden to the Legislature to justify its decision to draw the districts in this manner.

We conclude that the Legislature has not done so. At trial, the House's chief map drawer, Alex Kelly, testified that the "stacked," horizontal configuration represented "an opportunity to improve" the map. According to Kelly, this configuration would have been more compact and would have broken fewer political boundaries, and it could have been accomplished without violating any tier-one minority voting protection requirements. During a non-public meeting at the end of the redistricting process, Kelly presented this alternative configuration of the districts, but the Senate ultimately determined, without explanation, to reject this approach.

Because the Legislature has not justified its enacted

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configuration of these districts, we conclude that the districts must be redrawn. We do not, however, instruct that the Legislature must necessarily redraw the districts in a "stacked," horizontal configuration. Indeed, the challengers have conceded that a vertical configuration [**124] could perhaps pass constitutional muster, and their alternative maps introduced at trial did, in fact, configure these districts [*413] in a vertical manner. Accordingly, we leave it for the Legislature to determine how to redraw these two districts, with the understanding that tier-two compliance could be improved and, given the shift in the burden, that the Legislature must be able to justify its redrawn configuration of these districts.

## VII. REMEDY

We now turn to the remedy. The specifically challenged districts notwithstanding, the challengers suggest that a broader remedy is required and urge this Court to invalidate the whole map and either redraw it ourselves or order the trial court to redraw it, perhaps with the assistance of an appointed expert. The Legislature counters that this Court lacks the authority to do so, because a congressional redistricting plan may be enacted only by a state legislature pursuant to *article I, section 4, clause 1, of the United States Constitution*, which vests exclusive authority to regulate the time, place, and manner of congressional elections in state legislatures, subject only to oversight by Congress. Although we reject the Legislature's argument that this Court has no authority to adopt a plan, if necessary, we [**125] decline the invitation to do so at this time.

The Colorado Supreme Court has explained that state courts are empowered to enact constitutional redistricting plans for the United States Congress "when the legislature fails to do so." *People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1232 (Colo. 2003)*. The Colorado high court has stated that state courts "have the authority to evaluate the constitutionality of redistricting laws and to enact their own redistricting plans when a state legislature fails to replace unconstitutional districts with valid ones." *Id.* "In such a case," the Colorado Supreme Court has reasoned, "a court cannot be characterized as 'usurping' the legislature's authority; rather, the court order fulfills the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action." *Id.*

We agree, but we have determined that in this case the Legislature has not failed to conform to a ruling from this Court requiring it to adopt constitutionally compliant congressional districts, and, in fact, swiftly enacted a remedial redistricting plan in response to the trial court's judgment. We thus conclude that the appropriate remedy at this juncture is to require the Legislature to redraw the map, [**126] based on the directions set forth by this Court.

The Legislature need not, in addition, redraw the entire map. Although we have struggled with this issue, particularly in light of the admittedly gerrymandered 2002 map that was used as a baseline for the current districts, we have ultimately determined that requiring the entire map to be redrawn is not the remedy commensurate with the constitutional violations found in this case. Further, we note that the challengers did not allege, as a separate claim, that the Legislature's reliance on the 2002 map was a basis for invalidating the whole map, nor did they identify a neutral map that showed how all of the districts could be redrawn in a manner more objectively compliant with the constitutional requirements.

We have, instead, instructed the Legislature on which districts must be redrawn—Districts 5, 13, 14, 21, 22, 25, 26, and 27—and provided precise guidelines as to

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the deficiencies in these districts. Although we decline to require the whole plan to be redrawn, it follows that all adjacent districts affected by the reconfiguration of the specific districts being redrawn must also be redrawn. We have, in addition, been asked by the challengers [**127] to [*414] provide specific directives that the Legislature must follow in redrawing the districts.

HN26[] It is true, as the Legislature argues, that the judiciary is generally "without authority to review the internal workings" of the Legislature. *Fla. Senate v. Fla. Pub. Emps. Council 79, AFSCME, 784 So. 2d 404, 409 (Fla. 2001)*. But it is also true, as this Court has recognized in another of its recent redistricting opinions, that Florida has a "strong public policy, as codified in our state constitution, favoring transparency and public access to the legislative process." *Apportionment IV, 132 So. 3d at 144*. The Legislature's failure to preserve redistricting records and its decision to make important changes to the map during non-public meetings are factors that caused the trial court, and cause this Court, great concern as to whether the Legislature has complied with the constitutional provision to outlaw partisan political gerrymandering.

This is particularly so given that the Legislature itself proclaimed that it would conduct the most open and transparent redistricting process in the history of the state, and then made important decisions, affecting numerous districts in the enacted map, outside the purview of public scrutiny. As this Court has previously stated, "[i]f the Legislature alone is responsible for [**128] determining what aspects of the reapportionment process are shielded from discovery, the purpose behind the voters' enactment of the article *III, section 20(a)*, standards will be undermined." *Id. at 149*.

While the congressional redistricting plan is somewhat unique in that it required compromise between the two legislative chambers—unlike the state House and Senate maps that were drawn solely within each respective chamber—a redistricting plan enacted by the Legislature is also unique as compared to other types of legislation, in that it involves a specific "constitutional restraint on the Legislature's actions." *Id. at 147*. The dissent's claim that there is nothing "unique" about the challenge in this case, dissenting op. at 127, is unavailing—and belied by its own admonitions about how this Court's alleged errors are particularly grave in the context of redistricting.

In typical cases challenging the constitutionality of a legislative enactment, the relevant inquiry is whether the enacted legislation violates some individual right or contravenes some prohibition on the type of law the Legislature is empowered to enact. The traditional constitutional analysis of enacted legislation does not involve, as it does here, [**129] "a specific constitutional direction to the Legislature, as to what it can and cannot do with respect to drafting legislative reapportionment plans." *Apportionment IV, 132 So. 3d at 147*. Simply put, this case does not pit this Court versus the Legislature, but instead implicates this Court's responsibility to vindicate "the essential right of our citizens to have a fair opportunity to select those who will represent them." *Id. at 148*.

We therefore set forth the following guidelines and parameters, which we urge the Legislature to consider in adopting a redrawn map that is devoid of partisan intent. First, in order to avoid the problems apparent in this case as a result of many critical decisions on where to draw the lines having been made outside of public view, we encourage the Legislature to conduct all meetings in which it makes decisions on the new map in public and to record any non-public meetings for preservation. As we stated in *Apportionment IV*, HN27[

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] "one of our state constitutional values is a strong and well-established public policy of transparency and public access to the legislative process." *Id. at 146*. This transparency is critical in light of both the purpose of the Fair Districts Amendment [*415] to outlaw partisan manipulation in the redistricting process [**130] and the trial court's finding here that "an entirely different, separate process" to favor Republicans and incumbents was undertaken contrary to the Legislature's assertedly transparent redistricting effort. *Id. at 149*.

Second, the Legislature should provide a mechanism for the challengers and others to submit alternative maps and any testimony regarding those maps for consideration and should allow debate on the merits of the alternative maps. The Legislature should also offer an opportunity for citizens to review and offer feedback regarding any proposed legislative map before the map is finalized.

Third, the Legislature should preserve all e-mails and documents related to the redrawing of the map. In order to avoid additional, protracted discovery and litigation, the Legislature should also provide a copy of those documents to the challengers upon proper request.

Finally, we encourage the Legislature to publicly document the justifications for its chosen configurations. That will assist this Court in fulfilling its own solemn obligation to ensure compliance with the Florida Constitution in this unique context, where the trial court found the Legislature to have violated the constitutional [**131] standards during the 2012 redistricting process.

## VIII. THE VOTERS SOUGHT FAIR DISTRICTS

Before we conclude, we observe that this is neither the first, nor likely the last, time this Court must confront a challenge to a redistricting plan enacted by the Legislature. In each case, we have endeavored to give meaning to the intent of the framers and voters who passed the Fair Districts Amendment to outlaw partisan political gerrymandering—no easy task given how entrenched this practice has been for years in the politics of crafting Florida's district boundaries.

A reader of Justice Canady's dissent in isolation could be forgiven for believing that this Court's decision here amounts to a creative maneuver designed to overstep its proper bounds, done in order to usurp the Legislature's role in the redistricting process. The dissent's attacks on this Court's analysis are extravagant, even when measured against prior dissenting opinions in our recent redistricting cases that have accused this Court of devising "a radical alteration in the operation of the separation of powers." *Apportionment IV, 132 So. 3d at 160* (Canady, J., dissenting). The barrage of epithets employed by the dissent includes the following colorful array: "fallacious"; "fabricated"; "extreme [**132] distortion"; "revolutionary deformation"; "teeming with judicial overreaching"; "creatively cobbled"; "aggressive invasion"; "aberrant decision"; and "unprecedented incursions."[20] Dissenting op. at 110, 111, 112, 117, 127.

Of course, we categorically reject the dissent's many derisive criticisms. And we point out that the dissent's overblown claims that this Court has violated the separation of powers, and has done away with the presumption of constitutionality applied to legislative acts in the redistricting context, are in fact nothing new. In *Apportionment I*, the dissent repeatedly chastised this Court for "cast[ing] aside the presumption of

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[20] Perhaps we should take solace in not being accused of "jiggery-pokery." *See King v. Burwell, 135 S. Ct. 2480, 192 L. Ed. 2d 483, 2015 WL 2473448, at *19 (U.S. 2015)* (Scalia, J., dissenting).

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constitutionality." *Apportionment I, 83 So. 3d at 696* (Canady, J., concurring in part and dissenting in part). [*416] In *Apportionment III*, the dissent charged that this Court had "la[id] the groundwork for the unrestrained judicial intrusion" into the redistricting process. *Apportionment III, 118 So. 3d at 218* (Canady, J., dissenting) (internal quotation omitted). And in *Apportionment IV*, the dissent hyperbolically accused this Court of "grievously violat[ing] the constitutional separation of powers." *Apportionment IV, 132 So. 3d at 156* (Canady, J., dissenting).

The dissent's position has certainly [**133] been consistent. But so too has this Court's. We pointed out in *Apportionment I* that the Fair Districts Amendment "dramatically alter[ed] the landscape with respect to redistricting," increasing the scope of judicial review and commensurately requiring "more expanded judicial analysis of legislative compliance." *Apportionment I, 83 So. 3d at 607*. We emphasized in *Apportionment III* that "the framers and voters clearly desired more judicial scrutiny" of the Legislature's decisions in drawing the state's congressional and legislative districts. *Apportionment III, 118 So. 3d at 205*. And we reiterated in *Apportionment IV* that there can hardly be a more compelling interest than the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering. *Apportionment IV, 132 So. 3d at 147-48*.

Far from upending the law, then, our legal analysis today adheres to our recent redistricting precedents. The dissent, to the contrary, continues its refusal to acknowledge the import of the Fair Districts Amendment. As Chief Justice Labarga eloquently stated in his concurrence in *Apportionment IV*, this Court has an "important duty" to "honor and effectuate the intent of the voters in passing Florida's groundbreaking constitutional amendment prohibiting partisan or discriminatory intent in drawing the congressional apportionment plan." *132 So. 3d at 154-55* (Labarga, [**134] J., concurring). This is a responsibility we undertake with the utmost of seriousness—not because we seek to dictate a particular result, but because the people of Florida have, through their constitution, entrusted that responsibility to the judiciary.

## IX. CONCLUSION

In conclusion, we affirm the trial court's factual findings and ultimate determination that the redistricting process and resulting map were "taint[ed]" by unconstitutional intent to favor the Republican Party and incumbents. However, we reverse the trial court's order approving the remedial redistricting plan because we conclude that, as a result of legal errors, the trial court failed to give the proper effect to its finding of unconstitutional intent, which mandated a more meaningful remedy commensurate with the constitutional violations it found.

Through this opinion, we have provided clear guidance as to the specific deficiencies in the districts that the Legislature must redraw—Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected thereby—and we have urged the Legislature in light of the trial court's findings in this case to consider making all decisions on the redrawn map in public view. We have every [**135] confidence that the Legislature, given this guidance, will conduct itself in a manner that will fulfill the purpose of the Fair Districts Amendment, including the need for transparency and neutrality in drawing the state's congressional districts.

As to the remedy, we are aware that this litigation has now spanned more than three years and the qualifying period for the next congressional election of 2016 is not far away. We therefore urge that the redrawing of the map be expedited. We [*417] have chosen to relinquish this case to the trial court for a limited period of 100 days from the date of this opinion, therefore

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retaining jurisdiction, and we anticipate that the trial court can perform an oversight role should any disputes arise.[21] To avoid any further delays, we have also limited the time for filing a motion for rehearing or clarification to five days from the date of this opinion and have limited the time for filing a response to such a motion to three days from the date the motion is filed.

It is so ordered.

LABARGA, C.J., and QUINCE and PERRY, JJ., concur.

LEWIS, J., concurs in result.

CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

**On the Court's own motion, any motion for rehearing or clarification shall be filed no later than 3 p.m. on July 14, 2015. *See* Fla. R. App. P. 9.330(a). Any response to a motion for rehearing or clarification must be filed no later than 3 p.m. on July 17, 2015. No reply to the response shall be permitted.**

[*426contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

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[21] The specific parameters of the relinquishment and transmission of the record are set forth in a separate order issued by this Court simultaneously with this opinion. Although the dissent criticizes our requirement in that [**136] order of dual filings in the trial court and this Court during the relinquishment proceedings, *see* dissenting op. at 124-25, time is of the essence in bringing finality to the congressional redistricting plan. Requiring dual filings during a relinquishment or other proceeding over which this Court retains jurisdiction is not unusual, and the dual filings allow this Court to ensure it timely has the complete record so that it can act expeditiously.

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

RENE ROMO, et al, Plaintiffs, vs. KEN DETZNER and PAM BONDI, Defendants.

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al, Plaintiffs, vs. KEN DETZNER, et al, Defendants.

CASE NO: 2012-CA-412

CASE NO: 2012-CA-490

*FINAL JUDGMENT*

This [**137] case is before me following a lengthy bench trial. Plaintiffs claim that the congressional redistricting plan adopted by the Legislature violates *Article III, Section 20 of the Florida Constitution.* For the reasons set forth below, I agree, finding that districts 5 and 10 were drawn in contravention of the constitutional mandates of *Article III, Section 20*, thus making the redistricting map unconstitutional as drawn.

INTRODUCTION

President George Washington, in his farewell address of 1796, warned the new nation of the dangers of political parties.

"However combinations or associations of the above description may now and then answer popular ends, they are likely in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion....Without looking forward to an extremity of this kind (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the

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spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it."

His countrymen did not heed Washington's [**138] warning and quickly divided themselves into opposing political factions. Though the names have changed over the years, the two major political parties have been battling each other for control over our nation's government ever since. To many, it seems that Washington's fears have been realized. Certain in the rightness of their cause, of the superiority of their ideas and their members, they consider those in the opposing camp to be not only wrong, but a threat to the very foundations of our country. Any idea of the other party is to be opposed fervently. They must win elections and gain or remain in power because, to the partisans, their party's interest is synonymous with the country's interest. In short, winning is everything.

One of the ways in which political parties seek to gain or maintain an advantage over the other is through the redistricting process. Every ten years, based on new census data, congressional seats are reapportioned among the states based upon shifting population figures. To many citizens this process is of mild interest, but to the political parties it is a high stakes [*427] proposition, a zero sum game in which one party wins and the other loses — for years to come. [**139] Subtle shifts in a district boundary line can make the difference between a district that is "safe" for a political party or one that is "competitive" between the two. It can make a big difference in the ability to recruit candidates for particular districts, the amount of time, energy and resources necessary to give a party's candidate a real chance of success, and ultimately, whether the party can maintain a majority of seats in congress.

Historically, the political party in control of the state legislature has been able to draw the new districts in a manner that protects their party and its incumbents. Voter populations are shifted and clustered based upon how they are likely to vote. The result has often been maps with districts that have unusual boundaries and bizarre shapes, as if some abstract artist had been given free rein. This practice has come to be called political gerrymandering and has been criticized as allowing, in effect, the representatives to choose their voters instead of vice versa.

In 2010, the voters of Florida passed two amendments to the Florida Constitution, commonly referred to as the Fair Districts Amendments, aimed at eliminating such political gerrymandering. These amendments are [**140] now codified in the Constitution as *Article III Section 20*, pertaining to congressional redistricting and *Article III Section 21*, pertaining to state legislative redistricting. These amendments significantly decrease the Legislature's discretion in drawing district boundaries. Specifically forbidden is the drawing of a redistricting plan with the intent to favor or disfavor a political party or incumbent. *Section 20* reads as follows:

> Standards for establishing congressional district boundaries.—In establishing congressional district boundaries:
>
> (a)No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b)Unless compliance with the standards in this subsection conflicts with the standards in subsection 1(a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize [**141] existing political and

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geographical boundaries.

(c)The order in which the standards within subsections 1(a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

*Art. III, § 20, Fla. Const.*

*Subsection (a)* contains tier-one requirements which must be followed. In addition to prohibiting intent to favor or disfavor a political party or incumbent, this subsection contains two distinct protections for racial and language minorities. The first, which prohibits districts which are drawn with "the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process," is similar to *Section II to of the Voting Rights Act*. Commonly referred to as the "vote dilution" provision, this section requires majority minority districts where certain preconditions are met. The second minority protection prohibits a plan or district from "diminish[ing] their ability to elect representatives [*428] of their choice." Commonly referred to as "retrogression," this clause tracks *Section 5* of the Voting Rights Act and prohibits backsliding in the ability of minority groups to elected candidates of their choice.[1]

*Subsection (b)* contains provisions requiring compactness and the following of political and geographic boundaries, where feasible.[2] These traditional redistricting principles, tier-two requirements, must be followed unless doing so would conflict with tier-one requirements.

More than one witness during trial explained their opposition to the passage of these amendments by opining that "you can't take politics out of politics" or that the amendments would be "impossible to implement." Perhaps, but they are now a part of our organic law and I am bound to interpret and apply them as best I can in order to give effect to will of the voters as so expressed. See *Re: Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 597 (Fla. 2012)*.[3] Any act of legislation that is in conflict with the organic law of the constitution is not a valid law. This is a fundamental principle of our political and legal system.

This is a case of first impression interpreting *Article III Section 20*, dealing with congressional re-districting. The Florida Supreme Court, however, has interpreted the analogue provision in *Article III Section 21*, which applies to state legislative plans. *See Apportionment I, 83 So. 3d 597*. This lengthy and comprehensive opinion interprets [**143] key terms and explains how the various criteria are to be analyzed in reviewing a redistricting plan for constitutionality. It therefore provides me with a detailed road map for reviewing the congressional plan challenged by Plaintiffs.

## STANDARD OF REVIEW

A law passed by the legislature is entitled to a presumption of constitutionality. The burden to show otherwise is on those who challenge the law, and that burden is generally said to be beyond a reasonable doubt. This is, in fact, the standard I applied when considering motions for summary judgment earlier in this case. The Plaintiffs ask that I reconsider this decision in light of the Florida Supreme Court's holding to the contrary in *Apportionment I*, and its subsequent language in *League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135 (Fla. 2013)*.

[1] The contiguity requirement [**142] is not at issue in this case.

[2] The equal population requirement is not at issue in this case.

[3] Hereafter *Apportionment I*.

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In *Apportionment I*, the Florida Supreme Court specifically rejected the argument that those who challenge redistricting plans must prove facial invalidity beyond a reasonable doubt. It stated that the plans still come to the Court "with an initial presumption of validity"... and that the review of the plans would be done "with deference to the role of the Legislature in apportionment..." but stated that its constitutionally required independent review [**144] brought with it a lesser degree of deference than would be appropriate with other legislation. *Id. at 606-607*.

The question is whether this different standard of review is a consequence of the nature of the act reviewed (a redistricting plan), the nature of the new criteria required by the Fair District Amendments (the expanded scope of review), or the specific constitutional mandate that the [*429] State House and Senate plans be reviewed by the Florida Supreme Court irrespective of a specific challenge (the procedural process of obtaining review). It was this latter factor, the constitutional requirement of an independent review, which I felt distinguished this case from *Apportionment I* and thus required the traditional standard of review. Upon reflection, however, I'm not convinced that the different procedural process requires a different standard of review.

It is true that the constitutional mandate for review by the Florida Supreme Court is unique. But should the procedural manner in which a plan is brought before the court for review make a difference in the standard applied in that review? The other two factors noted by the Supreme Court in *Apportionment I*, the nature of the legislation and the criteria to be applied, [**145] are the same in this case. The rights protected are just the same and just as important when redistricting occurs for Congress as it is when it occurs for the State House and Senate. Should the voters be entitled to less constitutional protection when the redistricting is for the former rather than the latter? Should actions on the part of the legislature in the redistricting process be deemed in violation of the constitution in one instance but not the other?

I think not, and now conclude that it is the nature of the legislation and the nature of what is reviewed that requires a different standard of review. In *Apportionment I*, the Florida Supreme Court observed:

> We conclude that the beyond a reasonable doubt standard is ill-suited for an original proceeding before this Court in which we are constitutionally obligated to enter a declaratory judgment on the validity of the legislative plans. Unlike a legislative act promulgated separate and apart from an express constitutional mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the "instructions" of the citizens as expressed in specific requirements of the Florida Constitution governing [**146] this process.

*Apportionment 1, 83 So. 3d 597 at 607-608*;

> There is a difference between the Court's role in reviewing a legislative apportionment plan to determine compliance with constitutionally mandated criteria and the Court's role in interpreting statutes; this Court has stated its responsibility in construing statutes differently. For example, in *Tyne v. Time Warner Entertainment, 901 So. 2d 802, 810 (Fla. 2006)*, in upholding a statute as constitutional, the Court stated that it had "an obligation to give a statute a constitutional construction where such a construction is possible." This Court has stated that it is
>
> > "committed to the fundamental principle that it has the duty if reasonably possible, and consistent with constitutional rights, to resolve doubts as to the validity of a statute in favor of

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> its constitutional validity and to construe a statute, if reasonabl[y] possible, in such a manner as to support its constitutionality -- to adopt a reasonable interpretation of a statute which removes it farthest from constitutional infirmity."

*Apportionment I, 83 So. 3d at 607, n. 5* (quoting *Corn v. State, 332 So. 2d 4, 8 (Fla. 1976)*).

As this language suggests, the reason for the different standard is because apportionment plans cannot be interpreted. The lines are where they are. It is not a question of searching for a reasonable interpretation of a statute which [**147] would make it constitutional. Rather, the inquiry is [*430] into the process, the end result, and the motive behind the legislation.

I will therefore, in this case, apply the standard of review articulated in *Apportionment I*, deferring to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements, with an understanding of my limited role in this process and the important role of the Legislature. My duty "is not to select the best plan" but to determine whether Plaintiffs have proved the plan invalid. *Apportionment I, 83 So. 3d 597 at 608*.[4]

## CHALLENGE TO PLAN AS A WHOLE VERUS A CHALLENGE TO INDIVIDUAL DISTRICTS

Plaintiffs distinguish between their challenge to the redistricting plan as a whole, as being drawn with the intent generally to favor the Republican Party, [**148] and their challenge to several individual districts, as being specifically drawn with such intent. I find this to be a false dichotomy, a distinction without difference. The redistricting plan is the result of a single act of legislation. If one or more districts do not meet constitutional muster, then the entire act is unconstitutional. The districts are part of an integrated indivisible whole. So in that sense, if there is a problem with a part of the map, there is a problem with the entire plan.[5]

That does not mean, however, that portions of the map not affected by those individual districts found to be improperly drawn would need to be changed in a redrawn map, even if a general intent to favor or disfavor a political party or incumbents was proven. What would be the point if the other districts are otherwise in compliance? Such a remedy would go far beyond correcting the effect of such noncompliance, but rather would require a useless act that would encourage continued litigation. [**149] Therefore, I have focused on those portions of the map that I find are in need of corrective action in order to bring the entire plan into compliance with the constitution.

## EVIDENCE RECEIVED UNDER SEAL OR IN CLOSED PROCEEDINGS

A portion of the trial was closed to the public and certain exhibits entered under seal, pursuant to an order of the Florida Supreme Court. Whether this evidence will ever be made public awaits determination by that court of the

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[4] As a practical matter, it may make little difference as most of the material facts are not in dispute. Rather, the parties differ as to what inferences and legal conclusions may be properly drawn from those facts. Nor do I interpret *Apportionment I* as significantly reducing the burden on the Plaintiffs to demonstrate the lack of compliance with constitutional requirements. It remains a high burden.

[5] This is consistent with the approach taken by the Court in *Apportionment I*. The Court invalidated the entire Senate plan but gave specific instructions as to which districts *required* corrective action. *Id. at 684-686*.

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correctness of my ruling that the associational privilege of the non-parties from whom the evidence was obtained should yield to the interest in disclosure.[6] For purposes of such review, I will briefly explain how I weighed and balanced the appropriate factors and why I tipped the scales in favor of disclosure. Rather than file a partially redacted order, any reference to such evidence here will be [*431] general in nature so as not to reveal the specific information contained in the exhibits and testimony.

As noted [**150] in my previous Orders, I found that the non-parties, the political consultants, had cognizable *First Amendment* Rights in the documents and testimony sought by the Plaintiffs in this case.[7] The privilege is not absolute, however, and I had to weigh and balance the competing interests to determine whether that privilege should yield in favor of disclosure. Specifically, I considered the factors set forth in *Perry v. Schwarzenegger, 591 F. 3d 1147 (9th Circ. 2010)* and determined that the privilege should yield. In the interest of time, I did not elaborate in detail my reasons for that conclusion, announced in open court. I thought it important that the parties know what could and could not be used at trial and that the non-parties have time to obtain a stay if further review was deemed appropriate by the appellate court. The reasons I decided that the associational privilege should yield are as follows:

The case before me of is of the highest importance, going, as it does, to the very foundation of our representative democracy. "Indeed, as [this Court] succinctly stated, it is "difficult to imagine a more compelling, competing government interest" than the interest represented by the challengers' article [**151] *III, section 20(a)*, claims." *League of Women Voters, 132 So. 3d 135, 147*.

The required disclosure was narrowly tailored and limited. Out of approximately 1800 pages of documents, I required the disclosure of less than a third of those. The disclosure was only to the Plaintiffs' attorneys with instructions that they not disclose it to third parties other than staff or retained experts, including to their own clients. I felt that the Plaintiffs' attorneys were in the best position to determine which of these documents were most probative of their claims. As it turned out, they actually offered as evidence only a very small portion of those documents as exhibits.

The documents for which the political consultants claimed privilege evidenced a conspiracy to influence and manipulate the Legislature into a violation of its constitutional duty set forth in *Article 3, Section 20 of the Florida Constitution.* That was, at least, a reasonable conclusion to be drawn from this and other evidence made available to me in the case to that point. As such, I viewed any chilling effect the release of these documents might have on such behavior in the future to be not such a bad thing, and the danger to the legitimate exercise of *First Amendment* rights rather slight.

Some of the communications, and a good deal of the map work product [**152] of the non-party political consultants, were transmitted to persons outside of their group, and made very public by submission to the legislature. If this did not constitute an outright waiver of the privilege as to these items, it lessened the strength of a legitimate claim to its protection.

Unlike the politically hot button issue of homosexual marriage, present in *Perry*, the underlying subject matter

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[6] The 1st DCA has withdrawn its order reversing my ruling and passed the matter to the Supreme Court. Members of the original panel have set forth in their dissents their reasons for the initial reversal order which I hope to address here.

[7] I did not find that a trade secret privilege applied.

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here was redistricting. Although political partisans are no doubt deeply interested in the process, the redistricting process does not address controversial issues of social and moral values that divide the population. It does not arouse the type of intense passions that might justify a real fear of physical danger or mass public reprisals [*432] against the members if the information was made public.

The evidence was highly relevant and not available from other sources. When I considered this factor, I tried my best to look at it from the perspective of the judge rather than the ultimate fact finder, the two roles I play in a non jury trial. One of the principal theories of the Plaintiffs in this case was that legislative staff and leaders collaborated with these political consultants to produce [**153] a redistricting map that violated the constitution by favoring the Republican Party and its incumbents.

While it is true that the documents claimed as privileged contain no glaring "smoking gun" in terms of direct communications between the consultants and specific staff or legislators, that does not mean they are not highly relevant. Under their theory of the case, it was essential for the Plaintiffs to first prove that there was a secretive shadow process of map drawing by the political consultants which found its way into the enacted congressional map before they could prove the second prong -- the connection of this process to the Legislature.

Nor was this evidence available from other sources. Yes, the Plaintiffs engaged in extensive discovery and obtained e-mails and other documentation which they argued was compelling evidence in support of their claim. But the Plaintiffs' advocacy on this point should not be confused with the reality of what they actually had — which were bits and pieces of information which they sought to weave into a narrative consistent with their theory. The legislature had, in fact, destroyed e-mails and other evidence of communication regarding the redistricting [**154] process and so had many of the non-party political consultants.

Throughout the discovery process, these political consultants maintained that they were told by legislative leaders that they could not "have a seat at the table" in the drawing of the redistricting maps, and that they abided by that admonition. They denied having any input in the Legislative map drawing efforts or otherwise trying to influence how the maps were drawn. They denied that they submitted maps in the public submission process for redistricting. Any map drawing on their part was described as a hobby, something for personal use only, an exercise done to see what could be done on a map and to anticipate what the Legislature might produce.

What this additional evidence gave the Plaintiffs was the ability to confront these denials, to lay bear not only the fact that some of these consultants were submitting maps to the legislature, but to show how extensive and organized that effort was, and what lengths they went to in order to conceal what they were doing. Notably, even in the face of this evidence, the non-party witnesses at trial did their best to evade answering direct questions on the subject, often using semantic [**155] distinctions to avoid admitting what they had done.

At the time I considered the issue, the Plaintiffs did have some evidence that suggested otherwise but, considering the high burden on them to prove their case, I couldn't say that it would have been enough, or that this additional evidence wouldn't be crucial to the case. After all, I had not heard all of the evidence nor had the opportunity to view it in context. Now that I have, I can say that the evidence filed under seal was very helpful to me in evaluating whether Plaintiffs had proved that first prong of their theory.

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Moroever, as noted above, without sufficient proof of this secret, organized campaign to subvert the supposedly open and [*433] transparent redistricting process, the question of whether the Plaintiffs could sufficiently tie the Legislature to that effort becomes moot. To conclude that this evidence was not highly relevant to this central issue of legislative intent would have been to prejudge the case and determine ahead of time that the Plaintiffs would not be able to prove that connection. This I was not prepared to do.

For all of these reasons, I tipped the scales in favor of the First Amendment privileges of the non-parties yielding [**156] to the need and interest of disclosure in this particular case.

## DETERMING LEGISLATIVE INTENT GENERALLY

One of Plaintiffs' claims is that the entire redistricting process was infected by improper intent. Specifically, they argue that, despite the Legislature's assertion that its redistricting process was open, transparent and non-partisan, a secret, highly partisan map drawing campaign was being conducted in the shadows that was intended to, and did, favor the Republican Party and its incumbents.

The first question in evaluating this claim is to ask, whose intent? The language in *Section 20* prohibits a map being "drawn" to favor or disfavor a political party or an incumbent, not "adopted" or "enacted." Yet, the challenge is to an act passed by the Legislature, a collective body. When I asked the attorneys at the beginning of trial about this issue, I posed the hypothetical of a staff member charged with actually drawing the map, who did so with the intent to favor a political party, but hid this intent from other staff and members of the Legislature. Both sides agreed that it is the Legislature's intent that is at issue, not the staff member. Plaintiffs' attorneys conceded that, without more, this [**157] would be insufficient to show improper intent as contemplated by *Article III, Section 20* -- though they assert that the evidence indeed shows more.

There are some real problems in trying to make such a determination of legislative intent in this case. First, when we speak of legislative intent generally, we are concerned with trying to ascertain the meaning of language used in the enacted law. The goal is to interpret the language so as to give it the effect intended. In such a situation, we look to such things as the common meaning of the words used, legislative history, staff reports, statement of legislative intent in the enactment clause, transcripts of committee hearings, and statements made on the floor of the House and Senate. Some legal scholars suggest that one can never determine legislative intent from such sources, or indeed at all.[8]

This problem is exacerbated in a case like the one before me. Here, [**158] we are looking at something entirely different. See, e.g., *League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135, 150 (Fla, 2013)*[9] ("In this context, however, the 'intent' standard in the specific constitutional mandate of article *III section 20(a)*, is entirely different than a traditional lawsuit that seeks to determine legislative intent through

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[8] "Anyway, it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of 'history' that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law." *Graham County Soil & Water Conservation Dist. v. United States ex. rel. Wilson, 559 US 280, 302, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010)* (Scalia, J., concurring).

[9] *Apportionment IV*

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statutory construction."). It is not the meaning of the words used in the legislation that must be [*434] interpreted. We can see clearly where the lines are drawn on the map. Rather, the question is what was the motive in drawing these lines.

In this inquiry, it is extremely unlikely that the bill's sponsor would stand up on the floor of the House or Senate and advise his or her colleagues that the intent of the legislation is to favor the Republican Party. Nor would you expect such comments at committee meetings, or anywhere else in public for that matter. Even if a legislator expressed such intent on the floor, can we assume that all of his or her colleagues were convinced and so motivated in their votes?

Do we look to evidence of improper intent of the leaders? If so, how many other legislators, if any, would need to be "in on it" in order to find it sufficient proof of the body's intent? What if legislative leaders [**159] and staff knew that partisan groups or individuals were drawing maps with intent to favor a political party and submitting them to the Legislature through third persons in order to conceal the identity of the map drawer, but they didn't inform legislative members of this? On the flip side, if leaders took reasonable precautions to insulate the staff map drawers from partisan influence, should we conclude that the Legislature therefore had no improper partisan intent in adopting the map? How does that inform us as to what was motivating the members of the legislature?

Certainly, the actions and statements of legislators and staff, especially those directly involved in the map drawing process would be relevant on the issue of intent. As the Florida Supreme Court has explained,

> the 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.... [I]f evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent [redistricting] effort [**160] in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.

*Apportionment IV, 132 So. 3d at 149-150*. *See also, e.g., Easley v. Cromartie, 532 U.S. 234, 254, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001)* (finding "some support" for district court's conclusion that racial considerations predominated in drawing of district boundaries in email sent from legislative staff member to two senators); *Texas v. United States, 887 F. Supp. 2d 133, 165 (D.D.C. 2012)* (noting that an "email sent between staff members on the eve of the Senate Redistricting Committee's markup of the proposed plan" fueled the court's "skepticism about the legislative process that created" a challenged district).

It is very difficult, however, to know when such evidence establishes not just individual intent or motive, but the intent or motive of the collective body. It seems that the more reliable focus in such an inquiry would be on what was actually produced by the Legislature, the enacted map. Specifically, an analysis of the extent to which the plan does or does not comply with tier two requirements is a good place to start. Can one draw a map that meets tier-two requirements but nonetheless favors a political party or an incumbent? Sure, [**161] but it is more difficult.

Furthermore, a failure to comply with tier-two requirements not only supports an inference of improper intent, it is an independent ground for finding a map unconstitutional. [*435] *See Apportionment I, 83 So. 3d*

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597, 640-641. Additional direct and circumstantial evidence of intent may serve to strengthen or weaken this inference of improper intent. Therefore, I first examine the map for apparent failure to comply with tier-two requirements of compactness and utilization of political and geographical boundaries where feasible, then consider any additional evidence that supports the inference that such districts are also in violation of tier-one requirements.

## SPECIFICALLY CHALLENGED DISTRICTS

The tier-two standards at issue in this case are compactness and the requirement that districts follow geographic and political boundaries where feasible. Because Florida and many of its counties are cities are not perfectly square or round, there is often tension between these two requirements.

An evaluation as to compactness "begins by looking at the shape of a district." *Apportionment I,* 83 So. 3d 597, 634 (internal quotation marks and citation omitted). A district "should not have an unusual shape, a bizarre design, or an unnecessary appendage [**162] unless it is necessary to comply with some other requirement." *Id.; see also* Id. at 636 (emphasizing that "non-compact and 'bizarrely shaped districts' require close examination"). Districts "containing ... finger-like extensions, narrow and bizarrely shaped tentacles, and hook-like shapes ... are constitutionally suspect and often indicative of racial and partisan gerrymandering." Id. at 638 (internal quotation marks and alteration omitted). Thus, for example, the Florida Supreme Court struck down several Florida Senate districts in the Initial 2012 Senate Plan in part because those districts had "visually bizarre and unusual shapes." *Id.*

The compactness review should also utilize "quantitative geometric measures of compactness" derived from "commonly used redistricting software." Id. at 635. For example, the Florida Supreme Court has relied on the Reock method and the Area/Convex Hull method to assess compactness of voting districts. *See Id.* The Reock method "measures the ratio between the area of the district and the area of the smallest circle that can fit around the district." *Id.* The Area/Convex Hull method "measures the ratio between the area of the district and the area of the minimum convex bounding [**163] polygon that can enclose the district." Apportionment I, 83 So. 3d 597, 635.

Tier-two mandates also direct the Legislature to draw districts utilizing existing political and geographical boundaries where feasible. Political boundaries include "cities and counties," Id. at 637, while geographical boundaries include "rivers, railways, interstates and state roads," Id. at 638. This requirement is more flexible than the compactness requirement. But "the choice of boundaries" is not "left entirely to the discretion of the Legislature," Id. at 637, and it may not use any boundary (e.g., a "creek or minor road") that suits its purposes, Id. at 638. In addition, although no priority of importance is given to either, the requirement to use existing boundaries contains the modifier, "where feasible."

### A. Congressional District 5

Congressional District 5 does not adhere to the tier-two standards in Article III Section 20. It is visually not compact, bizarrely shaped, and does not follow traditional political boundaries as it winds from Jacksonville to Orlando. At one point, District 5 narrows to the width of Highway 17. The district has a Reock score of only 0.09. Enacted District 5 has majority black voting age population [*436] (BVAP), but the benchmark districting was only a plurality [**164] BVAP district. The Defendants' argument that the vote dilution

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provision of *Article III Section 20* and *Section 2* of the Voting Rights Act required a majority BVAP district and that this configuration was necessary to achieve that end, is not supported by the evidence.

Plaintiffs have shown that a more tier-two compliant district could have been drawn that would not have been retrogressive. The plans proposed by the House of Representatives prior to conference committee plan 9047 being adopted were all more compact and split fewer counties. While not model tier-two compliant districts, these iterations did avoid the narrow appendage jutting from the body of the district into Seminole County. Such appendages are particularly suspect of prohibited intent to benefit a political party or incumbent. Furthermore, the House's various iterations achieved a BVAP of between 47 and 48 percent. The House's chief map drawer, Alex Kelly, testified that he performed a functional analysis on these iterations, and that this level of minority population would not have been retrogressive. Indeed, this is higher than the BVAP of benchmark district when it was enacted.

The vote dilution provisions in *Article III, Section 20* and in the Voting Rights Act do not [**165] require the creation of a majority-minority district wherever possible, but only where certain conditions—conditions first announced in *Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)*—are satisfied. First, three preconditions must be present: (i) the minority population is sufficiently large and geographically compact to be a majority of the voting-age population; (ii) the minority population is politically cohesive; and (iii) the majority population votes sufficiently as a bloc to enable it usually to defeat the candidates preferred by minorities. *Apportionment I, 83 So. 3d at 622* (citing *Gingles, 478 U.S. at 50-51*).

The Legislature made no effort during the redistricting process to determine if the *Gingles* preconditions existed for this district, nor does the evidence introduced at trial demonstrate that they exist now. The minority population is not sufficiently large and geographically compact to constitute a majority of the voting age population. To achieve a BVAP over 50%, the district connects two far flung urban populations in a winding district which picks up rural black population centers along the way. The *Gingles* compactness inquiry certainly is focused on more than just district lines. *See League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 433, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006)*. But it also doesn't ignore such lines. *See Id.* District 5 is simply not compact for [**166] the purpose of the *Gingles* analysis.

Nor does the evidence prove the third precondition. There is no dispute that there is racially polarized voting in Northeast Florida. However, Defendants have not shown that this polarization is legally significant. Because "the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district." *Thornburg v. Gingles, 478 U.S. at 50*. The evidence is undisputed that the benchmark district, which was never majority-minority, elected an African-American to Congress during its entire existence. Additionally, analysis by Dr. Brunell, an expert retained by the House, suggested that there would be a 50/50 ability to elect a [*437] minority candidate of choice with a BVAP as low as 43.6 %. Thus, the evidence does not establish that the majority population votes sufficiently as a bloc to enable it usually to defeat the candidates preferred by minorities.

I also find that the decision to increase the district to majority BVAP, which was accomplished in large part by creating the [**167] finger-like appendage jutting into District 7 and Seminole County, was done with the

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intent of benefiting the Republican Party. I reach this conclusion based in part on the inference that the Florida Supreme Court suggested could be drawn from oddly shaped appendages that had no legal justification. *See* *Apportionment I, 83 So. 3d at 618* ("W]here the shape of a district in relation to the demographics is so highly irregular and without justification that it cannot be rationally understood as anything other than an effort to favor or disfavor a political party, improper intent may be inferred"). This inference is also buttressed by the evidence of improper intent in the redistricting process generally, and as specifically related to the drawing of District 5, the most significant of which I will outline now.

1. In General

Plaintiffs' theory of the case regarding improper intent is that Republican leadership in the House and the Senate, their key staff members, and a small group of Republican political consultants conspired to avoid the effective application of the Fair District Amendments to the redistricting process and thereby successfully fashioned a congressional map that favors the Republican Party and its incumbents. The strategy they came up [**168] with, according to the Plaintiffs, was to present to the public a redistricting process that was transparent and open to the public, and free from partisan influences, but to hide from the public another secretive process. In this secretive process, the political consultants would make suggestions and submit their own partisan maps to the Legislature through that public process, but conceal their actions by using proxies, third persons who would be viewed as "concerned citizens," to speak at public forums from scripts written by the consultants and to submit proposed maps in their names to the Legislature, which were drawn by the consultants.

What is clear to me from the evidence, as described in more detail below, is that this group of Republican political consultants or operatives[10] did in fact conspire to manipulate and influence the redistricting process. They accomplished this by writing scripts for and organizing groups of people to attend the public hearings to advocate for adoption of certain components or characteristics in the maps, and by submitting maps and partial maps through the public process, all with the intention of obtaining enacted maps for the State House and Senate [**169] and for Congress that would favor the Republican Party.

They made a mockery of the Legislature's proclaimed transparent and open process of redistricting by doing all of this in the shadow of that process, utilizing the access it gave them to the decision makers, but going to great lengths to conceal from the public their plan and their participation in it. They were successful in their efforts to influence the redistricting process and the congressional plan under review here. And they might have successfully concealed their scheme and their actions from the public had it not been for [*438] the Plaintiffs' determined efforts to uncover it in this case.

The closer question is whether the Legislature in general, or the leadership and staff principally involved in drawing the maps, knowingly joined in this plan, or were duped by the operatives in the same way as the general public. The Defendants argue that if such a conspiracy existed, there is no proof that anyone in the Legislature was a part of it. If portions of the operatives' [**170] maps found their way into the enacted maps, they say, it was not because leadership or staff were told or knew they came from this group, but rather because the staff, unaware of their origins, saw the proposals as improving the draft maps they were

[10] Although one of this group took umbrage at the term operative, another self-described himself as such. I will use the terms interchangeably to refer to the same group.

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working on.

The most compelling evidence in support of this contention of the Defendants is the testimony of the staff members who did the bulk of the actual map drawing for the Legislature. I had the ability to judge the demeanor of Alex Kelly, John Guthrie and Jason Poreda at trial and found each to be frank, straightforward and credible. I conclude that they were not a part of the conspiracy, nor directly aware of it, and that significant efforts were made by them and their bosses to insulate them from direct partisan influence. I accept that their motivation in drawing draft maps for consideration of the Legislature was to produce a final map which would comply with all the requirements of the Fair District Amendments, as their superiors had directed them.

That being said, the circumstantial evidence introduced at trial convinces me that the political operatives managed to find other avenues, other ways to infiltrate and influence the Legislature, to obtain [**171] the necessary cooperation and collaboration to ensure that their plan was realized, at least in part. They managed to taint the redistricting process and the resulting map with improper partisan intent. There is just too much circumstantial evidence of it, too many coincidences, for me to conclude otherwise.

**a. Destruction of Records**

The Legislative Defendants argue that despite the extensive discovery conducted by the Plaintiffs, there is a paucity of documentary evidence that ties the activities of the operatives with a single legislator so as to prove improper legislative intent. I note, however, that the Legislators and the political operatives systematically deleted almost all of their e-mails and other documentation relating to redistricting. There was no legal duty on the part of the Legislature to preserve these records, but you have to wonder why they didn't. Litigation over their plans was "a moral certainty," as their lawyers put it earlier in this case, and intent would be a key issue in any challenge.

**b. Early Meetings of Legislative Leaders and Staff with Political Consultants**

In December of 2010 and January of 2011, Legislative leaders, staff members and attorneys met with [**172] a group of Republican political consultants to discuss the upcoming 2012 redistricting process. The attendees for one or both included Senator Gaetz, Representative Weatherford, legislative staff members Alex Kelly, Chris Clark and John Guthrie, counsel for the House and Senate, Richard Heffley, Marc Reichelderfer, Patrick Bainter, Benjamin Ginsberg, Joel Springer, Andrew Palmer, and Frank Terraferma.

Clark was the chief legislative aide for Gaetz during the 2012 Redistricting Process and Guthrie was the Senate staff member in charge of map drawing. Heffley was a political consultant who has worked with a number of Republican legislators and candidates, including Gaetz. [*439] He was, at the time, under contract with The Republican Party of Florida (RPOF) to provide unspecified services relating to redistricting. Reichelderfer was a political consultant who had worked with a number of Republican legislators and candidates, including Speaker Dean Cannon. Bainter was a political consultant who had worked with a number of Republican legislators and candidates, including Representative Daniel Webster. Bainter was the owner of Data Targeting, Inc. ("Data Targeting"), a political consulting and [**173] polling firm located in Gainesville, Florida. Ginsberg was an attorney based in Washington, D.C., recognized in the area of redistricting and had represented the National Republican Party in redistricting matters. He also either was or came to be counsel for Heffley, Reichelderfer and Terraferma.

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Springer was employed by the RPOF as director of Senate campaigns. Palmer was employed by the RPOF as director of House campaigns. Terraferma was a political consultant who worked with a number of Republican legislators and candidates, including Weatherford.

The meetings were not open to the public, and there is no written record of what was discussed at either meeting. No one who testified at trial about them seemed to be able to remember much about what was discussed, though all seemed to agree that the political consultants were told that they would not have a "seat at the table" in the redistricting process. No one clearly articulated what that meant exactly, but there was testimony that they were told that they could still participate in redistricting through the public process "just like any other citizen." One witness testified that the participants discussed whether a privilege could [**174] be identified to prevent disclosure of redistricting-related communications among political consultants, legislators, and legislative staff members, and concluded that no privilege would apply.

Reichelderfer prepared a memorandum following the December, 2010 meeting that included the following notations: "What is our best operational theory of the language in [Amendments] 5 and 6 related to retrogression of minority districts?"; "Central FL Hispanic seats? Pros and Cons"; "Evolution of maps — Should they start less compliant and evolve through the process - or - should the first map be as near as compliant as possible and change very little? Or other recommendations?"; "Communications with outside non-lawyers - how can we make that work?"

There is nothing necessarily sinister about such meetings. Most of the attendees were friends or professional colleagues and perhaps it could be considered a courtesy extended. But it doesn't look good if you are promoting openness, transparency and neutrality in the redistricting process. There was really no reason to convene two meetings just to tell active political partisans of the Republican Party that they would not "have a seat at the table." [**175] A letter or e-mail would suffice, or some general public announcement as to what the protocol would be going forward.

And there are a few curious things about these meetings and their connection to subsequent events that are troubling. First, this was a highly partisan group and all the political consultants were very interested in the redistricting process. It is inconceivable to me that, if as testified to, they were advised that they could participate in the public process "just like any other citizen" they would not have done so. How could these political consultants, who were intensely interested in the process, whose jobs or livelihoods were tied into protecting their clients' and their party's interests with respect to redistricting, not take the opportunity to submit proposed [*440] maps through the public portal, to attend at least some of the public hearings and speak out?

The reality, and the irony, is that there would be absolutely nothing wrong about the attendees at those meetings submitting proposed maps or partial maps. The difference is, if done in the open, then those reviewing the submissions could take into account the source in evaluating whether it was neutral or whether [**176] it might tend to favor or disfavor a political party or an incumbent. One of the political consultants lamented that if he had submitted maps in his own name, he would probably have come under attack, accused of trying to favor his party or its incumbents. Well, of course his submission might be closely scrutinized, in the same way that a proposed map submitted by the Florida Democratic Party might be taken with a grain of salt. That's how it should be if one

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is concerned about improper partisan intent influencing the drawing of the map.

Regardless, given the circumstances, it's hard to imagine that the legislative leaders and staffers would not have expected active participation in the public redistricting process by those political consultants at the meetings. And when the process was under way and maps were being submitted by members of the public, and public hearings were being held, and these political consultants were not in attendance, and none of the maps coming from the public had any of their names on them, I would think that the staff and legislative leaders would find it extremely strange, that they might even ask why not. But they didn't.

One of the things that the Defendants [**177] tout as showing that there was no improper partisan intent in the drafting of the maps is to point to the fact that as things progressed, each succeeding map that was drawn was an improvement over the one before it in terms of compactness, leaving cities and counties intact and following geographical boundaries. Coincidentally, though, that corresponds with a strategy suggested from Reichelderfer's notes, i.e., start with less compliant maps and work toward a more compliant map.

The Defendants also tout the opportunity for the public to have input by submitting proposed maps or partial maps, and by attending public hearings which were held throughout the state. And, the Defendants point out, all of this was open, transparent and on the record. Although that sounds like a good idea — who can argue that openness and transparency are not good things when it comes to government -- it provided the means by which partisan maps, secretly drawn and submitted by political operatives, could be incorporated into the enacted map with no one in the general public the wiser. Staff members were encouraged to consider maps submitted by the public and if they contained concepts or configurations that [**178] made the draft map "better," to incorporate them.

Paid political operatives aside, when you think about it, anybody who would go to all the trouble of drawing a map and presenting it to the legislature for consideration is probably more likely to be motivated by personal or party politics than by an altruistic desire to draw the most constitutionally compliant map possible, free of any partisan intent. And if so, relying upon publicly submitted maps may not be the best way to protect against partisan influence.

If you choose, however, to accept and perhaps rely upon publicly submitted maps, it seems to me that you should have a way to address the possible, nay probable, partisan intent of the drafters of at least some of those maps. The Legislature's answer was apparently to ignore it. [*441] Both the Senate and the House leadership instructed their staff not to consider the potential political performance of any district drawn (except in the House as to districts involving tier one minority issues), nor were they to concern themselves with the origins or the author of any publicly submitted map.

This seems on its face a neutral approach, and I appreciate the dilemma that arises: If I start [**179] evaluating a proposed map for political performance because of suspicion that it is the result of improper partisan intent, and make "corrections," haven't I now altered the map with the intent to favor or disfavor a political party? While I appreciate this concern, I don't know that it is a satisfactory answer to say that, as long as the improper intent behind a submitted map did not originate with me, and I am not expressly told about it, I don't have to worry about it. Turning a blind eye to the probability of improper intent in these maps is not the same as neutrality.

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Perhaps it would be best to have it out on the table for all to see and evaluate. Considering political performance is not the same as intending to favor or disfavor a political party or incumbent, and an open process would assist in evaluating which was in play in a particular situation. And in truth, every single legislator or senator could very easily determine on their own the potential political performance of any district on a proposed map and vote on it accordingly. Any interested citizen could access such information and advise their representative of his or her concerns or feelings about a particular district. [**180] You might insulate the staffers from political consultants and partisan influences but you can't insulate the entire Legislature.

**c. Continued Involvement of the Political Consultants in the Redistricting Process**

On June 1, 2011, Senator Gaetz sent an email to legislators providing information about upcoming public hearings about the redistricting process. The metadata for the email reveals that a "blind copy" of it was sent to Heffley and Terraferma. At trial, Senator Gaetz had no explanation for why this was done, pointing out only that the information in the e-mail was public information and that he wasn't sure someone else in his office had not sent it out under his name. Again, there would be absolutely nothing wrong with sending this information to Heffley and Terraferma, but why secretly send a blind copy? And if Senator Gaetz did not send it out, someone in his office was keeping these operatives in the loop.

Two of the consultants, Reichelderfer and Hefley, were directly involved in the redistricting process, acting as go betweens for leadership of the two chambers regarding the redistricting process. This was purportedly because of a lack of a good working relationship between [**181] the Speaker of the House and the President of the Senate. Yet, by all accounts, the actual staff members of each chamber who were working on the maps got along well with each other, as did the chairmen of the redistricting committees. Regardless, in their insider roles, Hefley and Reichelderer did not have to speak directly to staff map drawers, or even leadership, to infect and manipulate the map drawing and adoption process.

As noted above, the House and Senate destroyed most e-mails and other records of communications concerning the redistricting process, as did the political consultants. What was recovered, however, allowed the Plaintiffs to show that Kirk Pepper, Deputy Chief of Staff to then [*442] Speaker Dean Cannon, was regularly sending to Reichelderfer copies of various draft maps of the Legislature well before they were disclosed to the public.

The Defendants acknowledge that this was improper, but say it is not evidence of improper intent on the part of the Legislature because: 1) It was done without permission from his boss; 2) It was not done for the purpose of influencing the actual drafting of the maps; 3) Pepper had no map drawing responsibilities and gave no directions on [**182] how the maps should be drawn; and 4) He was simply trying to give his friend, Reichelderfer, a heads up on what to expect so that he could get ahead of his competition and better advise his clients.

Pepper and Reichelderfer apparently did communicate about the political performance of the maps, however, as evidenced by a series of e-mails between the two. For example, on November 27, 2011, right after receiving an early unpublished copy of the Senate's first draft congressional map from Pepper, Reichelderfer advised Pepper that the district of Representative Daniel Webster was "a bit messed up," and Pepper responded by inquiring "performance or geography?" Mr. Pepper

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testified that, though it may seem that they were discussing political performance, his reply to his friend was actually a signal reminding him that they should not discuss such things. Perhaps, but that is a very unusual and illogical interpretation.

In an email exchange with Reichelderfer, Representative Cannon commented that "we are in fine shape" as long as "the Senate accommodates the concerns that you [Reichelderfer] and Rich [Heffley] identified in the map that they put out tomorrow." The Defendants explained this [**183] exchange by saying that the concerns referred to was the general concern by the House that the Senate map would be so far different than the House map that it would make reconciliation of the two maps difficult. Again, perhaps, but this seems a stretch given the language used.

In October of 2011, Frank Terraferma e-mailed Chairman Weatherford reporting that Pepper was at the Republican Party of Florida huddled on a computer with Rich Hefley and working on "congressional redistricting if I had to guess." Now, it's certainly possible that Terraferma was mistaken or simply speculating without any basis, as was suggested at trial, but one has to wonder why he would make this assumption if Pepper really had nothing to do with the redistricting process. Maybe not officially, but as noted above, he was heavily involved in helping his friend, Reichelderfer with inside information. From November 2011 until January 2012, Pepper transmitted at least 24 draft maps to Reichelderfer. In most cases, Pepper provided the draft maps to Reichelderfer before their release to the public. In many cases, Pepper provided Reichelderfer with draft maps that were never released to the public.

Reichelderfer made [**184] a number of modifications to these and other maps that he received from Pepper. Some of those revisions combine a District 5 with a Black VAP of over 50% and a Hispanic VAP of District 9 over 40%. (*Compare* CP Ex. 885 *with* CP Ex. 1050). As a result of such changes, the performance of Districts 5, 7, 9, and 10 went from being four Democratic performing or leaning seats in early maps such as H000C9001 to two Democratic and two Republican performing seats in the enacted map, H000C9047 based on the results of the 2008 presidential election.[11] Indeed, many of the maps [*443] and partial maps the consultants focused on seemed to be in the Central Florida area, which coincidentally were the areas in the enacted map I have found to be problematic.

**d. Prior Finding of Partisan Intent in State Senate Plan**

The Florida Supreme Court found improper partisan intent present in the State Senate Map. The same process and the same people were involved in drafting the congressional map. It seems unlikely that the same taint would not affect that map as well. There is a difference in that the former was drawn without [**185] any input from the House and the latter the result of a collaborative effort. I note, however, that my concerns with Districts 5 and 10 involve changes to the House's map in deference to the Senate. The problems that I find in Districts 5 and 10 were not present, at least to the same degree, in the House version.

**2. Evidence of Partisan Intent Specifically Related to District 5**

The decision to change District 5 to make it a majority BVAP was made at a non-public meeting attended by Alex Kelly and John Guthrie, the chief map drawers for the House and Senate respectively, and Will Weatherford and Don Gaetz, chairmen of the redistricting committees in their respective chambers.

[11] Demographic, election, and compactness data are derived from Joint Exhibit 1, unless otherwise stated.

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They had been given direction before the meeting from their respective chamber leaders, Speaker of the House Dean Cannon and Senate President, Mike Haridopolis. Notably, Alex Kelly testified that Speaker Cannon told him that the Senate would likely request to push District 5 over 50% BVAP and that they should be prepared to accede to that request. Speaker Weatherford[12] testified that the House only went along with this request because the Senate made a "compelling" argument for it, but he could not remember the substance [**186] of the argument. The reason given at trial for this change was that the District was very close to 50% BVAP and that it seemed prudent to avoid a possible VRA suit by bumping it up enough to create a majority-minority district. That justification is not compelling, without some showing that it was legally necessary to create a majority-minority district.

The changes also increased the Republican performance of neighboring District 7.[13] In the version of District 7 House Plan 9043, Alex Sink (D) would have received 48.5% of the two-party vote in the 2010 gubernatorial election, Barack Obama (D) would have received 50.5% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 39.7% of the two-party vote in the 2006 gubernatorial election. In the enacted version of District 7, Alex Sink (D) would have received 47.5% of the two-party vote in the 2010 gubernatorial election, Barack Obama (D) would have received 49.6% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 39.0% of the two-party vote in the 2006 gubernatorial [**187] election. The change resulted in a decrease in registered Democrats in District 7 from 36.0% to 35.0% based on 2010 general election data.

Based on the above, I find that Plaintiffs have proved that District 5 unnecessarily [*444] subjugates tier-two principals of compactness. They have also proved portions of District 5 were drawn to benefit the Republican Party, in violation of tier-one. Accordingly, District 5 is invalid and must be redrawn. Any surrounding districts affect by such a change must likewise be redrawn.

**Congressional District 10**

District 10 is overall fairly compact. It has a Reock Score of .39 and a Convex Hull Score of .73. However, there is an odd-shaped appendage which wraps under and around District 5, running between District 5 and 9. Such appendages render a district not compact pursuant to tier-two standards and should be avoided unless necessary to comply with tier-one requirements. *See* *Apportionment I, 83 So. 3d at 634* ("Compact districts should not have an unusual shape, a bizarre [**188] design, or an unnecessary appendage unless it is necessary to comply with some other requirement"). Plaintiffs have shown that the district could be drawn in a more compact fashion, avoiding this appendage. Plaintiffs adduced multiple iterations emanating from the House redistricting suite which did not contain this appendage and were otherwise more compact. Indeed these iterations were more compact in Central Florida generally, as the chart below will show.

***Central Florida Regional Compactness Chart***

Go to table2

The *Central Florida Regional Compactness Chart* lists

[12] Demographic, election, and compactness data are derived from Joint Exhibit 1, unless otherwise stated.

[13] The increased Republican performance is admittedly marginal, particularly when comparing enacted CD 7 with the analogue district in Senate map 9014. However, close political races are almost always won or lost on the margins.

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compactness scores for all districts included in Orange, Osceola, and Polk Counties.

Defendants contend that this appendage, and the configuration of Central Florida generally, is necessary to achieve tier-one minority protection in both Districts 5 and 9. Because the appendage is highly populated and white majority, they argue that placing its population in either of those districts would have impermissibly lowered the [**189] minority VAP. I cannot agree.

While the creation of a Hispanic influence district in CD 9 may be a legitimate goal, there is no evidence before me to suggest that it was entitled to tier-one protection. There was no Hispanic opportunity district in Central Florida under the benchmark plan. There was no evidence that a district without the appendage would lead to retrogression elsewhere. Indeed House plan 9043 had a non-retrogressive BVAP of 48.03% in CD 5 and a HVAP of 39.59% in CD 9.[14] Nor is District [*445] 9 entitled to vote-dilution protection. There was no evidence to suggest that a Hispanic majority district could be created in Central Florida. Defendants cannot justify deviation from a tier-two *constitutional requirement* because of a desire to create a Hispanic influence district.

I also find that District 10 was drawn to benefit the Republican Party [**190] and the incumbent. I reach this conclusion based in part on the inference that the Florida Supreme Court suggested could be drawn from oddly shaped appendages that had no legal justification. *See* Apportionment I, 83 So. 3d at 618. This inference is also buttressed by the general evidence of improper intent outlined above in my analysis of District 5 and the following evidence related specifically to the drawing of District 10.

The appendage benefited the incumbent Representative Webster by returning to District 10 territory that was part of his benchmark District 8 and improved the Republican performance of District 10 in two out of the three elections relied upon by the Florida Supreme Court in *Apportionment I*. In the version of District 10 in H000C9043, Alex Sink (D) would have taken 44.9% of the two-party vote in the 2010 gubernatorial election, Barack Obarna (D) would have received 48.0% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 39.0% of the two-party vote in the 2006 gubernatorial election. In the enacted version of District 10, Alex Sink (D) would have received 45.6% of the two-party vote in the 2010 gubernatorial election, Barack Obama (D) would have received [**191] 47.6% of the two-party vote in the 2008 presidential election, and Jim Davis (D) would have received 38.9% of the two-party vote in the 2006 gubernatorial election. In addition, the change lowered the number of registered Democrats in District 10 from 37.2% in H000C9043 to 36.8% in H000C9047 based on 2010 general election data.

Dr. Ansolabehere also testified that the changes between House plan 9043 and adopted plan 9047 altered the boundaries of that district primarily by moving 80,000 voting age people out of District 10 into District 9, while moving 71,000 voting age people out of District 9 to District 10. Dr. Ansolabehere testified that these changes were not necessary to make District 9 a minority-performing district, because without them District 9 was already a minority-performing district, and the populations that were shifted were majority white populations. As a result of this appendage, the decrease in Democratic registration in District 10 and

[14] It is true that CD 9 in plan 9043 did not keep Osceola County whole. The goal of keeping cities and counties whole is laudable and required where "feasible." Compactness on the other hand has no such modifier in its constitutional prescription, "suggesting that in balancing this criterion with compactness, more flexibility is permitted." *Id. at 636*.

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corresponding increase in Democratic registration in the already comfortably Democratic District 9 were of significant Republican benefit for a competitive district such as District 10.

Plaintiffs have proved that District 10 unnecessarily [**192] subjugates tier-two principles of compactness. They have also proved portions of District 10 were drawn to benefit the Republican Party, in violation of tier-one. Accordingly, District 10 is invalid and must be redrawn, as must the surrounding districts affected by such change.

**Districts 13 & 14**

Plaintiffs claim that Districts 13 and 14 are unconstitutional because they violate the tier-two standard, requiring that, where feasible, districts should utilize existing political and geographic boundaries. Plaintiffs point to District 14, which reaches across Tampa Bay to take in a portion of South St. Petersburg, splitting the city of St. Petersburg and Pinellas County. Plaintiffs suggest that this configuration is not justified by any tier-one consideration. They suggest that it is indicative of improper intent to benefit the Republican [*446] Party and the incumbent, the late Republican Congressman Bill Young.

The benchmark predecessor to District 14 (District 11 in 2002) had a BVAP population of 26.78% and a HVAP of 25.84%. As adopted, Congressional District 14 has a BVAP of 25.63% and a HVAP of 25.61%. Romo Plaintiff's proposed maps A and B have a BVAP of 21.73% and a HVAP of 26.91%

Plaintiffs [**193] have not proved tier-two deviations. While the Romo Plaintiffs' proposed map does increase the compactness of District 13, it causes District 14 to become less compact under both Reock and Convex Hull measurements. On a regional level, the Romo proposed map causes every district which touched District 13 and 14 to become less compact than the adopted plan, 9047. As the chart below shows, the Romo maps would decrease the compactness in five of the six districts, while increasing the compactness in only one. The legislature was not required to make this tradeoff in compactness to avoid splitting Pinellas County.

*Tampa Bay Regional Compactness Chart*

Go to table3

The Tampa Bay Regional Compactness Chart lists compactness scores for all which include portions of Hillsborough, Pasco, Pinellas, and Manatee Counties the adopted plan.

Nor have Plaintiffs proved that the decision to include portions of Pinellas County in District 14 was the result of partisan mal-intent to benefit the Republican Party. [**194] Unlike Districts 5 and 10, there are no flagrant tier-two deviations from which I can infer unlawful intent. The decision to have District 14 invade Pinellas County was made early in the process by the professional staff, as most if not all of the iterations emanating from both houses broke into Pinellas County. Thus, unlike changes made to District 5 by the leaders during conference committee, this decision was made by the Staff whom I have found were insulated from the political consultants. Z simply cannot conclude, on partisan effect alone, that the decision to incorporate portions of South St. Petersburg into District 14 was done with the intent to benefit the Republican Party or the incumbent member of Congress.

**Districts 21 & 22**

Plaintiffs contend that Districts 21 and 22 are invalid. They point to testimony from Alex Kelly along with

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redistricting iterations emanating from the House redistricting suite. They suggest it was possible to draw Districts 21 and 22 stacked on top of each other north to south rather than in the adopted configuration with the districts running parallel to each other down the coast. This configuration could have avoided county and city splits. Plaintiffs [**195] contend that failure to adopt this configuration was an unnecessary deviation from tier-two requirements and evidenced [*447] an intent to benefit the incumbents in that area.

Plaintiffs have not met their burden of proving unnecessary deviation from tier-two requirements. The iteration Plaintiffs point to might be more compliant with tier-two in a vacuum, but they have not shown that it could be achieved without violating tier-one requirements for minority protection in neighboring District 20.[15] Alex Kelly did testify that this configuration could be accomplished without retrogression. However, the inquiry does not end there because the benchmark district was a majority black district. CP 905, which was discussed extensively at trial, does not attain majority BVAP status in District 20. There was no testimony at trial about District 20 and whether it met the *Gingles* preconditions such that it was protected under the vote dilution provisions of *Section 2 of the VRA*. Because District 20 was a majority black district in the benchmark, I am reluctant to invalidate the Legislature's plan absent a showing that more tier-two compliant districts could be drawn while not violating either tier-one requirement regarding racial minority protection. [**196] *See Apportionment I, 83 So. 3d 597, 641* ("If an alternative plan can achieve the same constitutional objectives that prevent vote dilution and retrogression ... without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan").

Plaintiffs did produce a couple of draft iterations that achieved majority black status for District 20.[16] However, after visually examining these districts I don't find sufficient tier-two improvements to justify invalidating the Legislature's product.[17] These districts have a more irregular boundary in Hendry County, compared to the enacted plan. Additionally, the stacked configuration of Districts 21 and 22 causes both districts to be deeply invaded by tentacles reaching from District 20. In enacted plan 9047, District 21 has no such appendage invading it and is quite visually compact. Furthermore, these iterations cause District 23 to become more visually non-compact, creating two distinct areas, joined by a narrower section.

Plaintiffs have not met their burden of showing unnecessary deviation from tier-two requirements given the various tradeoffs required to draw compact districts in the region as a whole. Nor have they shown that improper intent led to the adoption of Districts 21 and 22. My "duty 'is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.'" *Apportionment I, 83 So. 3d at 608* (quoting *In re Apportionment Law—1992, 597 So. 2d at 285*).

**Districts 25, 26, & 27**

Plaintiffs contend that these districts are invalid because the Legislature unnecessarily split Hendry County between two districts and unnecessarily split the city of Homestead. They also contend that the configuration was done to benefit the Republican Party.

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[15] The Romo Plaintiffs' proposed map adopts the same general configuration as the Legislature's enacted map.

[16] CP 909; CP913.

[17] Plaintiffs did not provide compactness scores for these districts, so my analysis [**197] is limited to the ocular test.

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Plaintiffs have not proved invalidity. A regional view of South Florida shows that any tier-two differences between the enacted map and Romo Plaintiffs' maps are *de minimis*. Indeed the enacted plan splits the same number of counties, while splitting one less city. Were Ito invalidate the enacted plan based on the objective tier-two evidence before me, I would be selecting a plan I found subjectively better rather than determining if Plaintiffs have proved [**198] the enacted plan invalid. *Id.* Nor do I find based on the totality of the evidence that this configuration was based on unlawful partisan intent. Moreover, I [*448] credit the testimony of Professor Moreno that Romo A & B could have a retrogressive effect on the Hispanic majority districts in South Florida.

***South Florida Regional Compactness Chart***

Go to table4

The *South Florida* Regional Compactness Chart contains compactness scores for all districts included in Palm Beach, Broward, Miami-Dade, and Monroe Counties.

***South Florida Regional County and Citu Split Chart***

Go to table5

This table uses the same 9 districts included in the South Florida Regional Compactness Table.[18]

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[18] The specific counties and cities split are as follows:

Go to table6

*Congressional Plan Split Counties*

*Romo A & B Split Counties*

*by District*

*By District*

Broward- 20, 21, 22, 23, 24, 25

Broward- 20, 21, 22, 23, 24

Collier- 19, 25 [**199]

Collier- 19, 25

Hendry- 20, 25

Miami-Dade- 23, 24, 25, 26, 27

Miami-Dade- 23, 24, 25, 26, 27

Palm Beach- 18, 20, 21, 22

Palm Beach- 18, 20, 21, 22

St. Lucie- 8, 18

*Congressional Plan Split Cities*

*Romo A & B Split Cities*

*by District*

*by District*

Boynton Beach- 20, 22

Coconut Creek- 20, 21

Deerfield Beach- 20, 21, 22

Deerfield Beach- 20, 21, 22

Fort Lauderdale- 20, 22, 23

Fort Lauderdale- 20, 22, 23

Hialeah- 25, 27

Hallandale Beach- 23, 24

Homestead, 26, 27

Hollywood- 23, 24

Lake Worth- 20, 22

Margate- 20, 21

Lantana- 20, 22

Miami- 24, 27

Margate- 20, 21

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[*449] CONCLUSION

As I find the Legislature's remaining affirmative defenses to be without merit, I find the Congressional Redistricting plan adopted by the Legislature to be constitutionally invalid. Specifically, Districts [**200] 5 and 10 were drawn in contravention of *Article III Section 20 of the Florida Constitution.* They will need to be withdrawn, as will any other districts affected thereby. All additional challenges to the plan are rejected. Jurisdiction is reserved to consider any pending or post judgment motions, and to enter such further orders as may be necessary to effectuate this judgment or to otherwise fashion an appropriate equitable remedy.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 10th day of July, 2014.

/s/ Terry P. Lewis

TERRY P. LEWIS

Circuit Judge

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Miramar- 20, 24

Miami- 24, 27

North Miami- 23, 24

Miramar- 24, 25

Oakland Park- 20, 22

Oakland Park- 20, 22

Pembroke Pines- 23,24

Pembroke Pines- 23, 24, 25

Plantation- 20,22

Plantation- 20, 22, 23

Pompano Beach- 20,21,22

Pompano Beach- 20, 21, 22

Port St. Lucie- 8,18

Riviera Beach- 18, 20, 22

Riviera Beach- 18, 20

Royal Palm Beach- 18, 20, 21

North Miami Beach- 23, 24

Sunrise- 20, 22, 23

Sunrise- 20, 22, 23

West Palm Beach- 18, 20, 22

Tamarac- 20, 21

West Palm Beach- 18, 20

**Dissent by:** CANADY

## Dissent

CANADY, J., dissenting.

The circuit court properly ruled that the appellants failed to establish any basis for requiring the Legislature to further revise Florida's congressional district map. The majority's decision to reverse the circuit court and to invalidate numerous districts in the remedial congressional district plan adopted by the Legislature involves an extreme distortion of the appellate process deployed to effect a serious violation of the separation of powers. Accordingly, I dissent.

I.

The linchpin of the majority's decision is the assertion that in the final judgment the trial court "concluded that the [congressional redistricting] plan was drawn with [**201] improper partisan intent" and that the improper intent affected the entire plan. Majority op. at 39. According to the majority, "the trial court failed to give any actual effect to its finding in this case that the 'whole plan' challenge had been proven through the direct and circumstantial evidence of improper partisan

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intent presented at trial." Majority op. at 63. In fact, however, the final judgment—a copy of which is appended—contains no finding whatsoever that the Legislature acted with improper intent regarding the entire congressional plan or that the "whole plan" challenge had been proven. The majority fails to identify any such finding in the final judgment. Instead, the majority puts forth a misconstruction of the trial court's ruling based on fragments from the final judgment taken out of context and creatively cobbled together. The trial court refused to draw an inference from the evidence that an improper partisan intent affected the redistricting plan in its entirety. But the majority effectively steps into the role of the trier of fact, independently reweighs the evidence, finds that the evidence supports the inference that the whole plan was affected by an improper [**202] partisan intent, imputes that broad finding of unconstitutional intent to the trial court, and then faults the trial court for not acting in accord with that fabricated finding. The upshot is a virtually revolutionary deformation of the appellate process.

The materials from which the majority fashions its misconstruction of the trial [*418] court's ruling are found largely in the trial court's findings regarding a "conspiracy" by certain Republican political consultants "to influence and manipulate the Legislature into a violation of its constitutional duty." Final Judgment at 10. But those materials are misshaped by the majority. When the trial court's ruling is considered in its full context, three essential points are clear in the trial court's findings regarding the consultants' conspiracy.

First, the consultants "managed to taint the redistricting process and the resulting map with improper partisan intent" by finding "ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration to ensure that their plan was realized, at least in part." Final Judgment at 22 (emphasis added). The trial court unquestionably determined that efforts of the consultants to cause partisan action by the Legislature [**203] had some success.

Second, the consultants' conspiracy was not successful in affecting the entire map drawing process. The "taint" of "improper partisan intent" attributable to the activities of the Republican consultants was limited in scope and effect. This is evident from the trial court's crucial finding that "the staff members who did the bulk of the actual map drawing for the Legislature . . . were not a part of the conspiracy, nor directly aware of it, and that significant efforts were made by them and their bosses to insulate them from direct partisan influence." Final Judgment at 22. The trial court specifically found that the committee staff "were insulated from the political consultants," Final Judgment at 37, and that the "motivation [of the staff] in drawing draft maps for consideration of the Legislature was to produce a final map which would comply with all the requirements of the Fair Districts Amendments, as their superiors had directed them." Final Judgment at 22. This finding is of critical importance because of the pivotal role the committee staff indisputably had in drawing the districts the trial court refused to invalidate.

Third, the trial court found that an improper partisan intent did affect certain districts in the redistricting plan—namely, [**204] Districts 5 and 10—where there was evidence that the configuration of the districts was influenced through contact between the Republican consultants and legislative leadership or leadership staff. Thus, based on its consideration of the evidence, the trial court decided that "collaboration and cooperation" between the partisan consultants and decision makers in the Legislature regarding particular districts was the predicate for requiring the redrawing of a district based on a finding of unconstitutional intent.

The majority simply ignores the second of these points and fabricates a broad finding of unconstitutional intent.

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The majority goes on to fault the trial court for failing "to give any independent legal significance to its finding of unconstitutional intent when examining the challenges to individual districts," majority op. at 56, and to assert that the trial court essentially concluded that some improper intent is acceptable. See majority op. at 58. Neither criticism of the trial court's order can withstand analysis. The trial court cannot be faulted for failing to give independent significance to a factual finding it did not make. The trial court expressly considered the [**205] question of unconstitutional intent in its analysis of the challenged individual districts. Indeed, the trial court was intently focused on the factual question of whether improper intent affected the drawing of particular districts by the Legislature. With respect to two districts, the trial court found that the districts were drawn with unconstitutional intent in the [*419] map initially adopted. With respect to the other districts, the trial court found that the appellants had failed to establish that the districts were drawn with unconstitutional intent.

At no point does the trial court indicate that it would permit some level of unconstitutional intent in the drawing of any district. The assertion to the contrary is unwarranted. As the final judgment makes plain, the trial court thoughtfully considered the evidence in determining the extent to which the "secretive shadow process of map drawing by the political consultants" was in fact successful in causing the Legislature to act with unconstitutional intent in the drawing of particular districts. Final Judgment at 11-12. In rejecting the "whole plan" challenge, the trial court recognized the unremarkable proposition that districts that were not drawn with an [**206] unconstitutional intent and that did not otherwise violate the constitutional standards should not be invalidated. The trial court's ruling on this point is in accord with the basic principle "that the scope of the constitutional violation measures the scope of the remedy." *Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979)*.

Although the trial court made no finding of a "general intent" by the Legislature to favor a political party or incumbents, the court reasoned that "even if such a general intent could be proven it would be insufficient to invalidate a particular district unless it was shown that the improper intent affected the drawing of that district. Attempting to match the scope of the remedy to the scope of the violation, the trial court correctly focused on the "effect of. . . noncompliance" with the Constitution in determining whether districts should be invalidated. Final Judgment at 9.

The majority asserts that "the trial court considered a general improper intent to lack any independent legal significance unless it was accompanied by another constitutional violation." Majority op. at 58. But the trial court's analysis makes clear that it was focused on whether any general improper intent actually affected the drawing of particular districts—not [**207] on whether particular districts were affected by the violation of other standards.

The majority's reading of the text of the final judgment on this point imports incoherence into the final judgment. It puts the reference to "general intent" in conflict with the trial court's reiterated conclusion that the districts now invalidated by the majority were not drawn with improper intent. But the text of the final judgment—like any other text—should be read harmoniously. The rule that "the provisions of a text should be interpreted in a way that renders them compatible, not contradictory" is a compelling rule of construction predicated on the reality that "it is invariably true that intelligent drafters do not contradict themselves." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012). There is no basis for concluding here that the

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trial court engaged in self-contradiction.

II.

The invalidation of Districts 5, 13, 14, 21, 22, 25, 26, and 27 cannot be reconciled with crucial factual determinations made by the trial court. Indeed, the invalidation of these districts can only be accomplished by setting aside the trial court's rulings regarding not only improper [**208] intent but also compactness, retrogression and other constitutional standards. The invalidation of these districts flies in the face of the pivotal role of the committee staff in drawing them and the trial court's express finding that the committee staff were insulated from partisan influence. The trial court's [*420] rulings regarding improper intent and retrogression, in particular, indisputably turn on the question of fact that can only properly be determined by the trier of fact.

In an opinion teeming with judicial overreaching, the invalidation of Remedial District 5 has pride of place. The basis for the majority's decision to require that this district be reoriented from its north-south configuration to an east-west configuration ultimately boils down to this: the north-south configuration must be rejected because that is the configuration chosen by the Legislature and the Legislature's choice is presumed to be unconstitutional. If the Legislature made a choice, we must begin by assuming the choice violated the constitution. This is so even though the configuration chosen by the Legislature was based on a map drawn by committee staff, who were insulated from partisan influence in selecting [**209] that configuration. The majority also suggests that the north-south configuration is somehow tainted because "the long-time incumbent of the district, Congresswoman Corrine Brown . . . previously joined the leading Republicans in actively opposing the Fair Districts Amendment and redistricting reform." Majority op. at 80.

Based on this supposed taint and the presumption of unconstitutionality, the majority treats as irrelevant the trial court's ruling that "the Plaintiffs have not offered convincing evidence that an East-West configuration is necessary in order to comply with tier-one and tier-two requirements of *Article III, section 20*." Order Approving Remedial Redist. Plan at 3. Under the majority's application of the presumption of unconstitutionality, an alternative suggested by the challengers is virtually guaranteed to trump any choice made by the Legislature. This vividly illustrates just how far the majority has gone in repudiating the principle that a redistricting plan should not be declared unconstitutional "unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the [plan], it is in positive conflict with some identified or designated provision of constitutional law." *In re Apportionment Law, 263 So. 2d 797, 805-06 (Fla. 1972)* (quoting [**210] *City of Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, 772 (Fla. 1914))*.

The majority fails to consider critical aspects of the alternative suggested by the challengers for Remedial District 5. Most strikingly, the majority ignores the reality that the mandated east-west configuration will result in a district that is significantly less compact than Remedial District 5. In addition, no attention is given to the fact that the creation of the East-West District will cause adjoining District 2 to become significantly less compact.

*Remedial Plan Map*

[*421]

*Romo Map A*

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As the Legislature points out, the East-West District's length will be 43% greater than the length of Remedial District 5-206 miles rather than 144 miles. The perimeter of the East-West District is 22% larger than Remedial District 5's perimeter, and the area of the East-West District is 93% greater than the area of Remedial District 5. By any reasonable understanding of compactness, this is a dramatic movement toward a less compact district.

Go to table7

[*422] The redrawing of District 2 necessitated by the majority's decision that Remedial District 5 must be replaced by an East-West District will also result in a dramatic movement [**211] toward a less compact district. The length of District 2 will be increased by 39% from 167 miles to 232 miles. The district's perimeter will increase by 75% and its area by 30%.

Go to table8

The majority's imposition of the East-West District is also predicated on a disregard of the evidence of the potential for retrogression in the East-West District, and the failure to establish any objective standard for prohibited retrogression. On the issue of retrogression, the majority dismisses the expert testimony presented by the Legislature and acts on the basis of a very simple and totally subjective rule: we know retrogression when we see it. The majority's approach regarding the other challenged districts where retrogression was at issue parallels its approach regarding Remedial District 5.

With the invalidation of Remedial District 5 and other challenged districts, the ironic result is that districts drawn by professional committee staff, who were insulated from partisan influence in the drawing of the districts, are effectively displaced by districts drawn—as evidenced by deposition testimony—under the [**212] auspices of the National Democratic Redistricting Trust in cooperation with the Democratic Congressional Campaign Committee. There is something dreadfully wrong with this picture. As the Legislature argues: "To discard the work product of the Florida Legislature, which the trial court carefully considered and upheld, and substitute the partisan handiwork of the DCCC and the Democratic Trust, would be an indelible stain." Legislative Parties' Answer Brief at 91.

III.

Despite casting its disagreement with the trial court in terms of legal errors, the majority's real disagreement with the trial court is not about questions of law. It is about questions of fact. The majority thus reverses the trial court because the trial court failed to invalidate particular districts for being drawn with an unconstitutional intent when the trial court made the factual determination that those districts were not drawn with an unconstitutional intent. The majority's real problem with the trial court's ruling is that the trial court was unwilling to draw broad factual inferences concerning intent that the majority concludes should have been drawn.

Intent unquestionably is a question of fact. As we explained [**213] in *Jersey Palm-Gross, Inc. v. Paper, 658 So. 2d 531 (Fla. 1995)*, "the ultimate arbiter on the issue of intent is the trial court because 'the question of intent is one of fact.'" *Id. at 534* (quoting *Rebman v. Flagship First Nat'l Bank, 472 So. 2d 1360, 1364 (Fla. 2d DCA 1985)*).

It is axiomatic that determining whether a district should be invalidated based on an unconstitutional intent claim turns on the factual question of whether that district was drawn with an unconstitutional intent—a question indisputably within the [*423] province of the trier of fact. By imposing its own judgment about the factual

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inferences to be drawn from the evidence at trial, the majority has transgressed the boundaries of proper appellate review and invaded the province of the trier of fact. Such overreaching by an appellate court would be a grave matter in any context, but it is doubly grave in the context of redistricting litigation, where a coordinate branch of government is a party and the constitutional authority of that branch is at issue. In a context such as this, the court has a special duty to scrupulously observe the limitations inherent in its function as an appellate court. Unfortunately, the majority has heedlessly cast those limitations aside.

The majority effectively holds that a finding of any unconstitutional intent in the drawing of congressional [**214] districts causes a presumption to arise that all the districts in the plan were drawn with an unconstitutional intent. Based on that presumption, the majority places the burden of proof on the Legislature to establish that particular districts were not drawn with an unconstitutional intent. The majority thus creates a general presumption of unconstitutionality based on a specific, narrow constitutional violation. This broad presumption of unconstitutionality untethers the remedy for violating the Constitution from proven specific violations requiring specific remedies. It transgresses the self-evident principle that "the scope of the constitutional violation measures the scope of the remedy." *Penick, 443 U.S. at 455*. This, needless to say, shatters the shell of the presumption of constitutionality that was left by this court's recent redistricting decisions. But the majority reaches even further.

IV.

Having invaded the province of the trier of fact to find the factual basis for triggering the newly created presumption of unconstitutionality, the majority continues its march to dominate the redistricting process and finishes the job—at least for now—by making the factual determinations that the Legislature [**215] did not prove a lack of improper intent in the drawing of the specifically challenged districts. Marching forward, the majority eviscerates numerous factual determinations made by the trial court in its evaluation of the individual district challenges.

Under the well-established framework for appellate review, if an appellate court determines that the trier of fact has placed the burden of proof on the wrong party, the case should be remanded to the trier of fact to reevaluate the evidence in light of the correct legal rule regarding the burden of proof. The weighing of the evidence under the applicable burden of proof is the function of the trier of fact. That function should not be usurped by an appellate court. The Supreme Court has recognized as "elementary" that "'fact finding is the basic responsibility of [trial] courts, rather than appellate courts'" and "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint, 456 U.S. 273, 291-92, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* (quoting *DeMarco v. United States, 415 U.S. 449, 450 n. (1974, 94 S. Ct. 1185, 39 L. Ed. 2d 501))*. Proceedings by an appellate court contrary to these elementary principles are "incredible." *Id. at 293*.

The majority caps off its abandonment of the restraints [**216] of the appellate process by retaining jurisdiction after deciding this case, dictating the details of the proceedings in the trial court, and presuming to [*424] require that all filings submitted in the trial court shall "simultaneously be submitted to this court." This retention of jurisdiction and exercise of control of the proceedings in the trial court further vividly demonstrates the majority's aggressive determination to exercise full dominion over the redistricting process. Unlike our review of the legislative redistricting plan—

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over which we have original review jurisdiction under *article III, section 16*—our review of this case involving congressional redistricting is based on our jurisdiction to review trial court judgments that are certified by a district court under *article V, section 3(b)(5)*. Once we have decided this case, there is no reason—other than the majority's determination to guarantee that it has the last word—that the case should not proceed like any other case that is reversed and remanded to a trial court after we have exercised our jurisdiction over a trial court judgment certified to us by a district court. If a party believes that an error occurs in the proceedings on remand, that party may [**217] file an appeal in the district court. The district court can then either decide the case or certify it to this court for decision. That is the way such cases proceed in the ordinary course. But here the ordinary course of judicial proceeding is once again cast aside by the majority without a shred of justification.

V.

The damage done by this decision to the structure of the appellate process is exceeded only by the damage done to the constitutional separation of powers. Injury to the separation of powers in this case takes two forms. First, the majority effectively supplants the substantive constitutional power of the Legislature to draw congressional districts. As I have explained, the majority does this by reviewing the redistricting plan in a way that is inconsistent in multiple ways with the proper exercise of judicial power. Second, the majority invades the internal workings of the Legislature by effectively dictating how the Legislature must conduct its business in connection with the adoption of the revised congressional redistricting plan that the majority has mandated. The majority thus sets forth certain "guidelines and parameters" concerning the process for adopting a revised [**218] congressional district map. None of these "guidelines and parameters" have any basis in law. All of the subjects addressed by the "guidelines and parameters" are covered by existing law, but the majority imposes requirements that indisputably go beyond the clear requirements of the governing law.

The majority's "guidelines and parameters" for the conduct of legislative business run headlong into our prior recognition of the danger "that the control or influence by one branch of another branch's internal operating procedures could interfere with the independence of the second branch and possibly place the enforcing branch in a superior position." *Locke v. Hawkes, 595 So. 2d 32, 36 (Fla. 1992)*. Short shrift is given to the rule that "[i]t is a legislative prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative." *Moffitt v. Willis, 459 So. 2d 1018, 1022 (Fla. 1984)*. In all the annals of constitutional government, this Court's aggressive invasion of the internal workings of the legislative branch is without precedent. The only case authority that can be cited to support the depredations here visited on the independence of the legislative branch is this Court's recent aberrant decision [**219] requiring members of the Legislature to submit to interrogations concerning their legislative activities. But the invasion of the legislative sphere made by the Court's prior ruling is outstripped by today's ruling.

[*425] In attempting to justify these unprecedented incursions into the constitutional sphere of the Legislature, the majority offers the singularly unconvincing reason that "a redistricting plan enacted by the Legislature is . . . unique as compared to other types of legislation, in that it involves a specific 'constitutional restraint on the Legislature's actions.'" Majority op. at 103. This is fallacious. In every single case challenging the constitutionality of a law the

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question at issue is whether the law transgresses a constitutional restraint on the Legislature. There is nothing "unique" about the challenge brought in this case that justifies transgressing the separation of powers. It is "unique" only because the majority has chosen to treat it as "unique" to justify a "unique" exercise of judicial power.

All of the "parameters and guidelines" constitute unwarranted interference with the operation of the Legislature within its own constitutional sphere. The most egregious [**220] of the "safeguards" set forth by the majority is the admonition that "the Legislature should provide a mechanism for the challengers and others to submit alternative maps and any testimony regarding those maps for consideration and should allow debate on the merits of the alternative maps" and should "offer an opportunity for citizens to review and offer feedback regarding any proposed legislative map before the map is finalized." Majority op. at 105. This tramples on the institutional independence and integrity of the Legislature by inserting the challengers and others outside the Legislature into the very heart of the legislative process.

The challengers and others interested in redistricting have the benefit, of course, of the constitutional right granted to the people of Florida "to petition for redress of grievances." *Art. I, § 5, Fla. Const.* They thus have the right to communicate with members of the Legislature to make their views known and to criticize legislative proposals. But the majority opinion clearly contemplates a "mechanism" that goes far beyond permitting the exercise of this constitutional right. The Legislature debates and gives formal consideration only to proposals that are submitted—in [**221] the form of bills or resolutions and amendments thereto—by members of the Legislature. The filing of bills, resolutions and amendments in the Legislature is the exclusive constitutional prerogative of elected members of the Legislature. And no person who is not a member of the Legislature has standing in the Legislature to participate in legislative debate, submit proposals that must be debated or to formally "review" proposals under consideration by the Legislature before they are adopted. In ignoring these elemental features of the legislative process, the majority betrays either a lack of knowledge or a lack of regard for the integrity of the core function of a coordinate branch of government.

VI.

This decision causes serious damage to our constitutional structure. The proper functioning of the judicial process is deformed and the separation of powers is breached in an unprecedented manner. Since 2012, this Court's decisions concerning the redistricting process have been characterized by a repeated rewriting of the rules. The foundation for all that followed was the effective abrogation of our precedents that clothed a redistricting plan with a presumption of constitutionality. The Fair Districts Amendments—which [**222] said not a word about the alteration of the exercise of judicial power—could not bear the weight of that jettisoning of the presumption of constitutionality. And the Fair Districts Amendments certainly cannot bear the weight of today's decision, [*426] which abandons the well-established boundary between the trier of fact and a reviewing appellate court and transgresses the independence of the core function of the legislative branch in conducting the legislative process. I dissent.

POLSTON, J., concurs.

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**Table1** (Return to related document text)

| | Reock Score[17] | | Convex Hull Score[18] | |
|---|---|---|---|---|
| | Enacted Plan (H000C9047) | Romo Alternative (Romo A) | Enacted Plan (H000C9047) | Romo Alternative (Romo A) |
| CD12 | 0.40 | 0.38 | 0.81 | 0.79 |
| CD13 | 0.46 | 0.57 | 0.82 | 0.91 |
| CD14 | 0.36 | 0.28 | 0.69 | 0.60 |
| CD15 | 0.44 | 0.33 | 0.75 | 0.67 |
| CD16 | 0.42 | 0.32 | 0.81 | 0.80 |
| CD17 | 0.64 | 0.39 | 0.83 | 0.68 |
| **AVG.** | **0.45** | **0.38** | **0.79** | **0.74** |

**Table1** (Return to related document text)

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**Table2** (Return to related document text)

| | CONGRESSIONAL PLAN | | HOUSE PLAN 9043 | |
|---|---|---|---|---|
| | Reock | Convex Hull | Reock | Convex Hull |
| CD5 | 0.09 | 0.35 | 0.29 | 0.10 |
| CD7 | 0.60 | 0.77 | 0.67 | 0.86 |
| CD8 | 0.34 | 0.76 | 0.32 | 0.73 |
| CD9 | 0.48 | 0.80 | 0.66 | 0.90 |
| CD10 | 0.39 | 0.73 | 0.42 | 0.83 |
| CD15 | 0.44 | 0.75 | 0.60 | 0.81 |
| CD17 | 0.67 | 0.82 | 0.64 | 0.83 |
| AVG. | 0.43 | 0.70 | **0.49** | **0.76** |

**Table2** (Return to related document text)

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**Table3** (Return to related document text)

| Reock Score | Convex Hull Score |
|---|---|

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[17] The Reock, or circle-dispersion, method of quantifying compactness "measures the ratio between the area of the district and the area of the smallest circle that can fit around the district." *Apportionment I, 83 So. 3d at 635*. "This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale." *Id.*

[18] The Area/Convex Hull method, which "measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district," also ranges from 0 to 1, "with a score of 1 representing the highest level of compactness." *Apportionment I, 83 So. 3d at 635*. "A circle, square, or any other shape with only convex angles has a score of 1" under this measure. *Id.*

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| | Congressional | Romo Maps | Congressional | Romo Maps |
|---|---|---|---|---|
| CD12 | 0.40 | 0.38 | 0.81 | 0.79 |
| CD13 | 0.46 | 0.57 | 0.82 | 0.91 |
| CD14 | 0.36 | 0.28 | 0.69 | 0.60 |
| CD15 | 0.44 | 0.33 | 0.75 | 0.67 |
| CD16 | 0.42 | 0.32 | 0.81 | 0.80 |
| CD17 | 0.67 | 0.39 | 0.82 | 0.68 |
| AVG. | **0.46** | 0.38 | **0.78** | 0.74 |

**Table3** (Return to related document text)

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**Table4** (Return to related document text)

| | CONGRESSIONAL PLAN | | ROMO A & B | |
|---|---|---|---|---|
| | Reock | Convex Hull | Reock | Convex Hull |
| CD18 | 0.50 | 0.82 | 0.42 | 0.77 |
| CD20 | 0.48 | 0.74 | 0.49 | 0.75 |
| CD21 | 0.28 | 0.60 | 0.28 | 0.62 |
| CD22 | 0.18 | 0.61 | 0.22 | 0.53 |
| CD23 | 0.27 | 0.57 | 0.28 | 0.56 |
| CD24 | 0.38 | 0.73 | 0.37 | 0.76 |
| CD25 | 0.40 | 0.73 | 0.42 | 0.65 |
| CD26 | 0.18 | 0.46 | 0.17 | 0.49 |
| CD27 | 0.46 | 0.81 | 0.59 | 0.84 |

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| | CONGRESSIONAL PLAN | | ROMO A & B | |
|---|---|---|---|---|
| | Reock | Convex Hull | Reock | Convex Hull |
| AVG. | 0.35 | **0.67** | 0.36 | **0.66** |

**Table4** (Return to related document text)

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**Table5** (Return to related document text)

| | CONGRESSIONAL PLAN | ROMO A ☐ B |
|---|---|---|
| Split Counties | 5 | 5 |
| Counties Splits | 19 | **18** |
| Split Cities | **18** | 19 |
| City Splits | **45** | 42 |

**Table5** (Return to related document text)

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**Table6** (Return to related document text)

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**Table6** (Return to related document text)

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**Table7** (Return to related document text)

| | RD5 | E-WD | Change |
|---|---|---|---|
| Length (miles) | 144 | 206 | +43% |
| Perimeter (miles) | 583 | 711 | +22% |
| Area (square miles) | 2031 | 3,911 | +93% |

**Table7** (Return to related document text)

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**Table8** (Return to related document text)

| | D2 | NewD2 | Change |
|---|---|---|---|
| Length (miles) | 167 | 232 | +39% |
| Perimeter (miles) | 550 | 961 | +75% |
| Area (square miles) | 10,107 | 13,107 | +30% |

**Table8** (Return to related document text)

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Neutral

As of: February 13, 2022 7:36 PM Z

# League of Women Voters of Fla. v. Detzner

Supreme Court of Florida

December 2, 2015, Decided

No. SC14-1905

**Reporter**

179 So. 3d 258 *; 2015 Fla. LEXIS 2658 **; 40 Fla. L. Weekly S 667

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, etc., et al., Appellants/Cross—Appellees, vs. KEN DETZNER, et al., Appellees/Cross—Appellants.

**Subsequent History:** Costs and fees proceeding at, Decision reached on appeal by *League of Women Voters of Fla. v. Detzner, 188 So. 3d 68, 2016 Fla. App. LEXIS 4552 (Fla. Dist. Ct. App. 1st Dist., Mar. 24, 2016)*

**Prior History:** [**1] Certified Judgments of Trial Courts in and for Leon County — Terry Powell Lewis, Judge - Case Nos. 372012CA000412XXXXXX and 372012CA000490XXXXXX - An Appeal from the District Court of Appeal, First District, Case No. 1D14-3953.

*League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 2015 Fla. LEXIS 1474 (Fla., 2015)*

## Core Terms

districts, map, configuration, trial court, compact, Apportionment, split, tier-two, redistricting, plans, Coalition, partisan, compliant, elect, voters, recommended, redrawn, trial court's order, candidate, drawing, tier, Challengers, compliance, redrawing, special session, invalidated, parties, incumbent, drawer, benchmark

## Case Summary

**Overview**

HOLDINGS: [1]-With regard to remedial congressional redistricting under the Fair Districts Amendment, the new District 5 plan remedied the improper partisan intent found in the prior version, the configuration of Districts 13 and 14 complied with the court's directions and with constitutional requirements, the legislature failed to justify its chosen configuration of Districts 26 and 27 when plaintiffs' configuration of these districts was objectively better by tier-two standards, plaintiffs' plan for District 25 adhered to tier-two criteria more faithfully than the legislature's plan while presenting no tier-one issues, Districts 21 and 22 had been redrawn to improve compactness as instructed, and while both the Senate and House plans for Districts 9, 10, 11, 15, 16, and 17 were tier-two compliant, the House Plan, statistically, was slightly more compact than the two Senate plans.

**Outcome**

Trial court's recommendations approved in full.

## LexisNexis® Headnotes

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Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN1[] Constitutional Law, Elections, Terms & Voting

The Florida Supreme Court has an obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts. And an orderly and foreseeable constitutional end point must be reached in this process. Anything less makes a mockery of the will of the voters who passed the Fair Districts Amendment. The court has a responsibility to vindicate the essential right of citizens to have a fair opportunity to select those who will represent them.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN2[] Constitutional Law, Elections, Terms & Voting

The Fair Districts Amendment set forth tier-one and tier-two standards. The tier-one standards mandate three requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts shall consist of contiguous territory. *Art. III, § 20(a), Fla. Const.* The Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. By its express terms, Florida's constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually. The minority voting protection provision imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice. Finally, districts must be contiguous.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN3[] Constitutional Law, Elections, Terms & Voting

The tier-two standards of the Fair Districts Amendment circumscribe how districts can be drawn so as to guard against gerrymandering and thus require: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) districts shall utilize existing political and geographical boundaries where feasible. *Art. III, § 20(a), Fla. Const.*

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN4[] Constitutional Law, Elections, Terms & Voting

The Florida Supreme Court has described the tier-two requirements of the Fair Districts Amendment as follows: The legislature is required to make districts as nearly of equal population as is practicable, but deviations from equal population may be based on compliance with other constitutional standards. Compactness refers to the shape of the district; the goal

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is to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. Compactness can be evaluated both visually and by employing standard mathematical measurements. As to utilizing political and geographical boundaries, the court accepts the view of geographical boundaries as those that are easily ascertainable and commonly understood, such as rivers, railways, interstates, and state roads. Strict adherence to these standards must yield if there is a conflict between compliance with them and the tier-one standards. Importantly, the extent to which the legislature complies with the requirements contained in tier two serves as an objective indicator of impermissible legislative purpose proscribed under tier one (e.g., intent to favor or disfavor a political party or an incumbent).

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

*HN5*[] **Constitutional Law, Elections, Terms & Voting**

Once a Fair Districts Amendment tier-one violation of the constitutional intent standard is found with regard to redistricting, there is no basis to continue to afford deference to the legislature. To do so is to offer a presumption of constitutionality to decisions that have been found to have been influenced by unconstitutional considerations. The existence of unconstitutional partisan intent is contrary to the very purpose of the Fair Districts Amendment and to the Florida Supreme Court's pronouncements regarding the state constitutional prohibition on partisan political gerrymandering.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

Evidence > Burdens of Proof > Allocation

*HN6*[] **Constitutional Law, Elections, Terms & Voting**

States have placed the burden on their legislatures to justify the validity of a redistricting plan when the plan has raised sufficient issues with respect to state constitutional requirements. Because there are many ways in which to draw a district that complies with, for example, the constitutional requirement of compactness, which party bears the burden of establishing why a decision was made to accept or reject a particular configuration can ultimately be determinative.

Civil Procedure > Appeals > Standards of Review > Substantial Evidence

Governments > State & Territorial
Governments > Elections

Constitutional Law > Elections, Terms & Voting

*HN7*[] **Standards of Review, Substantial Evidence**

In reviewing the trial court's order recommending adoption of a remedial map, the Florida Supreme Court is mindful that as the trier of fact, the trial court is charged with the evaluation of the expert witnesses and testimony of all those who testified. Accordingly, the court upholds the trial court's factual findings so long as these findings are supported by competent, substantial evidence. The legislature bears the burden of demonstrating that the configuration it selected must comply with the court's directions in Apportionment VII and the constitutional requirements as set forth in *Art. III, § 20, Fla. Const.*

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Governments > State & Territorial
Governments > Elections

HN8[] State & Territorial Governments, Elections

Apportionment VII does not forbid a citizen affiliated with a particular party from drawing a map.

Governments > State & Territorial
Governments > Elections

HN9[] State & Territorial Governments, Elections

A redistricting process is not tainted merely by permitting citizens to speak out in a public forum and suggest a plan or portion of a plan.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN10[] Constitutional Law, Elections, Terms & Voting

In the context of Florida's constitutional provision, the Fair Districts Amendment, a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN11[] Constitutional Law, Elections, Terms & Voting

Thornburg v. Gingles set out three necessary preconditions that a plaintiff is required to demonstrate before he or she can establish that a legislative district must be redrawn to comply with Section 2. These preconditions require an individual challenging the plan to show that: (1) a minority population is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority population is politically cohesive; and (3) the majority population votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. When the three Gingles preconditions are met, courts must then assess the totality of the circumstances to determine if the Section 2 "effects" test is met—that is, if minority voters' political power is truly diluted. The Gingles preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis. When the Florida Supreme Court interprets the state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, it is guided by any jurisprudence interpreting Section 5.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN12[] Constitutional Law, Elections, Terms & Voting

The fact that a district may be less compact does not mean that the legislature is free to disregard the other Fair Districts Amendment tier-two standards, like following political and geographical boundaries where feasible.

Governments > State & Territorial
Governments > Elections

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HN13[] State & Territorial Governments, Elections

To determine whether election districts are compact, a court begins by looking at the shape of a district to evaluate whether the district has an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN14[] Constitutional Law, Elections, Terms & Voting

Maintaining communities of interest is not required by the constitution, and comporting with such a principle must not come at the expense of complying with constitutional imperatives.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN15[] Constitutional Law, Elections, Terms & Voting

The Florida Constitution does not mandate that districts within a redistricting plan achieve the highest mathematical compactness scores.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN16[] Constitutional Law, Elections, Terms & Voting

The court's role is not to select a redistricting map that performs better for one political party or another, but is instead to uphold the purposes of the constitutional provision approved by Florida voters to outlaw partisan intent in redistricting.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN17[] Constitutional Law, Elections, Terms & Voting

The citizens, through the state constitution, have imposed upon the Florida Supreme Court a weighty obligation to measure the legislature's Joint Resolution with a very specific constitutional yardstick. The constitutional imperatives set forth in *Art. III, §§ 16* and *21, Fla. Const.* are the instructions given to the legislature by the citizens, mandating how apportionment plans are to be drawn. These instructions are a further expression of the will of this state's citizens to ensure that their right to elect representatives is not frustrated as a result of partisan favoritism or incumbent protection. The citizens have expressed their will, requiring the legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations and to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts are avoided. The new constitutional provisions seek to level the playing field in how legislative districts are drawn. These mandates are specific, and the citizens of the state have entrusted to the Supreme Court of Florida the constitutional obligation to interpret the constitution and ensure that legislative apportionment plans are drawn in accordance with the constitutional imperatives set forth in §§ 16 and 21.

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Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN18[] Constitutional Law, Elections, Terms & Voting

The Fair Districts Amendment sought to eliminate the age-old practice of partisan political gerrymandering where the political party and representatives in power manipulate the district boundaries to their advantage. The amendment established stringent new standards for the once-in-a-decade apportionment, and these new standards clearly act as a restraint on the legislature. The goal of the Fair Districts Amendment was, in the words of the Eleventh Circuit Court of Appeals, to "level the playing field."

Governments > State & Territorial
Governments > Elections

HN19[] State & Territorial Governments, Elections

Any redrawing of lines, regardless of intent, will inevitably have an effect on the political composition of an election district and likely whether a political party or incumbent is advantaged or disadvantaged. Improper intent does not indicate a malevolent or evil purpose.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN20[] Constitutional Law, Elections, Terms & Voting

The Florida Constitution does not require the affirmative creation of a fair redistricting plan, but rather a neutral one in which no improper intent was involved.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial
Governments > Elections

HN21[] Constitutional Law, Elections, Terms & Voting

Despite the stringent constitutional standards that operate as a restraint on the legislature, the Florida Supreme Court will defer to legislative decisions on the drawing of districts as long as there is no violation of constitutional requirements. The court's limited role is simply to ensure compliance with constitutional requirements and to invalidate a redistricting plan only if it ran afoul of such mandates.

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General Counsel, The Florida House of Representatives, Tallahassee, Florida; and Charles Talley Wells of Gray Robinson, P.A., Orlando, Florida, and Jason Lawrence Unger, Andre Velosy Bardos, and George N. Meros, Jr. of Gray Robinson, P.A., Tallahassee, Florida, for Appellees/Cross-Appellants.

Martha Angela Pardo, Associate Counsel, LatinoJustice PRLDEF, Orlando, Florida, for Amici Curiae LatinoJustice PRLDEF, Florida New Majority, and Mi Familia Vota.

**Judges:** PARIENTE, J. LABARGA, C.J., and LEWIS, QUINCE, and PERRY, JJ., concur. PERRY, J., concurs with an opinion, in which QUINCE, J., concurs. CANADY, J., concurs in part and dissents in part with an opinion. POLSTON, J., dissents with an opinion.

**Opinion by:** PARIENTE

## Opinion

[*260] PARIENTE, J.

This case is before the Court for approval of a final congressional redistricting plan in accordance with the Fair Districts Amendment and in accordance with our previous opinion in *League of Women Voters of Florida v. Detzner (Apportionment VII), 172 So. 3d 363 (Fla. 2015)*. We approve in full the trial court's "Order Recommending Adoption of Remedial Map." Our opinion today—the eighth concerning legislative or congressional apportionment during this decade since the adoption of the landmark Fair Districts Amendment—should bring [**3] much needed finality to litigation concerning this state's congressional redistricting that has now spanned nearly four years in state courts. Accordingly, the plan approved here shall be used in the 2016 congressional elections and thereafter until the next decennial redistricting.

In *Apportionment VII*, we affirmed the trial court's finding that the 2012 "redistricting process" and the "resulting map" apportioning Florida's twenty-seven congressional districts were "'taint[ed]' by unconstitutional intent to favor the Republican Party and incumbent lawmakers." *Id. at 369*. Although we affirmed the trial court's finding of unconstitutional intent, we reversed the trial court's final judgment because it had not given proper legal effect to its finding of unconstitutional intent. As the trial court noted upon relinquishment, it "had not gone far enough in [its] requirements of the Legislature to correct the constitutional deficiencies." *Romo v. Detzner* (Trial Court Order), Nos. 2012-CA-00412 & 2012-CA-00490, Order Recommending Adoption of Remedial Map at 2 (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015).

In *Apportionment VII*, we rejected the Challengers'[1] request that the entire map be redrawn because "the remedy [should [**4] be] commensurate with the constitutional violations" and because the Challengers [*261] did not "identify a neutral map that showed how all of the districts could be redrawn in a manner more objectively compliant with the constitutional

[1] As we explained in *Apportionment VII*, "[w]e use the term 'challengers,' which has been used by this Court in prior opinions during the course of this litigation, to refer collectively to the plaintiffs in the trial court, who are the Appellants/Cross-Appellees in this Court. These litigants that challenged the constitutionality of the congressional redistricting plan enacted in 2012 include two separate groups, which have described themselves as the 'Coalition plaintiffs' and the 'Romo plaintiffs.' The 'Coalition plaintiffs' consist of the League of Women Voters of Florida, Common Cause, and four individually named parties. The National Council of La Raza was formerly a member of the 'Coalition plaintiffs' but later voluntarily dismissed [**5] all claims and withdrew as a party in the case prior to the trial. The 'Romo plaintiffs' consist of lead plaintiff Rene Romo and six other individually named parties." *172 So. 3d at 372 n.6*.

AMERICAN OVERSIGHT

requirements." *Id. at 413*. We did acknowledge that the "admittedly gerrymandered 2002 map . . . was used as a baseline" for the enacted plan, but the Challengers did not allege that fact as a "basis for invalidating the entire map." *Id.*

We also rejected the Challengers' request that this Court redraw the map, although we concluded that this Court had that authority once constitutional violations had been demonstrated. *Id.* Instead, we provided the Legislature with the opportunity to pass a constitutionally compliant plan. Accordingly, we relinquished jurisdiction to the trial court for a period of 100 days and directed the Legislature to redraw "Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected by the redrawing." *Id. at 371-72*.

We did not anticipate, however, that the Legislature would be unable to agree on a final remedial redistricting plan. Although each legislative chamber passed a plan, the Legislature deadlocked, failing to enact a remedial plan in a special session held for that purpose. Accordingly, this Court provided additional directions to the trial court based on a motion "for further relinquishment of jurisdiction" filed by the Florida House of Representatives.

In its detailed Trial Court Order, the trial court approved the House's [**6] proposed configuration of Districts 1 through 19—recommending the House's proposed plan over the Senate's where there was disagreement between the two chambers—but concluded that the Legislature had not met its burden of defending its proposed configurations for Districts 20 through 27. The trial court further recommended that the district configurations set forth in an alternative plan submitted by the Coalition Plaintiffs were more compliant with the tier-two constitutional requirements that "districts shall be compact" and "where feasible, utilize existing political and geographic boundaries." *Art. III, § 20, Fla. Const.* Consequently, the trial court concluded that the Legislature had not justified its decision to adopt a less tier-two compliant plan with respect to the eight challenged South Florida districts.[2]

Having considered the trial court's order and the parties' supplemental briefs, having considered the entire record of both the three-day evidentiary hearing and the special session, having considered the remedial plans submitted by the parties, and having heard oral argument, we approve in full the trial court's recommendations regarding [**7] the remedial congressional redistricting plan.

In so doing, we reject the Legislature's contention, echoed by Justice Canady, that our decision today moves the "goalposts" on the Legislature in its redrawing of the districts. Concurring in part and dissenting in part op. of Canady, J., at 94. The goal has not changed and has always been compliance with the Fair Districts Amendment. At this stage, after a finding that the 2012 congressional redistricting plan had been drawn with improper intent, the Legislature bears the burden of justifying its redrawn configurations. The Legislature did not escape this burden when it was unable to agree on a plan to enact and subsequently asked all parties to submit alternative plans to the trial court. The trial court's order, agreed to by the parties, required that each party submitting an alternative plan "identify every person involved in drawing, reviewing, directing or approving the proposed remedial [*262] plan." All parties, then, had a full opportunity to review and comment upon the various proposed plans submitted to the trial court, thereby providing a full and fair public airing of the contending arguments relating to the constitutionality of each plan.

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[2] We append the Trial Court Order to this opinion as Appendix B.

AMERICAN OVERSIGHT

We additionally dismiss the contention [**8] that the trial court and this Court have adopted a plan drawn by "Democratic operatives." Dissenting op. of Polston, J., at 100. As this opinion makes clear, the only subject of current dispute between the Legislature and the Challengers are eight South Florida districts, including two redrawn districts in which Democratic incumbents were actually paired against each other in the same district. From the outset, we have encouraged the public to submit proposed plans that can be evaluated by the objective criteria of the Fair Districts Amendment. What we were faced with in the factual record in *Apportionment VII* was not that Republican political operatives publicly submitted plans but that Republican political operatives successfully infiltrated the redistricting process with the coordination and cooperation of the Legislature, resulting in a redistricting plan that was tainted with improper partisan intent.

After our determination in *Apportionment VII* that the Legislature's plan had been drawn with improper intent, we "shifted the burden to the Legislature to justify its decisions in drawing the congressional district lines." *Apportionment VII, 172 So. 3d at 396-97*. In examining the Challengers' plan, we review for compliance with the objective constitutional standards [**9] we have promulgated throughout our redistricting decisions. Therefore, we reject the assertion in Justice Polston's dissent that this Court is violating separation of powers by affirming the trial court and approving the plan that most faithfully follows the objective criteria set forth in the Fair Districts Amendment. *See* dissenting op. of Polston, J., at 101. All plans were evaluated by the same objective criteria. As the trial court found, the map submitted by the Coalition Plaintiffs—not the Democratic Party, or the Senate, or the House—was "hands down the best tier two performing map of the group" and was "more compact and splits fewer cities than any of the others." Trial Court Order at 12.

In approving the trial court's recommendation, we are acutely aware that this case represents the first time that congressional districts have been challenged under the Fair Districts Amendment. As we have stated before, "the trial court had scant precedent to guide it," *Apportionment VII, 172 So. 3d at 370*; neither did the Legislature nor the Challengers. We again commend the trial court for its diligence and all parties for their professionalism.

We emphasize that although the Challengers and the Legislature disagree as to some of the redrawn districts, the disagreement is limited to only eight [**10] districts in South Florida (Districts 20 through 27). All parties agree as to three districts that were not redrawn in any proposed plan (Districts 1, 8, and 19), as well as to ten redrawn districts (Districts 5, 13, and 14, which were invalidated in *Apportionment VII*, and additionally Districts 2, 3, 4, 6, 7, 12, and 18 that were affected by the redrawing of the districts). The configuration of the remaining six districts—9, 10, 11, 15, 16, and 17—is the subject of the dispute between the House and the Senate, when the chambers could not agree to the passage of a final plan.

*HN1*[↑] This Court has an "obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts." *172 So. 3d at 372*. And as Chief Justice Labarga recently made clear, an "orderly and foreseeable constitutional end [*263] point must be reached in this process. Anything less makes a mockery of the will of the voters who passed the Fair Districts Amendment." *League of Women Voters of Fla. v. Detzner, No. SC14-1905, 2015 Fla. LEXIS 2947, *7 (Fla. Sup. Ct. order filed Sept. 4, 2015)* (Labarga, C.J., concurring) (the "Second Relinquishment Order"). We reiterate that "this case does not pit this Court versus the Legislature, but instead implicates [**11] this Court's responsibility to vindicate 'the essential right of our citizens to have a fair opportunity to select those who

AMERICAN OVERSIGHT

will represent them.'" *Id. at 414* (citing *League of Women Voters of Fla. v. Fla. House of Representatives (Apportionment IV), 132 So. 3d 135, 148 (Fla. 2013)*.

Accordingly, we affirm the Trial Court Order recommending a remedial plan, and the congressional redistricting plan approved by this Court shall be utilized in the 2016 Florida congressional elections and in Florida congressional elections thereafter until the next decennial redistricting. The trial court shall enter a final judgment incorporating the approved plan.

## PRIOR PROCEDURAL POSTURE: *APPORTIONMENT VII*

This Court's decision approving the Trial Court Order in all respects does not come to us in a vacuum. Far from it. *HN2*[↑] The Fair Districts Amendment set forth what we have referred to as tier-one and tier-two standards. The tier-one standards mandate three requirements: (1) no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; (2) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and (3) districts [**12] shall consist of contiguous territory. *Art. III, § 20(a)*. We previously explained the tier-one standards:

> The Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; there is no acceptable level of improper intent. By its express terms, Florida's constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually. The minority voting protection provision imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice. Finally, districts must be contiguous.

*In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I), 83 So. 3d 597, 684-85 (Fla. 2012)*.

*HN3*[↑] The tier-two standards circumscribe how districts can be drawn so as to guard against gerrymandering and thus require: (1) districts shall be as nearly equal in population as is practicable; (2) districts shall be compact; and (3) districts shall utilize existing political and geographical boundaries where feasible. *Article III, §20(a)*. *HN4*[↑] We have described the tier-two requirements [**13] as follows:

> The Legislature is required to make districts as nearly of equal population as is practicable, but deviations from equal population may be based on compliance with other constitutional standards. Compactness refers to the shape of the district; the goal is to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. Compactness can be evaluated both visually and by employing standard mathematical measurements. As to utilizing political and geographical boundaries, [*264] we accept the House's view of geographical boundaries as those that are easily ascertainable and commonly understood, such as "rivers, railways, interstates, and state roads." Strict adherence to these standards must yield if there is a conflict between compliance with them and the tier-one standards. Importantly, the extent to which the Legislature complies with the requirements contained in tier two serves as an objective indicator of impermissible legislative purpose proscribed under tier one (e.g., intent to favor or disfavor a political party or an

AMERICAN OVERSIGHT

incumbent).

*Apportionment I, 83 So. 3d at 685*.

In *Apportionment VII*, which dealt specifically with the 2012 congressional plan under *Article III, section 20(a)*, and the litigation arising [**14] from the legislatively adopted plan, we affirmed the trial court's finding that the Legislature's enacted map was "taint[ed] by unconstitutional intent." *172 So. 3d at 371*. The facts and history of the underlying litigation are fully set forth in that opinion, upholding the trial court's ruling that the congressional redistricting plan enacted by the Florida Legislature in 2012 was constitutionally invalid, in violation of the "Fair Districts" standards set forth in *article III, section 20, of the Florida Constitution. Id. at 393*. But we held, nevertheless, that the trial court committed "two legal errors, which significantly affected its determination of the proper effect of its finding that the Legislature violated the Florida Constitution." *Id.* The first legal error was that the trial court did not give effect to its finding of improper intent in analyzing the challenges to the individual districts. *Id. at 393-96*. The second legal error was that once the trial court found the Legislature intended to favor a political party or incumbent in the drawing of the plan, the trial court should have shifted the burden to the Legislature to justify its redistricting plan. *Id. at 396-97*.

In other words, as the trial court recently noted about our decision:

> On July 9, 2015, the Florida Supreme Court issued [**15] its opinion in [*Apportionment VII*], affirming my finding of constitutional violation but determining that I had not gone far enough in my requirements of the Legislature to correct the constitutional deficiencies. The Court directed the Legislature to draw a third map and gave specific instructions as to how to address problems it noted with certain districts (5, 13, 14, 21, 22, 25, 26 and 27.)

Trial Court Order at 2.

During the relinquishment proceedings, this Court considered the issue of the Legislature's burden to be important. After the trial court concluded that there was unconstitutional intent and a "violation of the Florida Constitution's prohibition on partisan intent . . . the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines." *Apportionment VII, 172 So. 3d at 370-71*. As we stated:

> *HN5*[↑] Once a tier-one violation of the constitutional intent standard is found, there is no basis to continue to afford deference to the Legislature. To do so is to offer a presumption of constitutionality to decisions that have been found to have been influenced by unconstitutional considerations. The existence of unconstitutional partisan intent is contrary to the very purpose [**16] of the Fair Districts Amendment and to this Court's pronouncements regarding the state constitutional prohibition on partisan political gerrymandering.
>
> Accordingly, after reaching the conclusion that the "redistricting process" and the "resulting map" had been "taint[ed]" by unconstitutional intent, [*265] the burden should have shifted to the Legislature to justify its decisions, and no deference should have been afforded to the Legislature's decisions regarding the drawing of the districts. In other contexts, *HN6*[↑] states have placed the burden on their legislatures to justify the validity of a redistricting plan when the plan has "raised sufficient issues" with respect to state constitutional requirements. *In re Legislative Districting of State, 370 Md. 312, 805 A.2d 292, 325 (Md. 2002)*.

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> *Because there are many ways in which to draw a district that complies with, for example, the constitutional requirement of compactness, which party bears the burden of establishing why a decision was made to accept or reject a particular configuration can ultimately be determinative*.

*Id. at 400* (emphasis supplied).

Applying the correct standard of review that placed the burden on the Legislature to justify its decisions based on the trial court's finding of unconstitutional intent, we analyzed the constitutional deficiencies of eight specifically [**17] challenged districts. We ultimately relinquished jurisdiction to the trial court and mandated that the Legislature redraw "Congressional Districts 5, 13, 14, 21, 22, 25, 26, 27, and all other districts affected by the redrawing." *Id. at 371-72*. In so doing, we provided "clear guidance as to the specific deficiencies in the districts that the Legislature must redraw," and we gave the Legislature 100 days from the date of our July 9, 2015, opinion to enact a remedial congressional redistricting plan and to submit that plan to the trial court for approval. *Id. at 416-17*.

We further stressed that "transparency is critical in light of both the purpose of the Fair Districts Amendment to outlaw partisan manipulation in the redistricting process and the trial court's finding here that 'an entirely different, separate process' to favor Republicans and incumbents was undertaken contrary to the Legislature's assertedly transparent redistricting effort.'" *Id. at 414-15*. Thus, we set forth four specific guidelines that we urged the Legislature to follow: (1) "conduct all meetings in which it [made] decisions on the new map in public and to record any non-public meetings"; (2) "provide a mechanism for challengers and others to submit alternative maps" and to permit [**18] debate on the merits of the proposed alternative maps; (3) "preserve all e-mails and documents related to the redrawing of the map"; and (4) "to publicly document the justifications for its chosen configuration." *Id.*

## PROCEDURAL POSTURE: AFTER RELINQUISHMENT

After this Court issued its opinion, the President of the Florida Senate and the Speaker of the Florida House of Representatives issued a joint proclamation on July 20, 2015, convening a special session for the purpose of enacting a remedial congressional redistricting plan. That same day, the Senate President and the House Speaker issued a joint memorandum to members of the Legislature, explaining procedures for the special session.

The memorandum directed legislative staff to work with House and Senate legal counsel to develop a "Base Plan" that complied with this Court's opinion. The legislative leaders determined that the Base Plan would be "drafted solely by staff in collaboration with counsel, without [the leaders'] participation or the participation of any other member." However, contrary to the Court's suggested guidelines that "all meetings in which it makes decisions on the new map" should be held "in public" or otherwise [**19] recorded for preservation, [*266] none of the meetings during which staff developed the Base Plan in collaboration with counsel—as well as outside counsel—were recorded or transcribed. The memorandum did direct, in accordance with this Court's recommended guidelines in *Apportionment VII*, that legislators retain and compile all communications related to redistricting.

Pursuant to the instructions set forth by legislative leadership, legislative staff then developed a Base Plan, in consultation with counsel for the House and Senate. This Base Plan was released publicly on August 5, 2015. In addition to redrawing the eight districts specifically invalidated by this Court—Districts 5, 13, 14,

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21, 22, 25, 26, and 27—legislative staff made changes to fourteen other districts that were affected thereby—Districts 2, 3, 4, 6, 7, 9, 10, 11, 12, 15, 16, 17, 20, and 23.

The Legislature met in special session from August 10, 2015, to August 21, 2015. The House and Senate considered amendments to the Base Plan, and each chamber ultimately passed its own amended plan. As to proposed Districts 26 and 27, the League of Women Voters of Florida and Common Cause sent a letter to the Speaker of the House and President [**20] of the Senate criticizing the configuration of those districts as not having been drawn in a constitutionally compliant manner.

Senator Dwight Bullard proposed an amendment that configured those same two districts in a more tier-two compliant manner. The plan last passed by the House (H110C9071, the "House Plan") differs from the Base Plan in Districts 9, 11, 15, 17, 18, 20, 21, 22, and 23, as a result of the House's stated purpose of keeping additional cities whole. The plan last passed by the Senate (S026C9062, the "Senate Plan") differs from the Base Plan in Districts 9, 10, 11, 15, 16, 17, 18, 20, 21, 22, and 23, as a result of the Senate's stated purpose of reducing the number of times Hillsborough County was split and keeping both Sarasota County and certain cities whole. The House and Senate Plans themselves differ only in six central and southwest Florida districts (Districts 9, 10, 11, 15, 16, and 17). Because the Legislature was unable to agree on and enact a single plan during the special session, the "Florida Legislature adjourned its special redistricting session sine die on August 21, 2015, without having enacted a remedial congressional redistricting plan as required [**21] by the Court's July 9, 2015, opinion." Second Relinquishment Order at 1.

After the Legislature failed to enact a remedial congressional plan, the House filed a "Motion For Further Relinquishment of Jurisdiction," specifically requesting that this Court "initiate proceedings toward the judicial adoption" of a remedial redistricting plan and allow all parties to submit proposed remedial congressional plans to the trial court for its review. This Court granted the motion, in part, and directed the trial court to make a recommendation to this Court as to "which map proposed by the parties—or which portions of each map—best fulfills the specific directions in [this] Court's July 9, 2015, opinion and all constitutional requirements." *See* Second Relinquishment Order at 2-3.

In the Second Relinquishment Order, we reemphasized that the "burden remains on the House and Senate to justify their chosen configurations." *Id.* at 2. We also explicitly rejected the proposition advanced by the House that any plan recommended by the trial court and ultimately approved by this Court would be "interim" or "provisional." *Id.* at 4. Doing so would make "a mockery of the will of the voters who passed the Fair Districts amendment." [**22] *Id.* at 6 (Labarga, C.J., concurring).

## [*267] THE TRIAL COURT PROCEEDINGS

After this Court issued the Second Relinquishment Order, the parties submitted an agreed scheduling order to the trial court, which the trial court entered:

> On or before Monday, September 14, 2015, each party that intends to present a proposed remedial plan at the evidentiary hearing shall serve the proposed remedial plan in .doj format. *The disclosing party shall identify every person involved in drawing, reviewing, directing, or approving the proposed remedial plan*. The Court will not consider any proposed remedial plan that is not timely disclosed in compliance with all provisions of this Order.

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(Emphasis supplied.)

Pursuant to that order, the parties submitted a total of seven proposed plans to the trial court. The House submitted the House Plan, the last plan passed by that chamber during the unsuccessful special session. The Senate submitted the Senate Plan, the last plan passed by that chamber during the special session, as well as a plan drawn after the special session by legislative staff at the direction of the Reapportionment Committee Chair, Senator William Galvano (the "Galvano Plan"). The Galvano Plan differs from the [**23] House Plan in four districts (Districts 9, 15, 16, and 17) and from the Senate plan in six districts (Districts 9, 10, 11, 15, 16, and 17).

The "Romo Plaintiffs" submitted one plan (the "Romo Plan"), which adopted the House's configuration for twenty-two districts but proposed new configurations for Districts 21, 22, 25, 26, and 27. The Romo Plaintiffs' proposed configuration for Districts 21 and 22 retained a vertical configuration, unlike the Coalition Plaintiffs' plans and the Legislature's plans, which included a stacked configuration that paired two Democratic incumbents against each other in District 21.

The Coalition Plaintiffs submitted three plans—"CP-1," "CP-2," and "CP-3." CP-1 adopted the House's configuration for nineteen districts and proposed new configurations for Districts 20 through 27 in South Florida. CP-2 and CP-3 both adopt the House's configuration for twenty-five districts and each contains an alternative configuration for Districts 26 and 27. The differences between CP-2 and CP-3 are minor, as each variation moves all of Homestead into District 26 and equalizes population in ways that do not move predominately black communities out of District 26 by using different [**24] major roadways as district boundary lines.

During the trial court's three-day evidentiary hearing, testimony was received from those persons involved in "drawing, reviewing, directing, or approving" the proposed remedial plans. John O'Neill, the Coalition Plaintiffs' map drawer, testified about how he drew the Coalition Plaintiffs' maps. Harvard University Professor Stephen Ansolabehere, the Romo Plaintiffs' map drawer, also testified at the remedial hearing about how he drew the Romo map. In lieu of live testimony, the trial court also admitted the report of the Coalition Plaintiffs' expert, Dr. Allan Lichtman, which considered how the Coalition Plaintiffs' plans performed for Hispanics.

Professors Dario Moreno and Baodong Liu, experts hired by the Legislature, testified about how the Legislature's and the Challengers' plans performed for Hispanics. The Legislature also called to testify the professional staff that drew its maps: Jay Ferrin, the Staff Director of the Senate Committee on Reapportionment, Jason Poreda, the Staff Director of the House Select Committee on Redistricting, and Jeffrey Takacs, a special advisor to that Committee. Senator William Galvano, the Chair of the Senate [**25] Committee on Reapportionment, [*268] and Senator Tom Lee, a member of the Committee, also testified for the Senate. Both senators testified in support of the Senate Plan, and Senator Lee specifically dispelled any suggestion that he proposed his amendment—which was incorporated into the Senate Plan—with the intent to disfavor any incumbent or to favor himself.

## THE TRIAL COURT ORDER

After receiving proposed orders from the parties, the trial court entered its own comprehensive order, recommending adoption of a remedial map. It first analyzed the seven proposed remedial maps submitted by the parties: the single map submitted by the House; two maps submitted by the Senate; three maps

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submitted by the Coalition Plaintiffs; and the one map submitted by the Romo Plaintiffs.

In doing so, the trial court first set forth what it understood to be the applicable legal standard and parameters of review and determined that, pursuant to this Court's directions, "the burden remains on the House and Senate to justify their chosen configurations, and that no deference is due to their choices regarding the drawing of the districts." Trial Court Order at 5. In interpreting this Court's direction in the Second [**26] Relinquishment Order to "especially focus on the House and Senate maps, any amendments offered thereto, and the areas of agreement," the trial court concluded that meant that the "maps passed by each chamber, especially where they are in agreement, are the closest [they] will come to an expression of the preferences of the elected representatives of the people as to a remedial map." *Id.* The trial court then determined that it would:

> [F]irst evaluate the maps proposed by the House and Senate to determine which map, or portions thereof, best meet the Court's criteria. Then I should evaluate that configuration in light of any challenges thereto by the Plaintiffs to determine if the Legislative defendants can meet their burden as noted above, or if some other configuration best fulfills the Court's directions and all constitutional requirements.

*Id.*

The trial court decided that if, in its review, it determined that the parties were "in agreement as to any particular district," then "it is no longer an issue for [the trial court] to resolve." *Id.* at 7-8. The trial court further concluded that it was "not at liberty to draw something different than what is contained within the maps proposed by the parties." [**27] *Id.* at 8.

In its review of the Legislature's proposed plans for Districts 1 through 19, the trial court concluded that these districts were not disputed by the Challengers and that they were "on the whole, more compact and contain fewer city and county splits than in the 2012 and 2014 legislative maps." *Id.* The trial court noted that of these districts, Districts 5, 13, and 14 were three that were required to be redrawn. *Id.*

The trial court then considered the Challengers' general complaint that the "actual drawing of the base map was not open to the public, nor recorded." *Id.* at 8-9. It determined that although "[r]ecording the sessions would probably have been a good idea," there was no way to "prevent a map drawer from manipulating lines with a partisan intent." *Id.* at 9. Ultimately, the trial court stated that it remained convinced that:

> [T]he best, if not perfect, way to guard against improper partisan intent in a map is to look closely at any tier two shortcomings and scrutinize the purported reasons for those shortcomings. If there is a way to make a map more [*269] compliant without sacrificing tier-one requirements, then it should be done. This will result in not only a more compact map that splits less cities and counties, [**28] it will go far in minimizing the risk, or the perception, that it was drawn with a partisan intent.

*Id.*

The trial court also dismissed the Legislature's argument that the Coalition Plaintiffs' plans were drawn with improper intent:

> Moreover, I find no evidence to suggest that CP-1 was drawn with improper partisan intent. Mr. O'Neill, Coalition Plaintiffs' map drawer, testified that he strove to draw the most tier-two compliant configuration of South Florida, did not consider

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> political or incumbent data in drawing the maps, and was not given any other direction but to focus on and comply with the requirements of *Article III, section 20* and *Apportionment VII* and to improve compactness and adherence to major roadways where possible.

*Id.* at 14.

The trial court found the Coalition Plaintiffs' map drawer, O'Neill, "to be straightforward in his testimony, logical in his approach to drawing the districts, and persuasive in his conclusions." *Id.* The trial court further found "no evidence to suggest that CP-1 was drawn with improper partisan intent." *Id.*

The trial court determined that CP-1 was the best plan as to Districts 20 through 27, and specifically noted that with respect to the tier-two constitutional standards—that is, [**29] how compact the districts are and how well they utilize existing political and geographical boundaries—CP-1 is "more compact and splits fewer cities than any of the others." *Id.* at 12. The trial court also found CP-1 more visually compact and "follow[ed] major roadways far more closely than the legislative proposals." *Id.* at 4.

The trial court stated that because the Legislature had "the burden of defending its choices in all respects," the Legislature should have "taken another look at the South Florida districts, not for political performance but for better tier two compliance, either in response to the Plaintiffs' complaint, or better yet, on its own initiative." *Id.* at 4, 11. Yet, the Legislature did not:

> The map drawers and their bosses seemed uninterested in exploring other possible configurations to see if these districts could be drawn more compact and reduce county and city splits. I would think the Legislature would have anticipated questions about improving tier two compliance and have been prepared to respond to such questions by saying they had explored several possibilities, and they chose the most compliant version.

*Id.* at 11. As the trial court noted, the Coalition Plaintiffs were able to easily improve tier-two compliance: [**30]

> The Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two compliance considerably. Indeed, CP-1 is hands down the best tier two performing map of the group. As to Districts 20-27 it is more compact and splits fewer cities than any of the others.

*Id.* at 12.

When reviewing CP-1 as to Districts 20 through 27, the trial court paid special attention to the Legislature's configuration of Districts 26 and 27, districts this Court specifically invalidated in *Apportionment VII*:

> I understand why the Plaintiffs might be suspicious as to Districts 26 and 27. The Florida Supreme Court, in its July 9th Order, found that the Legislature had needlessly split the City of Homestead, [*270] thereby turning one Democratic and one Republican district into two Republican-leaning districts. The proposed map, 9071, which admittedly does not split Homestead, actually enhances the partisan effect in favor of the Republican Party. *The irony of the cure being worse than the illness is not lost on me*.

*Id.* at 10. (Emphasis supplied.)

Because the House and the Senate could not agree on six districts in central Florida, the trial court was tasked with recommending which configuration for that region best complied with the directives this Court [**31] set out in *Apportionment VII* and all other constitutional requirements. Accordingly, the trial court recommended

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adoption of the House Plan for Districts 9, 10, 11, 15, 16, and 17.

After careful analysis, including an evaluation of the expert witnesses offered by both sides, the trial court recommended that this Court adopt the House's configuration of Districts 1 through 19 and the configuration of Districts 20 through 27 contained in CP-1. In its order, the trial court found that the Legislature did not meet "its burden of justifying the proposed versions of Districts 20 through 27 in [the House's and the Senate's plans]." *Id.* at 19.

*ANALYSIS*

In *Apportionment VII*, we held eight specific districts had constitutional deficiencies—Districts 5, 13, 14, 21, 22, 25, 26, and 27—focusing on those districts that were a central feature of the Legislature's unconstitutional intent. During the unsuccessful special session, the Legislature addressed each of these districts, attempting to remedy the problems we identified. The trial court found that, as to the first nineteen congressional districts, the Challengers did not dispute the Legislature's proposed configuration of these districts, including Districts [**32] 2, 3, 4, 6, 7, 9, 10, 11, 12, 15, 16, and 17, which were affected by the redrawing of Districts 5, 13, and 14 that we invalidated in *Apportionment VII*.[3] While the Senate contends that its configuration of Districts 9, 10, 11, 15, 16, and 17 is preferable to the House's configuration, we review the dispute between the House and the Senate as to these six districts last.

In reviewing the trial court's recommendations, we note that there are actually three different inquiries and address them in the following order: First, we review the trial court's recommendations and the agreement between the Senate and the House and the Challengers as to redrawn Districts 2, 3, 4, 5, 6, 7, 12, 13, and 14, which comprise the invalidated Districts 5, 13, and 14 and the uncontested districts affected by the redrawing of those districts. Second, we review the Challengers' arguments regarding the South Florida districts: Districts 20 through 27. Third, we review the trial court's recommendations regarding the districts that were the subject of disagreement between the Senate and the House: Districts 9, 10, 11, [**33] 15, 16, and 17.[4]

[*271] HN7[↑] In reviewing the trial court's order "recommending adoption of remedial map," we are mindful that as the trier of fact, the trial court was charged with the evaluation of the expert witnesses and testimony of all those who testified. Accordingly, we uphold the trial court's factual findings so long as these findings are supported by competent, substantial evidence. *See* Apportionment VII, 172 So. 3d at 372-73, 391-92. In first reviewing the districts uncontested by the Legislature and the Challengers, we remain mindful that the Legislature bears the burden of demonstrating that the configuration it selected must comply with this Court's directions in *Apportionment VII* and the constitutional [**34] requirements as set forth in article III, section 20.

[3] Districts 1, 8, and 19 were not redrawn, and are included in all of the parties' plans we review.

[4] The Challengers do not contend that any of these districts proposed by the House in either of its proposed plans is constitutionally deficient. However, the Challengers do claim that the Senate's proposed configuration may "raise potential tier-one concerns," basing their argument on the Senate's "tier-two defects not present in [the House's plan]." The House takes the position that all of these districts were required to be redrawn as a result of redrawing the invalidated districts. The Senate disputes that claim as to District 16.

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## I. THE UNCONTESTED DISTRICT CONFIGURATIONS OF THE REDRAWN DISTRICTS

The redrawn districts that all parties agree to include the three districts invalidated in *Apportionment VII*—Districts 5, 13, and 14—and seven other redrawn districts affected by the redrawing of the invalidated districts—Districts 2, 3, 4, 6, 7, 12, and 18. Because all parties agree as to the redrawn configurations and because the trial court concluded that the Legislature met its burden to justify its redrawn configurations for these seven districts, we approve the trial court's recommendation.

As to the uncontested districts that we specifically invalidated in *Apportionment VII*, we begin with District 5.

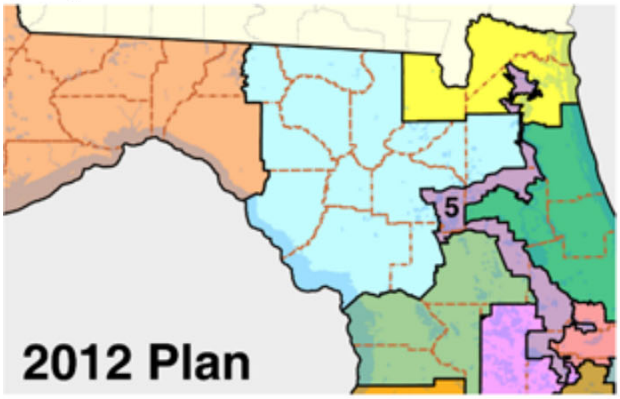
### A. DISTRICT 5

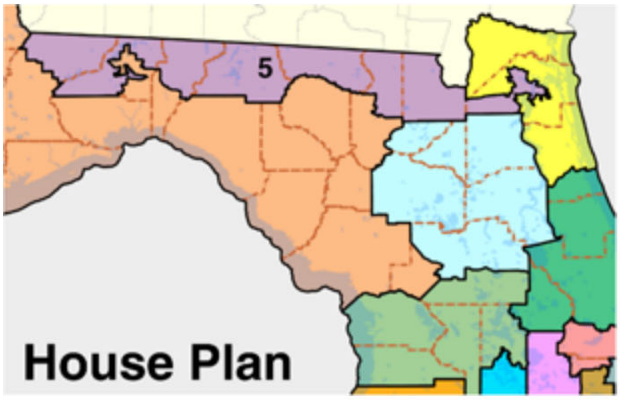
In *Apportionment VII*, District 5 was the "focal point of the challenge to the Legislature's redistricting plan," and the Challengers alleged that the Legislature's winding, North-South configuration of this district was "a linchpin to the Legislature's efforts to draw a map that favors the Republican Party." *Apportionment VII, 172 So. 3d at 402*.

We held that the trial court—which had concluded that District 5 was "a key component of the Legislature's unconstitutional intent in the drawing of the congressional [**35] redistricting plan"—erred in "deferring to the Legislature's North-South configuration on the basis of unstated 'non-partisan policy reasons.'" *Id. at 403*. Because we concluded that the Legislature could not establish "that the North-South configuration is necessary to avoid diminishing the ability of black voters to elect a candidate of their choice"—the justification offered by the Legislature for its enacted configuration—we determined that "District 5 must be redrawn in an East-West manner." *Id.*

Although District 5 was required to be drawn from East to West, no specific configuration was mandated in *Apportionment VII*. Nor did the Court specify a certain Black Voting Age Population (BVAP) or black share of registered Democrats as a "floor" below which the ability of black voters to elect a candidate of choice was certain to be diminished. In other words, in *Apportionment VII*, this Court examined the Legislature's enacted configuration and justification and held that this justification could not withstand legal scrutiny under the appropriate standard of review, leaving it to the Legislature to redraw the district based on the guidance the Court provided.

[*272]




Both the Senate and the House, choosing [**36] not to deviate from the Base Plan drawn by legislative staff during the special session, adopted the East-West version of District 5 presented in the alternative "Romo A" plan that was introduced into evidence during the original trial. Although the trial court observed that the

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District 5 drawn by the Legislature "appears still to be one of the least compact of the districts," the Challengers do not object to District 5 as proposed by the House and Senate and have presented no alternatives for the district. As the trial court noted, there was "no evidence" presented at the relinquishment hearing that District 5 "could have been drawn more tier-two compliant without adversely affecting minority voting rights protected under tier one."[5] Accordingly, the trial court recommended that this Court adopt this configuration for District 5 and the surrounding districts.

We agree with the trial court and conclude that this proposed district—drawn by legislative staff, passed by both the House and Senate, and agreed to by the Challengers—complies with this Court's directions in *Apportionment VII*. It is an East-West district that remedies the improper partisan intent found in the prior version of District 5. The new District 5 contains four whole counties and parts of four others, and is more visually and statistically compact than both the 2012 enacted district that was previously invalidated and the Legislature's 2014 remedial plan.

As we noted in *Apportionment VII* when [**38] analyzing the "Romo A" configuration of this district, the ability of black voters to elect a candidate of their choice is not diminished. With a black share of registered Democrats of 66.1%, the black candidate of choice is likely to win a contested Democratic primary, and with a Democratic registration advantage of 61.1% to 23.0% over Republicans, the Democratic candidate is likely to win the general election. *Apportionment VII, 172 So. 3d at 405*.

[*273] None of the parties in this case object to the Legislature's proposed configuration for District 5, which was the same in all seven proposed plans submitted for the trial court's consideration. Because the proposed district comports with this Court's directions in *Apportionment VII* and does not diminish the ability of black voters to elect a candidate of choice, the Legislature has met its burden to justify the configuration it selected.

### B. DISTRICTS 13 & 14

The next two districts we invalidated in *Apportionment VII* were Districts 13 and 14. In 2012, the Legislature drew these districts so that District 14 crossed Tampa Bay from Hillsborough County, splitting Pinellas County and the City of St. Petersburg to include a portion of the black population in southern Pinellas County [**39] in District 14. The Challengers contended that the Legislature's configuration of these districts—which "added more Democratic voters to an already safely Democratic District 14, while ensuring that District 13 was more favorable to the Republican Party"—was "directly connected to the trial court's finding that the enacted map was unconstitutionally drawn to favor the Republican Party." *Apportionment VII, 172 So. 3d at*

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[5] In *Apportionment VII*, Defendant-Intervener the Florida State Conference of NAACP Branches ("Florida NAACP"), opposed the East-West configuration of District 5. The Florida NAACP, however, did not present any arguments or testimony during the relinquishment proceedings before the trial court, nor did the organization submit an [**37] alternative plan. During the special session, the long-time incumbent representative of District 5, Congresswoman Corrine Brown, testified in opposition to the East-West configuration and has separately filed a lawsuit in federal court to enjoin the implementation of a redistricting plan that she alleges violates the 1965 Voting Rights Act and the *Fourteenth* and *Fifteenth Amendments*. Pl.'s V. Compl., *Brown v. Detzner*, No. 4:15-cv-00398-WS-CAS (N.D. Fla. Aug. 12, 2015). That case has been stayed pending the imposition of a remedial District 5. Congresswoman Brown continues to object to the East-West configuration.

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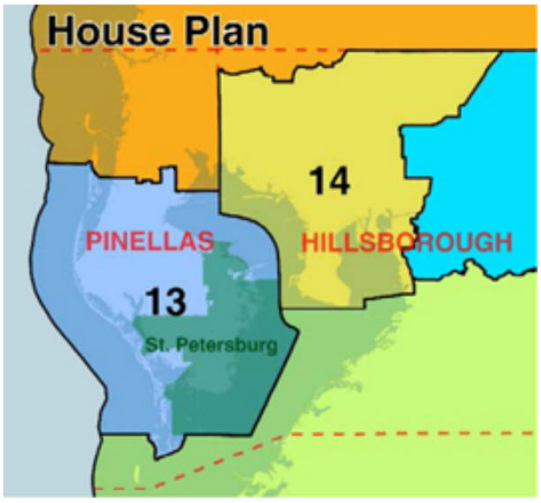
*407*.

Addressing this challenge, we concluded that the trial court erred in deferring to the Legislature's enacted configuration and failing to view these districts "through the lens of the direct and circumstantial evidence of improper intent presented at trial." *Id.* We rejected the Legislature's race-based justification for crossing Tampa Bay—that it allegedly was necessary to pick up voters from Pinellas County in District 14 to increase the minority voting strength in that district—and held that "Districts 13 and 14 must be redrawn to avoid crossing Tampa Bay." *Id. at 408-09*.




During the special session, both the House and the Senate adopted the configuration of these districts drawn by legislative staff in the Base Plan. That configuration remedied the improper intent we previously identified, keeping District 14 [**40] entirely within Hillsborough County and not crossing Tampa Bay. District 13, which remains completely within Pinellas County, now includes the entirety of the southern portion of that county and all of the City of St. Petersburg. The trial court reviewed this area with special focus, noting that this Court required it to be redrawn based on constitutional infirmities. The trial court then reviewed this area and the surrounding areas and found, as a whole, the districts are now "more [*274] compact and contain fewer city and county splits than in the 2012 and 2014 legislative maps." Trial Court Order at 8.

No party objects to the Legislature's chosen configuration for these districts, which was the same in all seven proposed plans submitted for the trial court's consideration. As with District 5, we agree with the trial court and conclude that the Legislature has met its burden to demonstrate that its selected, agreed-upon configuration of Districts 13 and 14 complies with this Court's directions in *Apportionment VII* and the constitutional requirements.

## II. THE CONTESTED DISTRICT CONFIGURATIONS

Before considering the configuration of districts contested by the Challengers, we address the Legislature's [**41] general attacks on the Challengers' maps: (a) that the Challengers violated this Court's instructions and also fundamental fairness by not presenting its maps to the Legislature; and (b) that this Court and the trial court erred in failing to consider the intent of the Challengers in drafting the maps presented to the trial court and this Court. After analyzing this argument, we then proceed to review the challenged districts. In our review of the challenged districts, we remain mindful, as the trial court did in its own review,

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that the Legislature bears the burden of justifying its proposed remedial congressional plans.

### A. THE LEGISLATURE'S CONTENTIONS: FUNDAMENTAL FAIRNESS AND THE INTENT BEHIND THE DRAWING OF THE ALTERNATIVE MAPS

Before turning to an analysis of the contested districts, we first must address the Legislature's allegations concerning the Coalition Plaintiffs' alternative maps. Specifically, the Legislature presents two arguments: (1) the adoption of CP-1 violates fundamental fairness because the Coalition Plaintiffs failed to present the CP-1 plan to the Legislature first and because this plan adopts revised districts that had not been invalidated in *Apportionment VII [**42]*; and (2) the trial court erred by failing to consider the intent of the drafters of CP-1.

First, the House contends that the trial court's order violates "fundamental fairness" because the Coalition Plaintiffs did not submit CP-1 to the Legislature during its special session and produced it only one week before the hearing. The House argues that it "had no opportunity (if it were even proper) to redraw its proposal and to participate in the Coalition Plaintiffs' game of leapfrog." The Senate similarly argues that because the Coalition Plaintiffs' alternative maps were not publicly proposed to the Legislature, and "they waited until the special session ended and sprang them forth in litigation," the public and the trial court had little opportunity to review and consider their proposals. The Challengers counter this specific contention by explaining that after publication of the Base Plan, the League of Women Voters of Florida and Common Cause sent a letter specifically expressing their concerns regarding the configuration of Districts 26 and 27 and urging the Legislature to "find a more non-partisan way to draw" these districts. In response, the Legislature accused the Coalition Plaintiffs [**43] of making a "blatant request to make District 26 'more Democratic' and asking 'the Legislature to engage in partisan gerrymandering.'"

We first note that even assuming that it would have been preferable for the Legislature to have the alternative plans during special session, once the special session adjourned without the Legislature passing a remedial plan, it was the House that [*275] requested that all parties be permitted to submit alternative plans and the agreed-to scheduling order included specific details about the information that should be included with the alternative plans to ensure full disclosure.

Second, as to the specific argument regarding the Coalition Plaintiffs' failure to submit alternative plans during the special session, the trial court rejected it and stated as follows:

> The Legislature complains that the Plaintiffs did not participate in the open and transparent process of drawing a remedial map. But when the Plaintiffs tried to participate by pointing out what anyone in the Legislature could also have determined—that the new districts were more Republican leaning than before—they are accused of trying to improperly insert political performance into the equations.

Trial [**44] Court Order at 11.

We agree with the trial court that there was no violation of fundamental fairness by the alternative plans not being submitted during the special session. It was logical that the Challengers awaited the release of the Base Plan to ascertain what changes the Legislature contemplated. As the League of Women Voters of Florida and Common Cause expressed to legislative leadership in their letter, the groups "applaud [the

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Legislature's leaders and their staff] for [their] efforts to follow the suggestions of the Florida Supreme Court" and that "[f]or the most part the base map appears to comply with" the opinion.

Moreover, the Legislature knew of alternative, more tier-two compliant ways in which to draw the South Florida districts, but rejected them. In the original trial court proceeding in 2014, the Romo Plaintiffs submitted configurations for these districts that are conceptually the same as the configuration of most of the districts in CP-1. In particular, the Romo trial map and CP-1 both contain a reconfigured District 20 that lacks an appendage down I-95 in Palm Beach County and that extends south to the Broward-Miami-Dade County line. Both maps contain a reconfigured [**45] District 25 that withdraws from Broward County to reduce the number of times that county is split. Both maps contain a reconfigured District 27 that sits compactly in central Miami-Dade County, rather than stretching south along the coast to the Miami-Dade-Monroe County line. Certainly, the Legislature had notice of the possibility of making some, if not all, of the South Florida districts more tier-two compliant. Further, the Legislature also had notice of a more tier-two compliant way to draw Districts 26 and 27 through the introduction of Senator Bullard's amendment during the special session, but rejected that amendment.

The House next claims, as part of its fundamental fairness argument, that the trial court's order ignores this Court's own instructions to the Legislature to only redraw the specific districts we invalidated in *Apportionment VII*. The House therefore argues that the trial court, in recommending a specific configuration of districts that were not ordered to be redrawn in *Apportionment VII*, exceeded this Court's directions to "focus" on the House and Senate plans. The Legislature is correct that *Apportionment VII* did not require the Legislature to redraw the entire [**46] map and start anew. *See* *Apportionment VII, 172 So. 3d at 413* ("The Legislature need not, in addition, redraw the entire map."). However, redrawing the districts this Court invalidated in South Florida—Districts 21, 22, 25, 26, and 27—would necessarily require redrawing the boundary lines and ultimately the shape of adjacent South Florida Districts 20 and 23. Indeed, this Court stated exactly that: "[T]he Legislature [*276] must redraw—Districts 5, 13, 14, 21, 22, 25, 26, 27, *and all other districts affected thereby*." *Id. at 416* (emphasis supplied). Accordingly, the trial court did not err in considering configurations of districts not specifically invalidated in *Apportionment VII*.

Finally, we address a claim raised by both the Senate and the House—that the trial court erred in not considering the intent of the drafters of CP-1 or, for that matter, the other alternative maps. The House asserts that this proceeding "abounds with glaring ironies and striking contradictions that undermine the fairness and credibility of the entire proceeding," including that the courts "condemned the 'secretive shadow process' in which the Legislature allegedly drew districts" while the "creation of CP-1 in an apartment in Los Angeles failed [**47] to raise an eyebrow." In sum, the House argues that "different rules applied to different maps." The Senate, while somewhat more restrained, echoes the House's arguments that the adoption of CP-1 would endorse a map "drawn in secret, instead of in the open and transparent legislative process this Court envisioned in *Apportionment VII*."

This contention is contrary to the record. As we have noted, the trial court's scheduling order, which all parties agreed to, required specific identification of "every person involved in drawing, reviewing, directing, or approving the proposed remedial plan." Although the maps themselves were not on trial, their drafters were called to testify during the relinquishment hearing and were subject to cross-examination. For instance, on

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direct examination during the evidentiary hearing, the Coalition Plaintiffs' map drawer, O'Neill, testified to the type of instructions he received regarding how to draw CP-1: "You pointed me to the constitution, and you made sure I read the specific sections about redistricting. And you directed me to follow only those criteria and use no other considerations in deciding how to evaluate a district or the map as a whole." [**48] On cross-examination, he further testified that "I was just asked to draw nonpartisan, constitutionally-compliant maps that reflected the Supreme Court's directions." After hearing O'Neill's testimony, the trial court found him "straightforward," and "logical in his approach to drawing the districts and persuasive in his conclusions." Ultimately, the trial court stated that it found no evidence "to suggest that CP-1 was drawn with improper partisan intent."

The trial court, like this Court, reviewed the proposed plans to analyze the objective criteria this Court has set out in our past seven opinions, giving effect to the Fair Districts Amendment. The trial court then discussed each of the submitted proposed maps by written order, setting out its determinations regarding the tier-two criteria. With those objective criteria of *Article III, section 20* and this Court's interpretation of those criteria in mind, the trial court noted that CP-1 was more compact, had fewer miles of border perimeter, and reduced the number of split cities. The alternative maps submitted to the trial court demonstrated that the Legislature did not meet its burden of justification as to its configuration of Districts 20 through 27 when these alternative maps, [**49] specifically CP-1, were objectively better by tier-two standards.

Moreover, the Legislature's and Justice Polston's argument that the trial court should have considered the intent of the drafters of CP-1 fundamentally misunderstands the trial court's role and this Court's role in the current proceeding. As explained in this Court's relinquishment orders, and as set out in *Apportionment VII*, this Court directed the trial court to approve or disapprove the Legislature's [*277] enacted remedial map—or, as what ultimately occurred, approve or disapprove the proposed remedial maps of the parties after the Legislature failed to enact a map during the special session. Based on the finding that the Legislature's prior proposed remedial congressional plan was tainted with partisan intent coming out of a shadow process in which political operatives infiltrated and influenced the Legislature, the burden switched to the Legislature to justify its configuration of its plans. Thus, as the trial court correctly noted in this proceeding, "It is the Legislature that bears the burden of defending its proposed maps, not the Plaintiffs." In other words, we are tasked with determining whether the Legislature met [**50] its burden as to its proposed remedial congressional maps.

Additionally, *HN8*[⬆] *Apportionment VII* did not forbid a citizen affiliated with a particular party from drawing a map, nor was our affirmance of the trial court's finding of unconstitutional intent based solely on the fact that political consultants aligned with the Republican Party had drawn maps. *172 So. 3d at 374*. Instead, this Court's decision rested largely on the Legislature's own claims that it had conducted an open and transparent redistricting process, while it was being manipulated into a violation of its constitutional duty. This Court explained that "if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate." *Id.* (quoting *Apportionment IV, 132 So. 3d at 149*).

Our decision detailed, at length, the circumstantial

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evidence revealing the Legislature's improper intent—evidence found and cited by the trial court in reaching that conclusion—including destruction of records and [**51] numerous "coincidences." *See, e.g., Apportionment VII, 172 So. 3d at 385*. Our conclusion that the process was tainted with improper intent did not rest on the fact that partisans submitted maps but that "a group of partisan political operatives 'conspire[d] to manipulate and influence the redistricting process' and succeeded in 'infiltrat[ing] and influenc[ing] the Legislature, to obtain the necessary cooperation and collaboration' to 'taint the redistricting process and the resulting map with improper partisan intent.'" *Id. at 376*. (emphasis omitted).

In reaching our conclusion, we used the trial court's detailed findings as to how the operatives concealed their actions by using proxies to submit their proposals, wrote scripts for others to state, and made a mockery of the Legislature's proclaimed transparent and open process, and that they "[found] other avenues, other ways to infiltrate and influence the Legislature, to obtain the necessary cooperation and collaboration to ensure that their plan was realized, at least in part." *Id. at 377*.

Thus, the Legislature is trying to conflate several arguments. The reason that improper partisan intent was found in the drawing of the map was not because of the intent of a particular map drawer or partisan operative. And assuming in this [**52] case that the Legislature wants to ascribe an improper intent to the Challengers' redistricting plan, we would point out that the very record here belies that motive, especially as to the Coalition Plaintiffs. An excellent example is the Coalition Plaintiffs' map with regard to Districts 21 and 22. Although Democrats complained that the redrawn map pitted two Democratic incumbents against one another, and even though the Romo Plaintiffs championed a vertical configuration before the trial [*278] court, the Coalition Plaintiffs maintained their advocacy for a "stacked" configuration of Districts 21 and 22 that substantially improves tier-two compliance.

*HN9*[↑] A redistricting process is not tainted merely by permitting citizens to speak out in a public forum and suggest a plan or portion of a plan. Nor was it tainted here when the Coalition Plaintiffs' map drawer proposed an alternative configuration of the South Florida districts that substantially improved tier-two compliance of those districts as the trial court found, based on its ability to hear extensive testimony as to how this map was drawn.

Simply put, as this Court's directive in *Apportionment VII* made clear—and as Justice Polston's dissent [**53] chooses to ignore—the "alternative maps are not on trial themselves, as is the Legislature's map." *Id. at 401 n.11*. Rather, in this case, the alternative plans, specifically the Coalition Plaintiffs' plans, CP-1, CP-2, and CP-3, serve to demonstrate that the South Florida districts could have been drawn to be more tier-two compliant. As the trial court noted:

> I remain convinced that the best, if not perfect, way to guard against improper partisan intent in a map is to look closely at any tier two shortcomings and scrutinize the purported reasons for these shortcomings. If there is a way to make a map more tier two compliant without sacrificing tier one requirements, then it should be done. This will result in not only a more compact map that splits less cities and counties, it will go far in minimizing the risk, or perception, that was drawn with a partisan intent.

Trial Court Order at 9.

We stated as much in *Apportionment I*. As we noted, *HN10*[↑] "in the context of Florida's constitutional provision, a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms." *Apportionment I, 83*

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*So. 3d at 640*. *See also* *Apportionment VII, 172 So. 3d at 399*.

As discussed in this opinion, the alternative maps [**54] were an objectively better configuration of the South Florida districts as to tier-two compliance. The evidence of the alternative maps were considered by the trial court that the Legislature had not met its burden to justify its chosen configurations under both tier-one and tier-two constitutional considerations.

Having rejected the argument that the trial court did not give proper effect to the intent of the Challengers in submitting the alternative plans, we now review the trial court's recommendation as to Districts 20 through 27, located in South Florida. Both the House and the Senate were in agreement as to the configuration of these districts, but the Challengers asserted that these districts could be drawn more tier-two compliant, and submitted alternative plans to the trial court during the evidentiary hearing demonstrating this possibility. As to Districts 20 through 27, the trial court concluded that CP-1 was "hands down the best tier two performing map of the group," because "it is more compact and splits fewer cities than any of the others." Trial Court Order at 12. The Romo Plaintiffs also submitted a plan proposing a vertical configuration for Districts 21 and 22 and [**55] changes to Districts 25, 26, and 27, but have advocated for the Coalition Plaintiffs' plan before this Court. Our review of these South Florida districts focuses on the five districts we invalidated in *Apportionment VII*—21, 22, 25, 26, and 27. In redrawing the invalidated districts, we note that the Legislature also redrew adjacent Districts 20 and 23. District 24, though not redrawn in the Legislature's [*279] plans, is altered in CP-1 as a result of making Districts 21 and 22 more compact and making additional cities whole in surrounding districts. We start with Districts 26 and 27, the first pair of South Florida districts we invalidated in *Apportionment VII*.

**B. DISTRICTS 26 & 27**

Districts 26 and 27 were the focus of the most controversy during the relinquishment proceedings. In *Apportionment VII*, this Court determined that Districts 26 and 27 "must be redrawn to avoid splitting Homestead" because "the enacted configuration of these two districts needlessly divided the City of Homestead to Republican gain." *172 So. 3d at 409*. In support of these conclusions, we explained some of the specific evidence of partisan intent as to these districts:

> The challengers also mounted an individual attack against the validity [**56] of Districts 26 and 27, claiming that the enacted configuration of these two districts needlessly divided the City of Homestead to Republican gain—turning one Republican district and one Democratic district into two Republican-leaning districts. In support, the challengers relied on the general evidence of improper intent in the plan as a whole, as well as specifically on an e-mail chain between consultants Heffley, Terraferma, and Reichelderfer that took place after the Senate released a draft map that did not split Homestead. In this e-mail chain, the operatives stated that the configuration of these districts was "pretty weak" and that the House "need[ed] to fix" it.

*Id. at 409* (footnote omitted).

The last maps passed by both the House and the Senate during the special session had identical configurations of these districts, where District 26 included all of Homestead, yet was even more favorable for the Republican Party than the previous district that this Court held must be redrawn. This was something the League of Women Voters of Florida and Common Cause expressly pointed out in a letter to leaders of the Legislature during the special session.

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At the evidentiary hearing, both the Coalition Plaintiffs [**57] and the Romo Plaintiffs submitted proposed maps to the trial court and demonstrated that these districts could be drawn markedly more tier-two compliant. Like with the other contested South Florida districts, the trial court found that CP-1 was "hands down the best tier two performing map." Trial Court Order at 12. The court found that CP-1 split fewer cities, was more compact than the Legislature's configuration, and would not "deprive Hispanic voters of their ability to elect a candidate of their choice in District 26." *Id.* at 18. The trial court recommended adopting CP-1 because of its significant improvement in tier-two compliance.

The Legislature claims that since this Court's only direction was to redraw the districts to avoid splitting Homestead, the trial court's recommendation goes beyond our instructions. The Legislature also claims that CP-1 violates the tier-one minority protection provisions of the Florida Constitution by diminishing the ability of Hispanic voters to elect a representative of their choice in District 26.

For the reasons more fully explained below, we reject the Legislature's arguments and approve the trial court's determination that the Legislature did not meet its [**58] burden of justification for its proposed configuration of Districts 26 and 27—a finding supported by competent, substantial evidence.

First, the Legislature's proposed configuration of Districts 26 and 27 was even [*280] more favorable to the Republican Party than the enacted district, which was invalidated partly for being drawn with the intent to favor the Republican Party. Second, although the Legislature bore the burden of justifying its chosen configuration of the redrawn area, the redrawn Districts 26 and 27 are less compact and split more cities than the alternative maps submitted at trial. Considering that an amendment was offered during the special session to draw the two districts more tier-two compliant, and that a map offered by the Romo Plaintiffs during the original merits trial of this case also demonstrated a more tier-two compliant configuration of the districts, the Legislature was aware of alternative, more tier-two compliant ways to draw these districts, yet did not seriously consider any of these alternatives. Third, the Legislature now provides a post hoc rationalization that its configuration for Districts 26 and 27, despite being less tier-two compliant than the alternative [**59] maps, is better than CP-1's plan because it avoids retrogression, as the Legislature asserts CP-1 does. Yet, during the special session, the Legislature performed only a cursory retrogression analysis for these districts.

Our determination that the Legislature has not met its burden of justification as to its chosen configuration of Districts 26 and 27 is first grounded in our previous conclusion that the enacted plan needlessly split Homestead to "benefit the Republican Party," *Apportionment VII, 172 So. 3d at 410*.

The Legislature's redrawn configuration has actually improved Republican performance. The trial court noted, "[t]he irony of the cure being worse than the illness is not lost on me." Trial Court Order at 6.

This result is contrary to *Apportionment VII*. Specifically, this Court's decision in *Apportionment VII* regarding this area did not just rest only on the fact that Homestead involved a city split, as Justice Canady asserts in his concurring in part and dissenting in part opinion, but also because the Legislature rejected other tier-two compliant configurations drawn by the Legislature's map drawer, configurations that were less favorable to the Republican Party. *Id. at 410*. Furthermore, the Legislature's decision to split [**60] Homestead was a product of what the trial court in its final judgment called "a conspiracy to influence and manipulate the

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Legislature into a violation of its constitutional duty." *Id. at 382* (quoting trial court order). As this Court noted in *Apportionment VII*:

> In another e-mail between [political consultants] Terraferma, Heffley, and Reichelderfer sent on the same day the Senate released a public map that did not divide the City of Homestead—a division considered by the consultants to be important to favor Republicans—Terraferma noted that District 26 was "pretty weak." Heffley responded, "The [H]ouse needs to fix a few of these," and Terraferma, copying Reichelderfer, responded, "yes." The enacted configuration did, indeed, split the City of Homestead between Districts 26 and 27, which turned one Republican district and one Democratic district into two Republican-leaning districts.

*Id. at 383-84*.

In an attempt to comply with this Court's directive that Homestead not be split, when drawing the Base Plan, legislative staff moved the eastern part of Homestead into District 26 from District 27. Consequently, a certain number of people needed to be added to District 27 to equalize the population between the districts. [**61] The question was then where to shift the population between the districts.

[*281] The legislative staff chose to shift a predominantly black population, which had the effect of making District 26 even more Republican-leaning than in the map we disapproved. The Legislature's Base Plan moved 34,785 people in the predominantly black neighborhoods of Palmetto Estates, Richmond Heights, and West Perrine from District 26 into District 27. At the time, legislative staff did not assert that it was necessary to move the black population based on any minority protection concerns. The resulting shifting of the predominantly black population from District 26 into District 27 did not even follow major roadways. After the Base Plan was released to the public, the League of Women Voters of Florida and Common Cause sent a letter to the Speaker of the House of Representatives and President of the Senate that, while praising the Legislature's "efforts to follow the suggestions of the Florida Supreme Court in drawing most of the [Base Plan]," criticized the Legislature's decision to attempt to remedy the constitutional deficiencies in these two districts by "shift[ing] Democratic, African American population into [District] [**62] 27 in order to maintain a lower Democratic performance index in [District] 26."

As the trial court observed, given that the Legislature bears the burden, one "would think the Legislature would have anticipated questions about improving tier two compliance and [would] have been prepared to respond to such questions by saying they had explored several possibilities, and they chose the most compliant version." Trial Court Order at 11. Ultimately, neither the House nor the Senate adopted any amendments to the staff-drawn districts—although one was offered by Senator Dwight Bullard—and the final maps passed out of each legislative chamber included the staff-drawn configuration.

Significantly, the boundary between Districts 26 and 27 in the Legislature's plan follows a variety of roads as it wraps around the black neighborhoods (including the Florida Turnpike, 117th Avenue, 97th Avenue, 88th Street, and 87th Avenue), while the Bullard Amendment follows a much more logical, regular, and compact boundary (almost exclusively US 1 and 97th Avenue), but does not move those black neighborhoods out of District 26.

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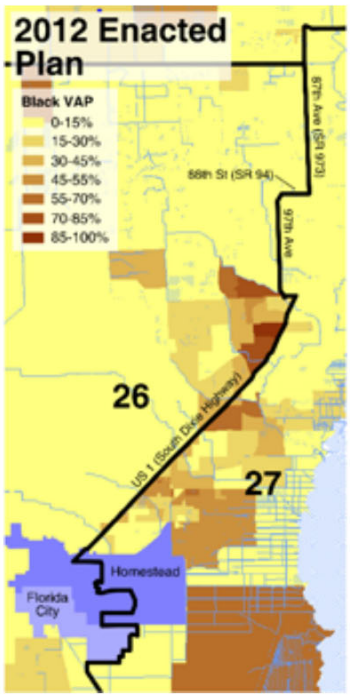


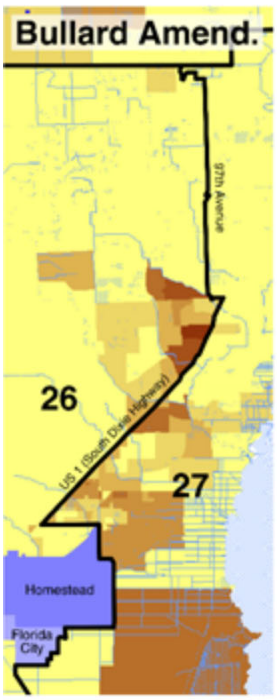


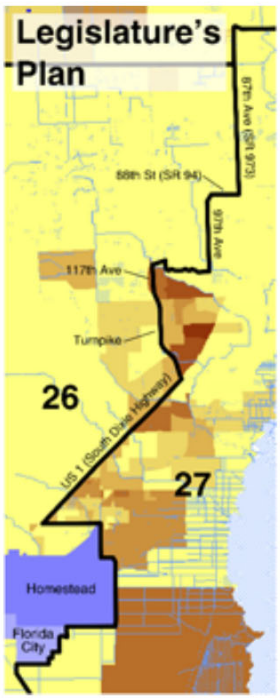


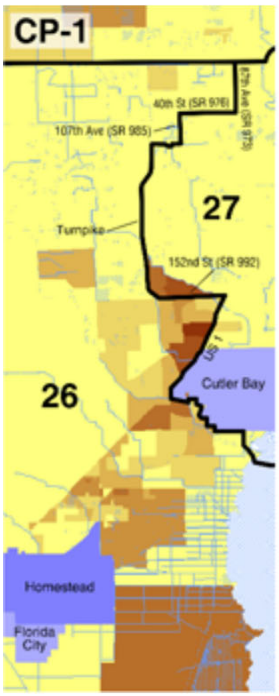


[*282] As we emphasized in *Apportionment VII*, the Legislature now has the burden to justify its chosen configuration. [**63] As was the case with the alternative maps in *Apportionment VII*, the alternative maps introduced by the Challengers demonstrate several other ways these districts could have been configured that actually would have *improved* the tier-two compliance of the districts and done so in a manner

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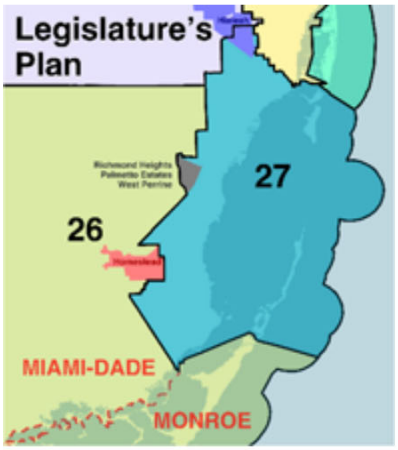
that complied with our directive in *Apportionment VII*.

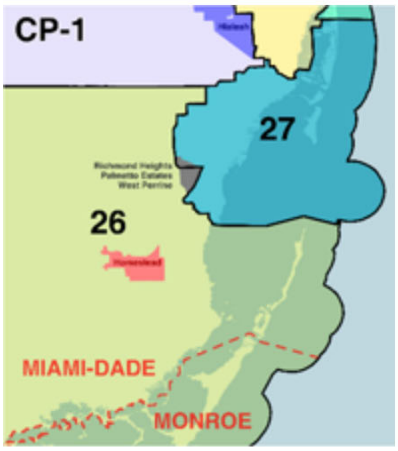
In its order, the trial court spoke to the shortcomings of the Legislature's approach:

> It appears that the map drawers for the Legislature took a very minimalist approach to rectifying the problem identified in Districts 26 and 27. In essence, they drew two versions—one with Homestead in District 26 and one with Homestead in District 27. They then made a cursory analysis to see if it would perform for minorities, compared the tier two metrics of both, and chose the one that was most compact.
>
> The cursory analysis regarding performance for minorities did not include a comparison against the benchmark district—an analysis necessary to determine whether the configuration unnecessarily packed minorities into one district. They testified that this function would be done by the expert hired by the Legislature for this purpose. It appears, however, that the [**64] expert did not make such a comparison to the benchmark district either.
>
> . . .
>
> The map drawers and their bosses seemed uninterested in exploring other possible configurations to see if these districts could be drawn more compact and reduce county and city splits.

Trial Court Order at 10-11.

CP-1, and indeed every other plan proposed by the Challengers during the relinquishment proceedings—as well as previous maps submitted during the initial trial which are similar to CP-1's configuration of these districts, in addition to the Bullard Amendment introduced during the special session—improves tier-two compliance in Districts 26 and 27. As the trial court noted, "[t]he Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two compliance considerably." *Id.* at 12. In particular, Districts 26 and 27 in CP-1 are more visually compact than in the Legislature's plan, as the maps below demonstrate. (Homestead is in red, and the neighborhoods of Palmetto Estates, Richmond Heights, and West Perrine are in gray. Hialeah, which is split in the Legislature's plan between Districts 25 and 27, but is whole in CP-1, is in blue.).

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[*283] This visual comparison is supported by the statistical compactness measurements. With the [**65] exception of the Reock score for District 26, which is the same, the statistical compactness measurements demonstrate improvement in CP-1 as compared to the Legislature's proposed configuration.

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Further, CP-1 utilizes major geographical and political boundaries at least as effectively as the Legislature's proposed configuration, if not more so, and also allows for the City of Hialeah to be made whole, whereas it is split between Districts 25 and 27 in the Legislature's proposal. In other words, by essentially any and every tier-two measure, the configuration of these districts in CP-1 is objectively superior to the configuration in the House and Senate maps.

Despite its knowledge of alternative, more tier-two compliant ways to draw Districts 26 and 27, the Legislature did not attempt a more tier-two compliant configuration—even after the League of Women Voters of Florida and Common Cause expressed concerns about the Base Plan—and indeed rejected the one legislative amendment (the Bullard Amendment) that offered an alternative configuration. Notably, speaking in debate in the Senate, Reapportionment Committee Chair, Senator William Galvano, offered what appears to be the only justification for why the Senate rejected the more tier-two compliant configuration: "If we adopt the Bullard Amendment, because of the Hispanic population shift that [**67] would move one to the other, I would suspect that the Court in its review would find that we have in fact packed District 27. So I would ask that you vote this down." Nothing in the record indicates that either legislative staff or counsel performed a functional analysis on Districts 26 and 27 in the Bullard Amendment to determine whether they violated the tier-one minority protection provisions, or the Voting Rights Act.

The decision not to consider *any* alternatives for Districts 26 and 27 in drawing the Base Plan—and to reject the one proposed [*284] amendment offering a different configuration—is indicative of the Legislature's shortcomings in meeting its burden. This is particularly true where it is clear that the "cure" the Legislature chose for the improper partisan intent that caused the Court to require these districts to be redrawn in the first place actually *improves* the Republican performance of the districts.

Although the Legislature bears the burden, as the trial court found, it offers hardly any justification for its chosen configuration of Districts 26 and 27. But while the Legislature's "minimalist" approach may have sufficed if it were starting from a blank slate, "that was not," as the trial [**68] court stated, "the situation facing the Legislature." Rather, "it had been tasked with preparing a remedial map" and "would have the burden of defending its choices in all respects." Trial Court Order at 11.

In an attempt to meet its burden of justification, the Legislature provides a post hoc rationalization for its demonstrably less tier-two compliant map by asserting—as it also did when justifying various challenged districts in the 2012 plan—that the alternative configuration of Districts 26 and 27 offered by the Coalition Plaintiffs would violate the tier-one minority protection provisions of the Florida Constitution. *Cf.* *Apportionment VII, 172 So. 3d at 411* (rejecting Legislature's "post-hoc rationalizations" for its enacted configuration of District 25). Specifically, the Legislature alleges that the configuration of District 26 in CP-1 diminishes the ability of Hispanic voters to elect a representative of their choice. The trial court did not find the Legislature's experts persuasive on the issue of whether CP-1 retrogresses, and ultimately rejected the Legislature's retrogression analysis.

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In support of its position that District 26 in CP-1 would result in retrogression, the Legislature presented testimony from [**69] two expert witnesses, Professor Liu and Professor Moreno. The trial court "did not find [Professor Liu's] testimony to be particularly helpful," because "the data he used to draw his conclusions from was suspect." Trial Court Order at 15-16. For instance, of the ten elections Professor Liu analyzed when performing his retrogression analysis, "only six involved Hispanic candidates and three of those were non-partisan judicial races." *Id.* Further, except for one of these non-partisan judicial races, Professor Liu "could not identify any election in which a coalition of African Americans and non-Hispanic whites effectively defeated the Hispanic candidate of choice." *Id.* at 16.

Regarding the Legislature's other expert, Professor Moreno, the trial court concluded that this testimony "had little probative value to me." *Id.* Most troubling in Professor Moreno's retrogression analysis was that his analysis was based on a comparison between CP-1 and the Legislature's proposed plan, rather than the benchmark map of 2002. In addition, the trial court noted the "speculative nature" of Professor Moreno's testimony and found his testimony to be "long on pure opinion based on experience and short on systematic, [**70] scientific analysis of accepted statistical data." *Id.* Further, contrary to his testimony at the evidentiary hearing, Professor Moreno had previously testified at the merits trial that the invalidated District 26, which has substantially similar demographic, registration, and Democratic primary turnout metrics as CP-1, preserved Hispanics' ability to elect the candidate of their choice.

On the other hand, the expert witness presented by the Coalition Plaintiffs, Professor Lichtman, explained that Districts [*285] 25, 26, and 27 in CP-1 are all Hispanic-performing districts. While the Legislature now attempts to discredit Professor Lichtman's report, it chose not to object to the report being entered into evidence. Additionally, in contrast to the trial court's findings regarding the Legislature's experts, the trial court found Professor Lichtman's opinions to be persuasive:

> The Plaintiffs' expert, Professor Lichtman, testified via his report . In it, he favorably compared Districts 26 and 27 in CP-1 to districts in both the 2012 congressional plan and 2002 benchmark congressional plan and found no retrogression. Although I did not have the opportunity to judge his demeanor while testifying, [**71] his report is persuasive. He systematically analyzed the subject matter with accepted scientific methodologies and found that the Hispanic candidate or Hispanic candidate of choice won 29 out of 29 elections that took place between 2006 and 2014 in comparable Miami-Dade County based districts that had similar Hispanic voting age population to the proposed Hispanic districts in CP-1. He also analyzed the 2010 U.S. Senate Election and demonstrated that Marco Rubio, a Hispanic Republican, carried the proposed Hispanic districts in CP-1 by landslide margins.
>
> And, through ecological regression, Lichtman showed that in CP-1's District 26, for instance, Rubio received an overwhelming 71% of the Hispanic vote (including support from non-Republican Hispanics) and substantial crossover votes from non-Hispanic voters, regardless of the fact that the district performed for the Democratic Gubernatorial Candidate, Alex Sink, in 2010.
>
> Lichtman concluded that, "according to the range of most pertinent factors, [District 26] in CP-1 is a Hispanic opportunity district beyond any reasonable doubt," and that Districts 25, 26, and 27 in CP-1, CP-2, and CP-3 all function as performing Hispanic districts.

[**72] Trial Court Order at 14-15.

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Critically, despite the burden the Legislature bears, the retrogression analysis the Legislature performed when drawing its configuration was not nearly as intensive as the retrogression analysis it has applied when attacking CP-1. As the trial court noted:

> It appears that the map drawers for the Legislature took a very minimalist approach to rectifying the problem identified in Districts 26 and 27. In essence, they drew two versions—one with Homestead in District 26 and one with Homestead in District 27. *They then made a cursory analysis to see if it would perform for minorities*, compared the tier two metrics of both, and chose the one that was most compact.
>
> *The cursory analysis regarding performance for minorities did not include a comparison against the benchmark district—an analysis necessary to determine whether the configuration unnecessarily packed minorities into one district*. They testified that this function would be done by the expert hired by the Legislature for this purpose. It appears, however, that the expert did not make such a comparison to the benchmark district either.

*Id.* at 10. (emphasis supplied).

Under the version of District 26 in CP-1, Hispanics [**73] were 65.5% of registered Republicans and 64.9% of registered Republicans who actually voted in the 2012 general election. A comparison with the benchmark district in the 2002 plan confirms that Hispanic voting ability in the Republican primary is not diminished. Under the benchmark District 25 configuration, Hispanics were 66.7% of registered Republicans and 65.7% of registered Republicans [*286] who actually voted in the 2012 general election.[9] In District 26 under the precleared 2012 plan—which the Legislature itself defended earlier in this proceeding—Hispanics constituted 66.2% of registered Republicans and 65.9% of registered Republicans who actually voted in the 2012 general election. Therefore, we can conclude that Hispanic Republicans' candidate of choice is just as likely to win a contested Republican primary as in the benchmark plan.

As to Hispanic Democrats' ability to nominate their candidate of choice in a contested primary, Hispanics were 45.0% of registered Democrats and 41.6% of registered Democrats who actually voted in the [**74] 2012 general election under CP-1's configuration for District 26. Although Hispanics do not constitute a majority of Democrats, a comparison with the benchmark district of 2002 confirms that Hispanic voting ability in the Democratic primary is not diminished. In benchmark District 25, Hispanics were 51.9% of registered Democrats and 48.9% of registered Democrats who actually voted in the 2012 general election. In District 26 under the precleared 2012 plan, Hispanics constituted 45.3% of registered Democrats and 42.2% of registered Democrats who actually voted in the 2012 general election.[10]

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[9] Since District 26 in CP-1 draws 73.8% of its population from District 25 in the 2002 plan, we use District 25 from the 2002 plan as the benchmark district.

[10] As we have noted when performing previous functional analyses, one relevant statistic in determining minority voting ability is the share that the minority group constituted in recent party primary elections. *See Apportionment I, 83 So. 3d at 608*. Unfortunately, the most recent primary turnout data in the record is from the 2010 primary election. Because this data will be six years old the next time a congressional primary election is held, we rely on the more recent 2012 general election registration and turnout data to compare minority voting ability within the Democratic and Republican parties in the proposed, benchmark, and enacted [**75] versions of District 26.

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These figures are comparable, and based on this statistical analysis, it is clear that Hispanic Democrats' candidate of choice is just as likely to win a contested Democratic primary in CP-1 as in the benchmark plan. The Legislature contends that because CP-1 makes District 26 Democratic-leaning, whereas the district was Republican-leaning in the Benchmark, and because Hispanics do not control the Democratic primary, the Hispanic candidate of choice is unlikely to emerge from the Democratic primary, yet the Democratic nominee is likely to prevail in the general election. Therefore, the Legislature argues, Hispanic voters' ability to elect a representative of their choice is diminished in CP-1.

As the trial court noted, this "is a cogent, logical, argument. The problem is that the argument is much more compelling than the evidence offered in support of it." Trial Court Order at 14. The Legislature's argument rests on an unproven assumption of Hispanic voting cohesion and polarized racial bloc voting—the establishment of which is the first step in any retrogression analysis.[11] Indeed, the [*287] evidence before this Court suggests a lack of Hispanic voting cohesion in this [**76] district. In 2012, of the registered Hispanic voters in benchmark District 25, 29.8% were Democrats, 37.5% were Republicans, and 32.7% were registered with neither party. In 2012, of the registered Hispanic voters in the enacted, precleared District 26, 28.1% were Democrats, 40.6% were Republicans, and 31.3% were registered with neither party. Professor Lichtman noted this fact in his expert report submitted to the trial court. Of the four counties that comprise Districts 25, 26, and 27 in CP-1, Lichtman found that "Hispanic registered voters are closely divided among Republicans (36.5%), Democrats (30.6%), and Independents and Others (32.9%)" based on 2014 registration.

Because there is scant evidence before this Court that Hispanics in Benchmark District 25 vote cohesively, and

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[11] We note that in their arguments before this Court, all parties correctly stated two prongs of our test for retrogression—whether the minority candidate of choice is likely to prevail in the relevant contested party primary, and whether that candidate is likely to prevail in the general election—but omitted from their analysis the first prong of our test, whether the minority group votes cohesively. *See* Apportionment VII, 172 So. 3d at 404-05; **Apportionment II, 89 So. 3d at 889**; Apportionment I, 83 So. 3d at 667-68.

As to cohesion, this Court expressly stated in *Apportionment I* that the leading case interpreting some of these [**77] requirements requires a preliminary showing of cohesion. Specifically, the opinion stated, HN11[↑] "[Thornburg v. ]Gingles[, 478 U.S. 30, 50, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)], set out three 'necessary preconditions' that a plaintiff is required to demonstrate before he or she can establish that a legislative district must be redrawn to comply with Section 2. These preconditions require an individual challenging the plan to show that: (1) a minority population is 'sufficiently large and geographically compact to constitute a majority in a single-member district'; (2) the minority population is 'politically cohesive'; and (3) the majority population 'votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" Apportionment I, 83 So. 3d at 622 (quoting Gingles, 478 U.S. at 50-51). "When the three *Gingles* preconditions are met, courts must then assess the totality of the circumstances to determine if the Section 2 'effects' test is met—that is, if minority voters' political power is truly diluted." *Id.*

The *Gingles* preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis. *See, e.g.,* (noting that "[a]t the outset, a court addressing a proposed voting plan under Section 5 must determine whether there is cohesive voting among minorities and whether minority/White [**78] polarization is present"). "[W]hen we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5." Apportionment I, 83 So. 3d at 625.

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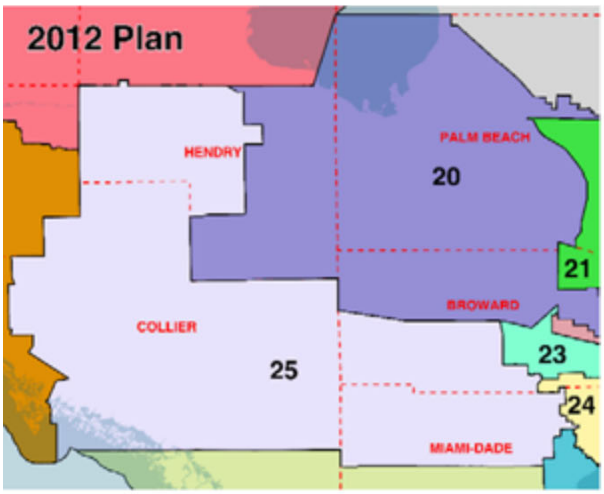
since the trial court found that the Legislature's experts were "less persuasive" than the Coalition Plaintiffs' expert, we affirm the trial court's conclusion that District 26 in CP-1 does not diminish the ability of Hispanics to elect representatives of their choice.

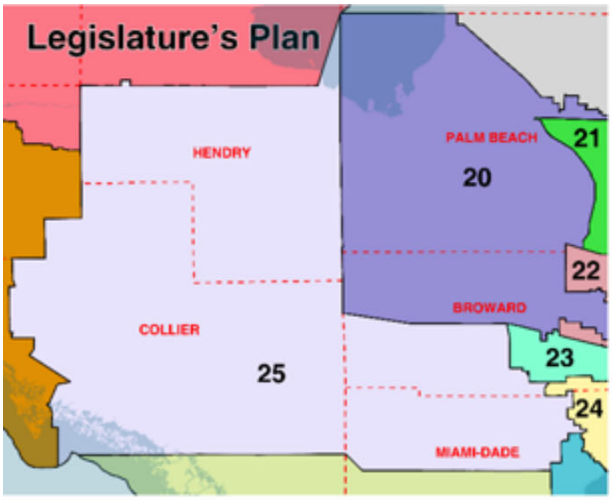
In conclusion, there was competent, substantial evidence to support the trial court's findings that the Legislature failed to meet its burden justifying its chosen configuration of Districts 26 and 27 when CP-1's configuration of these districts were objectively better by tier-two standards. We affirm the trial court's recommended adoption of CP-1's configuration of Districts 26 and 27.

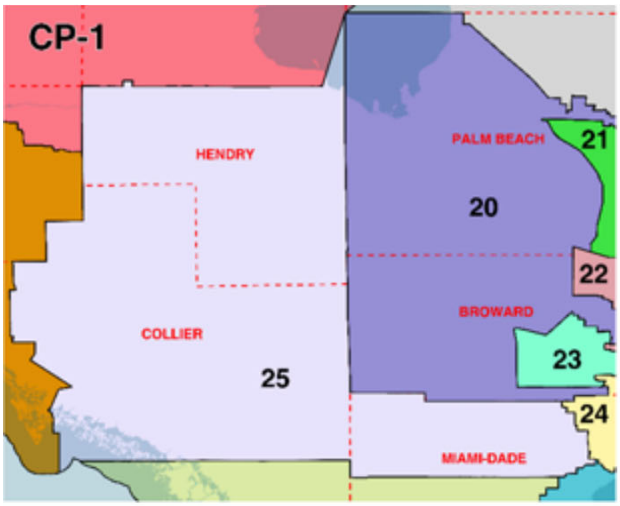
### C. DISTRICT 25

In 2012, the Legislature split Hendry County between Districts 20 and 25. The Challengers objected to this configuration on the basis that it resulted in unncessary tier-two deficiencies. In *Apportionment [**79] VII*, we determined that the Legislature could not justify its configuration, and that "District 25 must be redrawn to avoid splitting Hendry County." *172 So. 3d at 411*.

During the special session, legislative staff drew the Base Plan to keep Hendry County wholly within District 25, and made resultant changes to the surrounding Districts—Districts 20, 21, 22, and 23.[12] The House and the Senate adopted the [*288] Base Plan configuration of District 25, and adopted amended configurations of Districts 20, 21, 22, and 23 to keep additional cities whole.




During the trial court proceedings, the Coalition Plaintiffs objected to the Legislature's configuration of District 25 and the surrounding South Florida districts. They argued that their proposed remedial plan, CP-1, demonstrated that the Legislature rejected more tier-two compliant

[12] Districts 21 and 22 were also changed for other purposes not directly related to the Hendry County issue.

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configurations, and that therefore the Legislature could not justify its configurations.

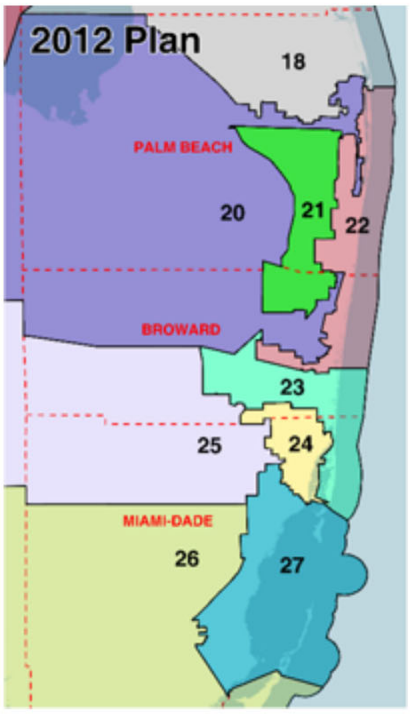
The trial court found that "[t]he Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two compliance considerably," calling CP-1 "hands down the best tier two performing map" of [**80] the plans proposed by the parties. Trial Court Order at 12. The trial court found CP-1 more visually compact than the Legislature's plan, and noted that it was also superior with respect to statistical compactness and city splits. Specifically, the trial court found that CP-1's District 20 "incorporates the whole city of Miramar, which the legislative proposals split between Districts 24 and 25. As such, CP-1's configuration of District 20 changes the border of District 24. It also eliminates an appendage protuding down from District 20 into District 21 in the legislative proposals that splits six cities along the borders of Districts 21 [and 22]." Trial Court Order at 4. Accordingly, it determined that the Legislature has not met its burden [*289] with respect to the South Florida districts and recommended that this Court adopt CP-1.

We agree with the trial court's factual determinations and conclusions. The alternative maps do indeed demonstrate that the Legislature could have complied with this Court's directive regarding District 25 in a way that improved tier-two compliance dramatically across South Florida. CP-1 makes seven more cities whole, eliminates a county split, has seventy-three [**81] fewer miles of border perimeter, improves statistical compactness in five districts, and improves or maintains visual compactness in the three others. Although statistical compactness decreases in one district—District 25—this is a direct result of the district withdrawing from Broward County and increasing the number of whole cities. District 25's visual compactness remains the same, especially considering that the area of Broward County which was removed from the District, resulting in the decreased compactness scores, is mostly unpopulated.

Go to table2

The Legislature argues that CP-1 renders District 20 unconstitutionally noncompact by adding a new, unnecessary appendage on its south end. Although District 20's south Broward arm is an appendage, it is entirely made up of one whole city (Miramar), uses the county line for its entire southern boundary, uses the city line for its entire northern and eastern boundaries, and has no impact on the district's compactness [**82] scores. The Miramar arm results from the elimination of a different, more visually bizarre appendage that stretches down I-95 through the middle of District 21, splitting three cities in the process. It also has the effect of eliminating an appendage of District 22 that reaches between Districts 20 and 23 in the Legislature's plan. Furthermore, District 23's southern appendage that reaches down into Miami Beach, and District 20's appendage that reaches up I-95 north of Fort Lauderdale, are both reduced. The map's improvements to city splits, county splits, and compactness are directly a result of that Miramar arm.

[*290]

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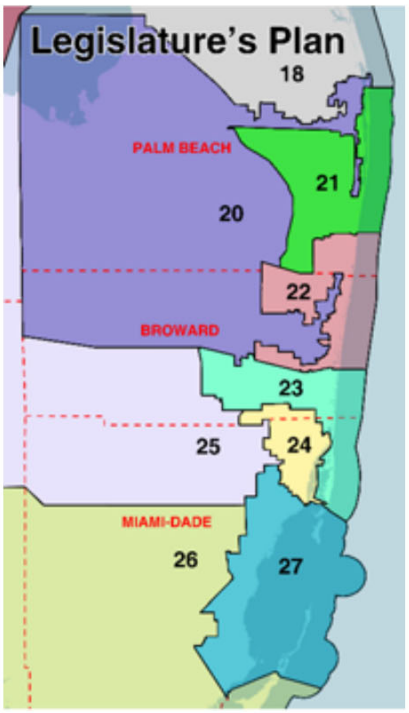


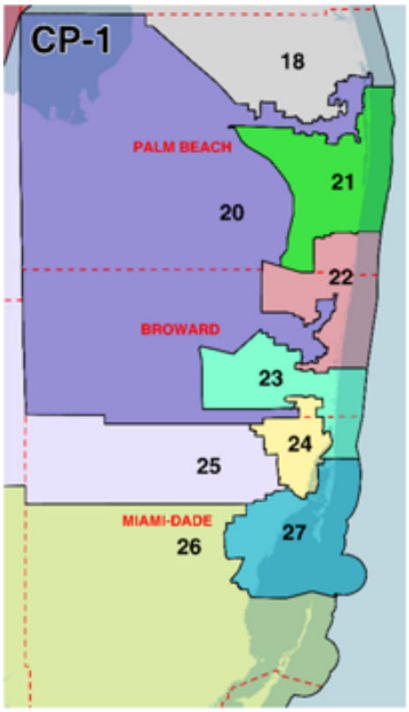


The Legislature's claim that CP-1 disregards the compactness standard in an effort to preserve cities misses the mark, since neither the Legislature's nor CP-1's District 20 can be considered "compact." That noncompactness is necessary to comply with tier-one and maintain its status as a district in which black voters have the ability to elect represenatives of their choice. But *HN12*[↑] the fact that a district may be less compact does not mean that the Legislature is free to disregard the other tier-two standards, like following political and geographical boundaries where feasible. [**83] In addition, the Legislature's premise that CP-1's District 20 is visually less compact than the Legislature's is incorrect. CP-1's District 20 is at least as compact—as every compactness score suggests—if not more so, as the trial court found, and as we agree.

In sum, CP-1 adheres to tier-two criteria more faithfully than the Legislature's plan, while presenting no tier-one issues. The Legislature does not offer an adequate justification for its adoption of a less tier-two compliant plan, and we therefore conclude that there was competent, substantial evidence to support the trial court's findings that the Legislature does not meet its burden with respect to District 25 and the surrounding districts.

### D. DISTRICTS 21 & 22

Districts 21 and 22 were the last pair of the eight specific districts we invalidated in *Apportionment VII*. In 2012, the Legislature drew Districts 21 and 22 to run North-South, parallel to each other along the Atlantic coast. Both the Coalition Plaintiffs and the Romo Plaintiffs, in their arguments to this Court in *Apportionment VII*, contended that these districts could have been drawn in a more constitutionally compliant manner and that the Legislature unjustifiably [**84] rejected one such configuration in which the districts were "stacked" on top of each other. *172 So. 3d at 411*.

Addressing this challenge in *Apportionment VII*, we concluded that the trial court erred in deferring to the Legislature's enacted configuration. *Id. at 412*. Based on evidence that the Legislature had rejected a staff-drawn proposal to draw Districts 21 and 22 in a more tier-two

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compliant "stacked" orientation, and based on the Challengers' trial maps, which maintained [*291] a North-South orientation but improved tier-two compliance by keeping more cities whole and eliminating an irregular appendage into District 22, we held that the Legislature had not justified its configuration and directed that the districts must be redrawn. *Id.* "We [did] not, however, instruct that the Legislature must necessarily redraw the districts in a 'stacked,' horizontal configuration," but rather "[left] it for the Legislature to determine how to redraw these two districts, with the understanding that tier-two compliance could be improved and, given the shift in the burden, that the Legislature must be able to justify its redrawn configuration of these districts." *Id. at 412-13*.

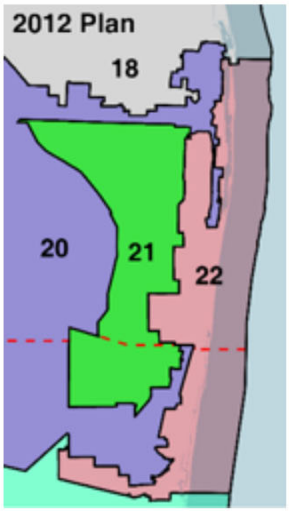
During the special session, both the House and the Senate adopted [**85] the configuration of Districts 21 and 22 drawn by legislative staff in the Base Plan, as amended solely to keep additional cities whole. That configuration redrew these districts in a "stacked" manner.

During the session, there was considerable public testimony from Palm Beach and Broward County leaders in support of maintaining a North-South configuration in order to respect the separate coastal and inland communities of interest there. During the trial court's remedial proceedings, the Romo Plaintiffs also objected to the Legislature's adopted configuration, arguing that the Legislature redrew Districts 21 and 22 with the intent to disfavor their Democratic incumbents, Congresspersons Ted Deutch and Lois Frankel, by pairing them both in District 21. The trial court, however, rejected the Romo Plaintiffs' argument, concluding that there was "insufficient evidence" that "such was the intent."

The trial court found that CP-1, besides being more tier-two compliant with respect to Districts 20 through 27, was preferable with respect to Districts 21 and 22 because CP-1 "eliminates an appendage protruding down from District 20 into District 21 in the legislative proposals that splits six [**86] cities along the borders of Districts 21 [and 20]." Trial Court Order at 4.

Before this Court, the Romo Plaintiffs do not object to CP-1's configuration, despite that this configuration pairs two Democratic incumbents against each other. The Coalition Plaintiffs object to the exact "stacked" configuration the Legislature adopted, as part of the general reconfiguration of these South Florida districts in CP-1. Specifically, the Coalition Plaintiffs allege that the Legislature cannot justify its configuration for Districts 21, 22, and surrounding districts because it rejected more tier-two compliant alternatives. Indeed, CP-1 presents such an alternative, by marrying the "stacked" configuration first introduced by legislative staff in 2012 with the "appendage-less" configuration included in the original Romo trial maps. Thus, CP-1 creates a more tier-two compliant configuration of the two districts.

[*292]

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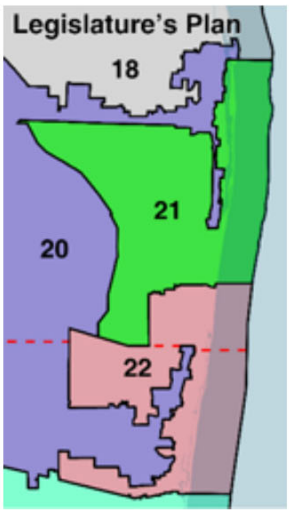


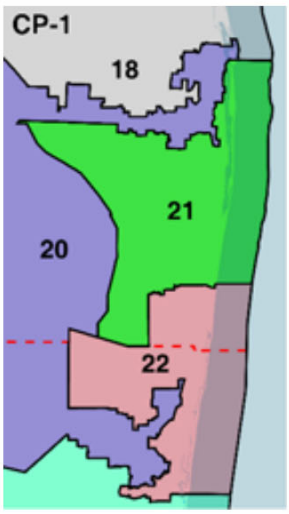


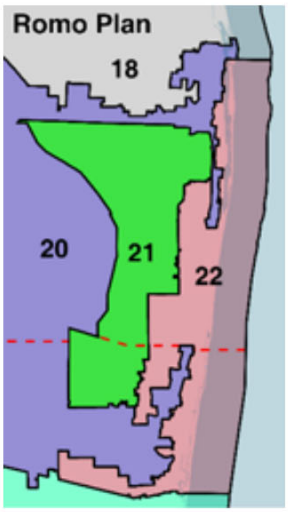


Compared to the Legislature's proposal, Districts 21 and 22 in CP-1 are more visually compact. CP-1 eliminates an incursion by District 20 into the middle of District 21, eliminates a southern appendage of District 22, and reduces District 20's finger into District 22.

CP-1 also keeps the cities [**87] of Boynton Beach, Lake Worth, and Lantana whole within District 21, and keeps Deerfield Beach whole within District 22, whereas those municipalities are split in the Legislature's proposal. As the trial court determined, CP-1 improves tier-two compliance "considerably" over the Legislature's proposal, both with respect to Districts 21 and 22 and in South Florida as a whole.

Because we instructed in *Apportionment VII* that Districts 21 and 22 be redrawn to improve compactness, we have no reason to reject an obviously more tier-two compliant configuration. For these reasons, we uphold the trial court's findings based on competent, substantial evidence and affirm the trial court's finding that the Legislature has not met its burden to justify its chosen configuration of Districts 21 and 22 that was less compact.

### E. THE HOUSE AND SENATE VERSIONS OF CENTRAL AND SOUTHWEST FLORIDA

Having addressed the eight districts we specifically required the Legislature to redraw—Districts 5, 13, 14, 21, 22, 25, 26, 27—and the districts affected thereby, we now turn to the districts that were the subject of disagreement between the House and the Senate in the special session that ultimately ended deadlocked. [**88] The trial court and this Court address six districts—Districts 9, 10, 11, 15, 16, and 17—as a result of the House's motion for further relinquishment and the House and Senate's inability to agree.

We emphasize that these districts, located in central and southwest Florida, were not the subject of dispute in *Apportionment VII*, but were redrawn to accommodate necessary changes to nearby districts invalidated in *Apportionment VII*. The Challengers do not dispute the

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configuration of these districts, although, as discussed below, they do prefer one variation over the others.

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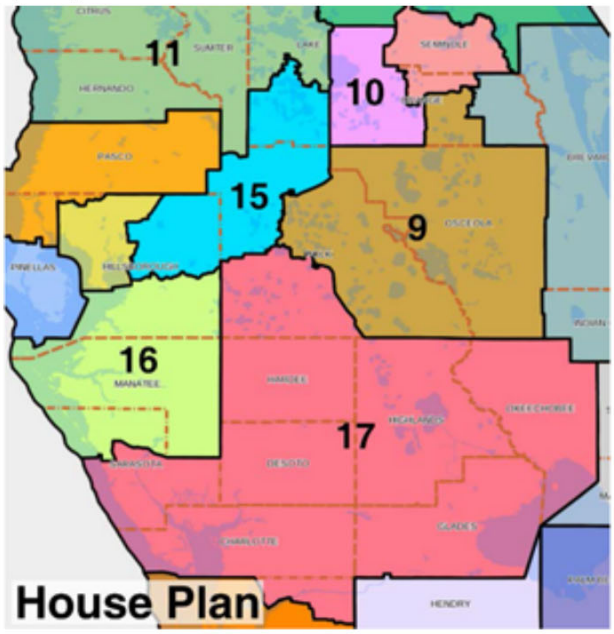


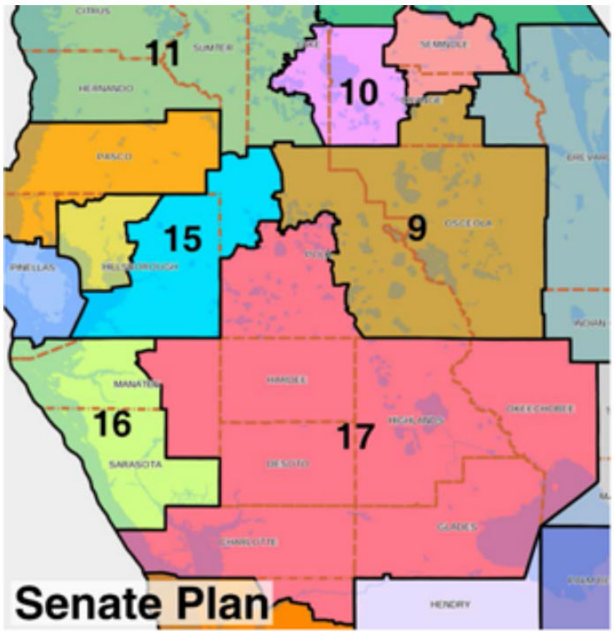


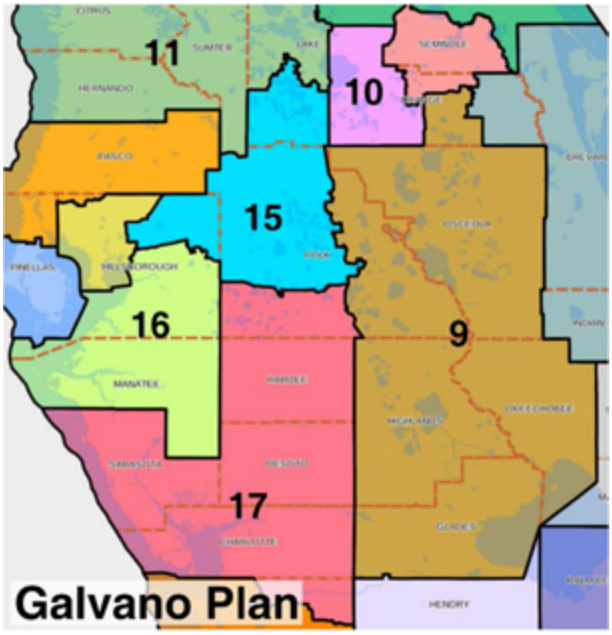


Specifically, the House Plan (9071) and the Senate Plan (9062) differ in these six districts, and the Galvano Plan (9066) differs from the House Plan only in four districts and from the Senate Plan in six. Importantly, the six districts within each of the plans have no impact on the configurations of other districts before this Court for review. Ultimately, after reviewing the House, the Senate, and the Galvano Plans for tier-two compliance, the trial court recommended adoption of the House Plan for these districts.

In weighing which of the three plans—the House Plan, the Senate Plan, or the Galvano Plan—to recommend to [**89] this Court, the trial court determined that "[b]oth the House and Senate have legitimate reasons for preferring their respective configurations" and that "[i]t is a close call." Comparing the House Plan to the Senate Plan, the trial court determined that "compactness is slightly better" in the House Plan but did not note any other tier-two differences. The trial court stated that the Senate Plan "was purportedly designed to address the perceived 'donor'[13] [*294]

[13] The parties use this term to refer to instances in which a county has a district that splits the county and draws part of its

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status of Hillsborough County, but it makes no similar effort to address the 'donor' status of other counties in the map, and it exacerbated the 'donor' status of Orange County." Trial Court Order at 6.

Comparing the House Plan to the Galvano Plan, the trial court found that the Galvano Plan preserves one more county, splits one more city, and decreases visual and statistical compactness somewhat. The Challengers prefer the House Plan, because, as they claim, it does not contain tier-two defects present in the Senate and Galvano Plans, and does not raise any tier-one questions, as the Senate [**90] and Galvano Plans do.

Because the Legislature did not agree on a configuration in this area of the state, we face a novel and somewhat different task than in our review of the other districts. As to these six districts, we are not comparing a legislatively enacted or agreed-upon plan to alternative plans in order to determine whether there is a violation of the constitutional standards. We are, in addition, not fashioning our own plan.

Instead, in light of our directions to the trial court to make a recommendation between the plans presented by the parties in this remedial process, we review the trial court's recommendation, keeping in mind that the Legislature has the burden of justifying their proposed configurations.

During its review of these districts, the trial court first determined whether each plan complies with the constitutional requirements. Although the Coalition Plaintiffs argue that the Senate's plans "give rise to potential incumbent favoritism concerns," the trial court did not make any finding that would suggest so. Before this Court, the Coalition Plaintiffs focus on the alleged tier-two shortcomings of the Senate and Galvano Plans.

population from other counties.

Based on the evidence in the record, [**91] we approve the trial court's findings that none of the three plans violate the tier-one standards with respect to these six central and southwest Florida districts.

The trial court next focused on whether the plans were tier-two compliant. *HN13*[↑] To determine whether the districts are compact, this Court begins "by looking at the 'shape of a district'" to evaluate whether the district has "an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement." *Apportionment I, 83 So. 3d at 634* (quoting *Hickel v. Se. Conference, 846 P.2d 38, 45 (Alaska 1992)*).

During the evidentiary hearing, the House claimed that its plan is the most compact, citing its higher compactness scores, superior visual compactness, "smoother boundaries," and "clear and consistent methodology." The House criticizes the Senate Plan for having an unpersuasive justification, for being "designed to address the perceived 'donor' status of Hillsborough County" but "not address[ing] the 'donor' status of other counties," and for "exacerbat[ing] the 'donor' status of Orange County." The Challengers agree.

The Senate, on the other hand, claimed before the trial court—as it does before this Court—that its plan is preferable because it leaves District 16 unchanged from the enacted 2012 [**92] plan and avoids an unnecessary split to Hillsborough County.[14] Alternatively, [*295] the Senate claims that the Galvano Plan is preferable because it keeps more

[14] An uninhabited portion of far southwestern Hillsborough County, which includes Egmont Key and a portion of the Sunshine Skyway Bridge, is assigned to District 16 in the Senate Plan. Since District 16 includes no population from Hillsborough County, it is not considered to include part of the county for the purpose of counting splits.

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counties whole better than any other plan.

The trial court found the House Plan to be more compact than the Senate Plan and the Galvano Plan and noted that while the Senate Plan does not divide Sarasota County, as the House Plan does, it achieves this result by dividing Manatee County (which the House Plan does not). Additionally, upon an examination of the numerical compactness scores, the trial court found that overall, the House Plan was more tier-two compliant. Trial Court Order at 6-7.

The trial court noted that "[b]oth the House and Senate have legitimate reasons for preferring their respective configurations." Trial Court Order at 5. We agree, and commend both the House and the Senate for passing plans that [**93] comply with our constitutional requirements. As we stated in *Apportionment I*, once the constitutional criteria are satisfied, there may still be other factors to determine which plan ought to be adopted. *See, e.g.,* *Apportionment I, 83 So. 3d at 673* (*HN14*[↑] "[M]aintaining communities of interest is not required by the constitution, and comporting with such a principle must not come at the expense of complying with constitutional imperatives.").

Acknowledging that redistricting does not have to be a mechanical exercise, we note that the Senate Plan, like the House Plan, keeps rural communities of interest together in District 17. However, the Galvano Plan splits up rural areas between Districts 9, 16, and 17. The Senate Plan additionally does not make any changes to District 16, which was not invalidated by this Court in *Apportionment VII*, from its 2012 configuration. This district contains all of Sarasota County and the vast majority of the population of Manatee County. While the trial court found the House Plan's configuration of this district to be more tier-two compliant, we appreciate the Senate's desire to keep the Sarasota-Manatee community of interest intact in District 16.

Given the unique procedural posture of this case, the Legislature's [**94] inability to agree forces the Court to adopt one—and only one—of these configurations. Mindful of the trial court's findings that the House Plan best complies with tier-two standards, we now review the trial court's finding that the House Plan is preferable over the Senate and Galvano Plans.

Our analysis concludes that no plan has a meaningful advantage with respect to compactness. As we have already established, all three plans are constitutionally compact. They are also all equally visually compact. The differences in statistical compactness are slight, and certainly not great enough to give any one plan a clear edge. *See* *Apportionment I, 83 So. 3d at 635* ("*HN15*[↑] The Florida Constitution does not mandate . . . that districts within a redistricting plan achieve the highest mathematical compactness scores.").

Similarly, with regard to utilizing existing boundaries, no plan has a meaningful advantage. Each makes tradeoffs to follow some boundaries over others for legitimate policy reasons. For instance, the Senate Plan prioritizes reducing the number of times Hillsborough County is split, while giving less priority to keeping a district wholly within Orange County. Alternatively, the House Plan does keep a district wholly [**95] within Orange County, our [*296] state's fifth-largest, within a district. While the House Plan's Districts 15 and 16 do divide eastern Hillsborough, the division line is the Alafia River, which is a geographic boundary. While there may be competing policy interests at play, we are not in a position to evaluate those policy concerns. We also do not consider any of these tradeoffs to be objectively superior to any other.

We conclude that there is no discernible difference between the three plans when it comes to the tier-two standards. No plan is more constitutionally compliant than any other and none is objectively superior in any

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meaningful way.

But, ultimately, the Legislature's failure to agree and enact one of these configurations forces us, as it did the trial court, to choose a plan. The trial court determined that the House Plan is preferable and the Challengers incorporated the House Plan into CP-1 and now urge its adoption before this Court. While both Senate plans and the House Plan are tier-two compliant, as the trial court found, the House Plan, statistically, is slightly more compact than the two Senate Plans. No party has given us legal basis to conclude that the House Plan poses [**96] more problems than either the Senate Plan or the Galvano Plan. Accordingly, this Court approves the trial court's recommendation to adopt the House Plan's configuration of Districts 9, 10, 11, 15, 16, and 17.

## REMEDY AND CONCLUSION

We remain "[c]ognizant that HN16[↑] this Court's role is not to select a redistricting map that performs better for one political party or another, but is instead to uphold the purposes of the constitutional provision approved by Florida voters to outlaw partisan intent in redistricting." *Apportionment VII, 172 So. 3d at 369*. We have endeavored to give meaning to the Fair Districts Amendment throughout our previous opinions. As we stated in *Apportionment I*:

> HN17[↑] The citizens, through our state constitution, have now imposed upon this Court a weighty obligation to measure the Legislature's Joint Resolution with a very specific constitutional yardstick. The constitutional imperatives set forth in *article III, sections 16* and *21, of the Florida Constitution* are the instructions given to the Legislature by the citizens, mandating how apportionment plans are to be drawn. These instructions are a further expression of the will of this state's citizens to ensure that their right to elect representatives is not frustrated as a result of partisan favoritism or incumbent protection. The citizens have expressed [**97] their will, requiring the Legislature to "redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations" and "to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts . . . are avoided." *Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d at 181, 187-88* (plurality opinion). The new constitutional provisions seek to level the playing field in how legislative districts are drawn. These mandates are specific, and the citizens of this state have entrusted to the Supreme Court of Florida the constitutional obligation to interpret the constitution and ensure that legislative apportionment plans are drawn in accordance with the constitutional imperatives set forth in *article III, sections 16* and *21*.

*Apportionment I, 83 So. 3d at 684*.

HN18[↑] The Fair Districts Amendment "sought to eliminate the age-old practice of partisan political gerrymandering where the political party and representatives in power [*297] manipulate the district boundaries to their advantage." *Apportionment VII, 172 So. 3d at 369*. The amendment established "stringent new standards" for the "'once-in-a-decade' apportionment," and these new standards "clearly act as a restraint on the Legislature." *Apportionment I, 83 So. 3d at 597*. The goal of the Fair Districts Amendment was, in the words of the Eleventh Circuit Court of Appeals, to "level [**98] the playing field." *Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1285 (11th Cir. 2012)*.

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At the same time, we recognized that HN19[↑] "any redrawing of lines, regardless of intent, will inevitably have an *effect* on the political composition of a district and likely whether a political party or incumbent is advantaged or disadvantaged." *Apportionment I, 83 So. 3d at 618*. We also recognized that improper intent did not indicate a "malevolent or evil purpose." *Apportionment VII, 172 So. 3d at 378*. In *Apportionment I*, we rejected any suggestion that "once the political results of the plan are known, the Legislature must alter the plan to bring it more in balance with the composition of voters statewide. HN20[↑] The Florida Constitution does not require the affirmative creation of a fair plan, but rather a neutral one in which no improper intent was involved." *83 So. 3d at 643*.

In our first opinion after Florida voters approved the Fair Districts Amendment, we emphasized that HN21[↑] despite the stringent constitutional standards that operated as a restraint on the legislature, we would defer to legislative decisions on the drawing of districts as long as there was no violation of constitutional requirements. *Apportionment I, 83 So. 3d at 608*. We noted that our limited role was simply to "ensur[e] compliance with constitutional requirements" and to invalidate a redistricting plan only if it ran afoul of such mandates. *Id.* In [**99] that vein, in *Apportionment I* we upheld the facial constitutionality of the House's legislative plan and in *In re Senate Joint Resolution of Legislative Apportionment, 89 So. 3d 872 (2012)* (*Apportionment II*) we upheld the facial constitutionality of the Senate plan.[15]

Now, however, as we explained in *Apportionment VII*, the Court has a "solemn obligation to ensure compliance with the Florida Constitution in this unique context, where the trial court found the Legislature to have violated the constitutional standards during the 2012 redistricting process." *Apportionment VII, 172 So. 3d at 415*. We have an additional obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts. *Id. at 373*.

Having reviewed the Trial Court Order recommending adoption of a remedial plan, we approve the House Plan's configuration of Districts 1 through 19, and approve the trial court's recommended configuration of Districts 20 through 27. In doing so, we reject the Challengers' request that we retain jurisdiction of this case, as we have every confidence that the Legislature and the State will adhere [**100] to the congressional redistricting plan this Court approves today. As the Senate made clear in its supplemental reply brief filed in this Court, the "Senate has no intention of adopting another congressional plan before the next redistricting cycle."

Accordingly, we affirm the Trial Court Order and approve the trial court's recommended remedial plan. The congressional redistricting plan approved by this Court [*298] as set forth in Appendix A[16] shall be used for the 2016 Florida congressional elections and for Florida congressional elections thereafter until the next decennial redistricting. The trial court shall enter a final judgment incorporating the approved plan as set forth in Appendix A.

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[15] Related litigation challenging the as-applied constitutional validity of the Legislature's 2012 plan apportioning districts for the Florida Senate remains pending in the trial court.

[16] Appendix A includes a statewide map of the approved plan. The approved plan's .doj file can be accessed online at *http://www.floridasupremecourt.org/decisions/2015/sc14-1905_app_doj.zip* . When read by a computer redistricting application, a .doj file defines the districts in a redistricting plan by delineating which census blocks comprise the districts. It is the format in which this Court has required all plans be submitted in this case.

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Because of the extremely limited timeframe, we limit the time for filing a motion for rehearing or clarification to five days from the date [**101] of this opinion and three days for a response from the date the motion is filed.

IT IS SO ORDERED.

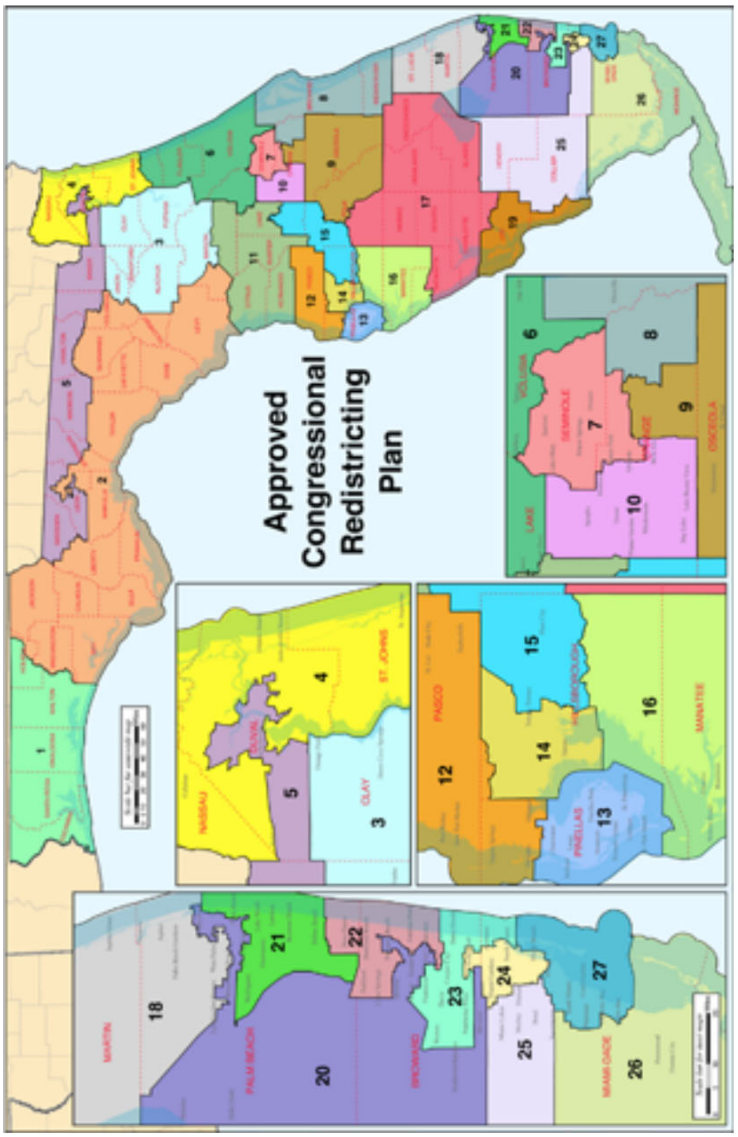
LABARGA, C.J., and LEWIS, QUINCE, and PERRY, JJ., concur.

PERRY, J., concurs with an opinion, in which QUINCE, J., concurs.

CANADY, J., concurs in part and dissents in part with an opinion.

POLSTON, J., dissents with an opinion.

APPENDIX A




APPENDIX B

ORDER RECOMMENDING ADOPTION OF REMEDIAL MAP

THIS CASE is before me on a temporary relinquishment of jurisdiction from the Florida Supreme Court for the purpose of evaluating proposed remedial congressional redistricting maps and making a recommendation to the Court as to which map, or portions thereof, should be adopted. I have reviewed the proposed maps, considered the evidence presented and the arguments of counsel. For the reasons set forth below, I find that

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the alternative map proposed by the Coalition Plaintiffs, identified as CP-1, best complies with the Court's directions and with all constitutional requirements, and therefore recommend its adoption.

## BACKGROUND AND PROCEDURAL POSTURE OF THE CASE

On July 10, 2014, I entered Final Judgment in this case, finding that the Congressional [**126] Redistricting Map enacted by the Legislature in 2012 violated *Article III, Section 20 of the Florida Constitution.* I directed the Legislature to draw another map to address the defects I found, and subsequently approved the remedial map drawn by the Legislature. Both Plaintiffs and Defendants appealed.

On July 9, 2015, the Florida Supreme Court issued its opinion in *League of Women Voters of Florida v. Detzner, 172 So. 3d 363, 40 Fla. L. Weekly S 432 (Fla. July 9, 2015)* (*"Apportionment VII"*), affirming my finding of constitutional violation but determining that I had not gone far enough in my requirements of the Legislature to correct the constitutional deficiencies. The Court directed the Legislature to draw a third map and gave specific instructions as to how to address problems it noted with certain districts (5, 13, 14, 21, 22, 25, 26 and 27.)

As to District 5, the Court declared that it must be an east/west rather than a north/south configuration; Districts 13 and 14 must be re-drawn to avoid crossing Tampa Bay; Districts 21 and 22 must be made more compact, suggesting but not requiring a stacked configuration for these two districts; District 25 must be drawn without dividing Hendry County; Districts 26 and 27 must be drawn so as not to split the City of Homestead.

The Florida Supreme Court temporarily relinquished jurisdiction to this [**127] Court for a period of 100 days for remedial proceedings, specifically, to hear evidence and arguments as to the new map and to recommend whether or not it should be approved. The Legislature met in special session but was unable to enact a remedial congressional map as directed. As there was no enacted map for me to evaluate, I requested further instruction from the Florida Supreme Court.

The Court modified its previous order of temporary relinquishment of jurisdiction, directing me to "make a recommendation to [the Florida Supreme] Court, before the end of the relinquishment period, as to which map proposed by the parties—or which portions of each map—best fulfills the specific directions in [*Apportionment VII]* and all constitutional requirements." Order at 2-3, *League of Women Voters of Fla. v. Detzner, No. SC14-1905 (Fla. Sept. 4, 2015)*.

## PROPOSED REMEDIAL MAPS

The parties have submitted seven proposed remedial maps: 9071, submitted by the House; 9062 and 9066, submitted by the Senate; CP-1, CP-2, and CP-3, submitted by Coalition Plaintiffs; and the Romo Map, submitted by Romo Plaintiffs. A general overview of the maps is as follows:

a. 9071 — The House proposes a modified version of [**128] the base map the staff drew. It differs from the base map by keeping whole four additional cities: Groveland, Auburndale, Riviera Beach, and Sunrise. 9071 includes (1) the same East-West version of District 5 as in the map designated Romo Plan A at trial, (2) a District 14 that does not cross Tampa Bay or divide Pinellas County, (3) a "stacked" configuration of Districts 21 and 22, (4) a District 25 that keeps Hendry County whole, and (5) a District 26 and District 27 that does not split the City of Homestead. 9071 includes 18 split

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counties and 20 split cities.

b. 9062 — Passed by the Senate during the special session, this map modifies Districts 9, 10, 11, 15, 16, and 17 from the staff-drawn configurations in the base map and the House Map 9071. 9062 keeps Sarasota County whole, whereas 9071 divides it. 9062 divides Manatee County, whereas 9071 keeps it whole. 9062 does not include a district wholly within Orange County, as does 9071. It includes 18 split counties and 20 split cities.

c. 9066 — The Senate's alternative map, 9066, was drawn by Senate staff after the special session. It differs from 9071 only as to Districts 9, 15, 16, and 17. It keeps both Sarasota County and Manatee [**129] County whole, while 9071 divides Sarasota County, but it divides the City of Longboat Key. Like 9062, it does not include any district wholly within Orange County. 9066 includes 17 split counties and 21 split cities.

d. CP-1 — Coalition Plaintiffs offer CP-1 as their principal alternative map. Northern and Central Florida in CP-1 include 19 identical districts to the House Map 9071. It differs from 9071, however, in its alternative configurations of Districts 20 through 27 in South Florida. First, CP-1 reconfigures District 20 to keep Hendry County whole (within neighboring District 25), to remain an African American majority-minority district. CP-l's District 20 incorporates the whole city of Miramar, which the legislative proposals split between Districts 24 and 25. It also eliminates an appendage protruding down from District 20 into District 21 in the legislative proposals that splits six cities along the borders of Districts 21.

CP-1, like the legislative proposals, eliminates the split of Homestead between Districts 26 and 27, but also makes them more compact. The border between Districts 26 and 27 in CP-1 also follows major roadways far more closely than the legislative proposals. [**130] CP-1 includes 18 split counties and only 13 split cities.

e. CP-2 and CP-3 — These are alternatives that use the basic configuration of the legislative proposals for Districts 26 and 27, and were offered to show that it was possible to draw districts that more closely follow major roadways, without adversely affecting compactness or dividing additional cities or counties.

f. Romo Map — Romo Plaintiffs modelled their proposed remedial map after 9071 in Northern and Central Florida, modifying only the South Florida districts. There are two significant differences between the Romo Map and 9071. First, the Romo Map retains the non-"stacked" configuration of Districts 21 and 22 in the 2012 and 2014 congressional maps. Second, the Romo Map modifies the boundary between Districts 26 and 27 so that the African-American communities in Richmond Heights, Palmetto Estates, and West Perrine are in District 26, rather than District 27. The Romo Map includes 18 split counties and 23 split cities.

## THE APPLICABLE LEGAL STANDARD AND PARAMETERS OF REVIEW

The Florida Supreme Court has directed me to "make a recommendation...as to which map proposed by the parties—or which portions of each map—best fulfills [**131] the specific directions in [*Apportionment VII*] and all constitutional requirements." The Court has emphasized that the burden remains on the House and Senate to justify their chosen configurations, and that no deference is due to their choices regarding the drawing of districts.

What then am I to make of the language that directs me to especially focus on the House and Senate maps, any amendments offered thereto, and the areas of agreement between the legislative chambers?

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Presumably this means that, even though the Legislature did not enact a map, the ones passed by each chamber, especially where they are in agreement, are the closest we will come to an expression of the preferences of the elected representatives of the people as to a remedial map.

Accordingly, I should first evaluate the maps proposed by the House and Senate to determine which map, or portions thereof, best meet the Court's criteria. Then I should evaluate that configuration in light of any challenges thereto by the Plaintiffs to determine if the Legislative defendants can meet their burden as noted above, or if some other configuration best fulfills the Court's directions and all constitutional requirements.

## THE MAPS [**132] PROPOSED BY THE HOUSE AND SENATE

The House Map (9071) and the Senate Map (9062) as well as the alternative offered by the Senate (9066) are very similar. They differ only as to the configuration of certain districts in Central and Southwest Florida. Both the House and Senate have legitimate reasons for preferring their respective configurations. It is a close call, but I find the House Map (9071) preferable to either Senate map.

First, as to 9062, compactness is slightly better in 9071.

Go to table3
Go to table4

The Senate Map does not divide Sarasota County, while the House Map does, but the Senate Map divides Manatee County, while the House Map does not. The Senate Map was purportedly [**133] designed to address the perceived "donor" status of Hillsborough County, but it makes no similar effort to address the "donor" status of other counties in the map, and it exacerbated the "donor" status of Orange County.

The Senate alternative map (9066), referred to as the Galvano Map, was drawn by staff at the request of Senator Galvano in the hopes of addressing some concerns the House had with 9062. It was drawn after the session and thus was not filed, debated, or voted on by the Senate. It splits neither Sarasota nor Manatee County, and thus preserves one more county, but it splits Longboat Key, which straddles the boundary between Sarasota and Manatee Counties. As shown below, it decreases somewhat the visual and numerical compactness of the four districts that differ between it and the House Map.

Go to table5
Go to table6

Although 9066 is an improvement over 9062, I find that the House Map (9071) still compares favorably to it. I also note that the Plaintiffs' proposed maps are aligned with the House Map (9071) relative to these districts and represents their agreement that the proposed House Map is preferable to those proposed by the Senate.

That does not mean, however, that the Plaintiffs agree that 9071 is constitutionally drawn and best complies with the Court's directions. They do not. I now consider their challenges to 9071 and their proposed alternatives.

## PLAINTIFFS' CHALLENGES AND THEIR ALTERNATIVE MAPS

One of the tenets of our adversarial system of justice is that a court should limit itself to a consideration and resolution of disputed issues between the parties before it. In the context of this case, that means that if the parties are in agreement as to any particular district, it is no longer an issue for me to resolve. This conclusion is strengthened by the directions of the Florida Supreme Court to me to recommend one of the maps proposed by the parties or some combination thereof. I am not at liberty to draw something different than what is

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contained [**135] within the maps proposed by the parties.

In this regard, neither the Coalition Plaintiffs nor the Romo Plaintiffs take issue with Districts 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 18, and 19, as reflected in 9071, 9062 and 9066. These districts are, on the whole, more compact and contain fewer city and county splits than in the 2012 and 2014 legislative maps. The Plaintiffs' proposed maps also contain the same configuration for these districts.

This group includes Districts 5, 13 and 14—which the Court required to be redrawn. I made inquiry of the witnesses as to District 5 specifically, as it appears still to be one of the least compact of the districts. I was told that the Legislature felt safe with the configuration chosen as it was one previously proposed by the Romo Plaintiffs and referenced with approval in the Court's July 9th Order. Regardless, I have no evidence before me that it could have been drawn more tier two compliant without adversely affecting minority voting rights protected under tier one.

The Plaintiffs do take issue, however, with Districts 20 through 27. The Plaintiffs complain that Districts 26 and 27 in 9071 were drawn to favor Republicans and disfavor Democrats in [**136] violation of the tier one prohibition, and that all of the contested districts could have been made more tier two compliant. Romo Plaintiffs also complain that Districts 21 and 22 were drawn to disfavor two Democratic incumbents.

It appears that the Legislature took appropriate steps to guard against improper partisan influence in the drawing of its base map and in opening up the process of amendments to public scrutiny. Plaintiffs complain that the actual drawing of the base map was not open to the public, nor recorded. Recording the sessions would probably have been a good idea, less so perhaps drawing the map in public. Neither would prevent a map drawer from manipulating lines with a partisan intent. One can research political performance in private. Team members can communicate outside a recorded session.

And, more importantly, once staff has drawn a base map, individual legislators can easily determine the expected political performance of each district. They can recommend changes which might improve tier two performance somewhat, but motivated by a desire to affect political performance. They might recommend no changes, recognizing that by a happy coincidence the base map had [**137] the political effect desired.

In short, there are many opportunities to manipulate the lines of a map for partisan reasons, all the while producing a map that is reasonably compact and appropriately respectful of county and city boundaries. And it is difficult to know, or to prove, that improper intent is involved.

I remain convinced that the best, if not perfect, way to guard against improper partisan intent in a map is to look closely at any tier two shortcomings and scrutinize the purported reasons for those shortcomings. If there is a way to make a map more tier two compliant without sacrificing tier one requirements, then it should be done. This will result in not only a more compact map that splits less cities and counties, it will go far in minimizing the risk, or the perception, that it was drawn with a partisan intent.

This difficult issue of intent is complicated here because there is no official legislative map to consider. There is not a single map to approve or disapprove. 9071 was the product of the House, so it is the intent of that chamber that is relevant. And for the most part, 9071 is little changed from the base map prepared by staff-and any changes improved tier two [**138] compliance. Districts 20-27, which are the ones in dispute, were

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unchanged. So the intent or motivation of the map drawers takes on particular importance. And I do not find from the evidence that the staff map drawers had a conscious intent to favor or disfavor a political party or incumbent.

I understand why the Plaintiffs might be suspicious as to Districts 26 and 27. The Florida Supreme Court, in its July 9* Order, found that the Legislature had needlessly split the City of Homestead, thereby turning one Democratic and one Republican district into two Republi-canleaning districts. The proposed map, 9071, which admittedly does not split Homestead, actually enhances the partisan effect in favor of the Republican Party. The irony of the cure being worse than the illness is not lost on me.

There is also an irony as well, however, in taking great pains to draw a map without any consideration of political performance but with the effect of doing so, which is then considered as evidence of improper partisan intent. The fact that 9071 has the effect of favoring a political party in Districts 26 and 27 is simply not enough to convince me that those districts were drawn with that specific intent. [**139]

What does concern me, however, is the shortcomings in the House Map as to tier two requirements. It appears that the map drawers for the Legislature took a very minimalist approach to rectifying the problem identified in Districts 26 and 27. In essence, they drew two versions--one with Homestead in District 26 and one with Homestead in District 27. They then made a cursory analysis to see if it would perform for minorities, compared the tier two metrics of both, and chose the one that was most compact.

The cursory analysis regarding performance for minorities did not include a comparison against the benchmark district—an analysis necessary to determine whether the configuration unnecessarily packed minorities into one district. They testified that this function would be done by the expert hired by the Legislature for this purpose. It appears, however, that the expert did not make such a comparison to the benchmark district either.

This approach would not be of such concern if they were at the beginning of the process, enacting the original redistricting map, which would be reviewed for compliance only and with deference given to the Legislature's choices. But that was not the situation [**140] facing the Legislature. Rather, it had been tasked with preparing a remedial map. It would have the burden of defending its choices in all respects.

The map drawers and their bosses seemed uninterested in exploring other possible configurations to see if these districts could be drawn more compact and reduce county and city splits. I would think the Legislature would have anticipated questions about improving tier two compliance and have been prepared to respond to such questions by saying they had explored several possibilities, and they chose the most compliant version.

The Legislature complains that the Plaintiffs did not participate in the open and transparent process of drawing a remedial map. But when the Plaintiffs tried to participate by pointing out what anyone in the Legislature could also have determined—that the new districts were more Republican leaning than before—they are accused of trying to improperly insert political performance into the equations.

I understand the dilemma faced by the Legislature in that situation. If it 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 [**141] districts when someone complains. But if a citizen

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cannot point out what appears to them to be political gerrymandering in certain districts, without the Legislature shutting down any further consideration of those districts because they would then be "favoring a political party" it is difficult to see how public participation in the process could ever effectively occur. There was no reason why the Legislature could not have taken another look at the South Florida districts, not for political performance but for better tier two compliance, either in response to the Plaintiffs' complaint, or better yet, on its own initiative.

The Coalition Plaintiffs' map drawer seemed to have no trouble improving tier two compliance considerably. Indeed, CP-1 is hands down the best tier two performing map of the group. As to Districts 20-27 it is more compact and splits fewer cities than any of the others.

The following charts show the differences in compactness and city splits among the proposed plans:

Go to table7
Go to table8

The Romo Plaintiff's argue that their map is superior, in part, because it corrects what they perceived to be a tier-one violation of targeting incumbents. Professor Ansolabehere testified that two Democratic incumbents live in the panhandle shaped area in the southwest of District 21 in both the Legislative proposal and CP-1. There is insufficient evidence for me to conclude, however, that such was the intent. Accordingly, there is no justification for this less tier-two compliant configuration.

The Legislature seeks to defend its map against CP-1 by arguing that CP-1 is not visually compact, was drawn with improper partisan intent, and causes retrogression, i.e., diminishes the ability of Hispanics in District 26 to elect a candidate of their choice. As to the argument concerning visual compactness, I suppose that is in the eye of the beholder, but I find CP-1 more visually compact than 9071. And, as noted above, [**143] its metrics are much better for compactness and it splits less cities.

On the issue of partisan intent, it is the Legislature that bears the burden of defending its proposed maps, not the Plaintiffs. While evidence that a map drawer might be a partisan or have a bias is certainly relevant, it would not be a reason to automatically reject it. Just as the Legislature could receive input from partisans in its process of drawing a map and give it the weight it felt appropriate, so can I.

Moreover, I find no evidence to suggest that CP-1 was drawn with improper partisan intent. Mr. O'Neill, Coalition Plaintiffs' map drawer, testified that he strove to draw the most tier-two compliant configuration of South Florida, did not consider political or incumbent data in drawing the maps, and was not given any other direction but to focus on and comply with the requirements of *Article III, section 20* and Apportionment VII and to improve compactness and adherence to major roadways where possible. I found him to be straightforward in his testimony, logical in his approach to drawing the districts and persuasive in his conclusions.

As to the claim that Districts 26 and 27 as drawn in CP-1 would be retrogressive, the Legislature [**144] presents a two-step argument. First they assert that District 26 in CP-1 weakens the Hispanic vote share in the Democratic primary. This leads to retrogression, they assert, because CP-1 also makes District 26 into a district that will lean Democratic in the general election. If the Hispanic candidate of choice cannot win the Democratic primary, there will be no Hispanic candidate elected in the general election because the Republican Hispanic candidate cannot defeat the Democratic candidate. It is a cogent, logical, argument. The problem

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is that the argument is much more compelling than the evidence offered in support of it.

The Plaintiffs' expert, Professor Lichtman, testified via his report. In it, he favorably compared Districts 26 and 27 in CP-1 to districts in both the 2012 congressional plan and 2002 benchmark congressional plan and found no retrogression. Although I did not have the opportunity to judge his demeanor while testifying, his report is persuasive. He systematically analyzed the subject matter with accepted scientific methodologies and found that the Hispanic candidate or Hispanic candidate of choice won 29 out of 29 elections that took place between 2006 and 2014 [**145] in comparable Miami-Dade County based districts that had similar Hispanic voting age population to the proposed Hispanic districts in CP-1. He also analyzed the 2010 U.S. Senate Election and demonstrated that Marco Rubio, a Hispanic Republican, carried the proposed Hispanic districts in CP-1 by landslide margins.

And, through ecological regression, Lichtman showed that in CP-I's District 26, for instance, Rubio received an overwhelming 71% of the Hispanic vote (including support from non-Republican Hispanics) and substantial crossover votes from non-Hispanic voters, regardless of the fact that the district performed for the Democratic Gubernatorial Candidate, Alex Sink, in 2010.

Lichtman concluded that, "according to the range of most pertinent factors, [District 26] in CP-1 is a Hispanic opportunity district beyond any reasonable doubt," and that Districts 25, 26, and 27 in CP-1, CP-2, and CP-3 all function as performing Hispanic districts.

Defendants find fault with his conclusions, asserting that he did not address the effect that a smaller Hispanic vote share in the Democratic primary would have in a district that is now more Democratic leaning. In fact, we don't know if he considered [**146] this particular factor. His testimony (via his report) was that he considered "not only the Hispanic demography in the districts, but such additional factors as Hispanic registration, turnout, and candidate voting: the electoral history of congressional, state senate, and state house districts with comparable Hispanic demographics; and the electoral history of the only recent statewide Hispanic candidate in Florida (Rubio in the 2010 general election for U.S. Senate)." He was present at the hearing and available for cross examination about his methods and conclusions. He could have been asked about this specific concern, but the Defendants chose not to do so.

The experts for the Legislature on this issue were less persuasive. Professor Liu opined that African Americans and Hispanics do not vote as a coalition in South Florida. Intuitively, this makes sense, but the data he used to draw his conclusions from was suspect. Of the ten elections he analyzed, only six involved Hispanic candidates and three of those were non-partisan judicial races. He could not identify any election in which a coalition of African Americans and non-Hispanic whites effectively defeated the Hispanic candidate [**147] of choice, except for a non-partisan judicial race involving a challenge to a sitting county judge. I did not find this expert testimony to be particularly helpful.

Professor Moreno, who no doubt has a good bit of knowledge and expertise about elections in South Florida, testified to his concerns that the CP-1 configuration would diminish the ability of Hispanics to elect a candidate of their choice. His testimony was long on pure opinion based on experience and short on systematic, scientific analysis of accepted statistical data. More troublesome is that, for whatever reason, he based his opinion on a comparison between CP-1 and the House proposed map (9071), not the Benchmark Map of 2002, or even the enacted Map of 2012. Moreover, his concern was for the future—what might happen. Given the legal test for retrogression, and the

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speculative nature of his testimony, his opinion had little probative value to me.

The undisputed political data provides some support for both sides on this issue. In the last three presidential and gubernatorial elections the district has leaned Democratic. While the benchmark district also leaned Democratic, District 26 is 1.1 % more Democratic in its partisan [**148] performance on average.[1]

Go to table9
Go to table10

The Hispanic demographic and political data also show that in many metrics CP-1 is actually stronger than benchmark District 18. However, 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 18.[2] The fact that this erosion of Hispanic control of the [**149] Democratic primary comes in a district that is also the most Democratic in its general election performance gives me some pause in accepting Professor Lichtman's conclusions. I am mindful that "[c]ircumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice . . ." *In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 625 (Fla. 2012)*.

Go to table11
Go to table12

However, applying the retrogression analysis employed by the Court in *Apportionment I,* the vast majority of the factors show that District 26 in CP-1 is not retrogressive. The district Hispanic voting age population of 68.3 % and Hispanics comprise 54.7 % of registered voters. In 2010, Hispanics comprised 50.3 % of the general election electorate. In South Florida elections with similar demographic statistics, Hispanics have consistently elected the candidate of their choice. Weighing all the evidence presented on the issue, I am not convinced that the deviations as noted above will deprive Hispanic voters of their ability to elect a candidate of choice in District 26, as drawn in CP-1.

The Legislature has thus not met its burden of justifying the proposed versions of Districts 20 through 27 in Plans 9062, 9066, and 9071. Districts 20 through 27 in CP-1 are, on the whole, more compact and split fewer cities than in Plans 9062, 9066, and 9071 or the Romo Plan, without running afoul of tier one requirements. CP-1 best complies with the directions [**151] in *Apportionment VII* and the requirements of *Article III, section 20*. I therefore recommend its adoption.

**DONE AND ORDERED** this 9th day of October, 2015.

/s/ Terry P. Lewis

Terry P. Lewis

Circuit Judge

**Concur by:** PERRY; CANADY (In Part)

## Concur

PERRY, J., concurring.

[1] The three Hispanic access districts in the benchmark plan from 2002 are significantly different in their configurations than any of the plans now before me, and District 26 in CP-1 contains portion of District 18, 21, and 25 of the 2002 plan. For the purposes of this analysis, I am using District 18 as the benchmark because it was most democratic of the three predecessor districts.

[2] The decline in Hispanic share of the Democratic electorate comes with a rise in the black share of the Democratic electorate. Blacks are the second most represented group in the 2010 Democratic primary electorate under CP-1 , with Hispanics falling to third.

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While I concur fully with my colleagues in the majority, I write separately to provide the context in which we make this decision. What concerns me are line-drawers who create districts for political advantage, but disingenuously cloak their explanations in the language of protecting minority voting rights. *Cf.* In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I), 83 So. 3d 597, 692-93 (Fla. 2012) (Perry, J. concurring). This course of action is antithetical to the Fair Districts Amendment and the basic principles of democratic self-governance. Neither our constitution nor the Voting Rights Act implicitly condones or justifies the practice.

> As explained by the United States Supreme Court, the [Voting Rights Act] "was designed by Congress to banish the blight of racial discrimination in voting," South Carolina v. Katzenbach, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), and to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be [**102] denied or abridged . . . on account of race, color, or previous condition of servitude." Voinovich v. Quilter, 507 U.S. 146, 152, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993) (quoting U.S. Const. amend. XV).

Id. at 621.

Historically, the Voting Rights Act protected minority voters from attempts to dilute their voting power. Enacted in 1965, it sought to eliminate traditional disenfranchisement mechanisms like literacy tests. *See* Pub. L. No. 89-110, 79 Stat. 437 (1965). In response, states turned to "second-generation barriers"—the principal tool being the gerrymandering of voting districts. *See* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2634-35, 186 L. Ed. 2d 651 (2013) (Ginsburg, J., dissenting). Courts invalidated the most blatant racial gerrymanders as unconstitutional violations of the right to vote. *See* Gomillion v. Lightfoot, 364 U.S. 339, 348, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960); *see, e.g.*, League of United Latin American Citizens v. Perry, 548 U.S. 399, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (holding that a congressional district violated the Voting Rights Act's prohibition on election practices or procedures with a discriminatory effect); Allen v. Va. State Bd. of Elections, [*299] 393 U.S. 544, 565, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969) (holding that the preclearance provisions of the Voting Rights Act apply to redistricting changes).

In the decades that followed, minority Democrats and white Republicans often formed alliances during redistricting sessions.[17] Under the guise of protecting minority voters, line-drawers would group large numbers of minority voters into small numbers of districts, a practice known as "packing." *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 153-54, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993). Consequently, [**103] the surrounding districts contained very few minority voters, an effect known as "bleaching." *See* Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L. Rev. 731, 740 (1998). Minority Democrats and white Republicans who supported these plans increased the reelection prospects for individuals in both groups: minority Democrats ran in districts replete with like-minded minority voters, while white Republicans ran in districts replete with like-minded white voters. *See, e.g.*, Hays v. Louisiana, 839 F. Supp. 1188, 1205 n.54 (W.D. La. 1993) ("Testimony at the trial revealed that [the redistricting plan] was passed by a legislative alliance between the Black and the

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[17] *See, e.g.*, Alex Larry, *Democrat U.S. Rep. Corrine Brown again aligns with GOP in Florida redistricting battle*, Tampa Bay Times, May 14, 2011, http://www.tampabay.com/news/politics/national/democrat-us-rep-corrine-brown-again-aligns-with-gop-in-florida/1169453 .

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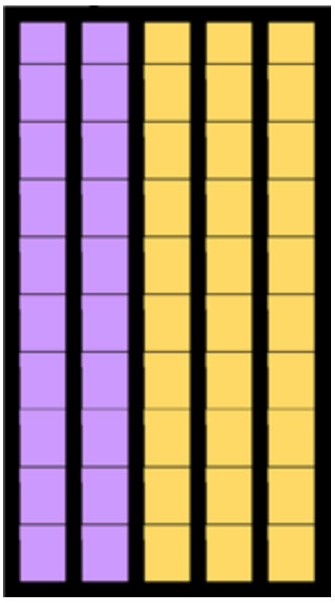
Republican Caucuses, historically uncommon bedfellows but, according to expert testimony, a phenomenon occurring with increasing frequency across the country."), *vacated*, *512 U.S. 1230, 114 S. Ct. 2731, 129 L. Ed. 2d 853 (1994)*.

To understand the effect on the redistricting process, consider the example of State X, a small state comprised of fifty people. Thirty people belong to the Orange party and twenty people belong to the Purple party. The state's line-drawers must divide the state into five congressional [**104] districts. Drawing the lines one way—in this case, vertically down the state—results in Orange winning 60% of the seats, and Purple winning 40% of the seats—an identical reflection of the partisan components of the state.

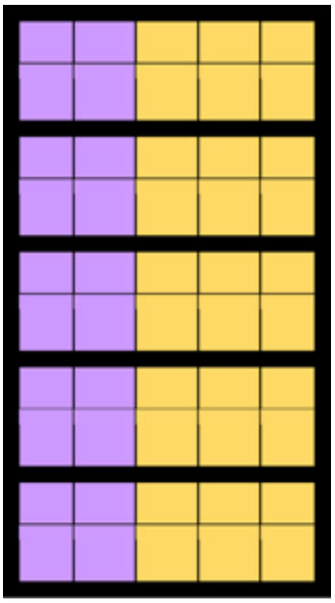
Now assume that the line-drawers are controlled by the Purple party. Knowing that their party is numerically disadvantaged, population-wise, the Purple line-drawers divide the state in an unwieldy manner, such that Purple wins 60% of the seats (despite support from only a 40% minority of the people) and Orange wins 40% of the seats (despite support from a 60% supermajority of the people).[18]

[*300] Proportionate Representation



3 Orange districts, 2 Purple districts

Compact but Disproportionate



5 Orange districts, 0 Purple districts

Neither Compact nor Proportionate

[18] This illustration is adapted from The Washington Post. Christopher Ingraham, *This is the best explanation of gerrymandering you will ever see, How to steal an election: a visual guide*, Wash. Post: Wonkblog, Mar. 1, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/ .

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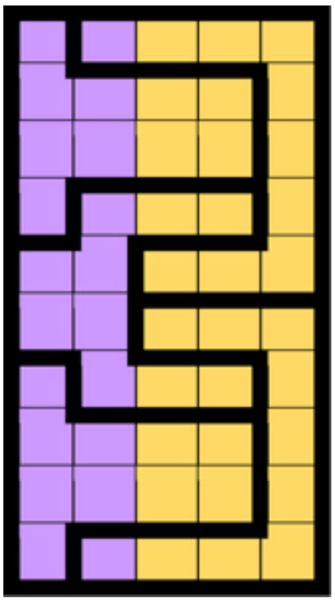

2 Orange districts, 3 Purple districts

When the legislature draws congressional districts and a single party controls both legislative chambers, the party has unfettered power in the redistricting process. [**105] Partisan-controlled legislatures often create redistricting plans that ensure the controlling members' party is disproportionately represented in the state's congressional delegation in comparison to the actual political makeup of the state. In exchange for working with the controlling party, the incumbents from the non-controlling party practically ensure their own reelections.

This Court is uniquely aware of how closely divided Florida's electorate can be. *See* Gore v. Harris, 772 So. 2d 1243, 1247 n.4 (Fla. 2000), *rev'd*, Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); *see also* Porter v. Bowen, 496 F.3d 1009, 1012 (9th Cir. 2007) (describing Florida as a "swing state"). Florida's political dead heat suggests that its members of Congress should be split relatively evenly between the two parties. Yet, the Republican Party holds a virtual supermajority. The Republican political advantage is, in large part, a result of the party's influence on the redrawing of boundary lines. However, "[t]he desire of a political party to provide its representatives with an advantage in reapportionment is not a Republican or Democratic tenet, but applies equally to both parties." *Apportionment I*, 83 So. 3d at 615; *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 285 (Fla. 1992) ("[S]everal of the opponents observe that the Joint Resolution is nothing more than a gerrymandering effort by the Democratic majority of the legislature [**106] to protect Democratic incumbents. We have little doubt that politics played a large part in the adoption of this plan.") (footnote omitted).

The people of this great state passed a constitutional amendment seeking to address the errors of the past. *See Apportionment I*, 83 So. 3d at 597. Floridians voted to add these new redistricting mandates, [*301] and they "could not have spoken louder or with more clarity." *Id. at 695* (Perry, J., concurring). "The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process." *Id. at 616* (citations omitted). Specifically, the Fair Districts Amendment prohibits lines "drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." *Art. III, § 20(a), Fla. Const.* In other words, "the standards governing the . . . apportionment process are now more stringent than the requirements under the United States Constitution and prior versions of the Florida Constitution." *Apportionment I, 83 So. 3d at 604*. Despite this populous mandate, those who were elected to represent the interests of the citizenry instead chose to use the undeniably [**107] gerrymandered 2002 map as the starting point and then opted to make as few changes as possible to create maps that could pass constitutional muster.

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After more than three years of litigation and appeals, even with clear instruction from this Court, *League of Women Voters of Florida v. Detzner, 172 So. 3d 363, 372 (Fla. 2015)*, there is criticism that the representatives of the people have spent more than $10 million in taxpayer dollars[19] and have failed to pass a single constitutionally-sound plan. It now falls to this Court to provide the Supervisors of Elections with a constitutionally compliant map.

Judge Lewis has worked tirelessly and diligently below to do just that. The efforts to paint this process as partisan or invoke the antebellum period are an unjustified attack on the integrity of our judicial system. Had those who were elected by the people heeded their electorate, our involvement would never have been required.

As it stands, once adopted, the plan we approve today increases the number of districts where minorities, both racial and ethnic, will have the opportunity to elect the representatives of their choice. The boundaries [**108] may have changed, but the purpose and goal of the Voting Rights Act and Florida's Fair Districts Amendment have been better met under this plan.

I understand that it is nearly impossible to remove politics from an inherently political process, and both parties have had the advantages of drawing the lines at some point in history. However, this Court is constitutionally required not to protect any individual incumbent, but to protect the interests of each individual voter. To do otherwise would be contrary to the democratic principles embodied in our constitution. Originally, the right to vote was limited to white male landowners. Others had to fight and die for the privilege to be extended to them. It is an insult to their struggle for politicians to now use that sacrifice for personal benefit. The Florida Constitution protects the ability of minority communities to elect representatives of their choice. *See art. III, § 20, Fla. Const.* That protection belongs to the minority community—not to the incumbents they choose to elect.

QUINCE, J., concurs.

**Dissent by:** CANADY (In Part); POLSTON

## Dissent

[*302] CANADY, J., concurring in part and dissenting in part.

I disagree with the decision to reject the configuration of Districts 20 through 27 contained in the House and Senate plans. I would approve Districts [**109] 20 through 27 of the House and Senate plans because those districts meet the requirements of *Apportionment VII* and result in no new constitutional violations. Regarding the configuration of the six central and southwest Florida districts on which the House and Senate plans did not agree, I would adopt the Galvano plan. Finally, I agree with the approval of the configuration of the remaining redrawn districts contained in the House and Senate plans.

The majority's decision suffers from two fundamental flaws. First, as Justice Polston has explained in greater detail, the majority has failed to examine the intent involved in drawing CP-1 and thus has failed to carry out the mandate of the Fair Districts Amendment. Second, the majority has imposed a morphing remedy by requiring additional changes that go beyond those mandated in *Apportionment VII*. The first error

[19] *See, e.g.*, Michael Auslen, *4 Sessions, 3 breakdowns for Florida Legislature come at a cost to taxpayers*, Miami Herald, Nov. 7, 2015, *http://www.miamiherald.com/news/politics-government/state-politics/article43500222.html* .

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constitutes a clear departure from the express mandate of the Fair Districts Amendment. The second error has imposed a fundamentally unfair burden on the Legislature, a burden that no litigant could reasonably be expected to meet.

### The Majority's Failure to Examine the Intent of CP-1

Justice Polston correctly concludes that the majority seriously errs in approving a redistricting plan that has never [**110] been judicially examined to determine whether it violates the constitutional prohibition of redistricting plans "drawn with the intent to favor or disfavor a political party or incumbent."[20] It is axiomatic that replacing one partisan redistricting plan with another partisan redistricting plan does not satisfy the requirements of the Fair Districts Amendment. Yet the majority's analysis here—as in *Apportionment VII*—rejects that fundamental point.

### The Majority's Morphing Mandate

*Apportionment VII* held that the 2014 remedial plan for certain districts was constitutionally defective in particular ways and directed that those specific defects be corrected. Under the mandate of Apportionment VII, it is appropriate to require that the Legislature meet the burden of showing that redrawn districts comply with the directions contained in that decision. And it is appropriate to require that the redrawing of districts be accomplished in a way that avoids [**111] new constitutional violations. But the trial court and the majority have gone far beyond imposing those reasonable requirements on the Legislature. In rejecting the configuration of Districts 20 through 27 contained in the House and Senate plans, the trial court and the majority have imposed a requirement to make additional changes that were not required by *Apportionment VII* without any showing that the districts drawn in the House and Senate plans resulted in new constitutional violations.

The Court thus has effectively imposed a morphing remedy, and the Legislature has confronted the confounding challenge of hitting a target that has been moved after the House and Senate have acted. Whenever a court moves the goalposts on any litigant, the specter of arbitrary judicial action is likely to arise. The resulting [*303] harm is compounded when the affected litigant is a coordinate branch of government.

Although I do not suggest that the majority intends to act arbitrarily, I cannot avoid the conclusion that the deeply flawed approach adopted here—as in *Apportionment VII*—does serious harm to the judicial process. The result of the daunting burden placed on the Legislature is that the challengers—whose [**112] motivations have been immune from scrutiny—have been virtually guaranteed to prevail in obtaining the approval of a map that suits them. It is highly problematic that the non-transparent process used to produce CP-1 thus has been allowed to trump the process in the Legislature that was implemented after *Apportionment VII* was handed down.

### Districts 26 & 27

In *Apportionment VII*, the Court directed that Districts 26 and 27 "must be redrawn to avoid splitting Homestead." *172 So. 3d at 410*. The districts drawn in the House and Senate plans unquestionably comply with that direct and

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[20] In *Apportionment VII*, I dissented from the majority's conclusion that the whole 2014 remedial plan was tainted by an improper partisan intent to benefit the Republican Party. *172 So. 3d at 417* (Canady, J., dissenting). I adhere to the view that there was no basis for the majority's broad finding of improper intent.

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unambiguous requirement. In those plans, Homestead lies wholly within District 26. The trial court expressly declined to find that Districts 26 and 27 in the House and Senate plans were drawn with "improper partisan intent." And there is no suggestion that the districts drawn by the House and Senate created other new constitutional violations.

Nevertheless, the trial court and the majority reject Districts 26 and 27 in the House and Senate plans on the ground that tier-two compliance would be improved by the configuration of the districts in CP-1. The majority, like the trial court, focuses on superior compactness. But as shown [**113] in the majority's chart comparing the statistical compactness measurements for Districts 26 and 27 in the House and Senate plans with CP-1, the improvements in compactness obtained by CP-1 can only be described as minor. *See* majority op. at 53. More importantly, in *Apportionment VII*, the Court did not hold that Districts 26 and 27 were flawed because of a lack of compactness. And the statistical compactness measurements relied on by the majority show that the compactness of Districts 26 and 27 as redrawn by the Legislature is virtually indistinguishable from the compactness of those districts in the 2014 remedial plan.

Go to table13

So a level of compactness that was no problem when the Court reviewed the 2014 remedial plan has now become a basis for rejecting the configuration agreed on by the House and Senate for Districts 26 and 27.

The majority also relies on the splitting of the city of Hialeah between Districts 25 and 27 as a basis for rejecting the configuration chosen by the House and Senate. The majority prefers CP-1, which does not split the city of Hialeah. But, as with the issue [**114] of compactness, the splitting of Hialeah was not an issue in the Court's invalidation of districts in the 2014 remedial plan—a plan that also split Hialeah. So a particular city split that was not disapproved in the 2014 remedial plan is now condemned and cited as a basis to reject [*304] districts approved by the House and Senate that comply with the Court's direction in *Apportionment VII*.

I strongly disagree with moving the goalposts in this manner. Because Districts 26 and 27 in the House and Senate plans comply with the requirements imposed by *Apportionment VII* and create no additional constitutional violations, I would conclude that those districts should be approved.

**District 25**

In *Apportionment VII*, the Court held that "District 25 must be redrawn to avoid splitting Hendry County." *172 So. 3d at 411*. The House and Senate plans eliminated the split, keeping all of Hendry County in District 25. But, once again, compliance with the unambiguous directive contained in Apportionment VII is not enough for the majority. The House and Senate are faulted for not taking additional steps to improve the tier-two performance of districts other than District 25, although *Apportionment VII* did not impose any general [**115] requirement to make such improvements.

Again, the trial court and the majority focus on statistical measures of compactness, but the numbers do not show that CP-1 has realized anything more than de minimis improvements in compactness. *See* majority op. at 65-66. More to the point, as shown in the chart below, the configuration in the House and Senate plans for Districts 20 through 27—compared with the 2014 remedial plan—has enhanced compactness in certain districts and has not diminished compactness overall.

Go to table14

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I would conclude that the House and Senate plans comply with the requirements of *Apportionment VII* regarding the redrawing of District 25, and have done so without creating any new constitutional violations.

Districts 21 & 22

In *Apportionment VII*, the Court invalidated Districts 21 and 22 and directed that they be redrawn "with the understanding that tier-two compliance could be improved." *172 So. 3d at 413*. Although the Court declined [**116] to "instruct that the Legislature must necessarily redraw the districts in a 'stacked,' horizontal configuration," the Court relied on testimony by the House's chief map drawer that a stacked "configuration would have been more compact and would have broken fewer political boundaries." *Id. at 412*. The Court also referred to a draft House map showing such a stacked configuration. *Id. at 411*.

The House and Senate plans adopted a stacked configuration for Districts 21 and 22. As shown in the preceding chart, that configuration did make improvements to the compactness of the two districts. In addition, city splits were reduced from a [*305] total of 15 to 11, and one county split was eliminated. Nonetheless, these districts in the House and Senate plans are rejected in large part because of what the majority identifies as a "visually bizarre appendage that stretches down I-95 through the middle of District 21, splitting three cities in the process." Majority op. at 66. The appendage is a portion of minority District 20. Although the appendage now dooms Districts 21 and 22 in the House and Senate plans, the appendage was never an issue in *Apportionment VII*. Indeed, the appendage is a prominent feature of the map the [**117] Court referred to in *Apportionment VII* as an example of how a stacked configuration could improve the tier-two performance of Districts 21 and 22. It is ironic that the Legislature is now faulted for failing to remove the same appendage contained in a map cited by the majority to show the potential for improvement in the 2014 remedial plan. The majority's mandate morphs once more.

I would conclude that the House and Senate plans comply with the mandate of *Apportionment VII* regarding Districts 21 and 22, and do so in a way that does not result in new constitutional violations.

Central and Southwest Florida Districts

I agree with the majority that none of the three plans under consideration for the six central and southwest Florida districts "has a meaningful advantage with respect to compactness," majority op. at 78, and that all of the plans comply with the requirements of the Florida Constitution. Given the absence of legislative agreement on those districts, I would conclude that on balance the Galvano plan is marginally superior because it avoids splitting either Manatee or Sarasota Counties.

Conclusion

Accordingly, I would reverse the portion of the trial court's order adopting the [**118] configuration of Districts 20 through 27 in CP-1 and instead adopt the configuration in the House and Senate plans. I would also reverse the portion of the trial court's order regarding the six central and southwest Florida districts and instead adopt the Galvano plan. I would affirm the trial court's order approving the remaining districts contained in the House and Senate plans.

POLSTON, J., dissenting.

This is a Court-adopted map, not a legislative-drawn map. The map the trial court recommended and the

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majority adopts was drawn by a Democratic consulting firm, a firm that has performed mapping and data analysis for numerous Democratic candidates and causes. Although the majority invalidated a prior plan lawfully enacted by Florida's elected legislators on the basis of Republican operatives' attempts to influence the legislative mapmaking process, it judicially adopts a remedial plan drawn entirely by Democratic operatives. The Coalition Plaintiffs even stated in oral argument (and the majority apparently agrees)[21] that, if the remedial plan had been drawn by the Democratic National Committee itself, the outcome would be the same. Not only is this result ironic,[22] it is an unconstitutional [**119] violation of the Fair Districts Amendment (as interpreted [*306] previously by the majority) and the separation of powers. I dissent.

The Fair Districts Amendment to Florida's constitution provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." *Art. III, § 20(a), Fla. Const.* And, in *League of Women Voters of Florida v. Detzner (Apportionment VII), 172 So. 3d 363, 392 (Fla. 2015)* (quoting trial court order), a majority of this Court invalidated the legislatively enacted plan because "'circumstantial evidence introduced at trial' [proved] that the political operatives 'obtain[ed] the necessary cooperation and collaboration' from the Legislature to ensure that the 'redistricting process and the resulting map' were 'taint[ed]' with 'improper partisan intent.'" The majority's list of evidence establishing improper intent primarily consisted of the Legislature's destruction of its communication records relating to redistricting in accordance [**120] with its previously established records retention policies as well as e-mails between Republican consultants indicating the consultants' desire to submit map proposals anonymously and to influence the legislative process. *See id. at 381-85, 390-91*.

There is much stronger and more direct evidence of partisan "infiltration" regarding the map that this Court is currently adopting than the evidence of partisan "infiltration"[23] that this Court found unconstitutional previously. Here, the Coalition Plaintiffs filed a notice in the trial court actually acknowledging that the map they proposed as CP-1 (and that the majority is adopting in its entirety)[24] was drawn by a mapping software employee of a Democratic consulting firm headquartered in Washington, D.C. Of course, who knows what additional evidence of improper partisan intent would have surfaced if this Court had permitted

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[21] *See* majority op. at 39-40 (avoiding any examination of whether CP-1 was drawn with partisan intent by explaining that this Court's only role is to determine whether the Legislature met its burden with respect to its proposed maps).

[22] *See* majority op. at 23 ("The irony of the cure being worse than the illness is not lost on me.") (majority's emphasis omitted) (quoting trial court order).

[23] *See Apportionment VII, 172 So. 3d at 385* ("[T]here was 'just too much circumstantial evidence' and 'too many coincidences' to reach any conclusion other than that the political operatives had '*infiltrate[d]* and influence[d] the Legislature.'") (emphasis added) (quoting trial court order).

[24] The majority repeatedly describes what it is adopting as a piecemeal map compiled from various proposals, but the majority, in fact, is adopting CP-1 in its entirety as proposed by the Coalition [**122] Plaintiffs. The majority expressly acknowledges that it is approving the trial court's recommendation, and, as reflected in the trial court's order appended to this opinion, the trial court recommended the adoption of CP-1 in its entirety. There is overlap between CP-1 and the House plan on districts 1-19 but not districts 20-27. Importantly, however, the legislative proposals were in agreement regarding districts 20-27.

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the same discovery regarding this mapmaking process that it permitted regarding the legislative mapmaking process. And, although the trial court found "no evidence to suggest that CP-1 was drawn with improper partisan intent," this lack of evidence in the record is due to the fact that the majority of this Court expressly prohibited any discovery [**121] regarding the maps proposed by the non-legislative parties. *See* League of Women Voters of Fla. v. Detzner, No. SC14-1905, Order at 4 (Fla. Sup. Ct. order filed Sept. 4, 2015) ("The Court further denies the House's motion to the extent it seeks any discovery."); *cf.* League of Women Voters of Fla. v. Fla. House of Reps., 132 So. 3d 135 (Fla. 2013) (holding —I believe improperly—that legislative privilege does not prevent broad and invasive discovery regarding the legislative process, including depositions of legislators and legislative staff, legislative communications, documents, testimony, etc., to test whether legislative map was drawn with partisan intent). However, even without discovery, the knowledge that a Democratic political operative actually drew CP-1 should prevent [*307] this Court's adoption of CP-1 under this Court's decision in *Apportionment VII*.

The majority emphasizes the burden of proof it outlined in *Apportionment VII*, repeatedly stating that the burden has shifted and that the Legislature must now demonstrate that the remedial map it enacted is constitutional. But the Legislature did not actually enact a map. The House passed a map, and the Senate passed a different map and also submitted a third distinct map. It is unclear how the Legislature could possibly bear the burden of establishing that something it did not enact is constitutional. In reality, without the plaintiffs even alleging any tier-two violations of the constitution with respect to the legislative proposals, the majority is requiring the Legislature to establish that the one House map and the two Senate maps are "objectively better" (as judged [**123] by the majority) in meeting tier-two requirements than a map that was never submitted to the Legislature for consideration. *See* majority op. at 62, 65, 68, 71, 79; *cf.* Beaubien v. Ryan, 198 Ill. 2d 294, 762 N.E.2d 501, 505, 260 Ill. Dec. 842 (Ill. 2001) ("Where, as here, challengers to a redistricting plan allege that districts formulated by the Commission fail to meet our constitution's compactness requirement, the applicable burden of proof requires those challengers to establish that the plan is against the manifest weight of the evidence."). In other words, the majority unlawfully imposes a burden on the Legislature to prove matters of judicial preference regarding compactness, unrelated to constitutional deficiencies. This inapposite burden of proof allows CP-1 to go untested.

Given that this is now a judicial process to adopt a court redistricting plan, we should at the very least ensure that the proposal we adopt passes constitutional muster. *See* Maestas v. Hall, 2012 - NMSC 006, 274 P.3d 66, 79 (N.M. 2012) (remanding state court adopted redistricting plan for reconsideration because it "did not undergo the same scrutiny for partisan bias that the majority of the plans that were previously considered had undergone"). And each party submitting a proposal to the court for consideration should be the party that bears the [**124] burden to establish that its proposal is constitutional. *See* Philip J. Padavano, *Florida Civil Practice* §16:1 (2015 ed.) ("Generally, the burden of proof is on the party who asserts the proposition to be established."). Instead, the Coalition Plaintiffs are having their proposed CP-1 map adopted in its entirety without sustaining any burden whatsoever in these judicial proceedings. I am unaware of any other legal process where this has been permitted. Furthermore, this is contrary to the United States Supreme Court's direction that when "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state

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plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Perry v. Perez, 565 U.S. 388, 132 S. Ct. 934, 941, 181 L. Ed. 2d 900 (2012)* (quoting *Abrams v. Johnson, 521 U.S. 74, 79, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997)*).

Additionally, the majority many times declares that today's opinion marks the end point of state litigation, but then remands the case back to the trial court to enter a final judgment. I guess it is not really the end. In this procedural posture, the trial court acted as a special master by conducting evidentiary proceedings and making [**125] a recommendation to this Court. The map is this Court's final judgment, not the trial court's, and it should rule accordingly.

[*308] Because the majority imposes an improper burden upon the Legislature and fails to consider whether the map it adopts passes constitutional muster, I respectfully dissent. I also dissent because of the majority's "morphing mandate," as described by Justice Canady.

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**Table1** (Return to related document text)

| | Reock[6] | | Convex Hull[7] | | Polsby-Popper[8] | |
|---|---|---|---|---|---|---|
| **District** | **26** | **27** | **26** | **27** | **26** | **27** |
| Legislature | .18 . | 46 | .46 | .82 | .20 | .43 |
| CP-1 | .18 | .54 | .48 | .85 | .22 | .47 |

**Table1** (Return to related document text)

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**Table2** (Return to related document text)

| **District** | **20** | **21** | **22** | **23** | **24** | **25** | **26** | **27** |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | **Reock** | |
| Legislature | .48 | .37 | .41 | .27 | .38 | .48 | .18 | .46 |
| CP-1 | .48 | .37 | .48 | .35 | .47 | .41 | .18 | .54 |
| | | | | | | | **Convex Hull** | |
| Legislature | .75 | .64 | .70 | .63 | .73 | .73 | .46 | .82 |
| CP-1 | .75 | .64 | .74 | .65 | .77 | .67 | .48 | .85 |
| | | | | | | | **Polsby-Popper** | |
| Legislature | .20 | .24 | .15 | .25 | .28 | .38 | .20 | .43 |
| CP-1 | .20 | .30 | .24 | .26 | .30 | .36 | .22 | .47 |

**Table2** (Return to related document text)

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**Table3** (Return to related document text)

| HOUSE MAP (9071) | | | | |
|---|---|---|---|---|
| LENGTH | PERIMETER | REOCK | CONVEX | POLSBY- |

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[6] The Reock method of quantifying compactness "measures the ratio between the area of the district and the area of the smallest circle that can fit around the district. This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale." *Apportionment I, 83 So. 3d at 635*. *See also Apportionment VII, 172 So. 3d at 408, n.17*.

[7] The Convex Hull method, which "measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district," also ranges from 0 to 1, "with a score of 1 representing the highest level of compactness. A circle, square, or any other shape with only convex angles has a score of 1" under this measure. *Apportionment I, 83 So. 3d at 635*. *See also Apportionment VII, 172 So. 3d at 408, n.18*.

[8] The Polsby-Popper score measures the ratio between the area of the district and the area of the circle with the same perimeter as the district (the isoperimetric circle). A circle has a Polsby-Popper score of 1; a square has a score of about [**66] 0.79. *See, e.g., **Wilkins v. West, 264 Va. 447, 571 S.E. 2d 100, 109 n.6 (Va. 2002)*** (describing the Polsby-Popper measure of compactness).

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| | (MILES) | (MILES) | | HULL | POPPER |
|---|---|---|---|---|---|
| District 9 | 69 | 269 | 0.63 | 0.87 | 0.46 |
| District 10 | 36 | 115 | 0.49 | 0.89 | 0.49 |
| District 11 | 84 | 332 | 0.52 | 0.80 | 0.33 |
| District 15 | 67 | 240 | 0.33 | 0.76 | 0.26 |
| District 16 | 58 | 200 | 0.64 | 0.90 | 0.52 |
| District 17 | 118 | 416 | 0.57 | 0.79 | 0.46 |
| AVERAGE | 72.0 | 262.0 | 0.53 | 0.84 | 0.42 |

**Table3** (Return to related document text)

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**Table4** (Return to related document text)

SENATE MAP (9062)

| | LENGTH (MILES) | PERIMETER (MILES) | REOCK | CONVEX HULL | POLSBY-POPPER |
|---|---|---|---|---|---|
| District 9 | 78 | 293 | 0.56 | 0.85 | 0.39 |
| District 10 | 36 | 151 | 0.64 | 0.85 | 0.36 |
| District 11 | 84 | 344 | 0.53 | 0.81 | 0.32 |
| District 15 | 66 | 206 | 0.34 | 0.78 | 0.34 |
| District 16 | 63 | 186 | 0.40 | 0.81 | 0.45 |
| District 17 | 116 | 478 | 0.61 | 0.77 | 0.36 |
| AVERAGE | 73.8 | 276.3 | 0.51 | 0.81 | 0.37 |

**Table4** (Return to related document text)

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**Table5** (Return to related document text)

HOUSE MAP (9071)

| | LENGTH (MILES) | PERIMETER (MILES) | REOCK | CONVEX HULL | POLSBY-POPPER |
|---|---|---|---|---|---|
| District 9 | 69 | 269 | 0.63 | 0.87 | 0.46 |
| District 15 | 67 | 240 | 0.33 | 0.76 | 0.26 |
| District 16 | 58 | 200 | 0.64 | 0.90 | 0.52 |
| District 17 | 118 | 416 | 0.57 | 0.79 | 0.46 |
| AVERAGE | 78.0 | 281.3 | 0.54 | 0.83 | 0.43 |

**Table5** (Return to related document text)

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**Table6** (Return to related document text)

GALVANO MAP (9066)

| | LENGTH (MILES) | PERIMETER (MILES) | REOCK | CONVEX HULL | POLSBY-POPPER |
|---|---|---|---|---|---|
| District 9 | 126 | 400 | 0.42 | 0.86 | 0.42 |
| District 15 | **61** | 272 | **0.50** | 0.74 | 0.25 |
| District 16 | **56** | 209 | 0.62 | 0.82 | 0.44 |
| District 17 | **91** | **333** [**134] | 0.52 | 0.77 | 0.39 |
| **AVERAGE** | **83.5** | **303.5** | **0.52** | **0.80** | **0.38** |

**Table6** (Return to related document text)

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**Table7** (Return to related document text)

SOUTH FLORIDA COMPACTNESS CHART

| | Reock Scores | | | Convex-Hull Scores | | | Perimeter Mileage | | |
|---|---|---|---|---|---|---|---|---|---|
| | 9062 9066 9071 | CP-1 | Romo | 9062 9066 9071 | CP-1 | Romo | 9062 9066 9071 | CP-1 | Romo |
| CD20 | .48 | .48 | .48 | .75 | .75 | .75 | 360 | 387 | 360 |
| CD21 | .37 | .37 | .29 | .64 | .64 | .60 | 137 | 121 | 114 |
| [**142] | .41 | .48 | .18 | .70 | .74 | .64 | 150 | 119 | 205 |
| CD22 | | | | | | | | | |
| CD23 | .27 | .35 | .27 | .63 | .65 | .63 | 120 | 113 | 120 |
| CD24 | .38 | .47 | .38 | .73 | .77 | .73 | 73 | 69 | 73 |
| CD25 | .48 | .41 | .48 | .73 | .67 | .73 | 363 | 361 | 363 |
| CD26 | .18 | .18 | .18 | .46 | .48 | .46 | 550 | 545 | 548 |
| CD27 | .46 | .54 | .44 | .82 | .85 | .78 | 131 | 96 | 139 |
| | .38 | .41 | .34 | .68 | .69 | .67 | 1,884 | 1,811 | 1,922 |

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**Table7** (Return to related document text)

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**Table8** (Return to related document text)

SOUTH FLORIDA SPLIT CITIES

| | 9071,9062,9066 | CP-1 | ROMO |
|---|---|---|---|
| Split Cities | 15 | 8 | 18 |

**Table8** (Return to related document text)

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**Table9** (Return to related document text)

BENCHMARK DISTRICT 18 POLITICAL PERFORMANCE

| | Democrat Vote Share | Republican Vote Share |
|---|---|---|
| 2012 President | 54.8% (Obama) | 45.2% (Romney) |
| 2010 Governor | 49.2% (Sink) | 50.8% (Scott) |
| 2008 President | 51.0% (Obama | 49.0% (McCain) |
| Average | 51.7% | 48.3% |

**Table9** (Return to related document text)

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**Table10** (Return to related document text)

CP-1 DISTRICT 26 POLITICAL PERFORMANCE

| | Democrat Vote Share | Republican Vote Share |
|---|---|---|
| 2012 President | 55.8% (Obama) | 44.2% (Romney) |
| 2010 Governor | 50.7% (Sink) | 49.3% (Scott) |
| 2008 President | 51.8% (Obama | 48.2% (McCain) |
| Average | 52.8% | 47.2% |

**Table10** (Return to related document text)

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**Table11** (Return to related document text)

BENCHMARK HISPANIC PERFORMANCE METRICS

| Hisp.% Voting Age Pop. | Hisp.% Reg Voters | | Hisp.% of Dems | | Hisp.% of Reps. | | Hisp.% General Turnout | | Hisp.% of Dem. Primary Turnout | Hisp.% of Rep. Primary Turnout |
|---|---|---|---|---|---|---|---|---|---|---|
| 2010 | 2010 | 2012 | 2010 | 2012 | 2010 | 2012 | 2010 | 2012 | 2010 | 2010 |

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BENCHMARK HISPANIC PERFORMANCE METRICS

| | Hisp.% Voting Age Pop. | Hisp.% Reg Voters | | Hisp.% of Dems | | Hisp.% of Reps. | | Hisp.% General Turnout | | Hisp.% of Dem. Primary Turnout | Hisp.% of Rep. Primary Turnout |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **CD 18** | **67.18** | **51.7** | **52.7** | **40.5** | **43.3** | **62.9** | **62.5** | **49.8** | **51.8** | **26.7** | **66.4** |
| CD 21 | 77.12 | 61.9 | 64.0 | 47.6 | 50.8 | 73.3 | 74.3 | 58.7 | 63.2 | 28.9 | 76.5 |
| CD 25 | 72.22 | 59.2 | 61.3 | 49.2 | 51.9 | 65.8 | 66.7 | 54.7 | 59.7 | 29.6 | 63.0 |

**Table11** (Return to related document text)

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**Table12** (Return to related document text)

CP-1 HISPANIC PERFORMANCE METRICS

| | Hisp.% Voting Age Pop. | Hisp.% Reg Voters | | Hisp.% of Dems | | Hisp.% of Reps. | | Hisp.% General Turnout | | Hisp.% of Dem. Primary Turnout | Hisp.% of Rep. Primary Turnout |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 2010 | 2010 | 2012 | 2010 | 2012 | 2010 | 2012 | 2010 | 2012 | 2010 | 2010 [**150] |
| CD 25 | 75.0 | 59.8 | 62.6 | 55.2 | 59.8 | 61.0 | 61.7 | 61.7 | 60.0 | 60.0 | 56.8 |
| **CD 26** | **68.3** | **54.7** | **56.5** | **42.5** | **45.0** | **64.7** | **65.5** | **50.3** | **55.0** | **22.8** | **62.4** |
| CD 27 | 69.2 | 54.5 | 55.6 | 40.9 | 43.6 | 67.1 | 67.1 | 52.4 | 55.1 | 26.0 | 71.4 |

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**Table12** (Return to related document text)

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**Table13** (Return to related document text)

| | Reock | | Convex Hull | | Polsby-Popper | |
|---|---|---|---|---|---|---|
| **District** | **26** | **27** | **26** | **27** | **26** | **27** |
| **Legislature** | .18 | .46 | .46 | .82 | .20 | .43 |
| **Remedial Plan** | .18 | .46 | .46 | .81 | .20 | .43 |

**Table13** (Return to related document text)

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**Table14** (Return to related document text)

| **District** | **20** | **21** | **22** | **23** | **24** | **25** | **26** | **27** |
|---|---|---|---|---|---|---|---|---|
| | | | | **Reock** | | | | |
| Legislature | .48 | .37 | .41 | .27 | .38 | .48 | .18 | .46 |
| Remedial Plan | .48 | .28 | .18 | .27 | .38 | .40 | .18 | .46 |
| | | | | **Convex Hull** | | | | |
| Legislature | .75 | .64 | .70 | .63 | .73 | .73 | .46 | .82 |
| Remedial Plan | .74 | .60 | .61 | .57 | .73 | .73 | .46 | .81 |
| | | | | **Polsby-Popper** | | | | |
| Legislature | .20 | .24 | .15 | .25 | .28 | .38 | .20 | .43 |
| Remedial Plan | .22 | .26 | .13 | .23 | .28 | .32 | .20 | .43 |

**Table14** (Return to related document text)

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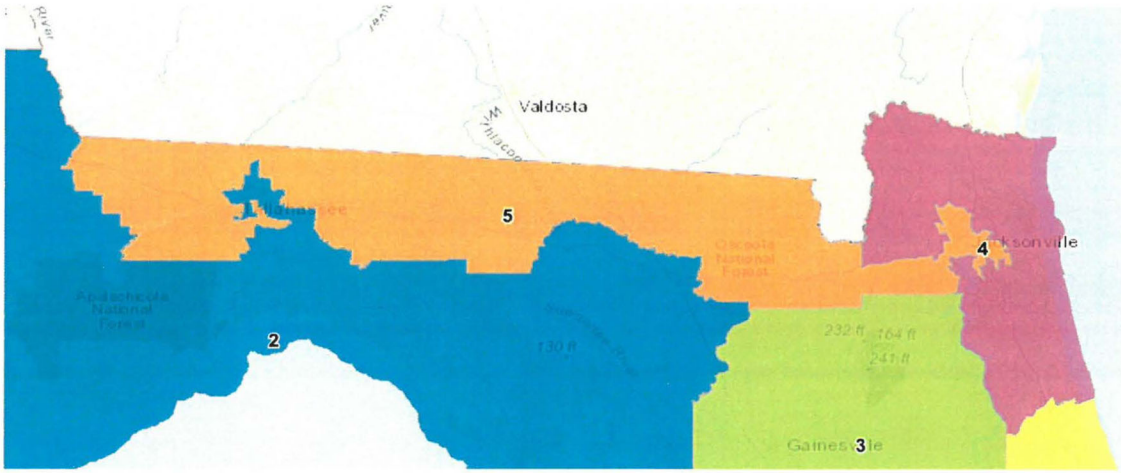
RON DESANTIS
GOVERNOR

February 1, 2022

Honorable Charles T. Canady
Chief Justice of the Florida Supreme Court
Florida Supreme Court, 500 S. Duval St.
Tallahassee, Florida 32399

Mr. Chief Justice and Justices of the Florida Supreme Court:

In the coming weeks, the Florida Legislature must present to me a bill that redraws Florida's congressional districts consistent with the most recent decennial census, *see* 2 U.S.C. §§ 2a–2c, and the one-person, one-vote requirement of the U.S. Constitution, *see Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). All maps that have been published by the Legislature and are currently under consideration retain, for the most part, the current Congressional District 5. The district stretches over 200 miles from East to West across eight counties without conforming to usual political or geographic boundaries, solely to connect a minority population center in Jacksonville with a separate and distinct minority population center in Leon and Gadsden Counties so that, together, these minority populations may elect a candidate of their choice. It is a narrow district that compresses to only three miles wide, North to South, when traversing a string of the northernmost precincts in Leon County so the district can connect with the minority population in western Leon County without including the non-minority population in eastern Leon County. Similarly, in Duval County, the district narrows to about a mile and a half in width. As of the 2020 Census, two counties, Duval to the East and Leon to the West, alone contribute 82.77% of the district's population. These counties are in two completely different regions of the State.




*See* FLSCOR, *Florida Congressional Districts 1982-2022*, ArcGIS Online, https://www.arcgis.com/home/item.html?id=db44457f19684fd99b19ce64f96ae787 (click "View") (last visited Feb. 1, 2022).

THE CAPITOL
TALLAHASSEE, FLORIDA 32399 • (850) 717-9249

RECEIVED, 02/01/2022 11:12:21 AM, Clerk, Supreme Court
AMERICAN OVERSIGHT
FL-GOV-22-0226-B, 22-0227-A-000274

I seek this Court's opinion on whether Article III, Section 20(a) of the Florida Constitution requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations (either in Leon and Gadsden Counties or outside of Orlando) to ensure sufficient voting strength, even if not a majority, to elect a candidate of their choice.

This Court's constitutional power to render an advisory opinion is quite broad. Upon my request, this Court may opine as to "the interpretation of *any* portion of [the] constitution upon *any* question affecting the governor's executive powers and duties." Art. IV, § 1(c), Fla. Const. (emphasis added). The Florida Constitution provides that "[t]he supreme executive power shall be vested in a governor." Art. IV, § 1(a), Fla. Const. That executive power includes the "[e]xecutive approval and veto" power over bills the Florida Legislature presents to me, Art. III, § 8, Fla. Const.; the duty to "take care that the laws be faithfully executed," Art. IV, § 1(a), Fla. Const.; and the power of "direct supervision" over the "administration" of the Department of State, Art. IV, § 6, Fla. Const.; *see also* § 20.02(3), Fla. Stat. (providing that "[t]he administration of any executive branch department . . . placed under the direct supervision of an officer . . . appointed by and serving at the pleasure of the Governor shall remain at all times under the constitutional executive authority of the Governor"); § 20.10, Fla. Stat. (creating the Department of State, which is headed by the Secretary of State, who is appointed by and serves at the pleasure of the Governor).

Once presented with a congressional redistricting bill, I must decide whether to approve or veto it, and even if I take no action and the law goes into effect, I must nevertheless take care that the Constitution and laws of the State of Florida are faithfully executed. The Secretary of State, whom I direct and oversee, is the chief election officer of the State, § 97.012, Fla. Stat., and is responsible for, among many things, "[o]btain[ing] and maintain[ing] uniformity in the interpretation and implementation of the election laws," *id.* § 97.012(1), and certifying "the names of all duly qualified candidates for nomination or election who have qualified with the Department of State," § 99.061(6), Fla. Stat. The Department of State will also be responsible for defending any legal challenges to the new congressional redistricting map. In deciding whether to exercise my veto power once the Legislature's congressional redistricting bill is presented to me, and how best to faithfully implement the law if enacted, I now seek your "opinion . . . as to the interpretation of [a] portion of [the] constitution" that applies to the congressional redistricting process. Art. IV, § 1(c), Fla. Const. Such an opinion is both necessary and appropriate in this instance.

*First*, the once-in-a-decade congressional redistricting process is a unique circumstance: it is required by the U.S. Constitution, and it must be completed before upcoming congressional elections. With the qualifying period for election to the U.S. House of Representatives quickly approaching, the voters and candidates have a pressing need for certainty regarding the meaning of the State's non-diminishment standard. *See* § 99.061(9), Fla. Stat.; https://dos.myflorida.com /elections/candidates-committees/qualifying/. In contrast, most legislation is neither constitutionally mandated nor of the sort where prolonged uncertainty regarding the meaning of such text may adversely affect the State's elections. *See League of Women Voters of Fla. v.*



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*Detzner*, 172 So. 3d 363, 372 (Fla. 2015) ("*Apportionment VII*") ("We emphasize the time-sensitive nature of these proceedings, with candidate qualifying for the 2016 congressional elections now less than a year away . . . ."). I make my request in the spirit of seeking as much guidance as possible from you consistent with "[t]his Court['s] . . . obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) ("*Apportionment VIII*") (citation and internal quotation marks omitted).

*Second*, I am aware that on one occasion well over a century ago, the members of this Court declined to opine on a constitutional question in aid of my predecessor's exercise of the veto power. *See In re Exec. Commc'n*, 6 So. 925 (Fla. 1887). Notwithstanding that the Florida Constitution assigns to the Executive the power to approve or veto legislation, *see* Art. III, § 8, Fla. Const., this Court concluded that "any act which is an essential prerequisite" to the enactment of a law "is legislative" and is performed by the Executive "as a part of the lawmaking power." *In re Exec. Commc'n*, 6 So. at 925. This reasoning, which you are not bound to follow, *see In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975), conflicts with the separation of powers enshrined in Article II, Section 3 of the Florida Constitution, and I respectfully request that you give the 1887 response no weight.

In particular, the Florida Constitution vests the State's legislative power in the Florida Legislature. *See* Art. III, § 1, Fla. Const. It follows, therefore, that the Governor's exercise of what the Constitution characterizes as the power of "[e]xecutive approval and veto," Art. III, § 8, Fla. Const., is not a legislative power. Rather, the veto power is an executive check on the legislative power; "[e]ach branch of the government necessarily at times, either by express provision of the Constitution or in the orderly administration of the state's affairs, comes in contact with one or the other branch, but such contact in n[o]wise merges the functions of one into that of the other." *Amos v. Gunn*, 94 So. 615, 627–28 (Fla. 1922) (Ellis, J., on pet. for reh'g). This Court's more recent opinions thus acknowledge that the exercise of the veto is an executive power.[1]

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[1] *See, e.g.*, *Chiles v. Child. A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) ("Article III, section 8 sets forth the procedure for the executive power to approve or veto legislation of both nonappropriations and appropriations bills."); *Brown v. Firestone*, 382 So. 2d 654, 672 (Fla. 1980) ("We hold further that the vetoes identified herein as 2, 4, 5 and 6 are valid as being within the purview of the executive power granted by article III, section 8(a)[.]"); *Owens v. State*, 316 So. 2d 537, 538 n.4 (Fla. 1975) ("Although article IV of the constitution deals with the executive branch, the placement of a legislative power in one subsection of that article does not render the delegated power nugatory. The placement is functional, as with executive powers conferred in the judicial article (art. V, [§] 11) and in the legislative article (art. III, [§] 8)."); *In re Advisory Opinion to the Governor*, 239 So. 2d 1, 9 (Fla. 1970) ("The Legislature may not validly so draft a general appropriations bill as to unduly and unreasonably preclude the exercise of the executive power to 'veto any specific appropriation in a general appropriation bill.'" (quoting Art. III, § 8(a), Fla. Const.)); *see also Green v. Rawls*, 122 So. 2d 10, 13 (Fla. 1960) ("[U]nder our tripartite division of the powers of government, and the checks and balances designed to be accomplished thereby, the chief executive must have the power and the opportunity to veto



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*Third*, the question affecting my executive powers and duties concerns Article III, Section 20(a) of the Florida Constitution, which provides that:

> No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process *or to diminish their ability to elect representatives of their choice*; and districts shall consist of contiguous territory.

Art. III, § 20(a), Fla. Const. (emphasis added). I limit my request to the phrase "diminish their ability to elect representatives of their choice"—the State's non-diminishment standard. Except where it may be necessary to inform your interpretation of the Florida Constitution, I do not ask for your opinion on any issues of federal law. *Cf. In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 620-21 (Fla. 2012) ("*Apportionment I*") (recognizing that the non-diminishment standard borrows from § 5 of the Voting Rights Act but "nonetheless recogniz[ing] our independent constitutional obligation to interpret our own state constitutional provisions").

Specifically, I ask whether the Florida Constitution's non-diminishment standard mandates a sprawling congressional district in northern Florida that stretches hundreds of miles from East to West solely to connect black voters in Jacksonville with black voters in Gadsden and Leon Counties (with few in between) so that they may elect candidates of their choice, even without a majority. This Court has previously suggested that the answer is "yes." *Apportionment VIII*, 179 So. 3d at 271 ("Although District 5 was required to be drawn from East to West, no specific configuration was mandated in *Apportionment VII*," and this Court did not "specify a certain Black Voting Age Population (BVAP) or black share of registered Democrats as a 'floor' below which the ability of black voters to elect a candidate of choice was certain to be diminished.").

In 2015, this Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando. The Court held that the North-South version had been unconstitutionally tainted by partisan and other improper influences and that such a configuration was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Apportionment VII*, 172 So. 3d at 403. Consequently, the Court adopted the East-West configuration that exists today. *Id.* at 405–06. In so doing, this Court acknowledged that this configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), but nevertheless concluded that it was "visually less 'unusual' and 'bizarre' than the meandering North-South version," *id.*, and that it would not "diminish the ability of black voters to elect a candidate of their choice," *id.* at 405. This Court indicated that the non-compact shape of the East-West district was nevertheless necessary because of "geography" and "other constitutional

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legislative action, subject to the power of the legislature to override the executive veto by the vote of a specified number of the legislature.").



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requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted).

This Court's prior guidance, however, pre-dates relevant decisions from the U.S. Supreme Court. In 2017, the U.S. Supreme Court made clear that where "racial considerations predominate[] over others, the design of the district must withstand strict scrutiny." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). To satisfy this test, and thus pass muster under the Fourteenth Amendment to the U.S. Constitution, a state must "prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.* (citations omitted). While the U.S. Supreme Court "has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act," a state must show "that it had 'a strong basis in evidence'" to conclude that the Act required race-based sorting of voters. *Id.* (citation omitted). In *Cooper*, North Carolina did not meet its burden when arguing that compliance with § 2 of the Voting Rights Act served as a compelling reason. *Id.* at 1469–72. Specifically, North Carolina could not satisfy § 2's threshold conditions: (1) that the "minority group" was "sufficiently large and geographically compact to constitute a majority" in a reasonably compact legislative district, (2) that the minority group was "politically cohesive," and (3) that the district's majority group voted "sufficiently as a bloc" to "defeat the minority's preferred candidate." *Id.* at 1470 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)).

If this Court advises that the non-diminishment standard does not specifically require that an East-West district be drawn to connect minority voters in Jacksonville with minority voters in Leon and Gadsden Counties, I nevertheless request guidance on what the non-diminishment standard does require. Specifically, I ask whether the Florida Constitution's non-diminishment standard requires that congressional districts be drawn to connect minority populations from distant and distinct geographic areas if doing so would provide the assembled minority group sufficient voting strength (although not a majority of the proposed district) to elect a candidate of its choice. Or, conversely, does the non-diminishment standard merely require that a minority population in a reasonably cohesive geographic area, where the population is not a majority but is nevertheless large enough to elect candidates of its choice, continue to be able to elect such candidates?

Relatedly, to make sense of the non-diminishment standard, I ask for clarification from this Court on what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice has been diminished. This Court has said that the "existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is measured.'" *Apportionment I*, 83 So. 3d at 624 (citation omitted). But is that so even if the district in the existing plan was designed solely to cobble together enough minority voters from distant and distinct geographic areas to elect candidates of their choice despite not constituting a majority? Or must the benchmark be confined to the minority population in a reasonably cohesive geographic area?



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Florida's non-diminishment standard—like the Voting Rights Act's non-diminishment standard—is a potent, race-based solution to a race-based problem. I ask for your opinion to help me be sufficiently conscious of race to comply with the Florida Constitution's anti-diminishment provision but avoid being so conscious of race that my actions could violate the U.S. and Florida Constitutions.

Because the U.S. Supreme Court's decisions inform, but do not definitively resolve, issues of state law, I ask for you to exercise your "independent constitutional obligation" to interpret Florida law, *id.* at 621, and to guide me in exercising my executive powers as Governor. *See* Art. III, § 8, Fla. Const.; Art. IV, § 1(a), Fla. Const. I respectfully request your assistance as expeditiously as possible given that March 11, 2022, is the last day of the legislative session and candidates for the U.S. House of Representatives will need to qualify under a new map in June.

Thank you for your consideration.

Respectfully submitted,

Ron DeSantis
Governor of Florida



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# In the Supreme Court of Florida

CASE NO. SC22-139

ADVISORY OPINION TO THE GOVERNOR RE: WHETHER ARTICLE III, SECTION 20(A) OF THE FLORIDA CONSTITUTION REQUIRES THE RETENTION OF A DISTRICT IN NORTHERN FLORIDA, ETC.

## BRIEF OF RON DESANTIS, GOVERNOR OF FLORIDA

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## ARGUMENT

This Court has jurisdiction to advise on the interpretation of the following phrase: "*districts shall not be drawn* with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or *to diminish their ability to elect representatives of their choice*." Art. III, § 20(a), Fla. Const. (emphasis added). Section 20(a)'s non-diminishment provision affects several of the Governor's executive powers and duties, namely his power to veto the congressional map presented to him, art. III, § 8, Fla. Const.; his duty to take care that the laws are faithfully executed, art. IV, § 1(a), Fla. Const.; and his power to directly supervise his Secretary of State in the administration of elections, art. IV, § 6, Fla. Const. Section 20(a)'s text is less than clear. There is a textual interpretation of this section, however, that avoids serious concerns under the U.S. Constitution. An advisory opinion confirming that interpretation would help the Governor ensure that the redrawing of congressional boundaries, which must occur every ten years, does not violate the Florida or U.S. Constitutions and is completed in a timely way to provide certainty



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to candidates and voters before the qualifying period begins in June.[1] Unlike most other legislation, redistricting is not discretionary and must be completed in short order before the electoral process commences. The unique demands of redistricting justify the Court's exercise of jurisdiction.

## I. THIS COURT HAS JURISDICTION TO PROVIDE AN ADVISORY OPINION TO THE GOVERNOR.

Article IV, section 1(c) of the Florida Constitution allows this Court to render an advisory opinion to the Governor concerning "the interpretation of any portion of th[e] constitution" that "affect[s]" his "executive powers and duties." The interpretation of section 20(a) informs, and thus affects, how the Governor will exercise his executive powers and duties with respect to congressional redistricting legislation. Specifically, when the Florida Legislature presents to the Governor a bill that redraws Florida's congressional districts, which it must under federal law, the Governor can veto the bill, approve the bill, or take no action. A veto nullifies the bill. Approval or inaction allows the bill to become law, at which point the

[1] *See* Qualifying Information, Fla. Div. of Elections, https://dos.myflorida.com/elections/candidates-committees/qualifying (last visited February 7, 2022).



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Governor must "take care that the laws [are] faithfully executed," art. IV, § 1(a), Fla. Const., and "direct[ly] supervis[e]" his "administration," particularly his Secretary of State, in carrying out the law, art. IV, § 6, Fla. Const. These executive powers and duties satisfy the jurisdictional prerequisites.

### A. The Veto Is an Executive Power.

Article III, section 8 expressly vests the Governor with the "[*e*]*xecutive* approval and *veto*" power. (Emphasis added.) If the Governor believes that a bill is "contrary to the public interest," including that it is unconstitutional, he may veto the bill. *Brown v. Firestone*, 382 So. 2d 654, 664 (Fla. 1980). The exercise of that executive power to affect legislation does not convert it into a lawmaking power any more than the judiciary's exercise of judicial review converts the judicial power into a lawmaking power.

The Florida Constitution's structure underscores that the veto is an executive power. The Florida Constitution vests "[t]he legislative power of the state" in the Florida Legislature, art. III, § 1, Fla. Const.; "[t]he supreme executive power" in the Governor, art. IV, § 1(a), Fla. Const.; and "[t]he judicial power" in the state judiciary, art. V, § 1, Fla. Const. "No person belonging to one branch shall exercise any



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powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. This separation of powers erects "high walls and clear distinctions" between each branch of government. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 (1995).

The high walls separating executive and legislative powers are apparent in the lawmaking process. The Florida Constitution gives specific, precise powers to the legislative and executive branches with respect to the lawmaking process. As this Court has noted, "[a]rticle III, sections 1 and 7 assign to the legislature the responsibility for passage of all bills into law, regardless of their subject matter," and "[a]rticle III, section 8 sets forth the procedure for the executive power to approve or veto legislation." *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). "These provisions" constitute the "constitutional allocation of the executive and legislative responsibilities concerning legislation generally." *Id.*

The Florida Constitution thus gives to the Governor the *executive* power in the legislative sphere, and that executive power includes the veto. *See id.* ("Article III, section 8 sets forth the procedure for the *executive power* to approve or *veto legislation of* both *nonappropriations* and appropriations *bills*." (emphasis added));



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*Brown*, 382 So. 2d at 672 ("We hold further that *the vetoes* identified herein as 2, 4, 5 and 6 a*re valid as being within the purview of the executive power* granted by article III, section 8(a)." (emphasis added)); *Owens v. State*, 316 So. 2d 537, 538 n.4 (Fla. 1975) ("Although article IV of the constitution deals with the executive branch, the placement of a legislative power in one subsection of that article does not render the delegated power nugatory" because "[t]he placement is functional, as with executive powers conferred in the judicial article . . . and in the legislative article.").

The veto is a "negative power, the power to nullify, or at least suspend, legislative intent." *Brown*, 382 So. 2d at 664. It is the "[p]rimary . . . executive check[] on unfettered legislative power" and gives the Governor a "stronger bargaining position from which to seek revision or amendment of bills" and a means to "counteract legislative action which he considers to be contrary to the public interest." *Id.* As such, in the lawmaking process, "the constitutional authority of the legislative department is in part delimited by the scope of executive authority"—as exercised by the veto power. *Id.* at 663.

By contrast, the Legislature does not have the power to veto bills—it has the power to bicamerally "pass" and "present" them, and



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to "re-enact" a vetoed bill by supermajority vote. *See* art. III, §§ 7–8, Fla. Const. So it cannot be said that in exercising the power to "veto" a bill that the Governor is exercising a power that otherwise belongs to the Legislature. It is quintessentially an executive power.

Only when the Governor exceeds his veto power by effectively amending legislative text (as opposed to nullifying it) does the Governor improperly intrude on the legislative power. For example, in the line-item-veto context, this Court has held that a Governor unconstitutionally engages in legislative action when he reduces or modifies an appropriation. *See Brown*, 382 So. 2d at 666; *Fla. House of Representatives v. Martinez*, 555 So. 2d 839, 844 (Fla. 1990).

In sum, the Governor's exercise of the veto power to affect the lawmaking process does not make the veto a legislative power. As Justice Ellis explained in 1922, "[e]ach branch of the government necessarily . . . comes in contact with one or the other branch, but such contact in n[o]wise merges the functions of one into that of the other." *Amos v. Gunn*, 94 So. 615, 627–28 (Fla. 1922). If that were so, then it follows that a "court acts in a legislative capacity when it



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declares an act of the legislature to be unconstitutional." *Id.* Because the veto is an executive power, this Court has jurisdiction.[2]

### B. The Governor's Other Executive Powers and Duties Also Support Jurisdiction.

If the Governor approves or takes no action on the Florida Legislature's redrawn districts, the districts become law, and the Governor must "take care that the laws [are] faithfully executed," art. IV, § 1(a), Fla. Const., and in so doing, must "direct[ly] supervis[e]" his "administration," namely the Secretary of State, art. IV, § 6, Fla. Const. In *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, this Court explained that the "Governor's question about the meaning of Amendment 4," the Florida Constitution's voting restoration amendment, "affect[ed]" his "take care" duties and

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[2] In 1887, this Court declined to issue an advisory opinion on a former Governor's use of the veto power. *See In re Exec. Commc'n*, 6 So. 925 (Fla. 1887). This Court concluded that it could not render an advisory opinion because it considered the veto to be a legislative power. *Id.* This Court is not required to follow its advisory opinions, *see In re Advisory Op. of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975), and for all the reasons explained, this Court should give little weight to the 1887 response. In fact, fifty years later, a "majority of th[is] Court" stated that it was "of the opinion that the duty imposed on the Governor" to veto legislation "is executive rather than legislative as may be presumed from dicta in *In Re Executive Communication*." *Advisory Opinion to the Governor*, 12 So. 2d 583, 584 (Fla. 1943).



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his "duty to provide the Department of State with necessary direction regarding the implementation of voter registration laws." 288 So. 3d 1070, 1076 (Fla. 2020). So too here.

Section 20(a)'s non-diminishment provision affects the Governor's take care duties and his duty to provide the Secretary of State with necessary direction regarding the implementation of redistricting maps. The Secretary, of course, serves at the pleasure of the Governor. *See* §§ 20.02(3), 20.10, Fla. Stat. As the "chief election officer of the state," § 97.012, Fla. Stat., the Secretary must administer future elections under any new congressional map. To administer such elections, among other things, the Secretary must "[o]btain and maintain uniformity in the interpretation and implementation of the election laws," *id.* § 97.012(1), and must certify "the names of all duly qualified candidates for nomination or election who have qualified with the Department of State," including congressional candidates, § 99.061(6), Fla. Stat.

## II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO ISSUE AN ADVISORY OPINION.

This Court should exercise its discretionary jurisdiction because of its "obligation to provide certainty to candidates and



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voters regarding the legality of the state's congressional districts." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) ("*Apportionment VIII*") (citations omitted). Unlike most other legislation, the State must create new congressional maps. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969); 2 U.S.C. §§ 2a–2c. The process must also be completed before the candidate qualifying period begins. The redistricting process should therefore proceed under a correct understanding of the law. The failure to do so could result in confusion and chaos in the administration of the state's congressional elections. To avoid that result, a timely advisory opinion on this matter of great public importance is both necessary and appropriate. *Apportionment VIII*, 179 So. 3d at 262; *see also In re Advisory Op. to Governor Request of June 29, 1979*, 374 So. 2d 959, 962 (Fla. 1979) (providing opinion to prevent the "confusion surrounding [an] important enactment").

The Governor does not seek the Court's opinion on the constitutionality of any proposed legislation or map. To the contrary, the Governor requests guidance on the meaning of section 20(a)'s minority-voting-protection provision, including whether it requires a district in northern Florida that stretches hundreds of miles to



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connect a black population in Jacksonville with a black population in Gadsden and Leon Counties so that they can elect a candidate of their choice, even though not a majority.

Section 20(a) can be broken into two parts with brackets added for the sake of clarity:

> districts shall not be drawn **[**with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process**]** or **[**to diminish their ability to elect representatives of their choice.**]**

Art. III, § 20(a), Fla. Const. The first bracketed clause contains the "non-vote-dilution provision," and the second contains the "non-diminishment provision." This Court has explained that section 20(a)'s non-vote-dilution provision mirrors § 2 of the Voting Rights Act and should be interpreted consistent with § 2 case law, and that section 20(a)'s non-diminishment provision mirrors § 5 of the Voting Rights Act and should be interpreted consistent with § 5 case law. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 619–27 (Fla. 2012) ("*Apportionment I*").

Still, section 20(a)'s vote-diminishment provision remains unclear. The text neither says what "diminish" means nor does it



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clarify whose "ability to elect representatives of their choice" is protected from diminishment. The dictionary defines "diminish" as "to make less or cause to appear less," *id.* at 702 (Canady, J., concurring in part and dissenting in part) (quoting *Diminish*, Webster's Third International Dictionary (1993)). But make less than what? Measured how? And if the previous congressional map serves as a baseline, *id.* at 624, must that baseline itself be constitutionally valid before the vote-diminishment standard applies?

Untangling these questions must begin with the text and, more specifically, the phrase "ability to elect representatives of *their* choice." The word "their," as used in section 20(a), refers back to "racial or language minorities" in section 20(a)'s non-vote-dilution provision—the first bracketed clause. Cases construing § 2 of the Voting Rights Act inform any understanding of the first clause, *id.* at 619–24, and the federal cases make clear that § 2 of the Voting Rights Act applies only to "a minority group" that is "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Thornburg v. Gingles*, 478 U.S. 30, 50



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(1986).[3] Taken together, "their" must then mean "racial or language minorities" within a reasonably cohesive geographic area. *See id.* It follows that under section 20(a)'s non-diminishment provision—the second bracketed clause—districts cannot be drawn to diminish racial or language minorities' ability to elect representatives of these geographically cohesive districts.

By giving meaning to section 20(a)'s text, we seek confirmation that such a reading comports with the rules of construction this Court now uses.[4] Among other things, we seek confirmation that the Governor's understanding of the word "their" comports with the harmonious-reading canon. Per the Governor's reading of Section 20(a), the non-vote-dilution provision allows minority groups to form

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[3] In particular, this Court has explained that section 20(a)'s non-vote-dilution provision matches § 2 of the Voting Rights Act, *Apportionment I*, 83 So. 3d at 619–24, and § 2 claims are only applicable to districts where (1) the "minority group" is "sufficiently large and geographically compact to constitute a majority," (2) the minority group is "politically cohesive," and (3) the majority "votes sufficiently as a bloc." *Gingles*, 478 U.S. at 50–51.

[4] *See Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021) (stating that the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." (cleaned up)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56, 167 (2012).



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geographically compact districts where appropriate consistent with two other preconditions (political cohesion of the minority group and bloc voting of the majority group). *See Gingles*, 478 at 50–51. The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477–80 (1997) (explaining the difference between § 2 and § 5 of the Voting Rights Act). Florida's non-vote-dilution provision therefore goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

But this Court has never squarely addressed whether the word "their" constrains the universe of districts to which the non-diminishment provision applies. *Apportionment I*, 83 So. 3d at 625.[5] That failure raises serious concerns under the U.S. Constitution.

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[5] Giving effect to the word "their" would also be consistent with this Court's prior redistricting cases. The cases note that "[e]very word of the Florida Constitution should be given its intended meaning and effect." *Apportionment I*, 83 So. 3d at 614 (referencing *In re Apportionment Law–1972*, 263 So. 2d 797, 807 (Fla. 1972)). And the cases even suggest that the *Gingles* preconditions have some import for the second bracketed clause in section 20(a)—the non-diminishment provision. *See Apportionment VIII*, 179 So. 3d at 286 n.11 ("The *Gingles* preconditions are relevant not only to a Section 2



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Decided after this Court's decisions in *Apportionments I-VIII*, the U.S. Supreme Court recently held that a "State may not use race as the predominant factor in drawing district lines" unless the State first proves "that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (cleaned up). This showing of compelling interest and narrow tailoring must find a "strong basis in evidence." *Id.* After all, governmental actions based on race are presumptively unconstitutional. *See id.*; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

Reading section 20(a)'s non-diminishment provision as applying only to minorities groups in geographically cohesive districts in section 20(a)'s non-vote-dilution provision would avoid significant concerns under the U.S. Constitution and would give Florida's congressional maps the best chance of surviving strict scrutiny. As in *Cooper*, such a reading would find a tether in the first *Gingles* factor, which is used for purposes of § 2 of the Voting Rights Act, and

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vote dilution analysis, but also to a Section 5 diminishment analysis.").



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the U.S. Supreme Court has assumed that compliance with § 2 would satisfy strict scrutiny. *See Cooper*, 137 S. Ct. at 1469–72.

Any reading of state law should avoid conflicts with the U.S. Constitution. Florida courts, including this Court, utilize the well-established doctrine of constitutional avoidance: "when two constructions" of state law "are possible, one of which is of questionable constitutionality," the law "must be construed so as to avoid any violation of" the "Florida and *the United States Constitutions*." *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116, 120 (Fla. 2006) (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983)) (emphasis added).

In light of the constitutional text and relevant interpretive canon, the best reading of section 20(a)'s non-diminishment standard is that it prevents diminishment of a reasonably cohesive racial or language minority's population. Confirming this interpretation now in an advisory opinion will avoid potential confusion and chaos later.

## III. CONCLUSION.

For the foregoing reasons, this Court should provide the requested advisory opinion to the Governor.



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Respectfully submitted on this 7th day of February, 2022.

/s/ Mohammad Jazil

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on February 7, 2022, undersigned electronically filed this Brief on Jurisdiction with the Florida Supreme Court using the Florida Courts E-filing Portal. The foregoing documents have been furnished on all parties required to be served.

/s/ Mohammad Jazil
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## CERTIFICATE OF COMPLIANCE

**I CERTIFY** that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.045(b) and this Court's February 2, 2022 order. This brief is 15 pages long and contains 3,476 words as counted by Word, excluding the parts of the brief exempted by Florida Rule of Appellate Procedure 9.210(a)(2)(E).

/s/ Mohammad Jazil
Mohammad Jazil (FBN 72556)



AMERICAN OVERSIGHT

# Supreme Court of Florida

No. SC22-139

**ADVISORY OPINION TO THE GOVERNOR RE: WHETHER ARTICLE III, SECTION 20(A) OF THE FLORIDA CONSTITUTION REQUIRES THE RETENTION OF A DISTRICT IN NORTHERN FLORIDA, etc.**

February 10, 2022

PER CURIAM.

On February 1, 2022, the Governor of Florida requested an advisory opinion from this Court pursuant to article IV, section 1(c) of the Florida Constitution relating to the constitutionality of redistricting congressional District 5. Specifically, the Governor asks, "whether Article III, Section 20(a) of the Florida Constitution requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations (either in Leon and Gadsden Counties or outside of Orlando) to ensure sufficient voting strength, even if not a majority, to elect a candidate of their choice." The Governor also cites precedent from this Court and the United States Supreme

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Court pertaining to this issue and seeks further "guidance on what the non-diminishment standard" requires and "clarification from this Court on what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice has been diminished." On February 2, 2022, this Court requested "briefs from interested persons addressing whether the Governor's request is within the purview of [article IV, section 1(c)], and if so whether the Court should exercise its discretion to provide an opinion in response to the request."

Several interested persons argue that the Court does not have jurisdiction to render an advisory opinion under the circumstances described by the Governor's request. We need not make that determination because assuming the Court has jurisdiction, which we do not decide, we exercise our discretion to deny the request for an advisory opinion. *See Advisory Op. to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1074 (Fla. 2020) ("After concluding that the Governor's request was within the purview of article IV, section 1(c) of the Florida Constitution, we agreed to exercise our discretion to provide an advisory opinion."); *In re Advisory Op. to the Governor*,



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509 So. 2d 292, 300 (Fla. 1987) ("It is the decision of the Court that this request is answerable under the above-noted section of the Constitution and we exercise our discretion to do so.").

This Court's advisory opinions to the Governor are generally limited to narrow questions. *See, e.g.*, *Advisory Op. to Governor re Implementation of Amendment 4*, 288 So. 3d at 1075 (answering only "the narrow question of whether the phrase 'all terms of sentence' includes LFOs ordered by the sentencing court"). Here, the scope of the Governor's request is broad and contains multiple questions that implicate complex federal and state constitutional matters and precedents interpreting the Voting Rights Act of 1965.

While this Court acknowledges the importance of the issues presented by the Governor and the expressed need for quick resolution and finality, history shows that the constitutionality of a final redistricting bill for all congressional districts will be subject to more judicial review through subsequent challenges in court. Moreover, the Governor's request might necessitate fact-intensive analysis and consideration of other congressional districts, not just District 5. We have no record before us setting forth a functional analysis of statistical evidence, such as the voting age of minority



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populations and election results. A record will assist the judiciary in answering the complex federal and state constitutional issues implicated by the Governor's request. *See generally Brown v. Firestone*, 382 So. 2d 654, 671 (Fla. 1980) (a declaratory action challenging the constitutionality of legislative action in circuit court will enable the parties "to develop a full record upon which the court can base an intelligent decision").

Accordingly, we respectfully deny the request for an advisory opinion. No rehearing will be permitted.

It is so ordered.

POLSTON, LABARGA, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.
CANADY, C.J., and LAWSON, J., recused.

Original Proceeding – Advisory Opinion to the Governor

Mohammad Jazil and Michael Beato of Holtzman Vogel Josefiak Torchinsky PLLC, Tallahassee, Florida, and Jason Torchinsky of Holtzman Vogel Josefiak Torchinsky PLLC, Haymarket, Virginia; and Ryan Newman, General Counsel, Joshua Pratt and Nicholas Meros, Deputy General Counsel, Executive Office of the Governor, Tallahassee, Florida,

for The Honorable Ron DeSantis, Governor of Florida

Henry C. Whitaker, Solicitor General, Daniel W. Bell, Chief Deputy Solicitor General, and Evan Ezray, Deputy Solicitor General, Office of the Attorney General, Tallahassee, Florida,



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for Interested Party, Attorney General Ashley Moody

Henry M. Coxe III and Michael E. Lockamy of Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Jacksonville, Florida; and Jacob Tuttle Newman, Peter A. Nelson, Catherine J. Djang, and Gregory L. Diskant of Patterson Belknap Webb & Tyler LLP, New York, New York,

for Interested Parties, Common Cause Florida and FairDistricts Now

Joseph W. Jacquot, Lauren V. Purdy, and Pierce N. Giboney of Gunster, Jacksonville, Florida,

for Interested Party, Mayor Lenny Curry

Daniel E. Nordby of Shutts & Bowen LLP, on behalf of the Florida Senate, Tallahassee, Florida; and Andy Bardos of GrayRobinson, on behalf of the Florida House of Representatives, Tallahassee, Florida,

for Interested Parties, the Florida Senate and the Florida House of Representatives

Thomas A. Zehnder and Frederick S. Wermuth of King, Blackwell, Zehnder & Wermuth, P.A., Orlando, Florida; Abha Khanna and Jonathan P. Hawley of Elias Law Group LLP, Seattle, Washington, Graham W. White and Christina A. Ford of Elias Law Group LLP, Washington, District of Columbia; and John M. Devaney of Perkins Coie LLP, Washington, District of Columbia,

for Interested Party, All On The Line Florida

Carl Christian Sautter, Washington, District of Columbia, Larry S. Davis, Hollywood, Florida, Benedict P. Kuehne and Michael T. Davis, Miami, Florida, and Jason B. Blank, Fort Lauderdale, Florida,

for Interested Party, Rep. Sheila Cherfilus-McCormick, Member of Congress, Florida Congressional District 20



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# Fla. Const. Art. III, § 21

Current through the 2020 Session of the Florida Legislature.

*LexisNexis® Florida Annotated Constitution > Constitution of the State of Florida as Revised in 1968 and Subsequently Amended. > Article III. Legislature.*

## Section 21. Standards for Establishing Legislative District Boundaries.

In establishing Legislative district boundaries:

**(a)** No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

**(b)** Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

**(c)** The order in which the standards within sub-sections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

## History

Proposed by Initiative Petition filed with the Secretary of State September 28, 2007; adopted 2010.

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# *Fla. Const. Art. III, § 16*

Current through the 2020 Session of the Florida Legislature.

*LexisNexis® Florida Annotated Constitution > Constitution of the State of Florida as Revised in 1968 and Subsequently Amended. > Article III. Legislature.*

## Section 16. Legislative apportionment.

**(a) Senatorial and representative districts. —** The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.

**(b) Failure of legislature to apportion; judicial reapportionment. —** In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, the attorney general shall, within five days, petition the supreme court of the state to make such apportionment. No later than the sixtieth day after the filing of such petition, the supreme court shall file with the custodian of state records an order making such apportionment.

**(c) Judicial review of apportionment. —** Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

**(d) Effect of judgment in apportionment; extraordinary apportionment session. —** A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.

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**(e) Extraordinary apportionment session; review of apportionment. —** Within fifteen days after the adjournment of an extraordinary apportionment session, the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment shall be had as provided for in cases of such joint resolution adopted at a regular or special apportionment session.

**(f) Judicial reapportionment. —** Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court determine that the apportionment made is invalid, the court shall, not later than sixty days after receiving the petition of the attorney general, file with the custodian of state records an order making such apportionment.

## History

Am. proposed by Constitution Revision Commission, Revision No. 8, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

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**Sent:** Saturday, February 12, 2022 3:19 PM
**To:** rpopper@judicialwatch.org
**CC:** Jason Torchinsky [jtorchinsky@HoltzmanVogel.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]; Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]
**Subject:** Request for Assistance

Mr. Popper,

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I look forward to hearing from you.

All the best,
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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

*Id*. at 921.

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> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

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argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

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My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g., How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

[2] Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).



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gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

In 2013, I joined Judicial Watch. In my time there, I have filed voting rights lawsuits in federal and state courts alleging claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act, the NVRA, and a number of state constitutional provisions. Among other things, I am currently representing plaintiffs pursuing gerrymandering claims in Maryland State court.

In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

[3] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).



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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

*Id*. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

*Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas



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argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.



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**From:** Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]
**Sent:** Tuesday, February 22, 2022 4:46 PM
**To:** baseballcrank@gmail.com
**CC:** MO Jazil [mjazil@holtzmanvogel.com]
**Subject:** FW: letter - redistricting
**Attachments:** Executive Office of the Governor Legal Memorandum - 2.18.2022.pdf; Robert D. Popper Report - 2.18.2022.pdf; Governor's Request for Advisory Opinion - 2.1.2022.pdf; Governor's Brief - 2.7.2022.pdf

Dear Dan,

Herein I've attached: (1) the Executive Office of the Governor's Legal Memorandum to the Florida House Congressional Redistricting Subcommittee; (2) Robert D. Popper's opening statement to the Subcommittee; (3) the Governor's Request for an Advisory Opinion from the Florida Supreme Court; and (4) the Governor's Brief in the Florida Supreme Court. Currently working on finding you the current maps under consideration by the House and Senate. If you have any other questions, please feel free to reach out.

- Sincerely, Josh

- -
Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

*Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.*

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**From:** Pushaw, Christina <Christina.Pushaw@eog.myflorida.com>
**Sent:** Tuesday, February 22, 2022 12:51 PM
**To:** 'Dan McLaughlin' <baseballcrank@gmail.com>; Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Cc:** AANR (dmclaughlin@nationalreview.com) <dmclaughlin@nationalreview.com>; Fenske, Taryn M. <Taryn.M.Fenske@eog.myflorida.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>
**Subject:** RE: letter - redistricting

I am available anytime this afternoon. We can plan for a 4:30 call with @Newman, Ryan unless Josh or Mo can confirm if they are available earlier.

Thanks!

**Christina Pushaw**
Press Secretary

AMERICAN OVERSIGHT

Executive Office of the Governor
850-717-9238
Christina.Pushaw@eog.myflorida.com

**From:** Dan McLaughlin <baseballcrank@gmail.com>
**Sent:** Tuesday, February 22, 2022 12:33 PM
**To:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Cc:** Pushaw, Christina <Christina.Pushaw@eog.myflorida.com>; AANR (dmclaughlin@nationalreview.com) <dmclaughlin@nationalreview.com>; Fenske, Taryn M. <Taryn.M.Fenske@eog.myflorida.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>
**Subject:** Re: letter - redistricting

Thanks. So long as there's someone who can offer a sanity check and fill in a few blanks, I'm fine.

On Tue, Feb 22, 2022, 12:26 PM Newman, Ryan <Ryan.Newman@eog.myflorida.com> wrote:

> I'm tied up until 4:30, but free afterward.
>
> I'm also adding Josh and Mo, who might be available sooner to talk.
>
> **Ryan D. Newman**
>
> General Counsel
>
> Office of Governor Ron DeSantis
>
> (850) 717-9368
>
> **From:** Dan McLaughlin <baseballcrank@gmail.com>
> **Sent:** Tuesday, February 22, 2022 11:54 AM
> **To:** Pushaw, Christina <Christina.Pushaw@eog.myflorida.com>
> **Cc:** AANR (dmclaughlin@nationalreview.com) <dmclaughlin@nationalreview.com>; Newman, Ryan <Ryan.Newman@eog.myflorida.com>; Fenske, Taryn M. <Taryn.M.Fenske@eog.myflorida.com>
> **Subject:** Re: letter - redistricting

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Would it be possible to talk early this afternoon? I have a few things I want to nail down. I'm free any time from 1pm on.

On Mon, Feb 21, 2022 at 5:20 PM Dan McLaughlin <baseballcrank@gmail.com> wrote:

Got it, thanks. Will be in touch in the morning if I have follow up questions.

On Mon, Feb 21, 2022, 5:18 PM Pushaw, Christina <Christina.Pushaw@eog.myflorida.com> wrote:

Dan,

Attached is the legal memo that our GC, Ryan Newman, sent to the House Congressional Redistricting Committee last Friday morning. It lays out our arguments on why CD 5 is unconstitutional.

Here's the map that our office submitted last week:
https://redistricting.maps.arcgis.com/apps/View/index.html?appid=8d3ed79b33ee400b9260ac63d73d8a2a

Here's an article from last week that provides some background; Gov. DeSantis recently signaled that he is prepared to veto any congressional map that has an unconstitutional gerrymander in it.

https://www.chronicleonline.com/news/local/desantis-doesn-t-budge-on-redistricting/article_2fda24c2-11e4-5b51-be16-1e0b788188d9.html

Let me know if you have any questions!

Thanks,

**Christina Pushaw**

AMERICAN OVERSIGHT

Press Secretary

Executive Office of the Governor

850-717-9238

Christina.Pushaw@eog.myflorida.com

Please note that under Florida law correspondence sent to the Governor's Office, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

--

Dan McLaughlin

Senior Writer, *National Review*
http://www.nationalreview.com/author/dan-mclaughlin

https://twitter.com/baseballcrank

http://www.baseballcrank.com

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RON DESANTIS
GOVERNOR

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001
www.flgov.com
850-717-9418

February 18, 2022

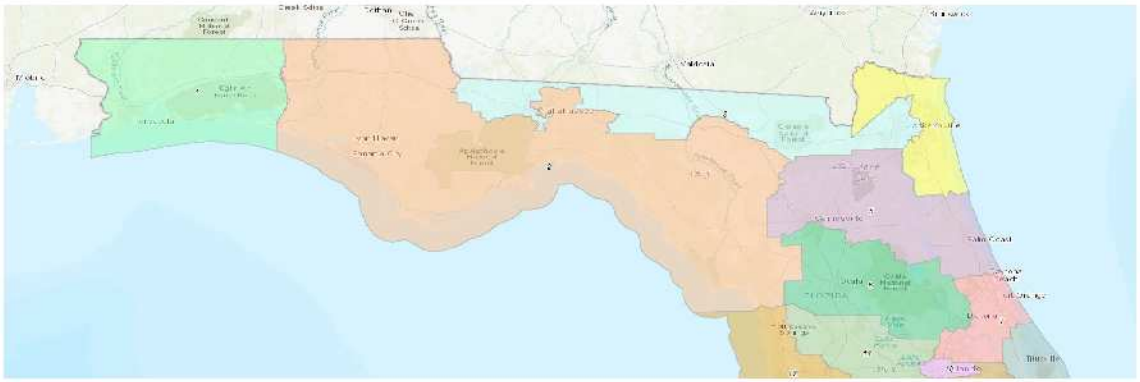
Honorable Tyler Sirois
Member, Florida House of Representatives
Chairman, Congressional Redistricting Subcommittee
400 South Monroe Street
Tallahassee, Florida 32399

Dear Chairman Sirois:

I write to convey the legal objections of the Executive Office of the Governor to the inclusion of Congressional District 3 in the maps proposed by the staff of the Florida House Redistricting Committee. The proposed district, which largely tracks current Congressional District 5, spans approximately 200 miles from East to West and cuts across eight counties to join a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact and does not otherwise conform to usual political or geographic boundaries. Instead, it appears to be drawn solely to combine separate minority populations from different regions of northern Florida in a less than majority-minority district so that together they may have an opportunity to elect a candidate of their choice.

Where race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the legislature must prove that such "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017) (citations omitted). Because the Legislature cannot show that the proposed Congressional District 3 would satisfy strict scrutiny, the proposed district violates the Fourteenth Amendment to the U.S. Constitution and should not be included in any map enacted by the Florida House of Representatives.

**Proposed Congressional District 3 (Blue)**





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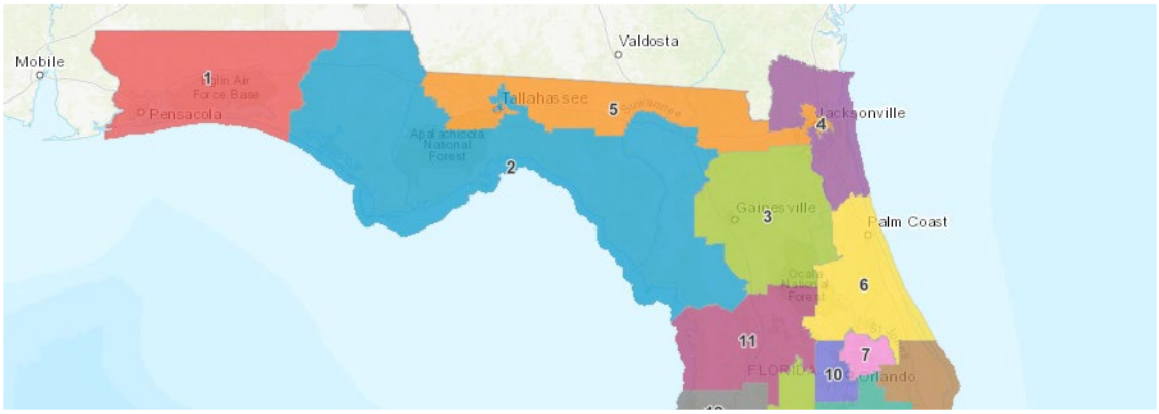
**Current Congressional District 5 (Orange)**




The Equal Protection Clause of the Fourteenth Amendment generally prohibits state laws that separate citizens into groups on the basis of race. A state law that "expressly distinguishes among citizens because of their race" can survive legal challenge only if it is "narrowly tailored to further a compelling governmental interest." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). This principle applies not only to a law that "contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'" *Id.* (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Redistricting legislation is treated no differently. According to the U.S. Supreme Court, "redistricting legislation that is so bizarre on its face" that it can only be explained because of race "demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 644.

To state an equal protection claim, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [line-drawing] decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Specifically, the plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

Given the foregoing considerations, it is evident that non-racial grounds cannot explain proposed Congressional District 3. First, the district violates traditional districting principles. Far from compact, the district records compactness scores as low as .11 on the Reock test, .63 on the Area / Convex Hull test, and .1 on the Polsby-Popper test. It also does not respect political subdivisions or communities defined by actual shared interests. The district splits four counties and three municipalities, and it stretches across eight counties to join a minority population in Jacksonville with minority populations in Leon and Gadsden Counties. These communities are in separate and distinct regions of northern Florida and are not defined by shared interests. With respect to contiguity, the district narrows to a mere three miles wide from North to South when traversing the northernmost precincts of Leon County at the state's northern border in an effort to include the minority populations in western Leon County and Gadsden County while avoiding the non-minority population in eastern Leon County.



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Second, only two considerations plausibly explain the district's unusual shape—partisanship or race. If the district were drawn to favor partisan interests, it would violate the Fair Districts Amendment of the Florida Constitution. Article III, Section 20 of the Florida Constitution provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." If improper partisan interests did not play a role, the only reasonable explanation for the district is race. This conclusion follows from the historical circumstances surrounding the creation of the current district.

The Florida Supreme Court drew the current district—Congressional District 5—in 2015. The Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando because it concluded that such configuration had been unconstitutionally tainted by improper partisan influences. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015) ("*Apportionment VII*"). The Court further held that the North-South version was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* Consequently, the Court adopted the current East-West version. *Id.* at 405-06. While acknowledging that the new configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), the Court determined that it would not "diminish the ability of black voters to elect a candidate of their choice." *Id.* at 405. The Court explained that the non-compact shape was necessary because of "geography" and "other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted). Thus, it is clear that race considerations predominated in the drawing of the current district. And because the proposed reapportionment plan seeks to retain the district in large measure to avoid diminishment of minority voting power, race considerations likewise predominate in the creation of proposed Congressional District 3.

Third, it is obvious, given the location of minority neighborhoods and precincts, that district lines in both Jacksonville and Tallahassee were drawn specifically to capture minority populations and to combine them into one district. But according to the U.S. Supreme Court, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. By attempting to connect a minority population in Jacksonville with a faraway minority population in Tallahassee and surrounding areas, proposed Congressional District 3 does precisely what the U.S. Supreme Court has condemned.

Because it subordinates traditional districting criteria to avoid diminishment of minority voting power, Congressional District 3 is a racial gerrymander that can survive constitutional challenge only if the Legislature can prove that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464 (citation omitted). The Legislature cannot meet that exacting burden here.

The U.S. Supreme Court has long assumed, without definitively deciding, that complying with the Voting Rights Act ("VRA") is a compelling interest. *Id.* at 1464, 1469. In this case,



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however, there is no good reason to believe that the VRA requires Congressional District 3. According to the U.S. Supreme Court in *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality), Section 2 is satisfied only when a compact majority of minority citizens can be drawn into a single district. But there is no configuration in any proposal put forward in any public map that we are aware of that has created a majority-minority district in northern Florida.

As both the U.S. Supreme Court and the Florida Supreme Court have noted, Section 2 prohibits the dilution of minority votes where a minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 622-23 (Fla. 2012) ("*Apportionment I*"). Congressional District 3 is not a reasonably configured district, and in any event, it does not contain a minority group that is sufficiently large and geographically compact to constitute a majority.

Nor does Section 5 of the VRA require Congressional District 3. Before the U.S. Supreme Court invalidated the VRA's coverage formula in *Shelby County v. Holder*, 570 U.S. 529, 553-57 (2013), the State of Florida was not a covered jurisdiction under Section 5, but five Florida counties were: Collier, Hardee, Hendry, Hillsborough, and Monroe. None of those counties are in Congressional District 3. Moreover, even assuming that compliance with the VRA is a compelling interest, it is doubtful that "continued compliance with [Section] 5 remains a compelling interest" in light of "*Shelby County v. Holder*." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015).

Finally, the U.S. Supreme Court has never held that compliance with a state non-diminishment requirement is a compelling interest sufficient to withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. That is especially so where the state race-based requirement lacks a strong basis in evidence. To the extent that Article III, Section 20(a)'s non-diminishment provision parallels Section 5 of the VRA, *see Apportionment I*, 83 So. 3d at 619-20, it should be noted that Congress compiled in 1965 an extensive record of racial discrimination in state electoral processes to justify Section 4 and 5's "strong medicine" and "extraordinary measures to address an extraordinary problem." *Shelby County*, 570 U.S. at 534-35; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 329-34 (1966). When Florida voters approved Article III, Section 20(a), by contrast, they did not have before them a similar record of pervasive, flagrant, widespread, or rampant discrimination.

In any event, the non-diminishment provision of the Florida Constitution simply does not require Congressional District 3. Article III, Section 20(a) of the Florida Constitution provides that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." This section contains two relevant provisions: the first is the non-vote-dilution provision ("districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process"), and the second is the non-diminishment provision ("districts shall not be drawn . . . to diminish their ability to elect representatives of their choice"). The



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Florida Supreme Court has held that the non-vote-dilution provision mirrors Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619-23.

When Article III, Section 20(a) is read in this context, it becomes apparent that the group referenced in the latter non-diminishment provision is the very same group of "racial or language minorities" referenced in the former non-vote-dilution provision. The word "their" in the non-diminishment provision necessarily refers back to the "racial or language minorities" in the non-vote-dilution provision. Because the non-vote-dilution provision mirrors Section 2 of the VRA, and because Section 2 only applies to districts that contain a minority group that is sufficiently large and geographically compact to constitute a majority, the non-diminishment provision should also apply to those kinds of districts. Because Congressional District 3 does not contain a minority group that is sufficiently large and geographically compact to constitute a majority, Article III, Section 20(a)'s non-diminishment provision does not apply.

With this reading, both the non-vote-dilution provision and the non-diminishment provision work in tandem. The non-vote-dilution provision allows minority groups to form geographically compact districts where appropriate. *See Gingles*, 478 U.S. at 50-51 (requiring, additionally, political cohesion of the minority group and bloc voting of the majority group). The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-80 (1997). In other words, the non-vote-dilution provision goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

This reading of Article III, Section 20(a)'s non-diminishment provision to refer to "racial or language minorities" in the non-vote-dilution provision flows from the text of the Florida Constitution. It also gives the Florida Constitution the best chance to avoid the federal constitutional concerns raised above. *See Cooper*, 137 S. Ct. at 1463-64, 1482 (invalidating two North Carolina congressional districts).

In sum, I respectfully ask that you consider the foregoing legal objections to Congressional District 3. I also respectfully ask that you include in the legislative record Governor DeSantis' advisory opinion request to the Florida Supreme Court and the Governor's brief before the Florida Supreme Court.

Sincerely,

Ryan Newman
General Counsel

cc: Honorable Chris Sprowls
Speaker, Florida House of Representatives
400 South Monroe Street
Tallahassee, Florida 32399



AMERICAN OVERSIGHT

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 18, 2022

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g., How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

[2] Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).



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gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

In 2013, I joined Judicial Watch. In my time there, I have filed voting rights lawsuits in federal and state courts alleging claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act, the NVRA, and a number of state constitutional provisions. Among other things, I am currently representing plaintiffs pursuing gerrymandering claims in Maryland State court.

In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

[3] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).



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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

*Id*. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

*Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas



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argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.



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Filing # 143038402 E-Filed 02/01/2022 11:11:04 AM

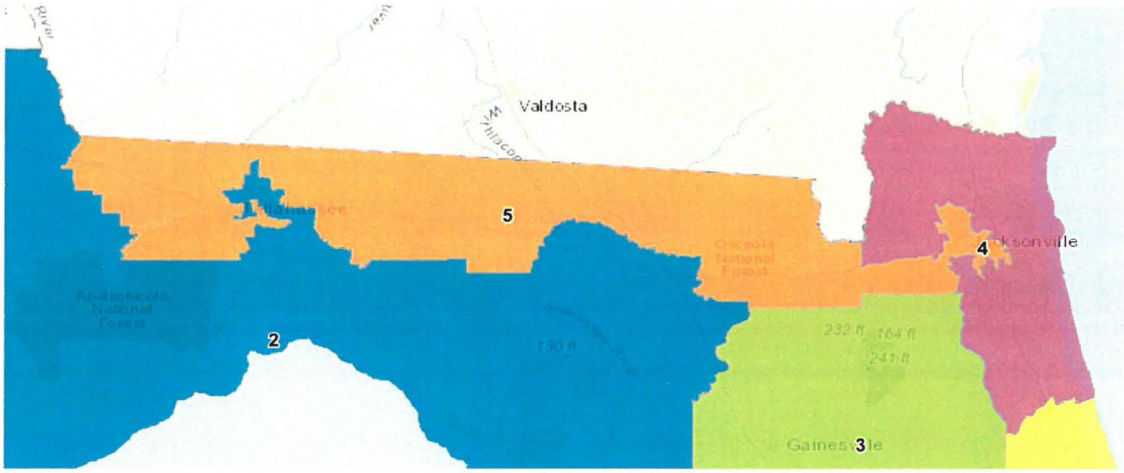
RON DESANTIS
GOVERNOR

February 1, 2022

Honorable Charles T. Canady
Chief Justice of the Florida Supreme Court
Florida Supreme Court, 500 S. Duval St.
Tallahassee, Florida 32399

Mr. Chief Justice and Justices of the Florida Supreme Court:

In the coming weeks, the Florida Legislature must present to me a bill that redraws Florida's congressional districts consistent with the most recent decennial census, *see* 2 U.S.C. §§ 2a–2c, and the one-person, one-vote requirement of the U.S. Constitution, *see Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). All maps that have been published by the Legislature and are currently under consideration retain, for the most part, the current Congressional District 5. The district stretches over 200 miles from East to West across eight counties without conforming to usual political or geographic boundaries, solely to connect a minority population center in Jacksonville with a separate and distinct minority population center in Leon and Gadsden Counties so that, together, these minority populations may elect a candidate of their choice. It is a narrow district that compresses to only three miles wide, North to South, when traversing a string of the northernmost precincts in Leon County so the district can connect with the minority population in western Leon County without including the non-minority population in eastern Leon County. Similarly, in Duval County, the district narrows to about a mile and a half in width. As of the 2020 Census, two counties, Duval to the East and Leon to the West, alone contribute 82.77% of the district's population. These counties are in two completely different regions of the State.




*See* FLSCOR, *Florida Congressional Districts 1982-2022*, ArcGIS Online, https://www.arcgis.com/home/item.html?id=db44457f19684fd99b19ce64f96ae787 (click "View") (last visited Feb. 1, 2022).

THE CAPITOL
TALLAHASSEE, FLORIDA 32399 • (850) 717-9249

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FL-GOV-22-0226-B, 22-0227-A-000407

I seek this Court's opinion on whether Article III, Section 20(a) of the Florida Constitution requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations (either in Leon and Gadsden Counties or outside of Orlando) to ensure sufficient voting strength, even if not a majority, to elect a candidate of their choice.

This Court's constitutional power to render an advisory opinion is quite broad. Upon my request, this Court may opine as to "the interpretation of *any* portion of [the] constitution upon *any* question affecting the governor's executive powers and duties." Art. IV, § 1(c), Fla. Const. (emphasis added). The Florida Constitution provides that "[t]he supreme executive power shall be vested in a governor." Art. IV, § 1(a), Fla. Const. That executive power includes the "[e]xecutive approval and veto" power over bills the Florida Legislature presents to me, Art. III, § 8, Fla. Const.; the duty to "take care that the laws be faithfully executed," Art. IV, § 1(a), Fla. Const.; and the power of "direct supervision" over the "administration" of the Department of State, Art. IV, § 6, Fla. Const.; *see also* § 20.02(3), Fla. Stat. (providing that "[t]he administration of any executive branch department . . . placed under the direct supervision of an officer . . . appointed by and serving at the pleasure of the Governor shall remain at all times under the constitutional executive authority of the Governor"); § 20.10, Fla. Stat. (creating the Department of State, which is headed by the Secretary of State, who is appointed by and serves at the pleasure of the Governor).

Once presented with a congressional redistricting bill, I must decide whether to approve or veto it, and even if I take no action and the law goes into effect, I must nevertheless take care that the Constitution and laws of the State of Florida are faithfully executed. The Secretary of State, whom I direct and oversee, is the chief election officer of the State, § 97.012, Fla. Stat., and is responsible for, among many things, "[o]btain[ing] and maintain[ing] uniformity in the interpretation and implementation of the election laws," *id.* § 97.012(1), and certifying "the names of all duly qualified candidates for nomination or election who have qualified with the Department of State," § 99.061(6), Fla. Stat. The Department of State will also be responsible for defending any legal challenges to the new congressional redistricting map. In deciding whether to exercise my veto power once the Legislature's congressional redistricting bill is presented to me, and how best to faithfully implement the law if enacted, I now seek your "opinion . . . as to the interpretation of [a] portion of [the] constitution" that applies to the congressional redistricting process. Art. IV, § 1(c), Fla. Const. Such an opinion is both necessary and appropriate in this instance.

*First*, the once-in-a-decade congressional redistricting process is a unique circumstance: it is required by the U.S. Constitution, and it must be completed before upcoming congressional elections. With the qualifying period for election to the U.S. House of Representatives quickly approaching, the voters and candidates have a pressing need for certainty regarding the meaning of the State's non-diminishment standard. *See* § 99.061(9), Fla. Stat.; https://dos.myflorida.com /elections/candidates-committees/qualifying/. In contrast, most legislation is neither constitutionally mandated nor of the sort where prolonged uncertainty regarding the meaning of such text may adversely affect the State's elections. *See League of Women Voters of Fla. v.*



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*Detzner*, 172 So. 3d 363, 372 (Fla. 2015) ("*Apportionment VII*") ("We emphasize the time-sensitive nature of these proceedings, with candidate qualifying for the 2016 congressional elections now less than a year away . . . ."). I make my request in the spirit of seeking as much guidance as possible from you consistent with "[t]his Court['s] . . . obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) ("*Apportionment VIII*") (citation and internal quotation marks omitted).

*Second*, I am aware that on one occasion well over a century ago, the members of this Court declined to opine on a constitutional question in aid of my predecessor's exercise of the veto power. *See In re Exec. Commc'n*, 6 So. 925 (Fla. 1887). Notwithstanding that the Florida Constitution assigns to the Executive the power to approve or veto legislation, *see* Art. III, § 8, Fla. Const., this Court concluded that "any act which is an essential prerequisite" to the enactment of a law "is legislative" and is performed by the Executive "as a part of the lawmaking power." *In re Exec. Commc'n*, 6 So. at 925. This reasoning, which you are not bound to follow, *see In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975), conflicts with the separation of powers enshrined in Article II, Section 3 of the Florida Constitution, and I respectfully request that you give the 1887 response no weight.

In particular, the Florida Constitution vests the State's legislative power in the Florida Legislature. *See* Art. III, § 1, Fla. Const. It follows, therefore, that the Governor's exercise of what the Constitution characterizes as the power of "[e]xecutive approval and veto," Art. III, § 8, Fla. Const., is not a legislative power. Rather, the veto power is an executive check on the legislative power; "[e]ach branch of the government necessarily at times, either by express provision of the Constitution or in the orderly administration of the state's affairs, comes in contact with one or the other branch, but such contact in n[o]wise merges the functions of one into that of the other." *Amos v. Gunn*, 94 So. 615, 627–28 (Fla. 1922) (Ellis, J., on pet. for reh'g). This Court's more recent opinions thus acknowledge that the exercise of the veto is an executive power.[1]

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[1] *See, e.g.*, *Chiles v. Child. A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) ("Article III, section 8 sets forth the procedure for the executive power to approve or veto legislation of both nonappropriations and appropriations bills."); *Brown v. Firestone*, 382 So. 2d 654, 672 (Fla. 1980) ("We hold further that the vetoes identified herein as 2, 4, 5 and 6 are valid as being within the purview of the executive power granted by article III, section 8(a)[.]"); *Owens v. State*, 316 So. 2d 537, 538 n.4 (Fla. 1975) ("Although article IV of the constitution deals with the executive branch, the placement of a legislative power in one subsection of that article does not render the delegated power nugatory. The placement is functional, as with executive powers conferred in the judicial article (art. V, [§] 11) and in the legislative article (art. III, [§] 8)."); *In re Advisory Opinion to the Governor*, 239 So. 2d 1, 9 (Fla. 1970) ("The Legislature may not validly so draft a general appropriations bill as to unduly and unreasonably preclude the exercise of the executive power to 'veto any specific appropriation in a general appropriation bill.'" (quoting Art. III, § 8(a), Fla. Const.)); *see also Green v. Rawls*, 122 So. 2d 10, 13 (Fla. 1960) ("[U]nder our tripartite division of the powers of government, and the checks and balances designed to be accomplished thereby, the chief executive must have the power and the opportunity to veto



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*Third*, the question affecting my executive powers and duties concerns Article III, Section 20(a) of the Florida Constitution, which provides that:

> No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process *or to diminish their ability to elect representatives of their choice*; and districts shall consist of contiguous territory.

Art. III, § 20(a), Fla. Const. (emphasis added). I limit my request to the phrase "diminish their ability to elect representatives of their choice"—the State's non-diminishment standard. Except where it may be necessary to inform your interpretation of the Florida Constitution, I do not ask for your opinion on any issues of federal law. *Cf. In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 620-21 (Fla. 2012) ("*Apportionment I*") (recognizing that the non-diminishment standard borrows from § 5 of the Voting Rights Act but "nonetheless recogniz[ing] our independent constitutional obligation to interpret our own state constitutional provisions").

Specifically, I ask whether the Florida Constitution's non-diminishment standard mandates a sprawling congressional district in northern Florida that stretches hundreds of miles from East to West solely to connect black voters in Jacksonville with black voters in Gadsden and Leon Counties (with few in between) so that they may elect candidates of their choice, even without a majority. This Court has previously suggested that the answer is "yes." *Apportionment VIII*, 179 So. 3d at 271 ("Although District 5 was required to be drawn from East to West, no specific configuration was mandated in *Apportionment VII*," and this Court did not "specify a certain Black Voting Age Population (BVAP) or black share of registered Democrats as a 'floor' below which the ability of black voters to elect a candidate of choice was certain to be diminished.").

In 2015, this Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando. The Court held that the North-South version had been unconstitutionally tainted by partisan and other improper influences and that such a configuration was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Apportionment VII*, 172 So. 3d at 403. Consequently, the Court adopted the East-West configuration that exists today. *Id.* at 405–06. In so doing, this Court acknowledged that this configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), but nevertheless concluded that it was "visually less 'unusual' and 'bizarre' than the meandering North-South version," *id.*, and that it would not "diminish the ability of black voters to elect a candidate of their choice," *id.* at 405. This Court indicated that the non-compact shape of the East-West district was nevertheless necessary because of "geography" and "other constitutional

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legislative action, subject to the power of the legislature to override the executive veto by the vote of a specified number of the legislature.").



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requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted).

This Court's prior guidance, however, pre-dates relevant decisions from the U.S. Supreme Court. In 2017, the U.S. Supreme Court made clear that where "racial considerations predominate[] over others, the design of the district must withstand strict scrutiny." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). To satisfy this test, and thus pass muster under the Fourteenth Amendment to the U.S. Constitution, a state must "prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.* (citations omitted). While the U.S. Supreme Court "has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act," a state must show "that it had 'a strong basis in evidence'" to conclude that the Act required race-based sorting of voters. *Id.* (citation omitted). In *Cooper*, North Carolina did not meet its burden when arguing that compliance with § 2 of the Voting Rights Act served as a compelling reason. *Id.* at 1469–72. Specifically, North Carolina could not satisfy § 2's threshold conditions: (1) that the "minority group" was "sufficiently large and geographically compact to constitute a majority" in a reasonably compact legislative district, (2) that the minority group was "politically cohesive," and (3) that the district's majority group voted "sufficiently as a bloc" to "defeat the minority's preferred candidate." *Id.* at 1470 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)).

If this Court advises that the non-diminishment standard does not specifically require that an East-West district be drawn to connect minority voters in Jacksonville with minority voters in Leon and Gadsden Counties, I nevertheless request guidance on what the non-diminishment standard does require. Specifically, I ask whether the Florida Constitution's non-diminishment standard requires that congressional districts be drawn to connect minority populations from distant and distinct geographic areas if doing so would provide the assembled minority group sufficient voting strength (although not a majority of the proposed district) to elect a candidate of its choice. Or, conversely, does the non-diminishment standard merely require that a minority population in a reasonably cohesive geographic area, where the population is not a majority but is nevertheless large enough to elect candidates of its choice, continue to be able to elect such candidates?

Relatedly, to make sense of the non-diminishment standard, I ask for clarification from this Court on what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice has been diminished. This Court has said that the "existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is measured.'" *Apportionment I*, 83 So. 3d at 624 (citation omitted). But is that so even if the district in the existing plan was designed solely to cobble together enough minority voters from distant and distinct geographic areas to elect candidates of their choice despite not constituting a majority? Or must the benchmark be confined to the minority population in a reasonably cohesive geographic area?



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Florida's non-diminishment standard—like the Voting Rights Act's non-diminishment standard—is a potent, race-based solution to a race-based problem. I ask for your opinion to help me be sufficiently conscious of race to comply with the Florida Constitution's anti-diminishment provision but avoid being so conscious of race that my actions could violate the U.S. and Florida Constitutions.

Because the U.S. Supreme Court's decisions inform, but do not definitively resolve, issues of state law, I ask for you to exercise your "independent constitutional obligation" to interpret Florida law, *id.* at 621, and to guide me in exercising my executive powers as Governor. *See* Art. III, § 8, Fla. Const.; Art. IV, § 1(a), Fla. Const. I respectfully request your assistance as expeditiously as possible given that March 11, 2022, is the last day of the legislative session and candidates for the U.S. House of Representatives will need to qualify under a new map in June.

Thank you for your consideration.

Respectfully submitted,

Ron DeSantis
Governor of Florida



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# In the Supreme Court of Florida

CASE NO. SC22-139

ADVISORY OPINION TO THE GOVERNOR RE: WHETHER ARTICLE III, SECTION 20(A) OF THE FLORIDA CONSTITUTION REQUIRES THE RETENTION OF A DISTRICT IN NORTHERN FLORIDA, ETC.

## BRIEF OF RON DESANTIS, GOVERNOR OF FLORIDA

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## ARGUMENT

This Court has jurisdiction to advise on the interpretation of the following phrase: "*districts shall not be drawn* with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or *to diminish their ability to elect representatives of their choice*." Art. III, § 20(a), Fla. Const. (emphasis added). Section 20(a)'s non-diminishment provision affects several of the Governor's executive powers and duties, namely his power to veto the congressional map presented to him, art. III, § 8, Fla. Const.; his duty to take care that the laws are faithfully executed, art. IV, § 1(a), Fla. Const.; and his power to directly supervise his Secretary of State in the administration of elections, art. IV, § 6, Fla. Const. Section 20(a)'s text is less than clear. There is a textual interpretation of this section, however, that avoids serious concerns under the U.S. Constitution. An advisory opinion confirming that interpretation would help the Governor ensure that the redrawing of congressional boundaries, which must occur every ten years, does not violate the Florida or U.S. Constitutions and is completed in a timely way to provide certainty



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to candidates and voters before the qualifying period begins in June.[1] Unlike most other legislation, redistricting is not discretionary and must be completed in short order before the electoral process commences. The unique demands of redistricting justify the Court's exercise of jurisdiction.

## I. THIS COURT HAS JURISDICTION TO PROVIDE AN ADVISORY OPINION TO THE GOVERNOR.

Article IV, section 1(c) of the Florida Constitution allows this Court to render an advisory opinion to the Governor concerning "the interpretation of any portion of th[e] constitution" that "affect[s]" his "executive powers and duties." The interpretation of section 20(a) informs, and thus affects, how the Governor will exercise his executive powers and duties with respect to congressional redistricting legislation. Specifically, when the Florida Legislature presents to the Governor a bill that redraws Florida's congressional districts, which it must under federal law, the Governor can veto the bill, approve the bill, or take no action. A veto nullifies the bill. Approval or inaction allows the bill to become law, at which point the

[1] *See* Qualifying Information, Fla. Div. of Elections, https://dos.myflorida.com/elections/candidates-committees/qualifying (last visited February 7, 2022).



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Governor must "take care that the laws [are] faithfully executed," art. IV, § 1(a), Fla. Const., and "direct[ly] supervis[e]" his "administration," particularly his Secretary of State, in carrying out the law, art. IV, § 6, Fla. Const. These executive powers and duties satisfy the jurisdictional prerequisites.

### A. The Veto Is an Executive Power.

Article III, section 8 expressly vests the Governor with the "[*e*]*xecutive* approval and *veto*" power. (Emphasis added.) If the Governor believes that a bill is "contrary to the public interest," including that it is unconstitutional, he may veto the bill. *Brown v. Firestone*, 382 So. 2d 654, 664 (Fla. 1980). The exercise of that executive power to affect legislation does not convert it into a lawmaking power any more than the judiciary's exercise of judicial review converts the judicial power into a lawmaking power.

The Florida Constitution's structure underscores that the veto is an executive power. The Florida Constitution vests "[t]he legislative power of the state" in the Florida Legislature, art. III, § 1, Fla. Const.; "[t]he supreme executive power" in the Governor, art. IV, § 1(a), Fla. Const.; and "[t]he judicial power" in the state judiciary, art. V, § 1, Fla. Const. "No person belonging to one branch shall exercise any



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powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. This separation of powers erects "high walls and clear distinctions" between each branch of government. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 (1995).

The high walls separating executive and legislative powers are apparent in the lawmaking process. The Florida Constitution gives specific, precise powers to the legislative and executive branches with respect to the lawmaking process. As this Court has noted, "[a]rticle III, sections 1 and 7 assign to the legislature the responsibility for passage of all bills into law, regardless of their subject matter," and "[a]rticle III, section 8 sets forth the procedure for the executive power to approve or veto legislation." *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). "These provisions" constitute the "constitutional allocation of the executive and legislative responsibilities concerning legislation generally." *Id.*

The Florida Constitution thus gives to the Governor the *executive* power in the legislative sphere, and that executive power includes the veto. *See id.* ("Article III, section 8 sets forth the procedure for the *executive power* to approve or *veto legislation of* both *nonappropriations* and appropriations *bills*." (emphasis added));



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*Brown*, 382 So. 2d at 672 ("We hold further that *the vetoes* identified herein as 2, 4, 5 and 6 a*re valid as being within the purview of the executive power* granted by article III, section 8(a)." (emphasis added)); *Owens v. State*, 316 So. 2d 537, 538 n.4 (Fla. 1975) ("Although article IV of the constitution deals with the executive branch, the placement of a legislative power in one subsection of that article does not render the delegated power nugatory" because "[t]he placement is functional, as with executive powers conferred in the judicial article . . . and in the legislative article.").

The veto is a "negative power, the power to nullify, or at least suspend, legislative intent." *Brown*, 382 So. 2d at 664. It is the "[p]rimary . . . executive check[] on unfettered legislative power" and gives the Governor a "stronger bargaining position from which to seek revision or amendment of bills" and a means to "counteract legislative action which he considers to be contrary to the public interest." *Id.* As such, in the lawmaking process, "the constitutional authority of the legislative department is in part delimited by the scope of executive authority"—as exercised by the veto power. *Id.* at 663.

By contrast, the Legislature does not have the power to veto bills—it has the power to bicamerally "pass" and "present" them, and



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to "re-enact" a vetoed bill by supermajority vote. *See* art. III, §§ 7–8, Fla. Const. So it cannot be said that in exercising the power to "veto" a bill that the Governor is exercising a power that otherwise belongs to the Legislature. It is quintessentially an executive power.

Only when the Governor exceeds his veto power by effectively amending legislative text (as opposed to nullifying it) does the Governor improperly intrude on the legislative power. For example, in the line-item-veto context, this Court has held that a Governor unconstitutionally engages in legislative action when he reduces or modifies an appropriation. *See Brown*, 382 So. 2d at 666; *Fla. House of Representatives v. Martinez*, 555 So. 2d 839, 844 (Fla. 1990).

In sum, the Governor's exercise of the veto power to affect the lawmaking process does not make the veto a legislative power. As Justice Ellis explained in 1922, "[e]ach branch of the government necessarily . . . comes in contact with one or the other branch, but such contact in n[o]wise merges the functions of one into that of the other." *Amos v. Gunn*, 94 So. 615, 627–28 (Fla. 1922). If that were so, then it follows that a "court acts in a legislative capacity when it



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declares an act of the legislature to be unconstitutional." *Id.* Because the veto is an executive power, this Court has jurisdiction.[2]

### B. The Governor's Other Executive Powers and Duties Also Support Jurisdiction.

If the Governor approves or takes no action on the Florida Legislature's redrawn districts, the districts become law, and the Governor must "take care that the laws [are] faithfully executed," art. IV, § 1(a), Fla. Const., and in so doing, must "direct[ly] supervis[e]" his "administration," namely the Secretary of State, art. IV, § 6, Fla. Const. In *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, this Court explained that the "Governor's question about the meaning of Amendment 4," the Florida Constitution's voting restoration amendment, "affect[ed]" his "take care" duties and

[2] In 1887, this Court declined to issue an advisory opinion on a former Governor's use of the veto power. *See In re Exec. Commc'n*, 6 So. 925 (Fla. 1887). This Court concluded that it could not render an advisory opinion because it considered the veto to be a legislative power. *Id.* This Court is not required to follow its advisory opinions, *see In re Advisory Op. of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975), and for all the reasons explained, this Court should give little weight to the 1887 response. In fact, fifty years later, a "majority of th[is] Court" stated that it was "of the opinion that the duty imposed on the Governor" to veto legislation "is executive rather than legislative as may be presumed from dicta in *In Re Executive Communication*." *Advisory Opinion to the Governor*, 12 So. 2d 583, 584 (Fla. 1943).



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his "duty to provide the Department of State with necessary direction regarding the implementation of voter registration laws." 288 So. 3d 1070, 1076 (Fla. 2020). So too here.

Section 20(a)'s non-diminishment provision affects the Governor's take care duties and his duty to provide the Secretary of State with necessary direction regarding the implementation of redistricting maps. The Secretary, of course, serves at the pleasure of the Governor. *See* §§ 20.02(3), 20.10, Fla. Stat. As the "chief election officer of the state," § 97.012, Fla. Stat., the Secretary must administer future elections under any new congressional map. To administer such elections, among other things, the Secretary must "[o]btain and maintain uniformity in the interpretation and implementation of the election laws," *id.* § 97.012(1), and must certify "the names of all duly qualified candidates for nomination or election who have qualified with the Department of State," including congressional candidates, § 99.061(6), Fla. Stat.

## II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO ISSUE AN ADVISORY OPINION.

This Court should exercise its discretionary jurisdiction because of its "obligation to provide certainty to candidates and



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voters regarding the legality of the state's congressional districts." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) ("*Apportionment VIII*") (citations omitted). Unlike most other legislation, the State must create new congressional maps. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969); 2 U.S.C. §§ 2a–2c. The process must also be completed before the candidate qualifying period begins. The redistricting process should therefore proceed under a correct understanding of the law. The failure to do so could result in confusion and chaos in the administration of the state's congressional elections. To avoid that result, a timely advisory opinion on this matter of great public importance is both necessary and appropriate. *Apportionment VIII*, 179 So. 3d at 262; *see also In re Advisory Op. to Governor Request of June 29, 1979*, 374 So. 2d 959, 962 (Fla. 1979) (providing opinion to prevent the "confusion surrounding [an] important enactment").

The Governor does not seek the Court's opinion on the constitutionality of any proposed legislation or map. To the contrary, the Governor requests guidance on the meaning of section 20(a)'s minority-voting-protection provision, including whether it requires a district in northern Florida that stretches hundreds of miles to



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connect a black population in Jacksonville with a black population in Gadsden and Leon Counties so that they can elect a candidate of their choice, even though not a majority.

Section 20(a) can be broken into two parts with brackets added for the sake of clarity:

> districts shall not be drawn **[**with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process**]** or **[**to diminish their ability to elect representatives of their choice.**]**

Art. III, § 20(a), Fla. Const. The first bracketed clause contains the "non-vote-dilution provision," and the second contains the "non-diminishment provision." This Court has explained that section 20(a)'s non-vote-dilution provision mirrors § 2 of the Voting Rights Act and should be interpreted consistent with § 2 case law, and that section 20(a)'s non-diminishment provision mirrors § 5 of the Voting Rights Act and should be interpreted consistent with § 5 case law. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 619–27 (Fla. 2012) ("*Apportionment I*").

Still, section 20(a)'s vote-diminishment provision remains unclear. The text neither says what "diminish" means nor does it



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clarify whose "ability to elect representatives of their choice" is protected from diminishment. The dictionary defines "diminish" as "to make less or cause to appear less," *id.* at 702 (Canady, J., concurring in part and dissenting in part) (quoting *Diminish*, Webster's Third International Dictionary (1993)). But make less than what? Measured how? And if the previous congressional map serves as a baseline, *id.* at 624, must that baseline itself be constitutionally valid before the vote-diminishment standard applies?

Untangling these questions must begin with the text and, more specifically, the phrase "ability to elect representatives of *their* choice." The word "their," as used in section 20(a), refers back to "racial or language minorities" in section 20(a)'s non-vote-dilution provision—the first bracketed clause. Cases construing § 2 of the Voting Rights Act inform any understanding of the first clause, *id.* at 619–24, and the federal cases make clear that § 2 of the Voting Rights Act applies only to "a minority group" that is "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Thornburg v. Gingles*, 478 U.S. 30, 50



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(1986).[3] Taken together, "their" must then mean "racial or language minorities" within a reasonably cohesive geographic area. *See id.* It follows that under section 20(a)'s non-diminishment provision—the second bracketed clause—districts cannot be drawn to diminish racial or language minorities' ability to elect representatives of these geographically cohesive districts.

By giving meaning to section 20(a)'s text, we seek confirmation that such a reading comports with the rules of construction this Court now uses.[4] Among other things, we seek confirmation that the Governor's understanding of the word "their" comports with the harmonious-reading canon. Per the Governor's reading of Section 20(a), the non-vote-dilution provision allows minority groups to form

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[3] In particular, this Court has explained that section 20(a)'s non-vote-dilution provision matches § 2 of the Voting Rights Act, *Apportionment I*, 83 So. 3d at 619–24, and § 2 claims are only applicable to districts where (1) the "minority group" is "sufficiently large and geographically compact to constitute a majority," (2) the minority group is "politically cohesive," and (3) the majority "votes sufficiently as a bloc." *Gingles*, 478 U.S. at 50–51.

[4] *See Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021) (stating that the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." (cleaned up)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56, 167 (2012).



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geographically compact districts where appropriate consistent with two other preconditions (political cohesion of the minority group and bloc voting of the majority group). *See Gingles*, 478 at 50–51. The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477–80 (1997) (explaining the difference between § 2 and § 5 of the Voting Rights Act). Florida's non-vote-dilution provision therefore goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

But this Court has never squarely addressed whether the word "their" constrains the universe of districts to which the non-diminishment provision applies. *Apportionment I*, 83 So. 3d at 625.[5] That failure raises serious concerns under the U.S. Constitution.

[5] Giving effect to the word "their" would also be consistent with this Court's prior redistricting cases. The cases note that "[e]very word of the Florida Constitution should be given its intended meaning and effect." *Apportionment I*, 83 So. 3d at 614 (referencing *In re Apportionment Law–1972*, 263 So. 2d 797, 807 (Fla. 1972)). And the cases even suggest that the *Gingles* preconditions have some import for the second bracketed clause in section 20(a)—the non-diminishment provision. *See Apportionment VIII*, 179 So. 3d at 286 n.11 ("The *Gingles* preconditions are relevant not only to a Section 2



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Decided after this Court's decisions in *Apportionments I-VIII*, the U.S. Supreme Court recently held that a "State may not use race as the predominant factor in drawing district lines" unless the State first proves "that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (cleaned up). This showing of compelling interest and narrow tailoring must find a "strong basis in evidence." *Id.* After all, governmental actions based on race are presumptively unconstitutional. *See id.*; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

Reading section 20(a)'s non-diminishment provision as applying only to minorities groups in geographically cohesive districts in section 20(a)'s non-vote-dilution provision would avoid significant concerns under the U.S. Constitution and would give Florida's congressional maps the best chance of surviving strict scrutiny. As in *Cooper*, such a reading would find a tether in the first *Gingles* factor, which is used for purposes of § 2 of the Voting Rights Act, and

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vote dilution analysis, but also to a Section 5 diminishment analysis.").



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the U.S. Supreme Court has assumed that compliance with § 2 would satisfy strict scrutiny. *See Cooper*, 137 S. Ct. at 1469–72.

Any reading of state law should avoid conflicts with the U.S. Constitution. Florida courts, including this Court, utilize the well-established doctrine of constitutional avoidance: "when two constructions" of state law "are possible, one of which is of questionable constitutionality," the law "must be construed so as to avoid any violation of" the "Florida and *the United States Constitutions*." *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116, 120 (Fla. 2006) (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983)) (emphasis added).

In light of the constitutional text and relevant interpretive canon, the best reading of section 20(a)'s non-diminishment standard is that it prevents diminishment of a reasonably cohesive racial or language minority's population. Confirming this interpretation now in an advisory opinion will avoid potential confusion and chaos later.

## III. CONCLUSION.

For the foregoing reasons, this Court should provide the requested advisory opinion to the Governor.



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Respectfully submitted on this 7th day of February, 2022.

/s/ Mohammad Jazil

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on February 7, 2022, undersigned electronically filed this Brief on Jurisdiction with the Florida Supreme Court using the Florida Courts E-filing Portal. The foregoing documents have been furnished on all parties required to be served.

/s/ Mohammad Jazil
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## CERTIFICATE OF COMPLIANCE

**I CERTIFY** that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.045(b) and this Court's February 2, 2022 order. This brief is 15 pages long and contains 3,476 words as counted by Word, excluding the parts of the brief exempted by Florida Rule of Appellate Procedure 9.210(a)(2)(E).

/s/ Mohammad Jazil
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**From:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]
**Sent:** Saturday, February 19, 2022 10:53 AM
**To:** Uthmeier, James [James.Uthmeier@eog.myflorida.com]
**Subject:** Fwd: MH: Florida GOP in conflict: DeSantis' redistricting expert doesn't convince House panel

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Florida GOP in conflict: DeSantis' redistricting expert doesn't convince House panel
Miami Herald
Mary Ellen Klas
February 19, 2022

The conflict between Gov. Ron DeSantis and the Florida Legislature came into sharper focus on Friday as the governor's office paid for a conservative redistricting expert to appear before the House Congressional Redistricting Subcommittee and the committee rejected his arguments.

Robert Popper, a senior attorney with the conservative activist group Judicial Watch, told the committee that if it moves ahead with its map that leaves in place a North Florida congressional district that stretches across several counties, it could "be in trouble" if the map were to get challenged before the U.S. Supreme Court.

"I'm talking as a lawyer. This district is going to have problems in federal court,'' Popper told the House Redistricting Subcommittee.

A redistricting expert who was one of the founders of the Polsby-Popper score used to measure the compactness of a district, Popper argued that because the North Florida district which the House has named District 3, is not compact, it is not "narrowly tailored" and violates the "strict scrutiny" requirements in recent court opinions.

"The entire map is going to end up in litigation, we know that,'' he warned. "I respectfully submit that this committee and this House would want to be holding the strongest hand that it could. District 3, as drawn, does not permit that."

DEFYING DESANTIS
The warning sets the stage for what could be the long-range goal of the governor, who has all but threatened to veto a congressional redistricting map if it includes the district that has elected U.S. Rep. Al Lawson, a Tallahassee Democrat, who is Black. The

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district was approved by the court a decade ago to link together Black communities from the Antebellum South in an effort to allow minorities in the region to elect a candidate of their choice.

Last week, the Florida Supreme Court rejected the governor's request to provide legal guidance over whether or not legislators should dismantle the Black-held congressional district in North Florida.

Absent the court's advice, Florida Republican leaders have so far defied the Republican governor and failed to embrace his argument.

The Senate unanimously passed its congressional redistricting map that included four districts that could elect Black candidates to Congress, a configuration that would leave the Republican majority in a 28-member congressional delegation at 16, with 12 seats, including a new one in Central Florida, likely able to elect a Democrat.

The House committee on Friday voted 14-7 along partisan lines to adopt a map that would likely elect only three Blacks to Congress, dismantling the Orlando-based district currently held by U.S. Rep. Val Demings, a Black Democrat, but leaving the district that elected Lawson intact.

By contrast, DeSantis has called Lawson's district an "illegal gerrymander" and said he would reject any map that has it in it. He has submitted two maps that create only two districts in the state that preserve Black voting strength, dismantling the Lawson and Demings districts.

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Under questioning of Republican members of the committee on Friday, Popper confirmed that his airfare to Tallahassee and his hotel were paid by the governor's office.

DeSantis spokesperson Taryn Fenske said that those expenses were paid by the legal counsel hired by the governor at taxpayer expense but, she noted, the House asked the governor to provide a witness to appear.

According to Judicial Watch, a group that has earned its reputation by filing Freedom of Information Act lawsuits to investigate claimed misconduct by government officials, Popper specializes in gerrymandering cases and has been with the organization since 2013.

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FAIR DISTRICTS UNDER FIRE?

Popper's testimony brought into focus the governor's legal argument and raised the prospect that the governor may be preparing to argue that the Fair Districts standards of the Florida Constitution may come into conflict with the federal court's interpretations of redistricting law.

In 2010, Florida voters overwhelmingly approved the Fair District standards, prohibiting the Legislature from drawing districts that favor incumbents or political parties or diminish the ability of minority voters from electing candidates of their choice.

The standards also require that legislators give priority to preserving the voting strength of minority voters over the geographical compactness of minority voters.

Members of the committee, many of whom had read Popper's written testimony ahead of the meeting, peppered him with legal questions.

Rep. Daniel Perez, a Miami Republican and a lawyer, asked how a court should weigh the equal protection standards of the U.S. Constitution against the Fair District standards of the Florida Constitution.

"Would it be fair to say that the 14th Amendment would invalidate the Fair District amendments — specifically, the prohibition on not diminishing the ability of minority communities to elect a candidate of their choice?'' he asked. "If it does not, then why is complying with the Florida Constitution, not a compelling state interest?"

"It depends,'' Popper answered. "My testimony is not to suggest that the Fair Districts amendment would be unconstitutional and all its applications."

"Can you point us to a district that does not diminish minority voting ability but is more narrowly tailored?'' asked Rep. Tyler Sirois, R-Merritt Island, the committee chair.

No, Popper answered.

Rep. Kaylee Tuck, R-Lake Placid, asked if Popper agreed with Florida Supreme Court Chief Justice Charles Canady's dissent in the redistricting case from a decade ago in which he interprets the state's redistricting standards that prohibit the state from diminishing minority voting access.

"I'm not an expert in Florida law,'' Popper answered.

Could he cite any federal court decisions relating to Section 5 of the federal Voting Rights Act that "requires that a district must be compact?'' Tuck continued.

No, Popper said, adding that he knows of case law where a non-compact district was rejected.

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And does he agree that adopting the governor's map for the North Florida district "will diminish the ability to elect" Black candidates, Tuck asked.

"It's ambiguous,'' Popper answered.

The intense grilling from Republicans prompted Democrats to conclude that Popper was not there to help them draw maps that abide by Florida law.

"We're here, big picture, trying to weigh what is best for the residents of Florida," said Rep. Christine Hunschofsky, D-Parkland.

She asked if there was "a compelling justification" to have less representation from minority candidates "in favor of more compactness?"

Popper continued with his warning. "This district is going to have problems in federal court,'' he said.

By the end of the meeting, Sirois commended Hunschofsky because her question "just cut to the heart of the matter."

He then read the redistricting standards of the Florida Constitution and concluded: "We have to follow the law."

"I want to assuage any doubt that may be in front of you today,'' he said. "This is a legally sound map. It's a constitutionally compliant map. Please join me in voting yes."

Democrats said they are hopeful the governor's approach will continue to be rebuffed by their Republican colleagues as the House and Senate work out differences in their congressional maps.

"We are the architects of our congressional and House and Senate maps and the governor is not — despite his attempts at interference," said Rep. Kelly Skidmore of Boca Raton, the ranking Democrat on the committee. "The process worked, and he has been shut down and his paid testifier today didn't change anybody's opinion on that."

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Robert Popper, a senior attorney with the conservative activist group Judicial Watch, told the committee that if it moves ahead with its map that leaves in place a North Florida congressional district that stretches across several counties, it could "be in trouble" if the map were to get challenged before the U.S. Supreme Court.

"I'm talking as a lawyer. This district is going to have problems in federal court,'' Popper told the House Redistricting Subcommittee.

A redistricting expert who was one of the founders of the Polsby-Popper score used to measure the compactness of a district, Popper argued that because the North Florida district which the House has named District 3, is not compact, it is not "narrowly tailored" and violates the "strict scrutiny" requirements in recent court opinions.

"The entire map is going to end up in litigation, we know that,'' he warned. "I respectfully submit that this committee and this House would want to be holding the strongest hand that it could. District 3, as drawn, does not permit that."

DEFYING DESANTIS
The warning sets the stage for what could be the long-range goal of the governor, who has all but threatened to veto a congressional redistricting map if it includes the district that has elected U.S. Rep. Al Lawson, a Tallahassee Democrat, who is Black. The

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district was approved by the court a decade ago to link together Black communities from the Antebellum South in an effort to allow minorities in the region to elect a candidate of their choice.

Last week, the Florida Supreme Court rejected the governor's request to provide legal guidance over whether or not legislators should dismantle the Black-held congressional district in North Florida.

Absent the court's advice, Florida Republican leaders have so far defied the Republican governor and failed to embrace his argument.

The Senate unanimously passed its congressional redistricting map that included four districts that could elect Black candidates to Congress, a configuration that would leave the Republican majority in a 28-member congressional delegation at 16, with 12 seats, including a new one in Central Florida, likely able to elect a Democrat.

The House committee on Friday voted 14-7 along partisan lines to adopt a map that would likely elect only three Blacks to Congress, dismantling the Orlando-based district currently held by U.S. Rep. Val Demings, a Black Democrat, but leaving the district that elected Lawson intact.

By contrast, DeSantis has called Lawson's district an "illegal gerrymander" and said he would reject any map that has it in it. He has submitted two maps that create only two districts in the state that preserve Black voting strength, dismantling the Lawson and Demings districts.

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Under questioning of Republican members of the committee on Friday, Popper confirmed that his airfare to Tallahassee and his hotel were paid by the governor's office.

DeSantis spokesperson Taryn Fenske said that those expenses were paid by the legal counsel hired by the governor at taxpayer expense but, she noted, the House asked the governor to provide a witness to appear.

According to Judicial Watch, a group that has earned its reputation by filing Freedom of Information Act lawsuits to investigate claimed misconduct by government officials, Popper specializes in gerrymandering cases and has been with the organization since 2013.

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FAIR DISTRICTS UNDER FIRE?

Popper's testimony brought into focus the governor's legal argument and raised the prospect that the governor may be preparing to argue that the Fair Districts standards of the Florida Constitution may come into conflict with the federal court's interpretations of redistricting law.

In 2010, Florida voters overwhelmingly approved the Fair District standards, prohibiting the Legislature from drawing districts that favor incumbents or political parties or diminish the ability of minority voters from electing candidates of their choice.

The standards also require that legislators give priority to preserving the voting strength of minority voters over the geographical compactness of minority voters.

Members of the committee, many of whom had read Popper's written testimony ahead of the meeting, peppered him with legal questions.

Rep. Daniel Perez, a Miami Republican and a lawyer, asked how a court should weigh the equal protection standards of the U.S. Constitution against the Fair District standards of the Florida Constitution.

"Would it be fair to say that the 14th Amendment would invalidate the Fair District amendments — specifically, the prohibition on not diminishing the ability of minority communities to elect a candidate of their choice?'' he asked. "If it does not, then why is complying with the Florida Constitution, not a compelling state interest?"

"It depends,'' Popper answered. "My testimony is not to suggest that the Fair Districts amendment would be unconstitutional and all its applications."

"Can you point us to a district that does not diminish minority voting ability but is more narrowly tailored?'' asked Rep. Tyler Sirois, R-Merritt Island, the committee chair.

No, Popper answered.

Rep. Kaylee Tuck, R-Lake Placid, asked if Popper agreed with Florida Supreme Court Chief Justice Charles Canady's dissent in the redistricting case from a decade ago in which he interprets the state's redistricting standards that prohibit the state from diminishing minority voting access.

"I'm not an expert in Florida law,'' Popper answered.

Could he cite any federal court decisions relating to Section 5 of the federal Voting Rights Act that "requires that a district must be compact?'' Tuck continued.

No, Popper said, adding that he knows of case law where a non-compact district was rejected.

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And does he agree that adopting the governor's map for the North Florida district "will diminish the ability to elect" Black candidates, Tuck asked.

"It's ambiguous,'' Popper answered.

The intense grilling from Republicans prompted Democrats to conclude that Popper was not there to help them draw maps that abide by Florida law.

"We're here, big picture, trying to weigh what is best for the residents of Florida," said Rep. Christine Hunschofsky, D-Parkland.

She asked if there was "a compelling justification" to have less representation from minority candidates "in favor of more compactness?"

Popper continued with his warning. "This district is going to have problems in federal court,'' he said.

By the end of the meeting, Sirois commended Hunschofsky because her question "just cut to the heart of the matter."

He then read the redistricting standards of the Florida Constitution and concluded: "We have to follow the law."

"I want to assuage any doubt that may be in front of you today,'' he said. "This is a legally sound map. It's a constitutionally compliant map. Please join me in voting yes."

Democrats said they are hopeful the governor's approach will continue to be rebuffed by their Republican colleagues as the House and Senate work out differences in their congressional maps.

"We are the architects of our congressional and House and Senate maps and the governor is not — despite his attempts at interference," said Rep. Kelly Skidmore of Boca Raton, the ranking Democrat on the committee. "The process worked, and he has been shut down and his paid testifier today didn't change anybody's opinion on that."

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Robert D. Popper
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Judicial Watch, Inc.

February 18, 2022

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I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

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As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

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AMERICAN OVERSIGHT

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**Subject:** Robert D. Popper Report - 2.18.2022
**Attachments:** Robert D. Popper Report - 2.18.2022.pdf

Dear Stephanie,

Herein I've attached Mr. Popper's opening statement. Please feel free to share it with the Committee.

- Sincerely, Josh

- -
Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

*Please note that under Florida law correspondence sent to me, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.*

AMERICAN OVERSIGHT

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 18, 2022

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

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AMERICAN OVERSIGHT

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In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

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AMERICAN OVERSIGHT

2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

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AMERICAN OVERSIGHT

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> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

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AMERICAN OVERSIGHT

argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.



AMERICAN OVERSIGHT

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**Sent:** Friday, February 18, 2022 7:26 AM
**To:** Kopelousos, Stephanie [Stephanie.Kopelousos@eog.myflorida.com]
**CC:** Kelly, Alex [Alex.Kelly@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]; Newman, Ryan [Ryan.Newman@eog.myflorida.com]; Michael Beato [mbeato@holtzmanvogel.com]; MO Jazil [mjazil@holtzmanvogel.com]
**Subject:** Robert D. Popper Report - 2.18.2022
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AMERICAN OVERSIGHT

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R. D. P.



AMERICAN OVERSIGHT

**From:** Michael Beato [mbeato@HoltzmanVogel.com]
**Sent:** Thursday, February 17, 2022 7:53 PM
**To:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]; Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]
**Subject:** Redistricting Documents
**Attachments:** Letter re House Proposed Congressional District 3_HV Edits (2) + JEP edits.docx; Testimony.docx

Good evening, all,

Attached are (1) the memorandum, which incorporates Josh's, Nick's, Mo's, and my edits and (2) Mr. Popper's opening statement. We hope to get the opening statement to Stephanie by 8:00 A.M.

**Michael Beato**
**Holtzman Vogel Baran Torchinsky & Josefiak PLLC**
mbeato@HoltzmanVogel.com // www.HoltzmanVogel.com

**Tallahassee Office**
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**Virginia Office**
15405 John Marshall Highway
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DISCLAIMER
Any accounting, business or tax advice contained in this communication, including attachments and enclosures, is not intended as a thorough, in-depth analysis of specific issues, nor a substitute for a formal opinion, nor is it sufficient to avoid tax-related penalties. If desired, Holtzman Vogel, PLLC would be pleased to perform the requisite research and provide you with a detailed written analysis. Such an engagement may be the subject of a separate engagement letter that would define the scope and limits of the desired consultation services.

AMERICAN OVERSIGHT

February 18, 2022

Honorable Tyler Sirois
Member, Florida House of Representatives
Chairman, Congressional Redistricting Subcommittee
400 South Monroe Street
Tallahassee, Florida 32399

Dear Chairman Sirois:

I write to convey the legal objections of the Executive Office of the Governor to the inclusion of Congressional District 3 in the maps by the staff of the Florida House Redistricting Committee. The proposed district, which largely tracks current Congressional District 5, spans approximately 200 miles from East to West and cuts across eight counties to join a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact and does not otherwise conform to usual political or geographic boundaries. Instead, it appears to be drawn solely to combine separate minority populations in a less than majority-minority district from different regions of northern Florida so that together they may elect a candidate of their choice.

Where race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the legislature must prove that such "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017). Because the Legislature cannot show that the proposed Congressional District 3 would satisfy strict scrutiny, the proposed district violates the Fourteenth Amendment to the U.S. Constitution and should not be included in any map enacted by the Florida House of Representatives.

**Proposed Congressional District 3 (Blue)**

**Current Congressional District 5 (Orange)**



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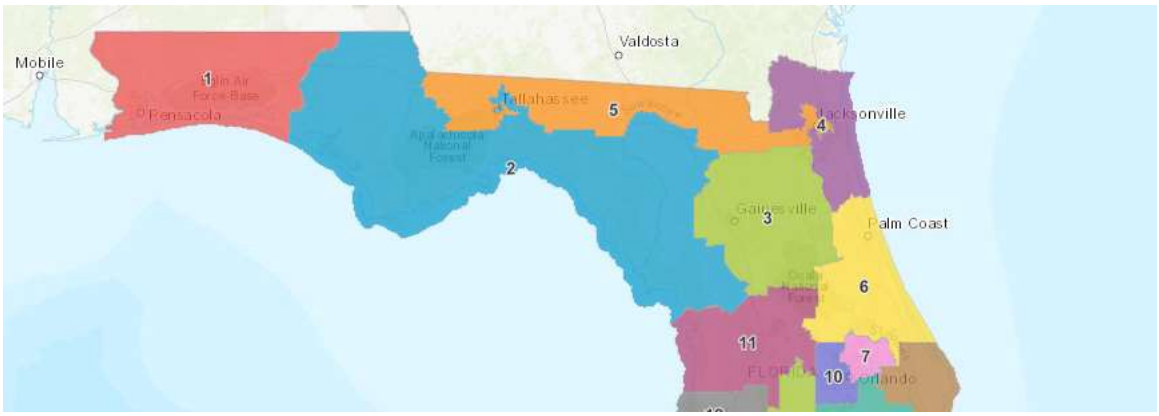


The Equal Protection Clause of the Fourteenth Amendment generally prohibits state laws that separate citizens into groups on the basis of race. A state law that "expressly distinguishes among citizens because of their race" can survive legal challenge only if it is "narrowly tailored to further a compelling governmental interest." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). This principle applies not only to a law that "contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'" *Id.* (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Redistricting legislation is treated no differently. According to the U.S. Supreme Court, "redistricting legislation that is so bizarre on its face" that it can only be explained because of race "demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 644.

To state an equal protection claim, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [line-drawing] decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Specifically, the plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

Given the foregoing considerations, it is evident that non-racial grounds cannot explan proposed Congressional District 3. First, the district violates traditional districting principles. Far from compact, the district records compactness scores as low as .11 on the Reock test, .63 on the Area / Convex Hull test, and .1 on the Polsby-Popper test. It does not respect political subdivisions or communities defined by actual shared interests. The district splits four counties and three municipalities, and it stretches across eight counties to join a minority population in Jacksonville with minority populations in Leon and Gadsden Counties. These communities are in separate and distinct regions of northern Florida and are not defined by shared interests. With respect to contiguity, the district narrows to a mere three miles wide from North to South when traversing the northernmost precincts of Leon County at the state's northern border in an effort to include the minority populations in western Leon County and Gadsden County while avoiding the non-minority population in eastern Leon County.



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Second, only two considerations plausibly explain the district's unusual shape--partisanship or race. If the district were drawn to favor partisan interests, it would violate the Fair Districts Amendment of the Florida Constitution. Article III, Section 20 provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." If improper partisan interests did not play a role, the only reasonable explanation for the district is race. This conclusion follows from the historical circumstances.

The Florida Supreme Court drew the current district—Congressional District 5—in 2015. The Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando because it concluded that such configuration had been unconstitutionally tainted by improper partisan influences. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015) ("*Apportionment VII*"). The court further held that the North-South version was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* Consequently, the court adopted the current East-West version. *Id.* at 405-06. While acknowledging that the new configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), the Court concluded that it would not "diminish the ability of black voters to elect a candidate of their choice." *Id.* at 405. The Court explained that the non-compact shape was necessary because of "geography" and "other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted). Thus, it is clear that race considerations predominated in the drawing of the current district. And because the House seeks to retain the district in large measure to avoid diminishing of minority voting power, race considerations likewise predominated in creationing proposed Congressional District 3.

Third, it is obvious, given the location of minority neighborhoods and precincts, that district lines in both Jacksonville and Tallahassee were drawn specifically to capture minority populations and to combine them into one district. But according to the U.S. Supreme Court, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. By attempting to connect a minority population in Jacksonville with a faraway minority population in Tallahassee and surrounding areas, proposed Congressional District 3 does precisely what the Supreme Court condemns.

Because the Florida Supreme Court subordinated traditional districting criteria to avoid diminishment of minority voting power, Congressional District 3 is a racial gerrymander whichcan survive constitutional challenge only if the Legislature can prove that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464. The Legislature cannot meet that exacting burden here.

The U.S. Supreme Court has long assumed, without definitively deciding, that complying with the Voting Rights Act ("VRA") is a compelling interest. *Id.* at 1469. In this case, however, there is no good reason to believe that the VRA requires Congressional District 3. According to the U.S. Supreme Court in *Bartlett v. Strickland*, Section 2 is satisfied only when a compact



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majority of minority citizens can be drawn into a single district. 556 U.S. 1, 26 (2009) (plurality). But there is no configuration in any proposal put forward in any public map that we are aware of that has created a majority-minority district in northern Florida.

Section 2 of the VRA does not require Congressional District 3. As both the U.S. Supreme Court and the Florida Supreme Court have noted, Section 2 prohibits the dilution of minority votes where a minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 622-23 (Fla. 2012) ("*Apportionment I*"). Congressional District 3 is not a reasonably configured district, and in any event, it does not contain a minority group that is sufficiently large and geographically compact to constitute a majority.

Nor does Section 5 of the VRA require Congressional District 3. Before the U.S. Supreme Court invalidated the VRA's coverage formula in *Shelby County v. Holder*, 570 U.S. 529, 553-57 (2013), Florida was not a covered jurisdiction under Section 5, but five Florida counties were: Collier, Hardee, Hendry, Hillsborough, and Monroe. None of those counties are in Congressional District 3. Moreover, even assuming that compliance with the VRA is a compelling interest, it is doubtful that "continued compliance with [Section] 5 remains a compelling interest" in light of "*Shelby County v. Holder*." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015).

The U.S. Supreme Court has never held or assumed that compliance with a state non-diminishment requirement is a compelling interest sufficient to withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. But even assuming that adherence to the non-diminishment provision of the Florida Constitution could be a compelling interest, and even assuming that Congressional District 3 is narrowly drawn to accomplish that interest, the non-diminishment provision of the Florida Constitution simply does not require Congressional District 3. Article III, Section 20(a) provides that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

This section contains two relevant provisions: the first is the non-vote-dilution provision ("districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process"), and the second is the non-diminishment provision ("districts shall not be drawn . . . to diminish their ability to elect representatives of their choice"). The Florida Supreme Court has held that the non-vote-dilution provision mirrors Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619-23.

In addition, when Article III, Section 20(a) is read in this context, it becomes apparent that the group referenced in the latter non-diminishment provision is the very same group of "racial or language minorities" referenced in the former non-vote-dilution provision. The word "their" in the non-diminishment provision necessarily refers back to the "racial or language



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minorities" in the non-vote-dilution provision. Because the non-vote-dilution provision mirrors Section 2 of the VRA, and because Section 2 only applies to districts that contain a minority group that is sufficiently large and geographically compact to constitute a majority, the non-diminishment provision should also apply to those kinds of districts. Because Congressional District 3 does not contain a minority group that is sufficiently large and geographically compact to constitute a majority, Article III, Section 20(a)'s non-diminishment provision does not apply.[1]

With this reading, both Article III, Section 20(a)'s non-vote-dilution provision and non-diminishment provision work in tandem. The non-vote-dilution provision allows minority groups to form geographically compact districts where appropriate. *See Gingles*, 478 U.S. at 50-51 (requiring, additionally, political cohesion of the minority group and bloc voting of the majority group). The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-80 (1997). In other words, the non-vote-dilution provision goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

This reading of Article III, Section 20(a)'s non-diminishment provision to refer to "racial or language minorities" in the non-vote-dilution provision flows from the text of the Florida Constitution. It also gives the Florida Constitution the best chance to avoid federal constitutional concerns—specifically, whether drawing congressional districts with race as a predominant factor violates the Equal Protection Clause of the U.S. Constitution. *See Cooper*, 137 S. Ct. 1463-64, 1482 (invalidating two North Carolina congressional districts).

In sum, I respectfully ask that you consider the legal objections to Congressional District 3. I also respectfully ask that you include in the legislative record Governor DeSantis's advisory opinion request to the Florida Supreme Court and the Governor's brief before the Florida Supreme Court.

Sincerely,

Ryan Newman
General Counsel

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1 To the extent that Article III, Section 20(a)'s non-diminishment provision parallels Section 5 of the VRA, it should be noted that when Congress compiled in 1965 an extensive record of racial discrimination in state electoral processes to justify Section 4 and 5's "strong medicine" and "extraordinary measures to address an extraordinary problem." *Shelby County*, 570 U.S. at 534-35; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 329-32 (1966?). When Florida voters approved Article III, Section 20(a), they did not have before them a similar record of pervasive, flagrant, widespread, or rampant discrimination.



AMERICAN OVERSIGHT

cc: Honorable Chris Sprowls
Speaker, Florida House of Representatives
400 South Monroe Street
Tallahassee, Florida 32399



AMERICAN OVERSIGHT

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 16, 2021

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g., How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

[2] Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).



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gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

In 2013, I joined Judicial Watch. In my time there, I have filed voting rights lawsuits in federal and state courts alleging claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act, the NVRA, and a number of state constitutional provisions. Among other things, I am currently representing plaintiffs pursuing gerrymandering claims in Maryland State court.

In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

[3] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).



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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

*Id*. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

*Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas



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argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.



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**From:** Michael Beato [mbeato@HoltzmanVogel.com]
**Sent:** Thursday, February 17, 2022 7:53 PM
**To:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]; Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]
**Subject:** Redistricting Documents
**Attachments:** Letter re House Proposed Congressional District 3_HV Edits (2) + JEP edits.docx; Testimony.docx

Good evening, all,

Attached are (1) the memorandum, which incorporates Josh's, Nick's, Mo's, and my edits and (2) Mr. Popper's opening statement. We hope to get the opening statement to Stephanie by 8:00 A.M.

**Michael Beato**
**Holtzman Vogel Baran Torchinsky & Josefiak PLLC**
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February 18, 2022

Honorable Tyler Sirois
Member, Florida House of Representatives
Chairman, Congressional Redistricting Subcommittee
400 South Monroe Street
Tallahassee, Florida 32399

Dear Chairman Sirois:

I write to convey the legal objections of the Executive Office of the Governor to the inclusion of Congressional District 3 in the maps by the staff of the Florida House Redistricting Committee. The proposed district, which largely tracks current Congressional District 5, spans approximately 200 miles from East to West and cuts across eight counties to join a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact and does not otherwise conform to usual political or geographic boundaries. Instead, it appears to be drawn solely to combine separate minority populations in a less than majority-minority district from different regions of northern Florida so that together they may elect a candidate of their choice.

Where race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the legislature must prove that such "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017). Because the Legislature cannot show that the proposed Congressional District 3 would satisfy strict scrutiny, the proposed district violates the Fourteenth Amendment to the U.S. Constitution and should not be included in any map enacted by the Florida House of Representatives.

**Proposed Congressional District 3 (Blue)**

**Current Congressional District 5 (Orange)**



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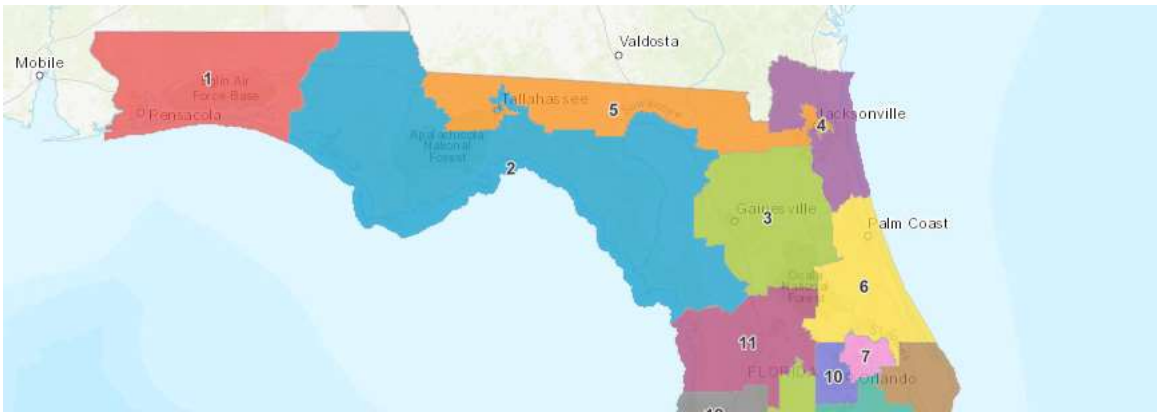


The Equal Protection Clause of the Fourteenth Amendment generally prohibits state laws that separate citizens into groups on the basis of race. A state law that "expressly distinguishes among citizens because of their race" can survive legal challenge only if it is "narrowly tailored to further a compelling governmental interest." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). This principle applies not only to a law that "contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'" *Id.* (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Redistricting legislation is treated no differently. According to the U.S. Supreme Court, "redistricting legislation that is so bizarre on its face" that it can only be explained because of race "demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 644.

To state an equal protection claim, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [line-drawing] decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Specifically, the plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

Given the foregoing considerations, it is evident that non-racial grounds cannot explan proposed Congressional District 3. First, the district violates traditional districting principles. Far from compact, the district records compactness scores as low as .11 on the Reock test, .63 on the Area / Convex Hull test, and .1 on the Polsby-Popper test. It does not respect political subdivisions or communities defined by actual shared interests. The district splits four counties and three municipalities, and it stretches across eight counties to join a minority population in Jacksonville with minority populations in Leon and Gadsden Counties. These communities are in separate and distinct regions of northern Florida and are not defined by shared interests. With respect to contiguity, the district narrows to a mere three miles wide from North to South when traversing the northernmost precincts of Leon County at the state's northern border in an effort to include the minority populations in western Leon County and Gadsden County while avoiding the non-minority population in eastern Leon County.



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Second, only two considerations plausibly explain the district's unusual shape--partisanship or race. If the district were drawn to favor partisan interests, it would violate the Fair Districts Amendment of the Florida Constitution. Article III, Section 20 provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." If improper partisan interests did not play a role, the only reasonable explanation for the district is race. This conclusion follows from the historical circumstances.

The Florida Supreme Court drew the current district—Congressional District 5—in 2015. The Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando because it concluded that such configuration had been unconstitutionally tainted by improper partisan influences. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015) ("*Apportionment VII*"). The court further held that the North-South version was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* Consequently, the court adopted the current East-West version. *Id.* at 405-06. While acknowledging that the new configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), the Court concluded that it would not "diminish the ability of black voters to elect a candidate of their choice." *Id.* at 405. The Court explained that the non-compact shape was necessary because of "geography" and "other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted). Thus, it is clear that race considerations predominated in the drawing of the current district. And because the House seeks to retain the district in large measure to avoid diminishing of minority voting power, race considerations likewise predominated in creationing proposed Congressional District 3.

Third, it is obvious, given the location of minority neighborhoods and precincts, that district lines in both Jacksonville and Tallahassee were drawn specifically to capture minority populations and to combine them into one district. But according to the U.S. Supreme Court, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. By attempting to connect a minority population in Jacksonville with a faraway minority population in Tallahassee and surrounding areas, proposed Congressional District 3 does precisely what the Supreme Court condemns.

Because the Florida Supreme Court subordinated traditional districting criteria to avoid diminishment of minority voting power, Congressional District 3 is a racial gerrymander whichcan survive constitutional challenge only if the Legislature can prove that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464. The Legislature cannot meet that exacting burden here.

The U.S. Supreme Court has long assumed, without definitively deciding, that complying with the Voting Rights Act ("VRA") is a compelling interest. *Id.* at 1469. In this case, however, there is no good reason to believe that the VRA requires Congressional District 3. According to the U.S. Supreme Court in *Bartlett v. Strickland*, Section 2 is satisfied only when a compact



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majority of minority citizens can be drawn into a single district. 556 U.S. 1, 26 (2009) (plurality). But there is no configuration in any proposal put forward in any public map that we are aware of that has created a majority-minority district in northern Florida.

Section 2 of the VRA does not require Congressional District 3. As both the U.S. Supreme Court and the Florida Supreme Court have noted, Section 2 prohibits the dilution of minority votes where a minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 622-23 (Fla. 2012) ("*Apportionment I*"). Congressional District 3 is not a reasonably configured district, and in any event, it does not contain a minority group that is sufficiently large and geographically compact to constitute a majority.

Nor does Section 5 of the VRA require Congressional District 3. Before the U.S. Supreme Court invalidated the VRA's coverage formula in *Shelby County v. Holder*, 570 U.S. 529, 553-57 (2013), Florida was not a covered jurisdiction under Section 5, but five Florida counties were: Collier, Hardee, Hendry, Hillsborough, and Monroe. None of those counties are in Congressional District 3. Moreover, even assuming that compliance with the VRA is a compelling interest, it is doubtful that "continued compliance with [Section] 5 remains a compelling interest" in light of "*Shelby County v. Holder*." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015).

The U.S. Supreme Court has never held or assumed that compliance with a state non-diminishment requirement is a compelling interest sufficient to withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. But even assuming that adherence to the non-diminishment provision of the Florida Constitution could be a compelling interest, and even assuming that Congressional District 3 is narrowly drawn to accomplish that interest, the non-diminishment provision of the Florida Constitution simply does not require Congressional District 3. Article III, Section 20(a) provides that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

This section contains two relevant provisions: the first is the non-vote-dilution provision ("districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process"), and the second is the non-diminishment provision ("districts shall not be drawn . . . to diminish their ability to elect representatives of their choice"). The Florida Supreme Court has held that the non-vote-dilution provision mirrors Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619-23.

In addition, when Article III, Section 20(a) is read in this context, it becomes apparent that the group referenced in the latter non-diminishment provision is the very same group of "racial or language minorities" referenced in the former non-vote-dilution provision. The word "their" in the non-diminishment provision necessarily refers back to the "racial or language



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minorities" in the non-vote-dilution provision. Because the non-vote-dilution provision mirrors Section 2 of the VRA, and because Section 2 only applies to districts that contain a minority group that is sufficiently large and geographically compact to constitute a majority, the non-diminishment provision should also apply to those kinds of districts. Because Congressional District 3 does not contain a minority group that is sufficiently large and geographically compact to constitute a majority, Article III, Section 20(a)'s non-diminishment provision does not apply.[1]

With this reading, both Article III, Section 20(a)'s non-vote-dilution provision and non-diminishment provision work in tandem. The non-vote-dilution provision allows minority groups to form geographically compact districts where appropriate. *See Gingles*, 478 U.S. at 50-51 (requiring, additionally, political cohesion of the minority group and bloc voting of the majority group). The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-80 (1997). In other words, the non-vote-dilution provision goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

This reading of Article III, Section 20(a)'s non-diminishment provision to refer to "racial or language minorities" in the non-vote-dilution provision flows from the text of the Florida Constitution. It also gives the Florida Constitution the best chance to avoid federal constitutional concerns—specifically, whether drawing congressional districts with race as a predominant factor violates the Equal Protection Clause of the U.S. Constitution. *See Cooper*, 137 S. Ct. 1463-64, 1482 (invalidating two North Carolina congressional districts).

In sum, I respectfully ask that you consider the legal objections to Congressional District 3. I also respectfully ask that you include in the legislative record Governor DeSantis's advisory opinion request to the Florida Supreme Court and the Governor's brief before the Florida Supreme Court.

Sincerely,

Ryan Newman
General Counsel

---

1 To the extent that Article III, Section 20(a)'s non-diminishment provision parallels Section 5 of the VRA, it should be noted that when Congress compiled in 1965 an extensive record of racial discrimination in state electoral processes to justify Section 4 and 5's "strong medicine" and "extraordinary measures to address an extraordinary problem." *Shelby County*, 570 U.S. at 534-35; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 329-32 (1966?). When Florida voters approved Article III, Section 20(a), they did not have before them a similar record of pervasive, flagrant, widespread, or rampant discrimination.



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cc: Honorable Chris Sprowls
Speaker, Florida House of Representatives
400 South Monroe Street
Tallahassee, Florida 32399



AMERICAN OVERSIGHT

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 16, 2021

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g., How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

[2] Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).



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gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

In 2013, I joined Judicial Watch. In my time there, I have filed voting rights lawsuits in federal and state courts alleging claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act, the NVRA, and a number of state constitutional provisions. Among other things, I am currently representing plaintiffs pursuing gerrymandering claims in Maryland State court.

In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

[3] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).



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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

*Id*. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

*Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas



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argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.



AMERICAN OVERSIGHT

**From:** Michael Beato [mbeato@HoltzmanVogel.com]
**Sent:** Thursday, February 17, 2022 7:53 PM
**To:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]; Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]
**Subject:** Redistricting Documents
**Attachments:** Letter re House Proposed Congressional District 3_HV Edits (2) + JEP edits.docx; Testimony.docx

Good evening, all,

Attached are (1) the memorandum, which incorporates Josh's, Nick's, Mo's, and my edits and (2) Mr. Popper's opening statement. We hope to get the opening statement to Stephanie by 8:00 A.M.

**Michael Beato**
**Holtzman Vogel Baran Torchinsky & Josefiak PLLC**
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DISCLAIMER
Any accounting, business or tax advice contained in this communication, including attachments and enclosures, is not intended as a thorough, in-depth analysis of specific issues, nor a substitute for a formal opinion, nor is it sufficient to avoid tax-related penalties. If desired, Holtzman Vogel, PLLC would be pleased to perform the requisite research and provide you with a detailed written analysis. Such an engagement may be the subject of a separate engagement letter that would define the scope and limits of the desired consultation services.

AMERICAN OVERSIGHT

February 18, 2022

Honorable Tyler Sirois
Member, Florida House of Representatives
Chairman, Congressional Redistricting Subcommittee
400 South Monroe Street
Tallahassee, Florida 32399

Dear Chairman Sirois:

I write to convey the legal objections of the Executive Office of the Governor to the inclusion of Congressional District 3 in the maps by the staff of the Florida House Redistricting Committee. The proposed district, which largely tracks current Congressional District 5, spans approximately 200 miles from East to West and cuts across eight counties to join a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact and does not otherwise conform to usual political or geographic boundaries. Instead, it appears to be drawn solely to combine separate minority populations in a less than majority-minority district from different regions of northern Florida so that together they may elect a candidate of their choice.

Where race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the legislature must prove that such "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017). Because the Legislature cannot show that the proposed Congressional District 3 would satisfy strict scrutiny, the proposed district violates the Fourteenth Amendment to the U.S. Constitution and should not be included in any map enacted by the Florida House of Representatives.

**Proposed Congressional District 3 (Blue)**

**Current Congressional District 5 (Orange)**



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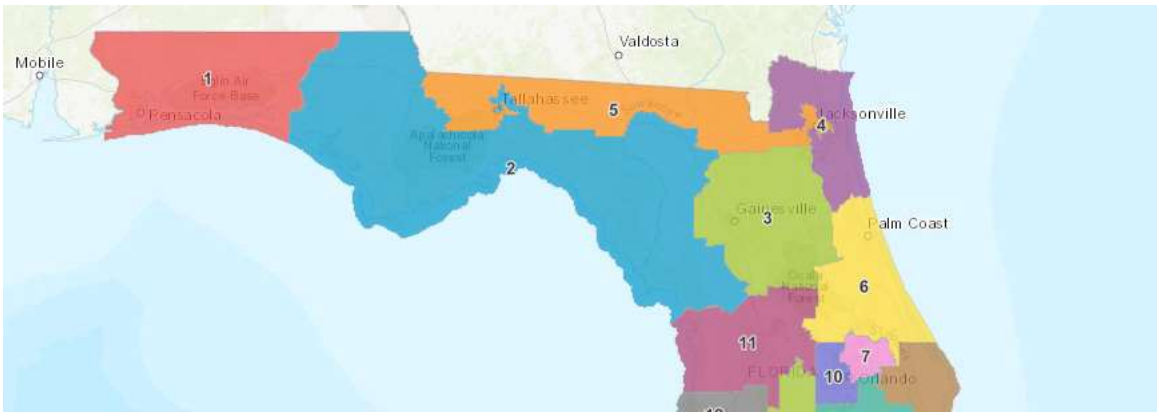


The Equal Protection Clause of the Fourteenth Amendment generally prohibits state laws that separate citizens into groups on the basis of race. A state law that "expressly distinguishes among citizens because of their race" can survive legal challenge only if it is "narrowly tailored to further a compelling governmental interest." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). This principle applies not only to a law that "contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'" *Id.* (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Redistricting legislation is treated no differently. According to the U.S. Supreme Court, "redistricting legislation that is so bizarre on its face" that it can only be explained because of race "demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 644.

To state an equal protection claim, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [line-drawing] decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Specifically, the plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

Given the foregoing considerations, it is evident that non-racial grounds cannot explan proposed Congressional District 3. First, the district violates traditional districting principles. Far from compact, the district records compactness scores as low as .11 on the Reock test, .63 on the Area / Convex Hull test, and .1 on the Polsby-Popper test. It does not respect political subdivisions or communities defined by actual shared interests. The district splits four counties and three municipalities, and it stretches across eight counties to join a minority population in Jacksonville with minority populations in Leon and Gadsden Counties. These communities are in separate and distinct regions of northern Florida and are not defined by shared interests. With respect to contiguity, the district narrows to a mere three miles wide from North to South when traversing the northernmost precincts of Leon County at the state's northern border in an effort to include the minority populations in western Leon County and Gadsden County while avoiding the non-minority population in eastern Leon County.



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Second, only two considerations plausibly explain the district's unusual shape--partisanship or race. If the district were drawn to favor partisan interests, it would violate the Fair Districts Amendment of the Florida Constitution. Article III, Section 20 provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." If improper partisan interests did not play a role, the only reasonable explanation for the district is race. This conclusion follows from the historical circumstances.

The Florida Supreme Court drew the current district—Congressional District 5—in 2015. The Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando because it concluded that such configuration had been unconstitutionally tainted by improper partisan influences. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015) ("*Apportionment VII*"). The court further held that the North-South version was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* Consequently, the court adopted the current East-West version. *Id.* at 405-06. While acknowledging that the new configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), the Court concluded that it would not "diminish the ability of black voters to elect a candidate of their choice." *Id.* at 405. The Court explained that the non-compact shape was necessary because of "geography" and "other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted). Thus, it is clear that race considerations predominated in the drawing of the current district. And because the House seeks to retain the district in large measure to avoid diminishing of minority voting power, race considerations likewise predominated in creationing proposed Congressional District 3.

Third, it is obvious, given the location of minority neighborhoods and precincts, that district lines in both Jacksonville and Tallahassee were drawn specifically to capture minority populations and to combine them into one district. But according to the U.S. Supreme Court, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. By attempting to connect a minority population in Jacksonville with a faraway minority population in Tallahassee and surrounding areas, proposed Congressional District 3 does precisely what the Supreme Court condemns.

Because the Florida Supreme Court subordinated traditional districting criteria to avoid diminishment of minority voting power, Congressional District 3 is a racial gerrymander whichcan survive constitutional challenge only if the Legislature can prove that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464. The Legislature cannot meet that exacting burden here.

The U.S. Supreme Court has long assumed, without definitively deciding, that complying with the Voting Rights Act ("VRA") is a compelling interest. *Id.* at 1469. In this case, however, there is no good reason to believe that the VRA requires Congressional District 3. According to the U.S. Supreme Court in *Bartlett v. Strickland*, Section 2 is satisfied only when a compact



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majority of minority citizens can be drawn into a single district. 556 U.S. 1, 26 (2009) (plurality). But there is no configuration in any proposal put forward in any public map that we are aware of that has created a majority-minority district in northern Florida.

Section 2 of the VRA does not require Congressional District 3. As both the U.S. Supreme Court and the Florida Supreme Court have noted, Section 2 prohibits the dilution of minority votes where a minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 622-23 (Fla. 2012) ("*Apportionment I*"). Congressional District 3 is not a reasonably configured district, and in any event, it does not contain a minority group that is sufficiently large and geographically compact to constitute a majority.

Nor does Section 5 of the VRA require Congressional District 3. Before the U.S. Supreme Court invalidated the VRA's coverage formula in *Shelby County v. Holder*, 570 U.S. 529, 553-57 (2013), Florida was not a covered jurisdiction under Section 5, but five Florida counties were: Collier, Hardee, Hendry, Hillsborough, and Monroe. None of those counties are in Congressional District 3. Moreover, even assuming that compliance with the VRA is a compelling interest, it is doubtful that "continued compliance with [Section] 5 remains a compelling interest" in light of "*Shelby County v. Holder*." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015).

The U.S. Supreme Court has never held or assumed that compliance with a state non-diminishment requirement is a compelling interest sufficient to withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. But even assuming that adherence to the non-diminishment provision of the Florida Constitution could be a compelling interest, and even assuming that Congressional District 3 is narrowly drawn to accomplish that interest, the non-diminishment provision of the Florida Constitution simply does not require Congressional District 3. Article III, Section 20(a) provides that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

This section contains two relevant provisions: the first is the non-vote-dilution provision ("districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process"), and the second is the non-diminishment provision ("districts shall not be drawn . . . to diminish their ability to elect representatives of their choice"). The Florida Supreme Court has held that the non-vote-dilution provision mirrors Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619-23.

In addition, when Article III, Section 20(a) is read in this context, it becomes apparent that the group referenced in the latter non-diminishment provision is the very same group of "racial or language minorities" referenced in the former non-vote-dilution provision. The word "their" in the non-diminishment provision necessarily refers back to the "racial or language



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minorities" in the non-vote-dilution provision. Because the non-vote-dilution provision mirrors Section 2 of the VRA, and because Section 2 only applies to districts that contain a minority group that is sufficiently large and geographically compact to constitute a majority, the non-diminishment provision should also apply to those kinds of districts. Because Congressional District 3 does not contain a minority group that is sufficiently large and geographically compact to constitute a majority, Article III, Section 20(a)'s non-diminishment provision does not apply.[1]

With this reading, both Article III, Section 20(a)'s non-vote-dilution provision and non-diminishment provision work in tandem. The non-vote-dilution provision allows minority groups to form geographically compact districts where appropriate. *See Gingles*, 478 U.S. at 50-51 (requiring, additionally, political cohesion of the minority group and bloc voting of the majority group). The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-80 (1997). In other words, the non-vote-dilution provision goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

This reading of Article III, Section 20(a)'s non-diminishment provision to refer to "racial or language minorities" in the non-vote-dilution provision flows from the text of the Florida Constitution. It also gives the Florida Constitution the best chance to avoid federal constitutional concerns—specifically, whether drawing congressional districts with race as a predominant factor violates the Equal Protection Clause of the U.S. Constitution. *See Cooper*, 137 S. Ct. 1463-64, 1482 (invalidating two North Carolina congressional districts).

In sum, I respectfully ask that you consider the legal objections to Congressional District 3. I also respectfully ask that you include in the legislative record Governor DeSantis's advisory opinion request to the Florida Supreme Court and the Governor's brief before the Florida Supreme Court.

Sincerely,

Ryan Newman
General Counsel

---

1 To the extent that Article III, Section 20(a)'s non-diminishment provision parallels Section 5 of the VRA, it should be noted that when Congress compiled in 1965 an extensive record of racial discrimination in state electoral processes to justify Section 4 and 5's "strong medicine" and "extraordinary measures to address an extraordinary problem." *Shelby County*, 570 U.S. at 534-35; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 329-32 (1966?). When Florida voters approved Article III, Section 20(a), they did not have before them a similar record of pervasive, flagrant, widespread, or rampant discrimination.



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cc: Honorable Chris Sprowls
Speaker, Florida House of Representatives
400 South Monroe Street
Tallahassee, Florida 32399



AMERICAN OVERSIGHT

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 16, 2021

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g., How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

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gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

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In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

*Id*. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

*Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas



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argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.



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**From:** Michael Beato [mbeato@HoltzmanVogel.com]
**Sent:** Thursday, February 17, 2022 7:53 PM
**To:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]; Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]
**Subject:** Redistricting Documents
**Attachments:** Letter re House Proposed Congressional District 3_HV Edits (2) + JEP edits.docx; Testimony.docx

Good evening, all,

Attached are (1) the memorandum, which incorporates Josh's, Nick's, Mo's, and my edits and (2) Mr. Popper's opening statement. We hope to get the opening statement to Stephanie by 8:00 A.M.

**Michael Beato**
**Holtzman Vogel Baran Torchinsky & Josefiak PLLC**
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DISCLAIMER
Any accounting, business or tax advice contained in this communication, including attachments and enclosures, is not intended as a thorough, in-depth analysis of specific issues, nor a substitute for a formal opinion, nor is it sufficient to avoid tax-related penalties. If desired, Holtzman Vogel, PLLC would be pleased to perform the requisite research and provide you with a detailed written analysis. Such an engagement may be the subject of a separate engagement letter that would define the scope and limits of the desired consultation services.

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February 18, 2022

Honorable Tyler Sirois
Member, Florida House of Representatives
Chairman, Congressional Redistricting Subcommittee
400 South Monroe Street
Tallahassee, Florida 32399

Dear Chairman Sirois:

I write to convey the legal objections of the Executive Office of the Governor to the inclusion of Congressional District 3 in the maps by the staff of the Florida House Redistricting Committee. The proposed district, which largely tracks current Congressional District 5, spans approximately 200 miles from East to West and cuts across eight counties to join a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact and does not otherwise conform to usual political or geographic boundaries. Instead, it appears to be drawn solely to combine separate minority populations in a less than majority-minority district from different regions of northern Florida so that together they may elect a candidate of their choice.

Where race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the legislature must prove that such "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017). Because the Legislature cannot show that the proposed Congressional District 3 would satisfy strict scrutiny, the proposed district violates the Fourteenth Amendment to the U.S. Constitution and should not be included in any map enacted by the Florida House of Representatives.

**Proposed Congressional District 3 (Blue)**

**Current Congressional District 5 (Orange)**



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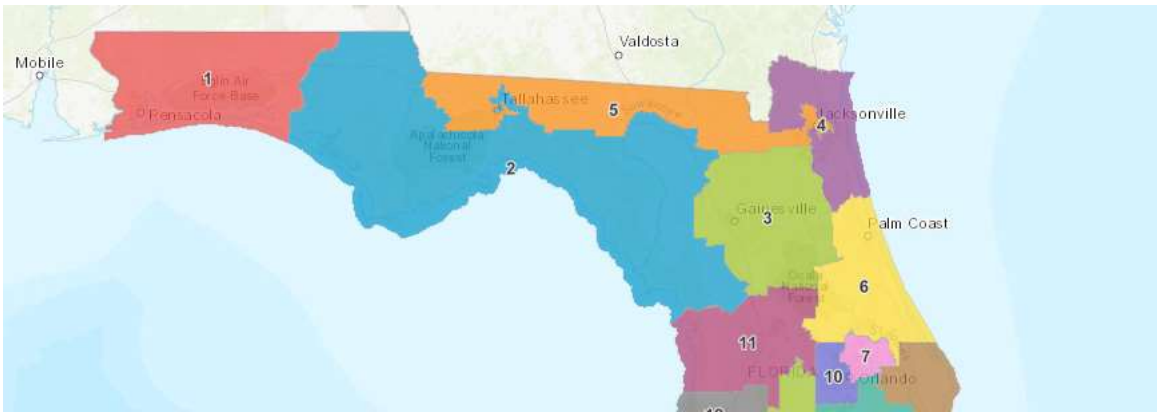


The Equal Protection Clause of the Fourteenth Amendment generally prohibits state laws that separate citizens into groups on the basis of race. A state law that "expressly distinguishes among citizens because of their race" can survive legal challenge only if it is "narrowly tailored to further a compelling governmental interest." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). This principle applies not only to a law that "contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'" *Id.* (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Redistricting legislation is treated no differently. According to the U.S. Supreme Court, "redistricting legislation that is so bizarre on its face" that it can only be explained because of race "demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 644.

To state an equal protection claim, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [line-drawing] decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Specifically, the plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

Given the foregoing considerations, it is evident that non-racial grounds cannot explan proposed Congressional District 3. First, the district violates traditional districting principles. Far from compact, the district records compactness scores as low as .11 on the Reock test, .63 on the Area / Convex Hull test, and .1 on the Polsby-Popper test. It does not respect political subdivisions or communities defined by actual shared interests. The district splits four counties and three municipalities, and it stretches across eight counties to join a minority population in Jacksonville with minority populations in Leon and Gadsden Counties. These communities are in separate and distinct regions of northern Florida and are not defined by shared interests. With respect to contiguity, the district narrows to a mere three miles wide from North to South when traversing the northernmost precincts of Leon County at the state's northern border in an effort to include the minority populations in western Leon County and Gadsden County while avoiding the non-minority population in eastern Leon County.



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Second, only two considerations plausibly explain the district's unusual shape--partisanship or race. If the district were drawn to favor partisan interests, it would violate the Fair Districts Amendment of the Florida Constitution. Article III, Section 20 provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." If improper partisan interests did not play a role, the only reasonable explanation for the district is race. This conclusion follows from the historical circumstances.

The Florida Supreme Court drew the current district—Congressional District 5—in 2015. The Court rejected a North-South configuration of the district that ran from Jacksonville to Orlando because it concluded that such configuration had been unconstitutionally tainted by improper partisan influences. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015) ("*Apportionment VII*"). The court further held that the North-South version was not "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* Consequently, the court adopted the current East-West version. *Id.* at 405-06. While acknowledging that the new configuration was not a "model of compactness," *id.* at 406 (internal quotation marks omitted), the Court concluded that it would not "diminish the ability of black voters to elect a candidate of their choice." *Id.* at 405. The Court explained that the non-compact shape was necessary because of "geography" and "other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Id.* at 406 (citation omitted). Thus, it is clear that race considerations predominated in the drawing of the current district. And because the House seeks to retain the district in large measure to avoid diminishing of minority voting power, race considerations likewise predominated in creationing proposed Congressional District 3.

Third, it is obvious, given the location of minority neighborhoods and precincts, that district lines in both Jacksonville and Tallahassee were drawn specifically to capture minority populations and to combine them into one district. But according to the U.S. Supreme Court, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. By attempting to connect a minority population in Jacksonville with a faraway minority population in Tallahassee and surrounding areas, proposed Congressional District 3 does precisely what the Supreme Court condemns.

Because the Florida Supreme Court subordinated traditional districting criteria to avoid diminishment of minority voting power, Congressional District 3 is a racial gerrymander whichcan survive constitutional challenge only if the Legislature can prove that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464. The Legislature cannot meet that exacting burden here.

The U.S. Supreme Court has long assumed, without definitively deciding, that complying with the Voting Rights Act ("VRA") is a compelling interest. *Id.* at 1469. In this case, however, there is no good reason to believe that the VRA requires Congressional District 3. According to the U.S. Supreme Court in *Bartlett v. Strickland*, Section 2 is satisfied only when a compact



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majority of minority citizens can be drawn into a single district. 556 U.S. 1, 26 (2009) (plurality). But there is no configuration in any proposal put forward in any public map that we are aware of that has created a majority-minority district in northern Florida.

Section 2 of the VRA does not require Congressional District 3. As both the U.S. Supreme Court and the Florida Supreme Court have noted, Section 2 prohibits the dilution of minority votes where a minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 622-23 (Fla. 2012) ("*Apportionment I*"). Congressional District 3 is not a reasonably configured district, and in any event, it does not contain a minority group that is sufficiently large and geographically compact to constitute a majority.

Nor does Section 5 of the VRA require Congressional District 3. Before the U.S. Supreme Court invalidated the VRA's coverage formula in *Shelby County v. Holder*, 570 U.S. 529, 553-57 (2013), Florida was not a covered jurisdiction under Section 5, but five Florida counties were: Collier, Hardee, Hendry, Hillsborough, and Monroe. None of those counties are in Congressional District 3. Moreover, even assuming that compliance with the VRA is a compelling interest, it is doubtful that "continued compliance with [Section] 5 remains a compelling interest" in light of "*Shelby County v. Holder*." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015).

The U.S. Supreme Court has never held or assumed that compliance with a state non-diminishment requirement is a compelling interest sufficient to withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. But even assuming that adherence to the non-diminishment provision of the Florida Constitution could be a compelling interest, and even assuming that Congressional District 3 is narrowly drawn to accomplish that interest, the non-diminishment provision of the Florida Constitution simply does not require Congressional District 3. Article III, Section 20(a) provides that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

This section contains two relevant provisions: the first is the non-vote-dilution provision ("districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process"), and the second is the non-diminishment provision ("districts shall not be drawn . . . to diminish their ability to elect representatives of their choice"). The Florida Supreme Court has held that the non-vote-dilution provision mirrors Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619-23.

In addition, when Article III, Section 20(a) is read in this context, it becomes apparent that the group referenced in the latter non-diminishment provision is the very same group of "racial or language minorities" referenced in the former non-vote-dilution provision. The word "their" in the non-diminishment provision necessarily refers back to the "racial or language



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minorities" in the non-vote-dilution provision. Because the non-vote-dilution provision mirrors Section 2 of the VRA, and because Section 2 only applies to districts that contain a minority group that is sufficiently large and geographically compact to constitute a majority, the non-diminishment provision should also apply to those kinds of districts. Because Congressional District 3 does not contain a minority group that is sufficiently large and geographically compact to constitute a majority, Article III, Section 20(a)'s non-diminishment provision does not apply.[1]

With this reading, both Article III, Section 20(a)'s non-vote-dilution provision and non-diminishment provision work in tandem. The non-vote-dilution provision allows minority groups to form geographically compact districts where appropriate. *See Gingles*, 478 U.S. at 50-51 (requiring, additionally, political cohesion of the minority group and bloc voting of the majority group). The non-diminishment provision allows minority groups to maintain those districts where appropriate. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-80 (1997). In other words, the non-vote-dilution provision goes into effect when a reasonably cohesive district *could be formed*, and the non-diminishment provision goes into effect *once the district has been formed*.

This reading of Article III, Section 20(a)'s non-diminishment provision to refer to "racial or language minorities" in the non-vote-dilution provision flows from the text of the Florida Constitution. It also gives the Florida Constitution the best chance to avoid federal constitutional concerns—specifically, whether drawing congressional districts with race as a predominant factor violates the Equal Protection Clause of the U.S. Constitution. *See Cooper*, 137 S. Ct. 1463-64, 1482 (invalidating two North Carolina congressional districts).

In sum, I respectfully ask that you consider the legal objections to Congressional District 3. I also respectfully ask that you include in the legislative record Governor DeSantis's advisory opinion request to the Florida Supreme Court and the Governor's brief before the Florida Supreme Court.

Sincerely,

Ryan Newman
General Counsel

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1

To the extent that Article III, Section 20(a)'s non-diminishment provision parallels Section 5 of the VRA, it should be noted that when Congress compiled in 1965 an extensive record of racial discrimination in state electoral processes to justify Section 4 and 5's "strong medicine" and "extraordinary measures to address an extraordinary problem." *Shelby County*, 570 U.S. at 534-35; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 329-32 (1966?). When Florida voters approved Article III, Section 20(a), they did not have before them a similar record of pervasive, flagrant, widespread, or rampant discrimination.



AMERICAN OVERSIGHT

cc: Honorable Chris Sprowls
Speaker, Florida House of Representatives
400 South Monroe Street
Tallahassee, Florida 32399



AMERICAN OVERSIGHT

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 16, 2021

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I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

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In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



AMERICAN OVERSIGHT

Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

*Id*. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

*Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas



AMERICAN OVERSIGHT

argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



AMERICAN OVERSIGHT

scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.



AMERICAN OVERSIGHT

**From:** Michael Beato [mbeato@HoltzmanVogel.com]
**Sent:** Thursday, February 17, 2022 9:11 AM
**To:** Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]
**CC:** Mohammad O. Jazil [mjazil@holtzmanvogel.com]
**Subject:** FW: Thursday, February 17 Schedule
**Attachments:** Testimony of Robert D. Popper - 2 16 2022.docx

Just as an FYI

**Michael Beato**
mbeato@HoltzmanVogel.com // www.HoltzmanVogel.com

Holtzman Vogel
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

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DISCLAIMER
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AMERICAN OVERSIGHT

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 16, 2021

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g., How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

[2] Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).



AMERICAN OVERSIGHT

gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

In 2013, I joined Judicial Watch. In my time there, I have filed voting rights lawsuits in federal and state courts alleging claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act, the NVRA, and a number of state constitutional provisions. Among other things, I am currently representing plaintiffs pursuing gerrymandering claims in Maryland State court.

In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

[3] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).



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2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice



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More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

*Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas



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Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.



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scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were counseling clients about whether to sue to enjoin District 3 in federal court, I would recommend that they do so, suggest that they are likely to prevail, and tell them that they would then be likely to receive an award of costs and legal fees.

R. D. P.



AMERICAN OVERSIGHT

**From:** Mohammad O. Jazil [mjazil@holtzmanvogel.com]
**Sent:** Monday, February 14, 2022 6:46 AM
**To:** Robert Popper [rpopper@JUDICIALWATCH.ORG]; Newman, Ryan [Ryan.Newman@eog.myflorida.com]
**CC:** Jason Torchinsky [jtorchinsky@HoltzmanVogel.com]; Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]; Michael Beato [mbeato@HoltzmanVogel.com]
**Subject:** Florida Materials

Dear Bob,

I include below a link where you can download the following materials:

1. Article III, Section 20 of the Florida Constitution (with the relevant provision highlighted)
2. A resource from the Florida Legislature that breaks down relevant Florida law concerning redistricting
3. Florida Supreme Court cases
    a. Apportionment I (with § 2 and § 5 standards highlighted)
    b. Apportionment VII (with Congressional District 5's discussion highlighted)
    c. Apportionment VIII
4. Governor DeSantis's advisory opinion request
5. Governor DeSantis's Brief concerning the advisory opinion request
6. The Florida Supreme Court's order declining to exercise jurisdiction

I also included

7. Article III, Section 21 of the Florida Constitution
8. Article III, Section 16 of the Florida Constitution

Here's an additional bit of information that I'm happy to expand on if you think it necessary: The Florida Attorney General has sent the joint resolution of Florida's state house and senate maps to the Florida Supreme Court under article III, section 16 of the Florida Constitution. The joint resolution does not require Governor DeSantis's approval or veto but the joint resolution must abide by standards nearly identical to those for the congressional districts.

You can view "Redistricting Packet.zip" at:
https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:8e7257f4-df1b-46e6-a03e-37f6d220f501

Many thanks,
Mo

**Mohammad O. Jazil**
**Mobile: (850) 274-1690**

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mjazil@holtzmanvogel.com // www.HoltzmanVogel.com

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---

**From:** Robert Popper <rpopper@JUDICIALWATCH.ORG>
**Sent:** Sunday, February 13, 2022 5:45 PM
**To:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Cc:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
**Subject:** Re: Request for Assistance

Thanks. We'll talk tomorrow.

Bob

---

**From:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Sent:** Sunday, February 13, 2022 5:40 PM
**To:** Robert Popper <rpopper@JUDICIALWATCH.ORG>
**Cc:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
**Subject:** RE: Request for Assistance

All,

The hearing is scheduled for 8 am to 12 pm on Friday, February 18. The witness need not submit written testimony.

But I think it may nevertheless be helpful for the Governor's office to submit a memo explaining our position on why the proposed CD3 is unconstitutional. Let's discuss in the morning.

Thanks,
Ryan

**Ryan D. Newman**

AMERICAN OVERSIGHT

General Counsel
Office of Governor Ron DeSantis
(850) 717-9368

---

**From:** rpopper <rpopper@JUDICIALWATCH.ORG>
**Sent:** Saturday, February 12, 2022 7:54 PM
**To:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Cc:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
**Subject:** RE: Request for Assistance

Sure, that works. Talk to you then.

Sent from my T-Mobile 4G LTE Device

-------- Original message --------
From: "Newman, Ryan" <Ryan.Newman@eog.myflorida.com>
Date: 2/12/22 7:44 PM (GMT-05:00)
To: Robert Popper <rpopper@JUDICIALWATCH.ORG>
Cc: Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>, "Mohammad O. Jazil" <mjazil@holtzmanvogel.com>, "Pratt, Joshua" <Joshua.Pratt@eog.myflorida.com>, "Meros, Nicholas" <Nicholas.Meros@eog.myflorida.com>
Subject: RE: Request for Assistance

Thanks so much, Bob.

Just to clarify, the hearing is this Friday, February 18. (I mistakenly wrote March 18.)

Is there any chance that you would be free tomorrow afternoon at 1:30? If so, Josh / Mo, could you please circulate a conference call number?

All the best,
Ryan

**Ryan D. Newman**
General Counsel
Office of Governor Ron DeSantis
(850) 717-9368

---

**From:** Robert Popper <rpopper@JUDICIALWATCH.ORG>
**Sent:** Saturday, February 12, 2022 5:35 PM
**To:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Cc:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; Mohammad O. Jazil

AMERICAN OVERSIGHT

<mjazil@holtzmanvogel.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
**Subject:** Re: Request for Assistance

Mr. Newman,

Thank you for the invitation. I have seen the map, and I would be glad to serve as a witness. We can talk any time this weekend or next week at your convenience. My cell no. is (201) 486-8773.

Bob

Robert D. Popper
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, D.C. 20024
(202) 646-5172
Direct: (202) 646-5173

---

**From:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Sent:** Saturday, February 12, 2022 3:19 PM
**To:** Robert Popper <rpopper@JUDICIALWATCH.ORG>
**Cc:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
**Subject:** Request for Assistance

Mr. Popper,

My name is Ryan Newman, and I am General Counsel to Governor Ron DeSantis. John Gore at Jones Day suggested that I reach out to you.

The Florida House of Representatives has scheduled a committee hearing for this coming Friday, March 18, on its congressional redistricting map. The House proposal retains Congressional District 5 in northern Florida, which we believe is an unconstitutional racial gerrymander. It stretches roughly two hundred miles to connect a minority community in Jacksonville with a minority community in Tallahassee and Gadsden County to create a district with a BVAP of only 44%.

We were hoping that you might be interested in serving as a witness at the hearing to educate the committee on why retaining this district would likely violate the U.S. Constitution.

Please let me know if you would be interested in speaking with us. I'm cc'ing Jason Torchinsky and Mo Jazil, who have been representing the Governor's office and the Florida Department of State as outside counsel. Josh Pratt and Nick Meros are Deputy GCs in my office.

AMERICAN OVERSIGHT

I look forward to hearing from you.

All the best,
Ryan

**Ryan D. Newman**
General Counsel
Office of Governor Ron DeSantis
State of Florida
The Capitol
Tallahassee, Florida 32399-0001
T: (850) 717-9368
F: (850) 488-9810
ryan.newman@eog.myflorida.com

Please note that under Florida law correspondence sent to the Governor's Office, which is not confidential or exempt pursuant to chapter 119 of the Florida Statutes, is a public record made available upon request.

AMERICAN OVERSIGHT

**From:** Mohammad O. Jazil [mjazil@holtzmanvogel.com]
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**Mohammad O. Jazil**
**Mobile: (850) 274-1690**

AMERICAN OVERSIGHT

mjazil@holtzmanvogel.com // www.HoltzmanVogel.com

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**Subject:** Florida Materials

**Follow Up Flag:** Follow up
**Flag Status:** Flagged

Dear Bob,

I include below a link where you can download the following materials:

1. Article III, Section 20 of the Florida Constitution (with the relevant provision highlighted)
2. A resource from the Florida Legislature that breaks down relevant Florida law concerning redistricting
3. Florida Supreme Court cases
    a. Apportionment I (with § 2 and § 5 standards highlighted)
    b. Apportionment VII (with Congressional District 5's discussion highlighted)
    c. Apportionment VIII
4. Governor DeSantis's advisory opinion request
5. Governor DeSantis's Brief concerning the advisory opinion request
6. The Florida Supreme Court's order declining to exercise jurisdiction

I also included

7. Article III, Section 21 of the Florida Constitution
8. Article III, Section 16 of the Florida Constitution

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State of Florida
The Capitol
Tallahassee, Florida 32399-0001
T: (850) 717-9368
F: (850) 488-9810
ryan.newman@eog.myflorida.com

AMERICAN OVERSIGHT

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**Subject:** Re: Request for Assistance

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Thanks mate. Enjoy family time!

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Joshua E. Pratt
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Get Outlook for iOS

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I look forward to hearing from you.

All the best,

Ryan

AMERICAN OVERSIGHT

**Ryan D. Newman**

General Counsel

Office of Governor Ron DeSantis

State of Florida

The Capitol

Tallahassee, Florida 32399-0001

T: (850) 717-9368

F: (850) 488-9810

ryan.newman@eog.myflorida.com

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AMERICAN OVERSIGHT

**From:** Mohammad O. Jazil [mjazil@holtzmanvogel.com]
**Sent:** Sunday, February 13, 2022 7:53 AM
**To:** Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]
**Subject:** Re: Request for Assistance

Sure, no problem. Will circulate later this morning.

Get Outlook for iOS

---

**From:** Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>
**Sent:** Sunday, February 13, 2022 7:37:04 AM
**To:** Mohammad O. Jazil <mjazil@holtzmanvogel.com>
**Subject:** Fwd: Request for Assistance

Good morning, Mo. Mind if we use y'all's conference line?

- -
Joshua E. Pratt
Deputy General Counsel
Executive Office of the Governor
850-717-9267

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**From:** rpopper <rpopper@JUDICIALWATCH.ORG>
**Sent:** Saturday, February 12, 2022 7:53:43 PM
**To:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Cc:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>
**Subject:** RE: Request for Assistance

Sure, that works. Talk to you then.

Sent from my T-Mobile 4G LTE Device

-------- Original message --------
From: "Newman, Ryan" <Ryan.Newman@eog.myflorida.com>
Date: 2/12/22 7:44 PM (GMT-05:00)
To: Robert Popper <rpopper@JUDICIALWATCH.ORG>

AMERICAN OVERSIGHT

Cc: Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>, "Mohammad O. Jazil" <mjazil@holtzmanvogel.com>, "Pratt, Joshua" <Joshua.Pratt@eog.myflorida.com>, "Meros, Nicholas" <Nicholas.Meros@eog.myflorida.com>
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Bob

Robert D. Popper

Judicial Watch, Inc.

425 Third Street, SW

Suite 800

Washington, D.C. 20024

(202) 646-5172

Direct: (202) 646-5173

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**To:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>, Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>, Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>, Mohammad O. Jazil <mjazil@holtzmanvogel.com>
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**To:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>
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**To:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>, Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>, Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>, Mohammad O. Jazil <mjazil@holtzmanvogel.com>
**Subject:** RE: Witness for Hearing

Roger.

Do you know Popper? Can you try to make contact with him as well?

**Ryan D. Newman**

AMERICAN OVERSIGHT

General Counsel
Office of Governor Ron DeSantis
(850) 717-9368

---

**From:** Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>
**Sent:** Saturday, February 12, 2022 2:26 PM
**To:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>; Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>
**Subject:** Re: Witness for Hearing

Popper Would be way better than Hans. Chris Coates is also at Judicial Watch – but I have not been able to reach him yet. Michael Barley was also unable to help

Get Outlook for iOS

---

**From:** Newman, Ryan <Ryan.Newman@eog.myflorida.com>
**Sent:** Saturday, February 12, 2022 2:24:48 PM
**To:** Pratt, Joshua <Joshua.Pratt@eog.myflorida.com>; Meros, Nicholas <Nicholas.Meros@eog.myflorida.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>
**Subject:** Witness for Hearing

Guys,

Unfortunately, John will not be able to be a witness for the hearing. (I can explain offline.) I asked him for alternatives, and he suggested Hans von Spakovsky at Heritage or Robert Popper at Judicial Watch. Both have experience at DOJ in the Civil Rights Division.

What do you guys think? Are you all available for a quick call?

Thanks,
Ryan

**Ryan D. Newman**
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ryan.newman@eog.myflorida.com

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**Sent:** Saturday, February 12, 2022 9:00 PM
**To:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]
**Subject:** Re: Request for Assistance

I'm dropping my daughter at an event around 130….so I'll join as soon as I can.

Jason Torchinsky
Holtzman Vogel Baran Josefiak Torchinsky PLLC

---

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ryan.newman@eog.myflorida.com

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AMERICAN OVERSIGHT

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**Sent:** Saturday, February 12, 2022 6:11 PM
**To:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]; Jason Torchinsky [jtorchinsky@HoltzmanVogel.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]
**Subject:** Re: Witness for Hearing

I should be free then.

- -
Joshua E. Pratt
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Executive Office of the Governor
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**Subject:** Re: Witness for Hearing

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F: (850) 488-9810
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**Subject:** Re: Witness for Hearing

Works for me.

Nicholas J.P. Meros
Deputy General Counsel
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nicholas.meros@eog.myflorida.com
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Bob

Robert D. Popper
Judicial Watch, Inc.
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Suite 800
Washington, D.C. 20024
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Direct: (202) 646-5173

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AMERICAN OVERSIGHT

We were hoping that you might be interested in serving as a witness at the hearing to educate the committee on why retaining this district would likely violate the U.S. Constitution.

Please let me know if you would be interested in speaking with us. I'm cc'ing Jason Torchinsky and Mo Jazil, who have been representing the Governor's office and the Florida Department of State as outside counsel. Josh Pratt and Nick Meros are Deputy GCs in my office.

I look forward to hearing from you.

All the best,
Ryan

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**CC:** Jason Torchinsky [jtorchinsky@HoltzmanVogel.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]; Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]
**Subject:** Re: Request for Assistance

Mr. Newman,

Thank you for the invitation. I have seen the map, and I would be glad to serve as a witness. We can talk any time this weekend or next week at your convenience. My cell no. is (201) 486-8773.

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Robert D. Popper
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, D.C. 20024
(202) 646-5172
Direct: (202) 646-5173

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AMERICAN OVERSIGHT

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**Subject:** Re: Witness for Hearing

Coates declined. He has other commitments this week.

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I'm checking to see if John has his contact info and can connect us. I didn't see it on his Judicial Watch bio page. If you already have his contact info, then go ahead and reach out to him. You can cc me.

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AMERICAN OVERSIGHT

**From:** Newman, Ryan [Ryan.Newman@eog.myflorida.com]
**Sent:** Saturday, February 12, 2022 2:25 PM
**To:** Pratt, Joshua [Joshua.Pratt@eog.myflorida.com]; Meros, Nicholas [Nicholas.Meros@eog.myflorida.com]; Mohammad O. Jazil [mjazil@holtzmanvogel.com]; Jason Torchinsky [jtorchinsky@HoltzmanVogel.com]
**Subject:** Witness for Hearing

Guys,

Unfortunately, John will not be able to be a witness for the hearing. (I can explain offline.) I asked him for alternatives, and he suggested Hans von Spakovsky at Heritage or Robert Popper at Judicial Watch. Both have experience at DOJ in the Civil Rights Division.

What do you guys think? Are you all available for a quick call?

Thanks,
Ryan

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