

IN RE: JOINT RESOLUTION
OF LEGISLATIVE
APPORTIONMENT

CASE NO. SC12-1

Ronald G. Meyer
Florida Bar No. 0148248
**MEYER, BROOKS, DEMMA AND
BLOHM P.A.**
131 North Gadsden Street
Post Office Box 1547
Tallahassee, Florida 32302
Telephone: (850) 878-5212

Paul M. Smith*
psmith@jenner.com
Michael B. DeSanctis*
mdesantis@jenner.com
Jessica Ring Amunson *
jamunson@jenner.com
Kristen M. Rogers*
krogers@jenner.com
**Pro hac vice*

JENNER & BLOCK, LLP
1099 New York Ave NW, Suite 900
Washington, DC 20001
Telephone: (202) 639-6000

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STATEMENT OF INTEREST

The League of Women Voters of Florida (LWV) is a nonpartisan organization founded in 1939 to promote active citizenship through informed and engaged participation in government. The League was one of the primary proponents of the FairDistricts Amendments and its members have been actively engaged in the redistricting process.

Common Cause Florida (CCF) is a nonpartisan, nonprofit advocacy organization founded as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Common Cause Florida was also a primary proponent of the FairDistricts Amendments and its members have been actively engaged in the redistricting process.

The National Council of La Raza (NCLR) is a nonpartisan, nonprofit Hispanic civil rights and advocacy organization in the United States, working to improve opportunities for Hispanic Americans through community-based organizations. NCLR (formerly Democracia, Inc.) was one of the primary proponents of the FairDistricts Amendments and its members were actively engaged in the redistricting process to try to get the Florida State Legislature to comply with the amendments, particularly the amendments' provisions for minority rights.

STATEMENT OF THE CASE

In this original proceeding brought by the Attorney General pursuant to Article III, Section 16(c) of the Florida Constitution, this Court is charged with reviewing the legislative reapportionment plans recently passed by the Florida Legislature to determine whether the plans are valid under federal and state law. Although this is the fifth time this Court will have occasion to undertake this review, it is the first time this Court is charged with applying Article III, Section 21. That constitutional provision, entitled “Standards for Legislative Boundaries,” provides as follows:

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 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.

Fla. Const., art. III, sec. 21.

The Joint Resolution of Legislative Apportionment adopted by the Legislature does not comply with Article III, Section 21. LWVF, CCF, and NCLR (together, the “Coalition”) submitted to the Legislature redistricting plans for the Florida House and Senate that demonstrated how the Legislature could have complied with the Florida constitution and respected the will of the 63% of Florida voters who voted for the FairDistricts Amendments. Those plans have also been submitted to this Court. *See* App. Tab A.¹ Along with the plans, the Coalition submitted a detailed letter to the Legislature that demonstrated the constitutional deficiencies in the Legislature’s plans. *See* App. at K-7. The Legislature did not seriously consider the Coalition’s submissions and instead passed constitutionally deficient maps.

Pursuant to this Court’s scheduling orders of January 4, 2012, and January 25, 2012, the Coalition submits this brief in opposition to the Legislature’s Joint Resolution of Legislative Apportionment. In the Appendix accompanying this brief, the Coalition has provided its alternative redistricting plans (at Tab A) along with the following information and statistical reports regarding those plans:

- Description of software, data, and criteria used to create the Coalition’s plans (App. Tab B);

¹ References to “App.” are to the appendix submitted with this brief.

- Reports comparing the compactness of the districts in the Coalition's plans with those in the Legislature's plans (App. Tab C);
- Reports showing the degree to which the Coalition's plans utilized existing political and geographic boundaries as compared to the Legislature's plans (App. Tab D);
- Reports comparing the population deviation among the districts in the Coalition's plans against the Legislature's plans (App. Tab E);
- Reports comparing the political competitiveness of the districts in the Coalition's plans against the Legislature's plans (App. Tab F);
- Reports comparing the degree to which the districts in the 2012 plans remained the same as the districts in the 2002 plans for both the Coalition's plans and the Legislature's plans (App. Tab G);
- Reports showing the demographics of each district by voting age population and citizen voting age population for both the Coalition's and the Legislature's plans (App. Tab H);
- Reports comparing the distribution of legislative seats by partisan performance in the Coalition's plans against the Legislature's plans (App. Tab I).

Concurrently with this brief, the Coalition has also filed a request for oral argument.

STATEMENT OF FACTS

A. THE PASSAGE OF THE FAIRDISTRICTS AMENDMENTS.

On November 2, 2010, the voters of Florida amended the state constitution by adopting two provisions that provide standards the Legislature must abide by when drawing state legislative and congressional districts after each decennial census. As this Court has held: “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.” *Advisory Opinion to Attorney General re Standards For Establishing Legislative District Boundaries*, 2 So. 3d 175, 181 (Fla. 2009). This Court further found that the “purpose of the standards ... is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts ... are avoided.” *Id.* at 187-88.

In supporting the FairDistricts Amendments, the voters were responding to a long history of political gerrymandering in Florida. In every major statewide election in recent memory, Florida has proven itself to be a state whose voters split almost evenly between Republican and Democratic candidates. In 2008, Florida narrowly voted for Barack Obama by 51.0%, while in 2004, 52.1% of Floridians

voted for George W. Bush.² Nevertheless, because of the Legislature's heretofore unchecked power to strategically draw district lines, the composition of Florida's Senate and House delegations reflects a severe partisan imbalance: Republicans hold 70% of Florida's Senate seats (28 of 40 seats) and 67.5% of Florida's House seats (81 of 120 seats). Moreover, these seats are extremely safe for their incumbents. In the 2010 elections, only two of 23 Senate races and only six of 120 House races were decided by margins of less than 10%.³

A federal court held that as to the existing districts from which these elections were held: "The legislature's overriding goal with respect to state legislative reapportionment in 2002 was to adopt plans that would . . . maximize the number of districts likely to perform for Republicans." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1312 (S.D. Fla. 2002). In fact, in 2002, the Legislature fully admitted at trial that the "intent of the Florida legislature, comprised of a majority of Republicans, was to draw the congressional [and legislative] districts in a way that advantages Republican incumbents and potential candidates." *Id.* at 1340.

Because the FairDistricts Amendments prohibit the Legislature from continuing this practice of drawing districts with the intent to favor political parties or incumbents, the Legislature has made multiple attempts to avoid them. *First*,

² See Florida Dep't of State, Div. of Elections, Election Results, *available at* <http://election.dos.state.fl.us/elections/resultsarchive>.

³ See *id.*

the Legislature came to this Court in an attempt to keep the FairDistricts Amendments from even getting onto the ballot. But this Court approved the amendments' placement on the November 2010 ballot. *See Advisory Opinion*, 2 So. 3d 175. *Next*, the Legislature proposed its own constitutional amendment that would have rendered the FairDistricts Amendments meaningless. This Court removed the Legislature's amendment from the ballot. *See Florida Dep't of State v. Florida State Conference of NAACP Branches*, 43 So. 3d 662 (Fla. 2010). *Then*, the Legislature brought suit in the circuit court to try to keep the FairDistricts Amendments from the voters. This Court issued a writ of mandamus to have that suit dismissed. *See Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010). *Next*, the Florida House went to federal court seeking invalidation of the congressional redistricting provision. The suit was dismissed on summary judgment and the Eleventh Circuit affirmed, rejecting in its entirety the Florida House of Representatives' argument. *See Brown v. Secretary of Florida*, No. 11-14554, --- F.3d ----, 2012 WL 264610 (11th Cir. Jan. 31, 2012). *Now*, the Florida House has scheduled a Judiciary Committee hearing on a proposed bill that would grant absolute immunity to legislators and staff from testifying or producing documents about anything related to the redistricting process. *See infra* p. 21 and n.10.

This waste of taxpayer dollars in an attempt to perpetuate political and incumbent advantage merely continues here, as the Legislature brings to this Court

reapportionment plans that plainly do not comply with Article III, Section 21. In fact, in opposing the FairDistricts Amendments in 2008, the Legislature informed this Court that it did not anticipate complying with Article III, Section 21's requirement of political neutrality. In briefing its attempt to keep the amendments from the ballot, the Legislature told this Court that the mandate of political neutrality was "humanly impossible" for the Legislature to achieve because "politics and political considerations *inevitably* play major roles in redistricting decisions." Brief of the Florida Legislature to the Florida Supreme Court, *Advisory Opinion to Attorney General re Standards For Establishing Legislative District Boundaries*, No. SC08-986, at 18 (Fla. July 15, 2008), *available at* 2008 WL 3491017 (hereinafter "Brief of the Florida Legislature"). The Legislature frankly informed this Court that it was "certain" that the Legislature would be "unable to draft a plan or create all districts in compliance with paragraph 1" of the amendments, *id.* at 20, and that "the task of eliminating political considerations" would be "impossible ... for the Legislature," *id.* at 21; *see id.* at 30 (stating that it was "humanly impossible" to "eliminate political partisanship from the redistricting process"). This Court found that while "the Legislature might ultimately fail to comply with the[] standards" in Article III, Section 21, *Advisory Opinion*, 2 So. 3d at 185, they were not impossible to achieve. The Legislature

was therefore tasked with drawing reapportionment plans that complied with the constitution.

B. THE PASSAGE OF THE REDISTRICTING PLANS.

Faced with the task of reapportionment, the House Redistricting Committee and Senate Reapportionment Committee announced that they would be holding a series of public hearings throughout the State from June through September 2011. At these hearings, members of the Coalition repeatedly asked the Legislature to reveal the maps that would form the basis for those ultimately passed. *See, e.g.*, Tallahassee Public Hr'g Tr. at 47-48, 52, 57, 62, 75, 78, 114 (June 20, 2011). Doing so, members of the Coalition argued, would have led to more productive hearings and would have permitted the public to analyze specific, concrete features of the Legislature's proposed redistricting plans. *See id.* Had plans been proposed by the Legislature during the public hearing process, the public would have been able to provide meaningful feedback, rather than just commenting in a vacuum.

But at no time did the Legislature present any maps for the public to openly discuss and debate. Instead, the public was given the task of submitting its own maps, commenting on those maps, and discussing general principles or redistricting preferences. The Legislature refused to reveal its own plans. In reality, legislators used the public hearing process as a chance to "cherry-pick" statements that suited their own partisan and incumbent-protection agenda. *See*

infra p. 37 and n.19 (discussing cherry-picking from public testimony as justification to split multiple counties while avoiding pairing incumbent Senators Gaetz and Evers); *id.* at 39-40 (discussing cherry-picking from public testimony to split Polk County multiple ways).

Also undermining the ability of the public to meaningfully impact the redistricting process was the fact that the Senate and House had already made a “Gentlemen’s Agreement,” under which each chamber would protect their own members. Senator Gaetz, the Chair of the Senate Committee on Reapportionment, agreed with Representative Weatherford, the Chair of the House Redistricting Committee, that the Senate would accept whatever plan the House made for its districts, while the House would accept whatever plan the Senate made for its districts, with no questions asked.⁴ As Chair Gaetz stated: “The Senate did not involve itself in the House’s business and my hope is the House will follow suit.”⁵ The “Gentlemen’s Agreement” allowed each body to protect its own incumbents without interference from the other.

⁴ Mary Ellen Klas, *Weatherford Agrees With Gaetz: We’ll Take Your Redistricting Map, You Take Ours*, THE MIAMI HERALD (Dec. 2, 2011), <http://miamiherald.typepad.com/nakedpolitics/2011/12/weatherford-agrees-with-gaetz-well-take-your-redistricting-map-you-take-ours.html>.

⁵ Mary Ellen Klas, *Personal Agendas Are At Stake With Senate Redistricting Maps*, THE MIAMI HERALD (Jan. 25, 2012), <http://www.miamiherald.com/2012/01/24/2606043/personal-agendas-are-at-stake.html>.

Pursuant to the “Gentlemen’s Agreement,” the Senate released its proposed redistricting maps for the Senate and Congress (but not the House) well after the public hearing process had closed, on November 28, 2011. Between the time these plans were released on November 28, 2011, and the time they were formally introduced in committee on December 6, 2011, there were no more public hearings, and again no opportunity for meaningful dialogue between legislators and members and the public.⁶ The House process was even more opaque. On December 6, 2011, the House introduced five separate proposals for reapportioning the House, as well as seven separate Congressional proposals.⁷ Thus, it was only as of December 6, 2011, that the public first had any plans from the Legislature formally introduced for consideration.

Though there was little time to analyze the House or Senate plans prior to the announced deadlines for submitting legislative amendments to the plans, the Coalition expeditiously determined that neither the Senate’s proposal nor the House’s five proposals comported with the FairDistricts mandate. Thus, on

⁶ The public was permitted to submit comments electronically or travel to Tallahassee to speak at committee meetings for a total of three minutes. *See* House Redistricting Cmte., Redistricting Update (Jan. 13, 2012), *available at* http://censusvalidator.blob.core.windows.net/mydistrictbuilderdata/Email%20Updates/2012.01.13_Email_Update.pdf.

⁷*See* Aaron Deslatte, *Check Out The Legislature’s New Redistricting Maps*, THE SUN SENTINEL (Dec. 6, 2011), http://weblogs.sun-sentinel.com/news/politics/dcblog/2011/12/check_out_the_legislatures_new.html.

January 6, 2012 – in advance of the deadline imposed by the Senate for submitting proposed amendments for the Senate plan – the Coalition submitted an alternative Senate reapportionment plan via the Committee’s website. *See App. at K-1, K-3.* The Coalition proposal was drawn in total compliance with the constitutional requirements in Article III, Section 21: it reflected a fair partisan breakdown among the 40 Senate seats, was not drawn to favor any incumbent, preserved minorities’ ability to elect candidates of their choice, expanded the influence of minority voters, and respected the traditional redistricting principles of contiguity, compactness, and respect for political and geographic boundaries. *See App. at A-1 to A-7; see also infra pp. 40-44.*

Via a January 6, 2012⁸ letter to Senate Reapportionment Committee Chair Gaetz and all members of the Committee, the Coalition asked that either the Chair or another member of the Committee introduce the Coalition’s proposed Senate plan as a strike-all amendment and submit the alternative plan for a vote at the Committee meeting. *See App. at K-1.* Neither the Chair nor any Committee member placed the Coalition map on the agenda and the Committee did not formally consider or vote on it. *See App. at K-3.* However, during the Committee’s discussion and in response to questions by a member, Committee

⁸ Though the letter is dated December 6, 2012, it was actually written and sent on January 6, 2012. *See App. at K-1.*

staff made it clear that they had analyzed the Coalition's map. *See* Senate Cmte. on Reapportionment Hr'g Tr. 65-74 (Jan. 11, 2012).

On January 17, 2012, the State Senate passed CS/SJR 1176 by a 34-6 vote. *See* Senate Floor Debate Tr. 235 (Jan. 17, 2012). It did so despite an impassioned plea from African American Senator Arthenia Joyner to vote against the bill because "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." *See id.* at 174 (Jan. 17, 2012). As Senator Joyner stated, "[i]n Florida, for the last 20 years, this sort of packing of African-American voters has been used to ensure the election of a disproportionate number of Republican candidates. Each of Florida's districts that have elected African-American representatives contains substantially more African-American population than is needed to allow African-Americans an opportunity to elect their preferred representatives." *Id.* at 174-75. Senator Joyner pointed out that the Legislature had used the minority-protection provisions of the constitution to adopt "a standard of retrogression that requires the same level of packing as currently exists." *Id.* at 175. The Senate ignored the concerns of Senator Joyner and other members of the Black Caucus and instead passed its plan.

The Coalition likewise submitted its proposed House and Senate plans to the House Redistricting Committee on January 23, 2012, in advance of the

Committee's deadline for filing amendments. *See* App. Tab A (Coalition's redistricting plans); K-5. In a letter to the House Redistricting Committee on January 26, 2012 – submitted at the request of Committee Chair Weatherford – the Coalition explained the many constitutional deficiencies of the House's plan. *See* App. at K-7. In particular, the Coalition informed the House Committee that the Legislature's plans would result in both a House and a Senate that were two-to-one Republican to Democrat. *See id.* at K-11. Although the House Redistricting Committee purported to consider the Coalition's House plan during a Committee hearing on January 27, in reality, committee members just used the opportunity to criticize Coalition members. *See, e.g.,* House Redistricting Cmte. Hr'g Tr. 28 (Jan. 27, 2012) (statement of Chair Weatherford accusing the League of Women Voters of submitting alternative redistricting plans as a "legal stunt"). The Committee then rejected the Coalition's House plan and never even considered its Senate plan.

On February 3, 2012, the House passed CS/SJR 1176 by an 80-37 vote, *see* Journal of the House of Representatives 472 (Feb. 3, 2012), despite having been informed by the Coalition of the constitutional deficiencies in the Legislature's Senate and House plans. The House simply accepted the Senate's plan with no change. Because of the way the Legislature used the minority-protection provisions of the constitution to further its partisan agenda, every member of the Black Caucus in the House voted against the plans. *See id.* The Senate then

adopted the House plan with no change on February 9, 2012, *see* Senate Floor Debate Tr. 57 (Feb. 9, 2012), just as the “Gentlemen’s Agreement” provided.

On February 10, 2012, the Attorney General petitioned this Court for review of CS/SJR 1176 pursuant to Article III, Section 16(c).

STANDARD OF REVIEW

This Court’s role under Article III, Section 16(c) is to grant relief “when a legislature fails to reapportion according to federal and state constitutional requisites.” *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002) (quotation marks omitted). With the passage of the FairDistricts Amendment, Article III, Section 21, while the Court’s duty remains the same – to reject any legislative map that violates the constitution – the parameters of the Legislature’s responsibility and therefore the Court’s review have expanded. This Court must now interpret the new standards and determine:

- Whether the Senate and House plans were drawn with intent to favor or disfavor a political party or any incumbent;
- Whether the plans were drawn with the intent or result of interfering with 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;

- Whether the districts are contiguous, and to the extent possible without interfering with federal law or the previously stated criteria;
- Whether the districts are compact;
- Whether the districts are as equal in population as practicable; and
- Whether the districts utilize existing geographical and political boundaries wherever feasible.

Because this is the first Court to interpret these new standards, it is especially important for the Court to provide explicit guidance as to the meaning of each standard in Article III, Section 21. Then, if, as the Coalition maintains, this Court finds that any or all of these standards are breached, the non-compliant plans should be returned to the Legislature with clear instructions as to how to remedy the breach.

SUMMARY OF ARGUMENT

The Joint Resolution of Apportionment adopted by the Legislature does not comply with Article III, Section 21. Specifically, the Legislature's reapportionment plans demonstrate an intent to favor incumbents and to favor the Republican Party. Because the Legislature modeled the 2012 districts on the 2002 districts – which the Legislature admitted were a blatant partisan gerrymander – the 2012 districts perpetuate the status quo of Republican domination in a State in which voters routinely split their votes 50/50 between the Republican and

Democratic parties. Under the maps passed by the Legislature, it is likely that both the House and the Senate will remain approximately two-to-one Republican, just like under the 2002 maps.

In pursuit of its partisan agenda, the Legislature used the minority-protection provisions of Article III, Section 21(a) as a pretext to pack minorities who vote for Democratic candidates into heavily Democratic performing districts without undertaking any functional analysis of what would be required for minorities to elect candidates of choice. This enabled the Legislature to keep as few Democratic districts as possible while falsely claiming that this strategy was necessary to avoid retrogression. The Legislature also subverted the constitutionally mandated requirements of population equality, compactness, and respect for political and geographical boundaries (the “Tier 2 requirements”) to further its partisan and incumbent-protection agenda.

The Legislature’s plans, quite simply, fail to comply with what this Court found was the “overall goal of the proposed amendments,” which “is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations.” *Advisory Opinion to Attorney General re Standards For Establishing Legislative District Boundaries*, 2 So. 3d 175, 181 (Fla. 2009). While the Eleventh Circuit found that the amendments were meant “to maximize electoral possibilities by leveling the playing field,” *Brown*,

2012 WL 264610, at *12, the Legislature’s plans show that it believes it is entitled to keep all the same players on the field and to actually minimize electoral possibilities for any newcomers wishing to join the game. In sum, the Legislature’s maps are blatant partisan and incumbent-protection plans and thus must be invalidated with instruction to the Legislature to draw plans – like those already submitted by the Coalition – that comply with the overall goal of Article III, Section 21.

ARGUMENT

I. THE FAIRDISTRICTS AMENDMENTS SHOULD BE INTERPRETED AS REQUIRING REAPPORTIONMENT PLANS WITH FAIR DISTRICTS.

When interpreting constitutional provisions, “this Court endeavors to construe [the] constitutional provision consistent with the intent of the framers and the voters.” *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm’n*, 838 So. 2d 492, 501 (Fla. 2003). As their name plainly demonstrates, the entire purpose of the “FairDistricts” Amendments was to require the Legislature to draw reapportionment plans with *fair districts*. Thus, as this Court undertakes its analysis of the Senate and House plans to determine whether they have achieved the goal of fair districts, the Coalition respectfully offers the following interpretations of the amendments to guide this Court’s review.

A. Because The Legislature Is Well Aware Of The Political Consequences Of The Plans It Draws, In Determining Whether An Apportionment Plan Or District Was Drawn With The Intent To Favor Or Disfavor A Political Party Or Incumbent, The Court Should Infer Intent By Looking At The Effects Of The Plan.

The Legislature has already instructed this Court on how to interpret the constitution's political and incumbency favoritism "intent" element. The Coalition fully agrees with the Legislature's views. In the Legislature's words: "[B]ecause drawing districts has political consequences, the legislature will have a very good idea of what those consequences are when the lines are drawn; therefore, any court which looks at the districts that are drawn *will have to assume those the consequences were intended. In fact, it is an inference courts are required to make.*" Answer Brief of the Florida Legislature at 9-10 (emphasis added).

The Legislature's position that the Court is required to infer that the political consequences of its plan were intended accords with the United States Supreme Court's views regarding legislative intent in redistricting cases. As the Supreme Court has observed: "[W]henver a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win." *Davis v. Bandemer*, 478 U.S. 109, 128 (1986). For that reason, the Court presumes that whenever redistricting is done by a legislature, "the likely political

consequences of the reapportionment were intended.” *Id.* at 129; *see also Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“The reality is that districting inevitably has *and is intended to have* substantial political consequences.”); *Smith v. Boyle*, 144 F.3d 1060, 1068 (7th Cir. 1998) (citing “*Bandemer's* recognition that a legislative body is presumed to intend the political consequences of its districting decisions”).⁹

Furthermore, under Supreme Court precedent, the “historical background” is “one evidentiary source” for “[d]etermining whether invidious discriminatory purpose was a motivating factor” in the Legislature’s decision. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Here, the fact that the Legislature attempted every possible legal maneuver to keep the FairDistricts Amendments from becoming law, and then went to court to invalidate the amendment regarding congressional districts once it became law, certainly

⁹ The Legislature’s position on the presumption of intent by a legislature when redistricting also is in keeping with a long line of Supreme Court precedent more generally permitting inferences of legislative intent from the effects of legislation. As the Court put it in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979): “What a legislature, or any official entity is ‘up to’ may be plain from the results its actions achieve, or the results they avoid.” *Id.* at 279 n.24; *see also, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that “[t]he impact of the official action ... may provide an important starting point” for the “sensitive inquiry into such circumstantial and direct evidence of intent as may be available”); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“an invidious discriminatory purpose may often be inferred from the totality of the relevant facts”); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 517 (2006) (Scalia, J., concurring and dissenting in part) (noting that when analyzing redistricting plans, “the effect of an action can support an inference of intent”).

speaks to its intent to evade the amendments' mandate of political neutrality. *See supra* p. 6-7.

“Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.” *Village of Arlington Heights*, 429 U.S. at 267. Here, just days after passing their redistricting plans, the House has scheduled a Judiciary Committee hearing on a bill that would make current and former legislators and staff absolutely immune from having to testify or produce documents having anything whatsoever to do with their legislative activities. With redistricting lawsuits looming and with full knowledge of what they have to hide, the House has made the effective date on the proposed bill “upon becoming law,” so that they can have a shield in place before the first subpoena is served in a redistricting case. This proposed bill is a thinly veiled attempt to interfere with the ability of citizens and the courts to determine independent facts that would show direct evidence of legislators’ intent to favor a political party and incumbents.¹⁰

The Legislature claims that it could not have had an intent to favor a political party or an incumbent because it did not use political performance data or

¹⁰ The proposed bill is scheduled to be heard in Committee on February 16, 2012 and is available at [http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2594&Session=2012&DocumentType=Proposed%20Committee%20Bills%20\(PCBs\)&FileName=PCB%20JDC%2012-03.pdf](http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2594&Session=2012&DocumentType=Proposed%20Committee%20Bills%20(PCBs)&FileName=PCB%20JDC%2012-03.pdf).

incumbents' addresses during the process of drawing its maps.¹¹ That it purportedly did not use such data explicitly as part of the software drawing its maps does not mean that legislators and staff were unaware of the political performance of districts. Indeed, the Legislature itself informed this Court that legislators would *always* be aware of political implications when redistricting. *See* Brief of the Florida Legislature at 18.

To the extent the Legislature nonetheless was somehow ignorant of the political consequences of its plans, the Coalition specifically informed the Legislature that its supposedly “politically mindless approach” produced both Senate and House maps in which Republicans would most likely outnumber Democrats two-to-one and in which incumbents plainly were favored. *See* App. at K-7 to K-18. Despite being informed of the results of its plans, the Legislature proceeded to adopt them anyway. As the United States Supreme Court has found, such an action amounts to an intent to favor a political party.

¹¹ Of course, citizens are simply being asked to take the Legislature’s word for it that it did not use political performance data or incumbent addresses in drawing its maps and have not yet had the opportunity to test that contention through the discovery process. However, such a contention is highly suspect, given that the Senate essentially admitted to using incumbent addresses to assign new district numbers on the basis of an incumbent’s seniority. *See infra* pp. 33-35. Moreover, the House has acknowledged that it had access to and considered political performance data, at least with respect to analyzing minority districts. *See* Att’y Gen. Pet. App., Tab B (Description of Software, Data, and Criteria); *see also* House Redistricting Cmte. Tr. 105 (Jan. 20, 2012) (noting that House staff had “access to” political performance data).

Discussing the approach the Legislature supposedly employed of “work[ing] with census, not political, data,” the United States Supreme Court held that “this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, *it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.*” *Gaffney*, 412 U.S. at 753 (emphasis added). The fact that the Legislature knew the overwhelmingly biased political consequences of its maps and chose not to change them mandates a finding of intent to favor.

Contrary to what the Legislature apparently believes, the use of political data in drawing a districting plan does not automatically imply an intent to favor a political party. The constitution does not forbid the Legislature from adopting a map with knowledge of its political effects. Instead, the constitution forbids the Legislature from drawing the lines with the intent to favor one party or to favor incumbents. With regard to political parties, this means that the map should reflect – to the extent possible consistent with other constitutional requirements – the revealed preferences of Florida’s electorate as measured by returns in recent statewide elections. Where the Legislature draws a map that can be expected to produce a Legislature that is significantly more Republican or more Democratic than the State as a whole (as measured by recent statewide election returns), this

will be strong evidence that the Legislature drew the map with an intent to favor one party over the other. And where it can be shown that it was possible to draw a map that more accurately reflects the composition of Florida's voters, while still complying with the other constitutional criteria, the Legislature's plan must be found invalid.

B. In Determining Whether An Apportionment Plan Or District Has Been Drawn With The Intent To Favor Or Disfavor A Political Party Or An Incumbent, The Court Should Look At Whether The Legislature Has Used The Minority Protection Provisions Of The Constitution As A Pretext To Advance A Partisan And Incumbent-Protection Agenda.

The minority-protection provisions of Article III, Section 21 require that the Court look at the plan as a whole to determine whether the new districts adequately maintain minorities' ability to elect candidates of their choice, while at the same time ensuring that minorities have equal opportunity to participate in the political process. The Legislature interpreted the amendments' mandate as prohibiting *any reduction at all* in the minority voting-age population percentage of a district. *See, e.g.,* Senate Cmte. on Reapportionment Hr'g Tr. 175-76, 195-97 (Dec. 6, 2011); Senate Floor Debate Tr. 9-10 (Feb. 9, 2012).

By keeping all of the minority percentages at the same level in all the same districts, the Legislature claimed to be protecting minorities while actually using the constitutional provision as a pretext to further its partisan and incumbent-protection agenda. "But the approach of focusing mechanically on the percentage

of minority population (or voting age population or registered voters) in a particular district, without assessing the actual voting strength of the minority in combination with other voters, has been justly criticized.” *Martinez*, 234 F. Supp. 2d at 1322. Rather than focusing mechanically on keeping minority voting age populations at exactly the same levels, the Legislature should have undertaken a functional analysis of what was required for minorities to maintain an ability-to-elect.¹²

As described by the Department of Justice with respect to retrogression under Section 5 of the Voting Rights Act:

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 behavior within the particular jurisdiction or election district. As noted above, census 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,

¹² The Senate frankly admitted that it did not undertake any proper functional analysis in determining whether it preserved minority ability to elect. *See, e.g.*, Senate Cmte. on Reapportionment Hr’g Tr. 178:23 (Dec. 6, 2011) (colloquy with staff counsel in which counsel states that no functional analysis was made). It is unclear what analysis, if any, the House performed.

additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination.

Dep't of Justice, *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011); *see also, e.g., Martinez*, 234 F. Supp. 2d at 1322 (“There is no bright line test for determining whether a district is likely to perform for minority candidates of choice. All circumstances that are likely to affect voting behavior and election outcomes in the district are relevant.”); *Texas v. United States*, No. 1:11-cv-01303-RMC-TBG-BAH, slip op. at 24 (D.D.C. Dec. 22, 2011) (holding that “a simple 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”).

In focusing mechanically on minority voting-age population without assessing actual ability to elect, the Legislature engaged in exactly the process this Court previously warned against: the “risk that in creating a district where the minority population is so high as to be unnecessarily safe[,] the minority influence will be siphoned off from other districts.” *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276 (Fla. 1992). Rather than continuing to racially gerrymander minorities into districts with no analysis of their voting strength, the Legislature should have determined how best to maintain minority ability-to-elect without keeping districts at “unnecessarily safe” levels.

Where it can be shown that it was possible to better comply with the other constitutional criteria while at the same time not diminishing minorities' ability to elect representatives of their choice or denying minorities an equal opportunity to participate in the political process, the Legislature's plan must be found invalid.¹³

C. In Addition To Constituting Independent Constitutional Violations, Failure To Adhere To The “Tier Two” Criteria Can Be Evidence Of Intent To Favor A Political Party Or An Incumbent.

The criteria enumerated as “Tier 2” of Article III, Section 21(b) are not only independent constitutional requirements, but also indicators of how well the Legislature complied with the “Tier 1” criteria in Section 21(a). It is well established that population deviations, lack of compactness, and failure to respect political and geographical boundaries are all tools used to gerrymander. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 671-72 (1993) (White, J., dissenting) (“Lack of compactness or contiguity, like uncouth district lines, certainly is a helpful indicator that some form of gerrymandering (racial or other) might have taken place and that ‘something may be amiss.’ Disregard for geographic divisions and compactness often goes hand in hand with partisan gerrymandering.” (internal citations omitted)). Thus, the Court should look to each of these Tier 2 criteria to

¹³ The functional analysis performed by Dr. Allan J. Lichtman on the Coalition's proposed Senate and House plans is provided at Appendix M. In finalizing his report, Dr. Lichtman discovered an error in the Coalition's House map. House District 107 was intended to be drawn as a district in which Hispanics would have the ability to elect a candidate of their choice, but was not. The Coalition is in the process of preparing a substitute House plan that will correct this error.

determine whether the Legislature's lack of adherence demonstrates an intent to favor a political party or incumbent.

First, in determining whether districts are “as nearly equal in population as is practicable,” this Court must require from the Legislature a justification showing that it was not “practicable” to achieve population equality. This is a stricter standard than the past standard applied by this Court. *See, e.g., In re Senate Joint Resolution 2G*, 597 So. 2d at 278 (allowing significant deviations despite finding that “[e]qual protection requires that state legislatures be apportioned in such a way that each person’s vote carries the same weight – that is, that each legislator represents the same number of voters”). Where it can be shown that it was possible to keep more equal numbers of persons in each of the districts while also complying with the other constitutional criteria, then the Legislature’s plans are at the very least suspect as to the political and incumbency favoritism prohibitions, and they may well be found invalid.

Second, in determining whether districts are compact, the Court must require from the Legislature a compelling justification for any district that is not as compact as it could be. In making this showing, the Legislature must come forward with quantitative measures of compactness. The “two standard measures of compactness are the perimeter-to-area score, which compares the relative length

of the perimeter of a district to its area,¹⁴ 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.¹⁵” *League of United Latin American Citizens v. Perry*, 548 U.S. at 455 n.2 (Stevens, J., concurring in part and dissenting in part); *see also Vieth v. Jubelirer*, 541 U.S. 267, 348 (2004) (Souter, J., dissenting) (noting that compactness is “measured quantitatively in terms of dispersion, perimeter, and population ratios”). Contrary to the Legislature’s apparent view that “you kind of know compactness when you see it,” Journal of the House of Representatives at 488 (Feb. 3, 2012) (statement of Rep. Weatherford, Chair of House Redistricting Committee), mere visual examination does not provide a judicially reviewable measure of compactness. To determine compactness, the Court should look at the quantitative measure. If it can be shown that it was possible to comply with all other constitutional criteria while also creating more compact districts, then the Legislature’s plans are at the very least suspect as to the political and incumbency favoritism prohibitions, and they may well be found invalid.

Third, the constitution requires that districts utilize existing political and geographical boundaries “where feasible.” This Court has found that the “purpose” of this standard “is to require legislative and congressional districts to

¹⁴ This measure is also referred to as the Polsby-Popper score.

¹⁵ This measure is also referred to as the Reock score.

follow existing community lines so that districts are logically drawn.” *Advisory Opinion*, 2 So. 3d at 187. In particular, the purpose of the standard was to keep communities together and not allow the Legislature to unnecessarily fracture counties, cities, and other defined geographical areas where people live. Because this standard demands that the Legislature utilize existing political and geographical boundaries wherever “feasible,” the Legislature must justify any departure from their use by demonstrating that it was not “feasible” to comply.

In determining what constitutes a “political and geographical boundary,” the Court has held that at a minimum, it should consider city and county boundaries as “political boundaries.” *See id.* at 187-88. Political subdivisions such as incorporated towns and villages also have “political boundaries.” As for geographical boundaries, this Court has held that the units of information from the census constitute “geographical boundaries.” *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 801 (Fla. 1972). The census recognizes many unincorporated Florida communities as “census designated places” (CDPs). Communities such as Brandon with a population of more than 103,000 people, or Spring Hill with more than 98,000 people are CDPs with recognized geographical boundaries. *See App.* at D-5. Because these communities are unincorporated, their boundaries technically may not be “political boundaries.” Nonetheless, their boundaries are certainly recognized by their

inhabitants as geographical boundaries and should not be ignored by the Legislature. In total, approximately 4.85 million people in Florida live in communities recognized as CDPs. *See App. at D-4 to D-35.*¹⁶

Thus, this Court should look to how many counties, cities, towns, villages, and CDPs were kept whole in the Legislature's plan and require the Legislature to justify any departure from utilizing these boundaries by showing that it was not "feasible." Where it can be shown that it was "feasible" to keep more counties, cities, towns, villages, and CDPs whole while also complying with the other constitutional criteria, then the Legislature's plans are at least suspect as to the political and incumbency favoritism prohibitions, and may well be found invalid.

In sum, a failure to properly adhere to the "Tier 2" criteria constitutes an independent constitutional violation. But it is also strong evidence of a failure to adhere to the "Tier 1" criteria prohibiting partisan and incumbent favoritism.

II. THE SENATE PLAN IS INVALID BECAUSE IT WAS DRAWN WITH THE INTENT TO FAVOR INCUMBENTS AND THE REPUBLICAN PARTY.

The Senate's plan plainly demonstrates an intent to favor incumbents and the Republican Party. Rather than starting with a clean slate as the voters wanted them

¹⁶ Courts generally consider census designated places in evaluating whether a redistricting plan follows existing political and geographical boundaries. *See, e.g., Goosby v. Town Bd. of Town of Hempstead*, 180 F.3d 476, 489 (2d Cir. 1999); *Fletcher v. Lamone*, No. RWT-11CV3220, --- F. Supp. 2d ----, 2011 WL 6740169, at *11-12 (D. Md. Dec. 23, 2011).

to, the Senate instead started with the 2002 maps and kept the districts essentially the same as they were in 2002, despite the fact that the 2002 plans were found to be a blatant Republican gerrymander. *See Martinez*, 234 F. Supp. 2d at 1312; *see id.* at 1350-51 (Hinkle, J., concurring) (“The Florida Legislature sought to draw district lines as favorably for Republican candidates as possible. . . . From all indications, the legislature did an outstanding job.”). By simply tweaking the 2002 Senate districts at the margins, and by rejecting the Coalition Senate plan that reflected a more fair partisan breakdown, even after being informed of the political effects of its plan, *see App.* at K-7; *see also, e.g.*, Journal of the House of Representatives 487, 493, 511 (Feb. 3, 2012); Senate Floor Debate Tr. 37 (Feb. 9, 2012) (statements of various legislators regarding the partisan effects of the Legislature’s plans), the Legislature intentionally favored the Republican Party.

Though this Court has found that “elected officials have no property rights to the office to which they have been elected,” *In re Apportionment Law Appearing as Senate Joint Resolution 1E*, 414 So. 2d 1040, 1046 (Fla. 1982), incumbent legislators approached the task of reapportionment in 2012 as if they, rather than Florida’s voters, owned the districts. The entire process in the Senate was built around accommodating incumbents. At the very start of the redistricting process, incumbent Senators were interviewed by staff and asked what would be advantageous in redrawing “their” districts. This process was described in part by

Senator Storms, who stated that staff came to her to ask about “proposed maps and what would be helpful.” Senate Cmte. on Reapportionment Hr’g Tr. 178:23 (Dec. 6, 2011). Senator Storms’ district was overpopulated and as she described it, “since my district had to lose ... I was given a couple of places to lose from.” *Id.* at 180:10-14. In particular, Senator Storms “was given the choice to lose more from the southern part of the district or more from the eastern part of the district.” *Id.* at 180:16-19. As Senator Storms’ statement illustrates, when the Legislature approaches the entire task of reapportionment by asking incumbents what they want to see happen to “their” districts, that is plainly an intent to favor incumbents.

The favoring of incumbents also extended to the “renumbering” of Senate districts. After introducing its first proposed Senate redistricting plan on December 6, 2011, *see* Senate Cmte. on Reapportionment Tr. 7-10 (Dec. 6, 2011), the Senate introduced an amendment on December 30, 2011, that renumbered all of the Senate districts. *See* Fla. S. Comm. on Reapp., PCS for SJR 1176, Staff Analysis 9 (Dec. 30, 2011). The Senate essentially admitted that the amendment was specifically designed to give incumbents eligible for reelection in 2012 a chance for a ten-year term, despite the constitutional term-limits provision.

In its 1982 reapportionment decision, this Court addressed the way that the term limits provision is meant to interact with redistricting. *See In re Apportionment Law Appearing as Senate Joint Resolution 1E*, 414 So. 2d at 1045-

50. Under Florida Constitution, Art. VI, Sec. 4(b), a Senator cannot run for re-election if at the end of his or her term he or she will have served eight years. Senators' four-year terms are staggered so that those elected from odd-numbered districts run for re-election in years divisible by four, while those elected from even-numbered districts run for re-election in years not divisible by four. Fla. Const., Art. III, sec. 15(a). However, the constitution provides an exception: "at the election next following a reapportionment, some senators shall be elected for terms of two years when necessary to maintain staggered terms." *Id.* So, for example, a senator who would have served six years at the end of 2012 could serve an additional four year term – for a total of ten years – if his or her district is odd numbered. But if that Senator is assigned an even numbered district, his or her term would expire in 2014 at which time he or she will have served eight years.

The Senate manipulated the district numbering system so as to give 28 of the 29 incumbents eligible for reelection in 2012 the opportunity for at least a ten-year term, blatantly flouting the prohibition against favoring incumbents.¹⁷ In so

¹⁷ The only exception to this incumbent accommodation appears to be Senator Jack Latvala, who is running for election to the Senate presidency in 2015. Senator Latvala is opposed in his bid for the presidency by Majority Leader Gardiner, who has the support of Senate leadership. See Mark Caputo, *Amid Fundraising Binge, Republican Intrigue In FL Senate President Race Continues*, THE MIAMI HERALD (Dec. 29, 2011), <http://miamiherald.typepad.com/nakedpolitics/2011/12/amid-fundraising-binge-republican-intrigue-in-fl-senate-president-race-continues.html>. Senator Latvala was elected in 2010 and therefore would be advantaged by an odd-numbered district. Yet he was assigned an even-numbered district.

doing, Senate staff explicitly considered the situations of certain incumbents and how best to accommodate them. *See* Fla. S. Comm. on Reapp., CS for SJR 1176, Staff Analysis 11 (final January 16, 2012), *reprinted in* Att’y Gen. Pet. App. at 1003 (discussing various Senators and when each was elected for purposes of determining how to allocate district numbers). According to the Senate, “professional staff assigned odd-numbered districts in a manner equitable to senators elected to terms of two years or less prior to redistricting and assigned even-numbered districts in a manner equitable to senators elected to four year terms prior to redistricting.” *Id.* at 10.

Rather than simply assigning Senate district numbers sequentially from one part of the state to the next (as they had done on the original draft of the adopted Senate plan), or assigning numbers randomly, the Senate instead explicitly considered what would be most “equitable,” or favorable, to its current incumbents to maximize the term lengths of all but one incumbent Senator eligible for reelection in 2012. Senate staff plainly considered where each Senator lived and which 2012 district that Senator would be running from in order to determine whether the new district should be assigned an even or an odd number for purposes of term limits. *See id.* at 10-11. This was blatant incumbent protection.

Given that the entire process in the Senate was built around accommodating incumbents, the results are unsurprising:

- The Senate plan maintains the status quo of Republican dominance in the Senate and actually creates even more safe Republican seats than in the 2002 map. Under the Senate's plan, there would likely be 26 Republican seats and 14 Democratic seats, or 65% Republican. *See App. at F-1.*
- No non-term-limited incumbent in the Senate is paired against any other incumbent. Instead, the districts were drawn to ensure that every non-term-limited incumbent keeps his or her seat. *See App. at G-1 to G-2.*
- On average, each Senate district keeps 64.15% of its prior population. *See App. at G-5.* However, it is very telling that non-term-limited incumbents retain 68.59% of their prior population, while in districts where no incumbent can run due to term limits, only 52.45% of the original population remains. *See id.* In effect, the term-limited districts were cannibalized to boost the performance numbers of non-term-limited incumbents in surrounding districts. *See id.*
- The Senate packed Democrats into as few districts as possible, as demonstrated by a curve showing the distribution of seats by partisan performance. *See App. at I-2.* The peaks to the right side of the 50% vote share, and the absence of any peaks on the left-hand side of the 50% vote share indicate that the Legislature is clearly trying to pack Democratic voters into a smaller number of safe Democratic seats. *See id.*

- Districts are plainly drawn in violation of other constitutional criteria so as to protect certain incumbents. One of the most obvious examples of incumbent protection is Districts 1 and 3 in the Panhandle. These districts were drawn horizontally in order to avoid Chair Gaetz being pitted against Senator Evers, since both live in the same county.¹⁸ In order to do this, each of the districts splits five counties.¹⁹ *See App. at J-2.* Under this configuration, Chair Gaetz (who is slated to be the next Senate President) retains 86% of the population from his 2002 district. *See App. at G-1.* This is the second-highest retention rate of any Senate incumbent.
- Another example of blatant incumbent protection is Senate District 10, which is gerrymandered into a bizarre shape for Senate Majority Leader Gardiner. *See App. at J-4.* It takes up parts of Lake and western Orange Counties but has a hand that winds down around Orlando, extending up into parts of Winter Park, and splitting the city to narrowly catch the Majority Leader's residence. *See id.* In order to include the northeastern part of Orange it narrows at one point so that its boundaries almost touch each

¹⁸ Though the Coalition considered incumbents' addresses in analyzing the Legislature's plans, it did not use incumbent addresses in drawing its own plans.

¹⁹ Although the Senate cited public testimony as a purported justification for this strange configuration of districts, the Senate plainly cherry-picked from the record as a cover for its incumbent-protection efforts. The Senate's decision to disregard the constitutional mandate to utilize existing political boundaries (such as county lines) in drawing districts was in no way unanimously supported by the weight of public testimony. *See App. Tab L.*

other. *See id.* In doing this, the Senate was able to give Gardiner a new seat that is safely over 55% Republican. *See App.* at F-1 n.1 & n.2; F-3.

- The Senate's new District 10 also barely misses incumbent Republican David Simmons's residence in the new District 13, preventing two incumbent Republicans from being pitted against one another and preserving safe Republican seats for each of them. *See App.* at J-4. District 13 reaches down from Altamonte Springs to scoop up Simmons's home in Maitland – splitting Maitland – but carefully avoiding Majority Leader Gardiner's residence in District 10. *See id.*
- The Senate's District 15 was gerrymandered to favor incumbent Republican Jim Norman. The district encompasses parts of Pasco and Hillsborough. Although he lives in Tampa, in 2010 Norman enjoyed strong support in Pasco and did not do as well in Hillsborough, where voters remember that Norman was under federal investigation while on the Hillsborough County Commission. The Senate plan accommodates Norman by removing from his district the Temple Terrace and New Tampa areas of Hillsborough, where he lost in 2010, and adding new, more friendly Pasco precincts to the district.²⁰ *See App.* at J-5.

²⁰ Mike Salinero, *Senate Redistricting Map Would Help Jim Norman*, THE TAMPA TRIBUNE (Dec. 7, 2011) Metro at 1,

- As was reported in the press, with respect to incumbent Senators Margolis and Sobel, “the Senate map consolidates blacks and Hispanic voters” into districts outside of the Senators’ existing Districts 31 and 35, thereby “allowing the districts of Margolis and Sobel to retain many of the constituencies they now serve.”²¹ *See* App. at G-2 (showing that Senator Margolis retains 64.1% of her former district in the new District 35 and Senator Sobel retains 70.1% of her former district in the new District 36). Senator Margolis reportedly stated that she was “happy” with her new district given that, in her words, “It’s hard to draw an Anglo seat anymore.”²²
- Polk County was split into four different Senate districts, only one of which is dominated by Polk residents. *See* Att’y Gen. Pet. App. at 689, 692, 694 (showing division of Polk County). The city of Lakeland in Polk was split into three Senate seats. *See id.* While the Senate cited supposed public testimony in support of this division, this was plainly cherry-picking since the only “public” that testified in support of this division was special interest group Florida Citrus Mutual. *See* Lakeland Public Hr’g Tr. 48 (July 25,

<http://www2.tbo.com/news/politics/2011/dec/07/13/senate-redistricting-map-would-help-jim-norman-ar-331787/>.

²¹ Mary Ellen Klas, *Personal Agendas Are At Stake With Senate Redistricting Maps*, THE MIAMI HERALD (Jan. 25, 2012), <http://www.miamiherald.com/2012/01/24/2606043/personal-agendas-are-at-stake.html>.

²² *Id.*

2011) (statement of Victor Story, Florida Citrus Mutual). The vast bulk of public testimony was in favor of keeping cities and counties whole. *See id.* at 51, 58, 74-75, 82, 86, 105, 111.

As the statistics and examples demonstrate, the intent to favor incumbents and to favor the Republican Party is plain.

Contrasting the distribution of seats by partisan performance in the Senate's map with the same distribution in the Coalition's map graphically demonstrates that the partisan intent of the Legislature in 2012 is just as strong, if not stronger than in 2002. *See App.* at I-2 to I-3. In the Legislature's map, there are three pronounced "bumps" in the curve. *See App.* at I-2. The one on the farthest right generally corresponds to African-American majority-minority districts, which tend to be very Democratic. The other two, however, represent the typical Democratic (the smaller middle bump), and Republican (higher left bump) districts. *See id.* What starkly stands out is that the Republican peak is around 46% Democratic vote share (54% Republican) for the Legislature's Senate plan, while the Democratic peak is around 61% Democratic vote share. *See id.* This demonstrates that Republican districts were drawn to be safe, but not overly packed with Republican voters. In contrast, the safe Democratic districts were drawn to be overly packed with Democratic voters, thus reducing Democratic influence in other districts.

Comparing the Senate’s plan to the Coalition’s plan shows what was possible. *Compare* App. at I-2 *with* App. at I-3. Although the Coalition curve also has a majority-minority district “bump” on the right-hand side, the remaining seats fall in a much more symmetric normally distributed curve, with just a single peak around 48%. *See* App. at I-3. This corresponds roughly to the statewide expected Democratic vote share and shows what a fair plan could (and should) have looked like.

What is particularly disturbing about the Legislature’s plan is that the Legislature used the constitution’s minority-protection provisions to further its partisan and incumbency-protection agenda. By “packing” minorities who vote Democratic into as few districts as possible without undertaking any analysis of what would be required for minorities to elect candidates of choice, the Legislature used the excuse of minority protection to keep its overwhelming Republican advantage. For example:

- District 34 in the Senate’s plan keeps the African American citizen voting age population at approximately 51% while packing as many Democrats as possible into the district in which approximately 85% of voters voted for President Obama. *See* App. at H-2; F-5.
- District 38 in the Senate’s plan keeps the African American voting age population at approximately 55% while packing as many Democrats as

possible into the district in which approximately 87% of voters voted for President Obama. *See id.*

By concentrating Democrats into as few districts as possible and packing those districts with minorities who vote Democratic, the Senate was able to keep surrounding Republican seats safe and use minority protection as a pretext for partisan favoritism. *See supra* p. 13 (statement of Senator Joyner).

The Legislature not only improperly used minority-protection as an excuse for rank partisan favoritism, but also subverted other constitutional principles to it. To keep minority voting age population percentages at the same levels, the Legislature often sacrificed other constitutional requirements, such as compactness and respect for political subdivisions. For example:

- District 6 in the Senate's plan keeps the African American citizen voting age population at 47.6% (roughly the same as in 2002) in a district in which 63.2% of voters voted for President Obama. *See App. at F-3; H-1.* To keep the African American citizen voting age population at 47.6%, Senate District 6 meanders through five counties in a blatant racial gerrymander. *See Att'y Gen. Pet. App. at 693* (map of Senate District 6).
- In contrast, the Coalition's proposed District 1 is contained entirely in Duval County, *see App. at A-4*, and provides African Americans with the ability to

elect a candidate of their choice in a compact, single-county district, as the report of Dr. Allan J. Lichtman demonstrates. *See App. Tab M.*

Finally, the Legislature's intent to favor incumbents and the Republican Party is evident from the fact that it rejected the Coalition's Senate plan despite the fact that the Coalition plainly demonstrated that it was possible to comply with the "Tier 1" criteria while also creating more compact districts that better respect political and geographical boundaries and that have lower population deviations.

- The Coalition's Senate plan has an average compactness score using the "Reock" score that is better than the Senate's score: 0.40 to 0.35. *See App. at C-2.*
- The Coalition's Senate plan pays far greater respect to existing political and geographic boundaries than the Legislature's Senate plan. The Coalition map keeps nine more counties, and 52 more cities, towns, villages, and CDPs whole than does the Senate's map. *See App. at D-2.*
- The Coalition's Senate plan contains far less population deviation than does the Legislature's, with an average deviation of 0.29% for the Coalition as compared to the Senate's 0.68%, and a median deviation of 0.19% for the Coalition as compared to the Senate's 0.75%. *See App. at E-1.*

The Senate districts' unjustified population deviations, lack of compactness, and failure to utilize existing political and geographical boundaries are independent

constitutional violations. But they are also indicative of the overall intent of the Legislature, which was to maintain Republican domination by freezing the status quo from the 2002 maps.

Though the Senate will no doubt claim that the show of bipartisan support for its plan in the ultimate adoption by a 34-6 vote demonstrates the plan's fairness, in reality all it demonstrates is that Republican leadership accommodated Democratic incumbents, who were therefore willing to "go along to get along." The fact that the Senate gave every non-term-limited incumbent a district that he or she would win again without pairing anyone or otherwise changing the 2002 districts in any meaningful way shows the real intent of this plan. *See App. at G-1 to G-2.* The Legislature's Senate plan must be found invalid.

III. THE HOUSE PLAN IS INVALID BECAUSE IT WAS DRAWN WITH THE INTENT TO FAVOR INCUMBENTS AND THE REPUBLICAN PARTY.

Like the Senate, the House drew its districts based largely on the 2002 districts, which were already found to be a blatant partisan gerrymander designed to benefit the Republican Party. *See supra* p. 6. Representative Jenne pointed this out on the House floor, asking Representative Weatherford: "[I]f the 2002 districts were drawn in order to preserve incumbency or to help any particular political party, is that something relevant to determining whether or not we can simply keep the 2012 districts and plans approximately the same as configured in 2002?"

Because I have to be quite honest, when I look over things it seems to be that they are very, very similar in nature.” Journal of the House of Representatives at 487 (Feb. 3, 2012). Shockingly, Representative Weatherford responded that he did not “think that's a factor in whether or not the maps that we drew were compliant with Amendments 5 and 6” and stated that there was no obligation to consider “whether or not a district looks anything similar to the way it looked 10 years ago when it was drawn.” *Id.* In fact, when districts are drawn very similar to the way they looked 10 years ago – as the House districts were – that is highly relevant to whether they were drawn with an intent to favor the Republican party. *See App.* at G-15 (demonstrating that House districts retain, on average, 59.2% of their prior population).

The intent to favor becomes even more stark when examining who came out on top. In the most blatant example, House Redistricting Chair Weatherford (like his counterpart in the Senate) rewarded himself by keeping 98.5% of his constituents in his “new” House district – the highest number of any incumbent in the House. *See App.* at G-8. It is thus no wonder that Chair Weatherford stated that these statistics are “irrelevant” to determining an intent to favor an incumbent. Journal of the House of Representatives at 492 (Feb. 3, 2012).

Other incumbents were not as lucky as Chair Weatherford. One example is Representative Perry Thurston. In the 2010 and 2011 sessions, he was designated

by the House Minority Leader to be the point person on redistricting. Representative Thurston was a leader both in the campaign to pass the FairDistricts Amendments and in opposing the attempt of Senate leadership to gut the amendments by placing Amendment 7 on the ballot. In 2011, Representative Thurston again crossed House leadership by opposing a move to split the Supreme Court into criminal and civil divisions. In retaliation, Speaker Dean Cannon intentionally excluded Representative Thurston from the House Redistricting Committee.²³ And when the Committee revealed its House map, Representative Thurston was drawn right out of the majority-minority district he had been representing. Instead, his home was placed about one block inside the lines of neighboring House District 99 pitting him against a fellow Democratic incumbent.²⁴ If Representative Thurston wishes to run in majority-minority District 94 (one block away) and continue representing the constituents who have elected him, he will have to move.

²³ See Mary Ellen Klas, *House Democrat: Speaker Dean Cannon Tried To Trade Favorable Treatment For Support On Court Bill*, TAMPA BAY TIMES (April 26, 2011), <http://www.tampabay.com/news/courts/house-democrat-speaker-dean-cannon-tried-to-trade-favorable-treatment-for/1166002>;

²⁴ See Mary Ellen Klas, *With Redistricting Deal Nearly Done, 38 House Members Must Battle It Out*, THE MIAMI HERALD (Jan. 26, 2012), <http://miamiherald.typepad.com/nakedpolitics/2012/01/at-least-38-sitting-house-members-would-be-forced-into-a-face-off-with-one-of-their-colleagues-if-the-house-redistricting-comm.html>.

Beyond the specific examples of favoring and disfavoring incumbents, the House plan overall maintains the status quo of Republican dominance in the House and actually creates even more safe Republican seats than in the 2002 map. Under the House's plan, there would likely be 75 Republican seats and 45 Democratic seats, or 62.5% Republican. *See App. at F-2.* And the House increases the number of safe Republican seats (those that perform at more than 54% Republican) from 54 to 56. *See id.*

In short, the House maps suffer many of the same constitutional infirmities as the Senate map. Indeed, in looking at the distribution of seats by partisan performance for the House, the same “bumps” indicating Democratic packing and Republican favoritism are evident. *See App at I-4.* Contrasting the distribution of seats by partisan performance in the House's map with that of the Coalition's map shows that there was a way to draw a politically fair map and the Legislature deliberately chose not to do so. *Compare App. at I-4 with App. at I-5.*

The Legislature likewise ignored that the Coalition's House plan paid greater respect to existing political and geographic boundaries than the Legislature's House plan. The Coalition's plan demonstrated that it was “feasible” to keep 84 more cities whole than the Legislature's plan while nesting three House districts in each Senate district and still complying with other constitutional

criteria.²⁵ *See* App. at D-3. Similarly, the Coalition’s plan showed that it was “practicable” to maintain a greater degree of population equality among districts. The Coalition’s House plan has an average percentage deviation of just 0.46% as compared to the Legislature’s 0.83%, and a median percentage deviation of just 0.42% as compared to the Legislature’s 0.83%. *See* App. at E-6.

Given the incumbent and partisan favoritism that is plain on the face of the House map, the Legislature’s House plan must be found invalid.

CONCLUSION

The Legislature’s plans simply fail to level the political playing field and create a fair chance for voters to choose their representatives. Instead, they are politically biased and rife with incumbency favoritism. This maintains the unacceptable situation where it is obvious that politicians are choosing their voters. The Coalition therefore respectfully requests that this Court interpret the new constitutional provisions, declare that the Legislature’s Senate and House plans are

²⁵ The Coalition’s choice to nest three House districts within each Senate seat added the hurdle of keeping House and Senate district lines coterminous. Yet even with nesting, the Coalition was still able to best the Legislature’s House plan in utilizing existing political and geographical boundaries. While there is a sound public policy in creating political communities by nesting House seats within Senate districts, the Coalition recognizes that drawing House and Senate districts independently may have other benefits. Had the Coalition not nested the House and Senate districts, the resulting map would have been even more competitive and more compliant with the “Tier 2” criteria.

invalid and instruct the Legislature to adopt lawful plans, such as those proposed by the Coalition.

Respectfully submitted this 17th day of February, 2012.

/s/

Ronald G. Meyer
Florida Bar No. 0148248
**MEYER, BROOKS, DEMMA AND
BLOHM P.A.**
131 North Gadsden Street
Post Office Box 1547
Tallahassee, Florida 32302
Telephone: (850) 878-5212

Paul M. Smith*
psmith@jenner.com
Michael B. DeSanctis*
mdesanctis@jenner.com
Jessica Ring Amunson *
jamunson@jenner.com
Kristen M. Rogers *
krogers@jenner.com
**Pro Hac Vice*
JENNER & BLOCK, LLP
1099 New York Ave NW, Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

J. Gerald Hebert*
hebert@voterlaw.com
Pro Hac Vice
191 Somerville Street, #415
Alexandria, VA 22304
Telephone: (703) 628-4673

Counsel for The Coalition

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Notice was furnished by United States Mail to the following parties on this 17th day of February, 2012. Service was made to all parties appearing on the most recently revised service list at the time of service.

Timothy D. Osterhaus
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, Florida 32399-0400
Telephone: (850) 414-3681
Facsimile: (850) 410-2672
timothy.osterhaus@myfloridalegal.com

Attorney for the Attorney General

Michael A. Carvin
JONES DAY
51 Louisiana Avenue N.W.
Washington, D.C. 20001
Telephone: (202) 879-7643
macarvin@jonesday.com

Cynthia Skelton Tunnichliff
PENNINGTON, MOORE, ET AL.
215 South Monroe Street
Second Floor
Tallahassee, Florida 32301
Telephone: (850) 222-3533
cynthia@penningtonlaw.com

Attorneys for the Florida Senate

Andy Bardos
Special Counsel to the President
THE FLORIDA SENATE
404 South Monroe Street, Suite 409
Tallahassee, Florida 32399
Telephone: (850) 487-5229
bardos.andy@flsenate.gov

Miguel De Grandy
800 Douglas Road, Suite 850
Coral Gables, Florida 33134
Telephone: (305) 444-7737
Facsimile: (305) 443-2616
mad@degrandylaw.com

George T. Levesque
General Counsel
FLORIDA HOUSE OF REPRESENTATIVES
422 The Capitol
Tallahassee, Florida 32399-1300
Telephone: (850) 488-0451
George.Levesque@myfloridahouse.gov

Charles T. Wells
George N. Meros, Jr.
Jason L. Unger
Allen C. Winsor
Charles B. Upton II
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone: (850) 577-9090
Facsimile: (850) 577-3311
Charles.Wells@gray-robinson.com
George.Meros@gray-robinson.com
Jason.Unger@gray-robinson.com
Allen.Winsor@gray-robinson.com
CB.Upton@gray-robinson.com

Attorneys for the Florida House of Representatives

Joseph W. Hatchett
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Facsimile: (850) 222-0103
joseph.hatchett@akerman.com

John M. Devaney
PERKINS COIE, LLP
700 Thirteenth Street, NW, Suite 700
Washington, DC 20005
Telephone: (202) 434-1624
jdevaney@perkinscoie.com

Abha Khanna
PERKINS COIE, LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8312
akhanna@perkinscoie.com

Marc Erik Elias
PERKINS COIE, LLP
700 Thirteenth Street, NW, Suite 600
Washington, DC 20005
Telephone: (202) 434-1609
MElias@perkinscoie.com

Kevin J. Hamilton
PERKINS COIE, LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8741
khamilton@perkinscoie.com

Jon L. Mills
BOIES, SCHILLER & FLEXNER, LLP
100 Southeast Second Street
Suite 2800
Miami, Florida 33131
Telephone: (305) 539-8400
Facsimile: (305) 539-1307
jmills@bsfllp.com

Attorneys for the Florida Democratic Party

David A. Theriaque
S. Brent Spain
Christopher F. Busch
THERIAQUE & SPAIN
433 North Magnolia Drive
Tallahassee, Florida 32308
Telephone: (850) 224-7332
Facsimile: (850) 224-7662
dat@theriaquelaw.com
sbs@theriaquelaw.com
cfb@theriaquelaw.com

Attorneys for the City of Lakeland, Florida

Karen C. Dyer
Elan M. Nehleber
BOIES, SCHILLER & FLEXNER, LLP
121 South Orange Avenue
Suite 840
Orlando, Florida 32801
Telephone: (407) 425-7118
Facsimile: (407) 425-7047
kdyer@bsfllp.com
enehleber@bsfllp.com

Timothy J. McCausland
CITY OF LAKE LAND
228 South Massachusetts Avenue
Lakeland, Florida 33801
Telephone: (863) 834-6010
Facsimile: (863) 834-8204
Timothy.mccausland@lakelandgov.net

/s/
Ronald G. Meyer

CERTIFICATE OF COMPLIANCE

I certify that this submission complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210. This brief was typed using Times New Roman, 14 point font.

/s/
Ronald G. Meyer