IN THE SUPREME COURT OF FLORIDA

Case No.: SC12-1

Original Proceeding
On The Attorney General's Petition for Review
Of The Florida Legislature's
2012 Joint Resolution of Apportionment

IN RE: 2012 JOINT RESOLUTION OF APPORTIONMENT
CS/SJR 1176

BRIEF OF FLORIDA DEMOCRATIC PARTY IN OPPOSITION TO JOINT RESOLUTION OF APPORTIONMENT

Counsel for the Florida Democratic Party

BOIES, SCHILLER & FLEXNER LLP Jon L. Mills (Bar # 148286) Karen C. Dyer (Bar # 716324) Elan M. Nehleber (Bar # 79041) 121 S. Orange Ave., Suite 840 Orlando, Florida 32801-3233 Phone: (305) 539-8400 Fax: (305) 539-1307 E-mail: jmills@bsfllp.com E-mail: kdyer@bsfllp.com E-mail: enehleber@bsfllp.com **AKERMAN SENTERFITT** Joseph W. Hatchett (Bar # 34486) 106 E. College Ave., Suite 1200 Tallahassee, Florida 32301 Phone: (850) 224-9634 Fax: (850) 222-0103 E-mail: joseph.hatchett@akerman.com	**PERKINS COIE LLP** Marc Elias (admitted *pro hac vice*) Kevin J. Hamilton (admitted *pro hac vice*) John Devaney (admitted *pro hac vice*) Abha Khanna (admitted *pro hac vice*) 700 13th St., N.W., Suite 600 Washington, D.C. 20005-3960 Phone: (202) 654-6200 Fax: (202) 654-6211 E-mail: MElias@perkinscoie.com E-mail: KHamilton@perkinscoie.com E-mail: JDevaney@perkinscoie.com E-mail: AKhanna@perkinscoie.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Florida Legislature has a long history of gerrymandering, designing districts not to respect communities or the will of the voters, but rather to maintain the control of the party then in power (once the Democratic Party, today the Republican Party). Such gerrymandering was long tolerated under Florida law, and, over decades, Florida became one of the most gerrymandered states in the nation.[1]

By 2010, however, Florida voters had had enough. Voters enacted Amendments 5 and 6 to provide fair, clear, and objective standards for reapportionment—standards to curb political gerrymandering and other abuses that have marked past reapportionment efforts. Amendments 5 and 6 were the culmination of years of effort by voters—Republicans, Democrats, and non-partisan groups—to reform the reapportionment process and make it less about partisan politics and more about the fair representation of the people of Florida.[2]

---

[1] *See, e.g.*, Robert Watson, *Hidden History: Gerrymandering isn't what Founding Fathers had in mind*, SUN-SENTINEL, April 4, 2010, *available at:* http://articles.sun-sentinel.com/2010-04-04/news/fl-rwcol-gerrmander-oped0404-20100404_1_gerrymandered-three-different-districts-senate-seat.

[2] In 1993, the Senate under Republican leadership unanimously approved an independent reapportionment commission, with standards demanding political and racial fairness, but an amendment to add such standards failed in the House. CS for SJR's 328, 530, 844, 1398, 1689 (Reg. Sess. 1993). *See* FLA. SEN. J. (Feb. 23, 1993), at 187-88. In 1998, the Constitution Revision Commission narrowly failed to approve a proposal committing reapportionment to an independent commission

The ballot summary and voter materials made clear that the amendments were targeted at past abuses that had distorted the equal and fair representation of Floridians.[3]

Amendment 5 was approved by over 60% of Florida voters and became Article III, Section 21 of our Constitution. Although the Legislature might have been expected to embrace the new constitutional limitations on gerrymandering, sadly the Legislature did precisely the opposite and did everything it could to defeat those restrictions. Prior to voter approval, the Legislature proposed another amendment targeted at neutralizing the effects of Amendment 5. This Court removed that proposal from the ballot, partly because that neutralizing effect was

---

with more explicit standards. *See* FLORIDA CONST. REVISION COMM'N, J. OF THE 1997-98 CONST. REVISION COMM'N, Mar. 23, 1998, at 240-41. In 2006, this Court invalidated a proposed initiative amendment to establish such an independent reapportionment commission. *See Advisory Opinion to the Att'y Gen'l re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Districts Which Replaces Apportionment by the Legislature*, 926 So. 2d 1218 (Fla. 2006) (finding the proposal violated the single subject requirement of Article XI, Section 3).

[3] The ballot title for Amendment 5 was "Standards for Legislature to Follow in Legislative Redistricting." The full ballot summary available to voters read:

> 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.

not disclosed in the ballot summary. *Florida Dept. of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 669 (Fla. 2010). After the election, elected officials, including the Florida House, challenged Amendment 6, the Congressional redistricting companion to Amendment 5, in federal court. That challenge was rejected by the 11th Circuit Court of Appeals.[4]

After these attempts to undo the fair districts amendments failed, the Legislature attempted to undermine the amendments by drafting plans that largely continued business as usual. Those plans passed both houses on February 9, 2012. The following day, the Attorney General petitioned this Court for a declaratory judgment regarding the validity of the 2012 Joint Resolution of Apportionment, CS/SJR 1176. Pursuant to this Court's Order of January 4, 2012, and as provided by Article III, Section 16(c), the Florida Democratic Party hereby submits this brief challenging the constitutionality of the Florida Legislature's Senate and House reapportionment plans.

SUMMARY OF ARGUMENT

Despite the landmark amendment to the Florida Constitution imposing new and detailed reapportionment standards, the Florida Legislature approached this

[4] *See Brown v. Secretary of State*, Case No. 11-14554 (11th Cir. Jan. 31, 2012). The Florida House of Representatives intervened as a plaintiff challenging Article III, Section 20.

reapportionment cycle as it has every other over the last several decades, protecting the party in power at the expense of Florida voters. After striving and failing to defeat the constitutional amendments requiring fairness and neutrality in drawing district lines, the Legislature chose another tactic—skillfully circumventing those demanding new requirements. The end result is a legislative reapportionment plan that continues Florida's long history of partisan and racial gerrymandering.

The Legislature cannot credibly contest that the Senate and House Plans were drawn with the intent and result of favoring the Republican Party. Incontrovertible statistics demonstrate a significant partisan imbalance in both plans that simply cannot be justified on the basis of voter registration or election data, racial fairness, or any other legitimate rationale. Indeed, the Legislature even deviated from the fundamental principle of equal population to suit its partisan agenda. Not surprisingly, this politically gerrymandered plan is also drawn to protect many Republican incumbents.

Moreover, the Legislature's reapportionment plan turns the constitutional principle of racial fairness on its head. Rather than drawing districts that enhance minority voting strength across the State, the Legislature chose to pack African-American voters into a small handful of districts, foreclosing their ability to effectively participate in the political process in surrounding districts and diminishing their ability to elect candidates of their choice.

The fundamental unfairness of the reapportionment plan is reflected in its tortured lines that sever multiple communities. Principles such as compactness and respect for political subdivision boundaries are entirely ignored in the Senate Plan and in several portions of the House Plan, as districts twist and turn in every direction, dividing county, municipality, and geographic boundaries along the way. Additionally, the Legislature paid only lip service to the contiguity principle, drawing districts that, though they may comply with the letter of the law, fail to comply with the spirit of the new constitutional standards.

In sum, the people of Florida, after decades of effort, satisfied the demanding process of seeking constitutional change through initiative to put meaningful limits on the discretion of the Legislature. Now there are explicit standards requiring partisan and racial fairness and that districts be drawn in logical, compact, and understandable fashion. But, in the end, the legislative reapportionment plan violates nearly every one of the new provisions in Article III, Section 21 of the Florida Constitution. The Legislature systematically tried to redefine its new constitutional duties to fit its own goals rather than abide by the will of Florida voters to provide fair and understandable maps. It falls on this Court's shoulders to protect the will of the people and to make clear that the new constitutional standards created real change and have real meaning, and that failure to abide by them will have real consequences.

ARGUMENT

As this is an original proceeding under Article III, Section 16(c) of the Florida Constitution, the Court has plenary review over each aspect of the constitutional validity of the Senate and House reapportionment plans.

I. AMENDMENT 5 IMPOSED DEMANDING NEW STANDARDS ON REAPPORTIONMENT AND ENTRUSTED THEIR ENFORCEMENT TO THIS COURT

Amendment 5 to the Florida Constitution, codified as Article III, Section 21, substantially raises the bar for the Florida Legislature, imposing new and detailed requirements on legislative redistricting plans. The new requirements also demand new considerations in judicial review of the plans. Now that the constitutional test for valid redistricting schemes is more demanding, the Court's review of the Legislature's compliance necessarily becomes more demanding as well.

When interpreting a new constitutional provision, it is the Court's duty to discern and give effect to the will of the voters who adopted the provision. *See Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979). The Court also should keep in view the objective to be accomplished and the evils to be remedied by the constitutional provision, and so interpret the constitution as to accomplish rather than to defeat that objective. *See State ex rel. Dade Cnty. v. Dickinson*, 230 So. 2d 130, 135 (Fla. 1969); *Gray v. Bryant*, 125 So. 2d 846, 851-52 (Fla. 1960); *Amos v. Mathews*, 126 So. 308, 316 (Fla. 1930) ("The object of constitutional construction

is to ascertain and effectuate the intention and purpose of the people in adopting it. That intention and purpose is the 'spirit' of the Constitution—as obligatory as its written word."). For that reason, courts look to the legislative history of the provision and statements by the drafters and adopters in interpreting a constitutional provision. *See Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985). New constitutional provisions "must be viewed in light of the historical development of the decisional law extant at the time of . . . adoption and the intent of the framers and adopters." *Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980).

The intent of the drafters and the people who passed this new provision was to dramatically change the previous and prevalent practice of partisan gerrymandering that both parties had pursued for decades. *See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 181 (Fla. 2009). By adopting Article III, Section 21, the voters introduced new standards that have explicitly restricted the Legislature's formerly broad discretion in reapportioning House and Senate seats. Although Florida has almost always been a toss-up, battleground state, the Legislature has perpetuated a system of one-party control that does not reflect the actual identity and political profile of Florida voters. That old system is no longer valid under the Florida Constitution. The "historical development" of the new constitutional provision, as informed by

the "intent of the framers and adopters," *Jenkins*, 385 So. 2d at 1357, thus warrants a rigorous review of the extent to which the Legislature abided by its new constitutional duties.

In the prior redistricting cycle, this Court noted that "'[j]udicial relief becomes appropriate only 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) ("*In re HJR 1987*") (quoting *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Reg. Sess.*, 263 So. 2d 797, 800 (Fla. 1972)); *see also id.* ("We made clear that we are without authority to declare a legislative apportionment plan invalid unless it violated some prohibition in the constitution."). While these guiding principles still hold true, the "state constitutional requisites" are now more robust and explicit, requiring a commensurately more robust judicial analysis of legislative compliance. Unlike 2002, when "the requirements under the Florida Constitution [were] not more stringent than the requirements under the United States Constitution," *id.*, now the Florida Constitution imposes a higher burden on the Legislature, a higher standard on its redistricting plans, and a higher bar for those plans to pass the test of judicial review. No longer can Florida legislators simply pay nominal heed to one-person, one-vote principles while gerrymandering the maps to their benefit. Rather, the voters of Florida have decided to hold the Legislature's feet to the fire to ensure

that districts are drawn fairly and logically, beyond the minimum requirements of federal law. In this context, this Court must take a hard look at the Legislature's final product under the new microscope of Article III, Section 21.

Notably, while Florida voters have gone to great lengths to cabin the Legislature's discretion to draw district lines, they have not similarly sought to limit this Court's authority to review the Legislature's reapportionment plans. Rather, they have left it to this Court to "determin[e] the validity of the apportionment." Fla. Const. art. III, § 16(c). Thus, the public has put its trust in this Court to act as a careful check on the Legislature to ensure it abides by the new constitutional provision, not to serve as a rubber stamp of the Legislature's plans. *See Mun. Court, City of Fort Lauderdale v. Patrick*, 254 So. 2d 193, 194 (Fla. 1971) ("We must zealously guard America's traditional separation of powers in the legislative, executive and judicial bodies of government; for that time tested formula will fail if each does not 'check and balance' the other."); *see also Seminole Cnty. Bd. of Cnty. Comm'rs v. Long*, 422 So. 2d 938, 941-42 (Fla. Dist. Ct. App. 1982) ("The fundamental idea of separation of powers is that the judiciary is the operative check on possible arbitrary action by legislative and executive officers."). The Florida Constitution contemplates a significant role for both branches of government over legislative redistricting; as the rules governing the Legislature's reapportionment have become more demanding, this Court's duty has

become all the more vital to ensure that the Legislature's partisan tendencies are not allowed to override their constitutional duties. Ultimately, the Court defines the constitutional duties in reapportionment and the validity of the plans.

II. THE FLORIDA SENATE AND HOUSE PLANS WERE DRAWN WITH THE INTENT TO FAVOR THE REPUBLICAN PARTY AND INCUMBENTS

A. Determining Improper Intent

To promote fair, meaningful, and competitive elections, Florida voters have imposed stringent new rules on the establishment of legislative districts. "No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Fla. Const. art. III, § 21(a). This language is clear, mandatory, and demanding. No longer can the majority party in the Legislature craft a plan designed to favor its own, and no longer can legislators in either party set out to protect themselves.

Proving "intent to favor or disfavor a political party or an incumbent" does not and cannot require a personal confession from a majority of the Legislature that a plan was gerrymandered. Such admissions would obviously suffice, but intent can be shown in many other ways.

Most importantly, enacting a plan whose effect is to favor one party or to protect incumbents implies an intent to do just that, for there is a "presumption, common to the criminal and civil law, that a person intends the natural and

foreseeable consequences of his voluntary actions." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278 (1979). Thus, the Legislature's awareness that a plan would "favor or disfavor a political party or an incumbent" creates a presumption that it intended to do so. This is far from a novel rule, for both this Court and the U.S. Supreme Court have recognized that "intentional discrimination against an identifiable political group would not be difficult to show in most instances because '[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.'" *In re HJR 1987*, 817 So. 2d at 830 (quoting *Davis v. Bandemer*, 478 U.S. 109, 129 (1986)). Indeed, many courts have rejected plans based on a finding that their effect was to favor a party or incumbent, even where there was no admitted intent to do so. *See, e.g.*, *Diaz v. Silver*, 978 F. Supp. 96, 104 (E.D.N.Y. 1997) (finding that "[d]espite its conspicuous absence from any direct discussion, incumbency appears to have been the unacknowledged third-most-significant factor used when redistricting," because so many incumbents were protected by proposed plan), *aff'd*, 522 U.S. 801 (1997); *Good v. Austin*, 800 F. Supp. 557, 561-63 (E.D. Mich. 1992) (rejecting redistricting plans that provided parties with unfair partisan advantage).[5]

[5] *See also Black's Law Dictionary* 810 (6th ed. 1990) (defining "intent" as "[a] state of mind in which a person seeks to accomplish a given result through a course of action").

Evidence that legislators considered information relevant to partisanship or protecting incumbents also suggests improper intent, e.g., where incumbents are consulted as to the shape of their districts, where legislators discuss partisan measures or incumbent locations, or where legislators possess information about incumbency or partisanship when they are not supposed to consider either. *See, e.g.*, *In re Legislative Districting of Gen. Assembly*, 175 N.W.2d 20, 26 (Iowa 1970) ("It is apparent from the record that in the commission plan as filed there are instances of districts being created to facilitate keeping present members in office and others of providing boundaries to avoid having present members contest with each other at the polls.").

Finally, there is no acceptable level of improper intent. Any intent to favor a party or incumbent invalidates the plan, for "intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Feeney*, 442 U.S. at 277. This definition is crucial because although it is hard to say whether "a legislature . . . operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," no such showing is required here. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).

B. The Partisan Imbalance of the Senate and House Plans Reflects an Intent to Favor the Republican Party.

In an attempt to end the rampant partisan gerrymandering that has characterized many past redistricting efforts in Florida, the people of Florida have now demanded that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party." Fla. Const. art. III, § 21(a). Many other states have similar rules, and courts and experts have developed several methods to test whether a plan favors or disfavors a political party.

First, courts routinely compare the voter registration numbers for the state as a whole with the voter registration numbers in the districts in a plan to determine whether one party has unfairly advantaged itself. *See, e.g.*, *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 598, 208 P.3d 676, 687 (2009). If one party outnumbers the other in terms of registration statewide, yet the minority party comprises a majority in most of the districts, that strongly suggests improper partisan intent. Similarly, if registration is evenly divided, the number of districts in which each party is a majority should be roughly evenly divided, absent improper gerrymandering.

Second, courts routinely look to past election results to determine the partisan balance of districts and whether one party has unfairly favored itself. *See, e.g.*, *id.*; *Good*, 800 F. Supp. at 561-63. Two approaches are most common. One is to look at past "baseline" elections and the level of support for candidates from each party and to use that data to determine how many districts each party would

likely win in future elections. *See, e.g.*, *Ariz. Minority Coalition*, 220 Ariz. at 598, 208 P.3d at 687; *Good*, 800 F. Supp. at 561-62. The other is to compare "partisan symmetry." *Good*, 800 F. Supp. at 562. "Under the partisan symmetry test, a plan is evaluated to determine whether it will allow each party to translate the same percentage of overall votes across the state into the same number of [legislative] seats. . . . For example, if under a proposed plan one party could win 75% of the seats with 55% of the overall vote, the plan would be fair only if the other party could also win 75% of the seats with 55% of the overall vote." *Id.* Only "if both parties can translate votes into seats in the same proportion" is the plan "politically fair." *Id.* Therefore, if a 50-50 vote produces a partisan advantage of, for example, 65-35, that plan fails the symmetry test.

Unfortunately, by any of these accepted measures, the Senate plan enacted by the Florida Legislature fails to comply with the constitutional requirement to avoid partisan favoritism, as it maintains Florida's long history of accumulating the majority of political power in the State's minority party. As of February 1, 2012, there are 12,264,831 registered voters in Florida, 40.4 percent (4,952,688) of whom are registered as Democrats and 35.7 percent (4,372,710) of whom are registered as Republicans. *See* Expert Affidavit of Stephen Ansolabehere (Feb. 16, 2012) (attached as Appendix to Brief of Florida Democratic Party in Opposition to the Joint Resolution) (hereinafter "Aff.") ¶ 6. Framed differently, 53.1 percent of

Florida voters who are registered with one of the two major parties are Democrats, while 46.9 percent of them are Republicans. Based on this division in party registration alone, one would expect the Senate Plan to contain 21 out of 40 districts in which Democrats are more numerous. The Legislature's Senate Plan, however, is tilted heavily in favor of Republicans—with 23 districts in which Republicans are more numerous and just 17 districts in which Democrats are more numerous, Aff. ¶ 7—in complete disregard for the actual party affiliation of voters in the State. In fact, even if Florida were divided evenly between registered Democrats and Republicans (which it is not), each party would enjoy greater representation in 20 districts. The Senate Plan misses even this mark, giving a 3-district advantage to Republicans. Thus, the Senate Plan perpetuates Florida's system of minority rule—though registered Republicans comprise just 47 percent of voters registered with one of the two major parties, they outnumber Democrats in 58 percent of Senate districts.

Perhaps the best evidence of the partisan intent that drove this year's redistricting process is that the Senate map reflects an even worse partisan imbalance than the maps drawn ten years ago, when no state constitutional prohibition against political favoritism governed the Legislature's efforts. After the 2000 reapportionment cycle, when there were approximately 380,000 more registered Democrats than registered Republicans, Republican registrants

outnumbered Democratic registrants in 21 out of 40 Senate districts, reflecting an unfair partisan tilt in favor of Republicans. *See* Aff. ¶¶ 9-10.[6] Despite the fact that Democratic voter registration grew by 1,099,164 (28.5 percent) between 2000 and 2012, compared to Republican registration growth of just 898,272 (25.9 percent), Aff. ¶¶ 12-13, and despite the adoption of a constitutional amendment prohibiting partisan favoritism, the Legislature's Senate Plan is even more gerrymandered than it was before, with a Republican voter registration advantage in 23 out of 40 seats.

One additional way to discern the partisan imbalance in the Senate Plan is to map onto the districts recent statewide election results and compare the results to the statewide average. For instance, in the 2008 presidential election, 51.4 percent of the two-party vote among Florida voters statewide voted for President Obama and 48.6 voted for John McCain.[7] Aff. ¶ 14. In the Legislature's Senate Plan, however, only 17 of the districts would have had a plurality or majority vote for

[6] A federal court held that "[t]he 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," and 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." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1312, 1340 (S.D. Fla. 2002).

[7] In other words, President Obama received 51.4 percent of all votes cast statewide for either Obama or McCain. (The statewide vote share among all Presidential candidates was 50.9 percent for Obama, 48.1 percent for McCain, and 1.0% for other candidates.)

Obama, while 23 districts would have voted for McCain. Aff. ¶ 15. Thus, even though the Democratic candidate won 51.4 percent of the two-party votes statewide, he would have won only 42.5 percent of the districts in the Legislature's Senate map. This near 9-point bias in favor of Republicans and against Democrats is substantial indeed, reflecting the difference between a Democratic win and a Republican win.

Additionally, in the 2010 gubernatorial race, Republican Rick Scott won with a slight majority of the statewide two-party vote, 50.6 percent, while Democrat Alex Sink received 49.4 percent. The Legislature's Senate Plan, however, is tilted heavily in favor of the Republican candidate, who would have won in no less than 24 (or 60 percent) of the districts.[8] Aff. ¶¶ 17-18.

The Florida Legislature's House Plan, though not nearly as politically biased as the Senate Plan, still reflects a substantial advantage for Republicans at the expense of Democrats—and at the expense of the State's constitutional principles. Out of 120 House districts, Republican registrants outnumber Democrats in 62, or 52 percent. Aff. ¶ 8. Against the backdrop of a state in which registered Democrats outnumber Republicans, this disparity fails any measure of partisan

[8] Additional evidence of partisan favoritism in the Senate Plan derives from the Legislature's systematic overpopulation of Democratic-leaning Senate districts and underpopulation of Republican-leaning Senate districts, resulting in packing of Democrats in Democrat-leaning seats to the disadvantage of the Democratic Party. *See infra* Section V,

fairness. Although registered Republicans comprise just 47 percent of two-party registrants, they control 52 percent of the House districts.

Recent election data reflect the same partisan bias in the House Plan. Although the 2008 Democratic candidate for President won the state with 51.4 percent of the two-party vote, he would win a majority or plurality in just 47.5 percent of the House districts, while the Republican candidate would have won the majority, or 52.5 percent, of the districts. Aff. ¶ 16. Similarly, although the 2010 Republican candidate for Governor won by a narrow margin of 50.6 percent to 49.4 percent of the two-party vote, that margin would have been much wider under the House Plan, in which he would win 55.8 percent of the districts. Aff. ¶ 19.

The Legislature can hardly claim that such a drastic partisan imbalance was unintentional or was necessary in order to serve other constitutional principles. First, the Legislature was well aware of the partisan implications of its plan. There was extensive testimony and debate as to the plan's Republican bias. *See, e.g.*, 12 Florida Journal of the House of Representatives 486, 489, 493, 511 (Feb. 3, 2012). And although House Republican Redistricting Committee Chair William Weatherford claimed he had not seen data reflecting the plan's partisan implications, he acknowledged that "everyone has access to it," *id.* at 492, and it is undisputed that legislative staff had data on partisan performance, House Redistricting Committee Meeting, Tr. 105 (Jan. 20, 2012) (noting that "the staff

has access to" performance data); 12 Florida Journal of the House of Representatives 508 (same). The record demonstrates that members were broadly informed in debate and in the press that the plans favored Republicans; a conscious and volitional vote for the plan was a clear expression of intent to favor a political party.

Second, to the extent the Legislature would blame the partisan bias on its attempts to ensure racial fairness, the fact that the Senate and House Plans fail the minority voting rights criteria, *see infra* Section III, discredits that alleged justification. Nor can a credible argument be made that the partisan imbalance results from compactness concerns or attempts to preserve political boundary lines. Not only do the Senate and House Plans fail on those measures, *see infra* Sections VI and VII, but also these are lower priority constitutional principles, *see* Fla. Const. art. III, § 21(c). If anything, instead of making intuitive, compact districts, the Florida Senate Plan dissects parts of Florida in a variety of ways precisely to create a partisan imbalance. In sum, the legislative maps violate the Florida Constitution in multiple respects, not the least of which is partisan favoritism.

C. The Senate and House Plans Favor Incumbents.

"The goal of reapportionment . . . is just representation of the people, not the protection of incumbents in a legislative body." *League of Neb. Municipalities v. Marsh*, 242 F. Supp. 357, 360 (D. Neb. 1965). Nonetheless, the Florida

Legislature had often focused its reapportionment efforts on protecting its own. Amendment 5 rejected this approach, requiring that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor . . . an incumbent." Fla. Const. art. III, § 21(a). Sadly, the Legislature continued with business as usual.

There are many ways to determine if a redistricting plan has been designed to favor incumbents. One of the simplest is to check whether current incumbents have intentionally been allowed to retain many of the voters in their prior districts. *See, e.g.*, *In re Legislative Districting of Gen. Assembly*, 175 N.W.2d at 26. Another is to check whether incumbents of one party have often been combined in districts and forced to run against each other while incumbents of the other party have not. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866-67 (W.D. Wis. 1992) (rejecting plan that combined many incumbents of minority party in the same districts). Still another is to check what percentage of districts include an incumbent, and how many include more than one incumbent; if a high percentage of districts include one and only one incumbent, it suggests that those districts were drawn to favor incumbents. *See, e.g.*, *Diaz*, 978 F. Supp. at 104. Finally, where a preexisting plan was drawn largely to protect incumbents, and a proposed plan largely maintains those districts, it suggests an improper purpose to favor incumbents. *See, e.g.*, *Vandermost v. Bowen*, No. 5198387, 2012 WL 246627, at

*28 (Cal. Jan. 27, 2012) (rejecting prior redistricting plan because the plan had repeatedly led to incumbents being reelected).

In the Senate Plan, 22 out of 40 incumbents (55 percent) are drawn into districts that contain over 60 percent of the population from their old districts. Aff. ¶ 21. In other words, these incumbents are drawn into relatively "safe" districts. Moreover, all of the five "safest" incumbents, based on the percentage of population carried over from their previous districts, are Republicans. Aff. ¶ 22. Senator Detert (R), who resides in Senate District 28 under the Legislature's Plan, enjoys a district in which 89 percent of her previous constituents are placed. Redistricting Committee Chair Don Gaetz (R) is also drawn into a very safe seat, both for his party and for him personally, as 86 percent of his prior constituency has been placed in his new district. Senate District 30 contains 85 percent of the population from prior district 37, to the benefit of incumbent Senator Richter (R). Similarly, Senate District 33 is comprised of 85 percent of the population from old district 40, creating a very safe seat for Senator Garcia (R). Finally, Senator Evers (R) resides in Senate District 3, 83 percent of which is comprised of his prior constituency. *Id.* Thus, not only does the Senate Plan reflect an intent to favor incumbents generally, it reflects an intent to favor Republican incumbents in particular.

The House Plan also treats Republican incumbents differently than Democrats. Sixty-two districts in the House Plan contain a single incumbent; of those incumbents, 16 are Democrats and 46 are Republicans. Aff. ¶ 27. Looked at another way, 41 percent of Democratic incumbents are the sole incumbent in their district, while 57 percent of Republican incumbents enjoy this advantage.

Even more striking is the number of Democratic incumbents who are pitted against other incumbents in the House Plan. Among the 39 Democratic incumbents in the Florida House of Representatives, 23 (or 59 percent) are drawn into districts with one, two, or even three other incumbents. Of the 81 Republican incumbents, by contrast, just 35 (or 43 percent) are in a district with other incumbents. *See* Aff. ¶¶ 28-30. This evidence demonstrates that the shuffling of incumbents is significantly correlated with political party, with a disproportionate number of Democrats disadvantaged.

III. THE SENATE AND HOUSE PLANS HAVE THE INTENT AND RESULT OF DENYING, ABRIDGING, AND DIMINISHING MINORITY VOTING RIGHTS

The Florida Constitution now 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." Art. III, § 21 (a). This provision

provides protection for minority voters distinct from the protections afforded by the federal Voting Rights Act ("VRA").

Both the Senate and House Plans fail this constitutional test, in particular with respect to their treatment of African-American voters. As in the past several cycles, the Florida Legislature crafted tortured district lines in order to pack as many African Americans as possible into a handful of districts, with the result of diluting African-American influence in surrounding districts. In many of these districts, maximizing minority numbers is not necessary in order for African Americans to elect their candidates of choice because those candidates receive sufficient levels of support from Anglos and other racial groups. *See* Aff. ¶¶ 34-36. Where there is not substantial racially polarized voting, packing minority voters works to their disadvantage. *Cf. Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003) (stating that where there is no majority bloc voting, "spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice").

Senate District 6 is a prime example. This district is one of the least compact among all of the districts and cuts a number of political subdivision lines, *see infra* Sections VI and VII, as it winds in and out of the Jacksonville area with awkward protrusions in various directions to grab pockets of minority voters. The

result of these contorted boundaries is a district with a 46 percent African-American voting age population ("VAP"), not enough for a "majority-minority" district under the VRA and much more than is needed to elect the minority-preferred candidate. *See* Aff. ¶ 38. Rather than following more logical, neutral lines to afford African-American voters the opportunity to exert greater influence in surrounding districts, such as District 4, the Senate Plan packs African-American voters into one district to their detriment. Similarly, Senate District 19, with an African-American VAP of 35 percent, is a contorted district that overwhelmingly elects the minority-preferred candidate. *See id.* Here, the Legislature could have abided by constitutional principles by drawing more natural boundary lines that allow African Americans to have greater influence in neighboring District 15. Senate District 12, with an African-American VAP of 37 percent, *id.*, creates similar compactness and political boundary violations only to unnecessarily pack African-American voters in a single district when they would be afforded greater participation in the political process had they been spread between this district and neighboring District 13.

The House Plan exhibits this same strategy. For instance, House District 88—the least compact of the House Plan, *see infra* Section VI, unnecessarily packs African Americans to achieve an African-American VAP of 49 percent, far more than necessary to elect minority-preferred candidates in this district. *See* Aff. ¶ 41.

House District 70, with an African-American VAP of 44 percent, *id.*, suffers from the same malady; any sensible, fair—indeed, constitutional—plan would have spread African-American voters between Districts 70 and 71.

Thus, both the Senate and House Plans violate the minority voting rights provisions of the Florida Constitution. At the end of the day, what the Legislature may attempt to justify on grounds of "racial fairness" is in actuality a means of diluting minority voting strength and decreasing possibilities for minority-preferred candidates statewide.

IV. THE SENATE PLAN STRETCHES THE BOUNDS OF CONTIGUITY

The Florida Constitution mandates that "districts shall consist of contiguous territory." Fla. Const. art. III, § 21(a). Contiguity means "'being in actual contact: touching along a boundary or at a point.'" *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1179 (Fla. 2003) (quoting *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1051 (Fla. 1982)). A district is not contiguous if "a part is isolated from the rest by the territory of another district," or if the lands "mutually touch only at a common corner or right angle." *Id*. (internal quotation marks and citation omitted). A district is considered contiguous if a person can go from one point in the district to any other point without leaving the district. *In re HJR 1987*, 817 So. 2d at 828. This definition, however, does not impose a requirement that all parts of a district

must be accessible by road, or require that districts be accessible by terrestrial rather than marine transportation. *Id.*

Although the Court has permitted district boundaries that cross lakes, fragment counties, and connect islands, it has made clear that such districts push the contiguity principle to its very limits. For instance, in 2002, the Court concluded that a district was contiguous even though it connected a population center in Lee County with one in Palm Beach County by crossing Lake Okeechobee. *Id.* But the Court emphasized that drawing a district boundary across Lake Okeechobee "stretches to the limits our language that a district drawn across a body of water does not violate the contiguity requirement." *Id.*; *see also In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d at 1051 (finding that a district is "barely" contiguous where there is a lake, a river, and an interstate highway connecting the eastern and western edges).

In its 2012 Senate Plan, the Florida Legislature once again pushed the boundaries of the contiguity principle right up to its breaking point, thereby undermining any contiguity-based justification for the Plan's other constitutional failures. Senate District 34, for instance, is comprised of a long and skinny strip down the eastern part of the State, at one point narrowing to a single stretch of highway to connect one part of the district to the other. Several districts isolate a single precinct from the rest of the district territory. For example, Senate District

16 contains a single precinct that is entirely surrounded by Senate District 14 and just barely connected to the rest of the district. Senate District 31 jumps across a highway in order to pick up a single, isolated precinct on the other side.

Undeterred by the Court's warning regarding the Lake Okeechobee criss-crossing, *see In re HJR 1987*, 817 So. 2d at 828, the Florida Legislature drew multiple Senate districts that are connected solely by water. Senate District 1, for instance, stretches horizontally along the panhandle and, as a result, contains multiple portions that are connected solely by inlets, rivers, and lakes along the way (though some are connected by bridges). By contrast, the House Plan cuts the panhandle vertically such that no one district jumps across multiple bodies of water. Senate District 19 crisscrosses Tampa Bay several times and spans a separate channel to grab Bradenton. Finally, Senate District 6 is connected solely by a river for several miles. Moreover, at one point it is barely connected by land, as the strip of land between St. Augustine and the rest of the district is hardly 300 feet wide.

Even if the Senate Plan does not fail the contiguity test outright, it certainly stretches it to its limits. Thus, the violations discussed above regarding partisan and racial fairness cannot be justified by any efforts to achieve contiguity, as the Legislature largely ignored this requirement. Rather than making a good faith effort to comply with the spirit of the contiguity principle, the Legislature has

demonstrated—once again—its willingness to draw district lines as it sees fit without regard for the objectives of the Constitution or the will of the voters.

V. THE SENATE PLAN FAILS TO ABIDE BY THE EQUAL POPULATION PRINCIPLE

The Florida Constitution now expressly incorporates an equal population requirement. Article III, Section 21(b) mandates that "districts shall be as nearly equal in population as is practicable." This provision mirrors the language often employed by the U.S. Supreme Court to describe states' responsibilities under the Equal Protection Clause. In *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), the Court held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." The Court noted that, in drawing legislative district lines, states may pursue legitimate objectives such as "maintain[ing] the integrity of various political subdivisions" or "provid[ing] for compact districts of contiguous territory." *Id.* at 578; *see also id.* at 578-79 ("Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."). Accordingly, unlike the strict population equality rule that is applied to congressional districts, federal law provides that "mathematical exactness" is not a constitutional prerequisite for legislative districts. *Id.* at 577. Rather, "substantial

equality of population" among legislative districts must be the "overriding objective." *Id.* at 579.

The U.S. Supreme Court has generally held that a legislative redistricting plan may contain an overall population deviation of up to ten percent in order to meet rational state objectives, unless there is proof of intentional discrimination within that range. *See, e.g., White v. Regester*, 412 U.S. 755, 764 (1973) (no equal population violation based on "the single fact that two legislative districts in Texas differ from one another by as much as 9.9%"); *id.* at 764 n.8 ("[I]t appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts."); *Chapman v. Meier*, 420 U.S. 1, 23 (1975) ("[W]e have acknowledged that some leeway in the equal-population requirement should be afforded States in devising their legislative reapportionment plans. . . . For example, in *Gaffney v. Cummings*, [412 U.S. 735 (1973),] we permitted a deviation of 7.83% with no showing of invidious discrimination.").

This Court has of course previously abided by the federal equal protection principle, *see, e.g., In re HJR 1987*, 817 So. 2d 819, but at the time it was applying only federal constitutional law. There is good reason for the Court to interpret the new state constitutional provision to impose a more stringent population

requirement, as several other states have done. *See, e.g.*, *Fay v. St. Louis Cnty. Bd. of Comm'rs*, 674 N.W.2d 433, 438 (Minn. Ct. App. 2004) ("These standards, requiring that the districts be 'as nearly equal in population as possible,' extend beyond the population-deviation standard under federal constitutional law to ensure greater compliance with the one-person, one-vote principle in redistricting."); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784 (Iowa 1972). Indeed, the addition of an explicit equal population requirement to the Florida Constitution implies that it was meant to mean something more than the federal standard already applied by the Court, for courts presume that changes to the Florida Constitution are "intentional" and were "intended to have a different effect from the prior language." *State v. Creighton*, 469 So. 2d 735, 739 (Fla. 1985).

But even if the Court were to determine that the state equal population principle is no more restrictive than its federal counterpart, the ten percent overall range is by no means a safe harbor under federal law. In *Cox v. Larios*, 542 U.S. 947 (2004), *aff'g Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), the U.S. Supreme Court struck down a plan with an overall deviation of less than ten percent where Georgia had systematically underpopulated districts in inner-city Atlanta and overpopulated districts in suburban Atlanta to favor Democratic

candidates and disfavor Republican candidates (underpopulating heavily Democratic districts left more Democrats to place in other districts).

> In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation. . . . [T]he equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.

Id. at 949-50 (Stevens, J., concurring). In *Cox*, the population deviations, *de minimis* as they may have been, resulted not from "any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts," but rather from an impermissible design to "'allow Democrats to maintain or increase their representation in the House and Senate through the underpopulation of districts in Democratic-leaning . . . areas of the state.'" *Id.* (Stevens, J., concurring) (quoting *Larios*, 300 F. Supp. 2d at 1334). Thus, *Cox* reaffirmed the well-established principle that population deviations among legislative districts are permissible only if "'incident to the effectuation of a rational state policy.'" *Id.* (Stevens, J., concurring) (quoting *Reynolds*, 377 U.S. at 579).

As demonstrated below, the Florida Legislature's Senate Plan deviates from the equal population principle not to serve any rational state objective but rather for

improper purposes—namely, to discriminate against Democrats, minorities, and certain regions of the state. There is no question that, in Florida, an intent to favor or disfavor a certain political party or racial minority is the very epitome of "arbitrariness and discrimination," *Roman v. Sincock*, 377 U.S. 695, 710 (1964). Indeed, such invidious intent is now expressly prohibited by the Florida Constitution. *See* Fla. Const. art. III, § 21(a). And the U.S. Supreme Court has previously rejected attempts by the Florida Legislature to deviate from equal population rules for improper purposes. *See Swann v. Adams*, 385 U.S. 440, 444 (1967) (rejecting Florida Legislature's plan and reaffirming that "variations from a pure population standard" must be justified by legitimate objectives); *see also id.* (citing *Roman*, 377 U.S. at 710, for the proposition that "the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination'"). But despite this rich history disapproving of arbitrary population deviations in Florida, the Senate Plan's deviations from the ideal population have no rational justification.

Based on the 2010 Census, Florida's total population is 18,801,310, so the ideal population for the State's 40 Senate districts is 470,033. Aff. ¶ 43. Not a single district in the Florida Legislature's Senate Plan meets this ideal. Rather, the plan contains 20 overpopulated districts and 20 underpopulated districts, resulting in nearly 64,000 persons too many in the overpopulated districts and 64,000 too

few in the underpopulated districts. Aff. ¶ 44. The votes of residents in overpopulated districts are diluted relative to votes cast by citizens of underpopulated districts.

The population deviations in the Senate Plan systematically favor Republican candidates and disfavor Democrats. Across all of the Senate districts, the average Senate district reflects a 2008 vote share for President Obama of 52.3 percent, and a vote share for Alex Sink, the 2010 Democratic candidate for Governor, of 50.7 percent. Aff. ¶ 45. The average vote share for Obama across the overpopulated Senate districts, however, is 55.3 percent, while the average vote share for Sink in these districts is 53.9 percent. Aff. ¶ 47. The Plan's underpopulated districts are just the opposite: the average Obama vote share across those districts is 49.3 percent and the average vote for Sink is 47.5 percent. *Id.* Thus, the average overpopulated district is at least six percentage points more favorable to Democratic candidates than the average underpopulated district, meaning that Democratic-leaning districts have been systematically overpopulated to their detriment, while Republican-leaning districts are underpopulated such that each resident's vote is comparatively overrepresented.

The disparity is particularly acute in the Miami-Dade area. Across all of the Miami-Dade/Broward Senate districts (SDs 27, 29, and 31-40), the average district is overpopulated by 2,423 residents, for a total of 29,079 extra residents in the area

as a whole. Aff. ¶ 48. Not surprisingly, the Miami-Dade area is significantly more Democratic than the state average: the average vote for the Democratic presidential candidate in 2008 was 61.8 percent, and the average vote for the Democratic gubernatorial candidate in 2010 was 60.5 percent. *Id.* Notably, there are just two districts in the Miami-Dade area that are underpopulated—SDs 29 and 33. These districts are the only ones in the area that are substantially less favorable to Democrats than the area as a whole, with vote shares for Democratic candidates less than the average Senate district. (SD 29 voted 51 percent for Obama and 51 percent for Sink, and SD 33 voted 46 percent for Obama and 50 percent for Sink.) *Id.* The Senate Plan's population deviations in the Miami-Dade area thus are based not only on the impermissible pursuit of regional interests, *see Swann*, 385 U.S. at 447 (noting "the constitutional impropriety of maintaining deviations from the equal population principle in deference to area and economic or other group interests"), but also on the improper—indeed, unconstitutional—objective of disfavoring a political party, *see Cox*, 542 U.S. 947.

By contrast, the districts encompassing the more Republican-leaning area between Fort Meyers and Tampa (SDs 15, 17, 19, 22, 21, 24, 23, 28 and 30) are all underpopulated by an average of 2,100 persons, for a total of 18,901 individuals too few. These districts, predictably, reflect a vote share for Democratic candidates that is less than the average Senate district statewide (50 percent for

Obama and 47 percent for Sink). *See* Aff. ¶ 49. The disparity between the Fort Meyers-Tampa districts and the Miami-Dade districts demonstrates the extent to which Republican portions of the State are overrepresented compared to Democratic portions in the Senate Plan.

Not only are the Senate Plan's deviations driven by partisan interests, they also favor Anglos and disfavor minorities. There are seven majority-minority districts in the Senate Plan. On average, these districts are overpopulated by 1,572 persons, for a total of 11,003 extra persons. *See* Aff. ¶¶ 50-51. By contrast, there are 27 majority-Anglo Senate districts, the average of which is *underpopulated* by 439 people, or a total of 11,859 persons. *See* Aff. ¶ 52. In addition, a breakdown of the percentage of each racial group in overpopulated and underpopulated districts reveals that Anglos are more likely to be overrepresented. Among all of the Senate Plan's overpopulated districts, 53 percent of persons are Anglo, 26 percent are Hispanic, and 17 percent are African-American. Aff. ¶ 53. Among all the underpopulated districts, 63 percent of persons are Anglo, 19 percent are Hispanics, and 14 percent are African-American. *Id.* In other words, there is a full ten percentage point difference between the proportion of Anglos in overpopulated districts and the proportion of Anglos in underpopulated districts. This analysis proves that on average, Florida minorities—who experienced the greatest

population growth—are underrepresented in Florida's Senate Plan relative to the State's Anglo population.

There can be no dispute that deviations based on regional, partisan, or racial favoritism are impermissible. Nor can the map drawers credibly contend that the deviations were in service to other, legitimate state objectives. The Legislature can hardly claim such deviations were necessary to protect minority voting rights; not only does the Senate Plan fail on that constitutional measure, *see supra* Section III, but the population deviations themselves disadvantage minorities. Compactness and contiguity could not have been the goals given the extent to which the Senate Plan fails miserably on any measure of compactness and stretches the bounds of the contiguity principle. Finally, unlike those cases in which population deviations were necessary in order to preserve county lines, *see, e.g.*, *White*, 412 U.S. at 764 n.8, the Senate Plan indiscriminately cuts county lines across the state, *see infra* Section VII. Given that the Senate Plan violates these other redistricting criteria, its population deviations can only be explained by impermissible discrimination. This not only provides additional evidence of the Plan's unconstitutionality based on partisan and racial favoritism, it warrants striking down the Senate Plan based on failure to adhere to the constitutional principle of equal population.

VI. THE SENATE AND HOUSE PLANS VIOLATE THE COMPACTNESS STANDARD

Courts across the country have long applied the traditional redistricting principle of compactness, and in 2012, for the first time, the Legislature was constitutionally bound to respect that principle in drawing legislative district lines. *See* Fla. Const. art. III, § 21(b). Although compactness is secondary to the predominant requirements of partisan and racial fairness, non-compact districts are often a sign of partisan and racial gerrymanders that would themselves violate the Florida Constitution. Unless there is a justification, districts must be compact. In fact, the U.S. Supreme Court has found "finger-like extensions," "serpentine district[s]," "narrow and bizarrely shaped tentacles," and "hook-like shape[s]" constitutionally suspect, as these non-compact shapes are often indicative of racial or partisan gerrymandering. *See Shaw v. Reno*, 509 U.S. 630, 635 (1993); *Shaw v. Hunt*, 517 U.S. 899, 906 (1996); *Bush v. Vera*, 517 U.S. 952, 965 (1996); *see also Hunt v. Cromartie*, 526 U.S. 541, 547 n.3 (1999) ("[A] district's unusual shape can give rise to an inference of political motivation."). Other courts around the country agree that compactness is an important check on attempts at partisan favoritism in redistricting. *See, e.g.*, *Parella v. Montalbano*, 899 A.2d 1226, 1243 (R.I. 2006) ("[A]ny deviation from contiguity and from natural, historical, geographical, and political lines for the purpose of achieving a political gerrymander is constitutionally prohibited by the mandate of compactness.") (internal quotation marks and citation omitted); *In re House Bill No. 2620*, 225 Kan. 827, 834, 595

P.2d 334, 341 (1979). ("[L]ack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification."); *In re Legislative Districting of State*, 299 Md. 658, 675, 475 A.2d 428, 436 (1982) ("[C]ourts have held that the contiguity and compactness requirements, and particularly the latter, are intended to prevent political gerrymandering."). As the Supreme Court has stated, "reapportionment is one area in which appearances do matter." *Reno*, 509 U.S. at 647.

Many state courts have defined compactness to mean the extent to which districts are regularly shaped. *See, e.g., Kilbury v. Franklin Cnty. ex rel. Bd. of Cnty. Comm'rs*, 151 Wash. 2d 552, 564, 90 P.3d 1071, 1077 (2004) ("[T]he phrase 'as compact as possible' does not mean 'as small in size as possible,' but rather 'as regular in shape as possible.'"); *Acker v. Love*, 178 Colo. 175, 177, 496 P.2d 75, 76 (1972) (compact district may best be defined as "a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered"); *Schrage v. State Bd. of Elections*, 88 Ill. 2d 87, 98, 430 N.E.2d 483, 487 (1981) (describing non-compact district as having "tortured, extremely elongated form"); *In re Livingston*, 96 Misc. 341, 352, 160 N.Y.S. 462, 469, 470 (N.Y. Sup. Ct. 1916) (defining non-compact as "really grotesque" or "absurd in shape").

Courts and experts alike employ several quantitative techniques to measure compactness. One of the most commonly used approaches is the Reock Test, *see Karcher v. Daggett*, 462 U.S. 725, 728-29 (1983), which is a relatively simple method of measuring the relationship between the area of the district and the area of the smallest possible circumscribing circle. *See* Aff. ¶ 55. The resulting measure is a number between 0 and 1, with numbers closer to 1 being more compact. *See* Ernest C. Reock, Jr., *A Note: Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. Pol. Sci. 70 (1961).

The Legislature's Senate Plan fails under any measure of compactness. The Senate Plan is riddled with non-compact districts throughout the State. Senate District 34, for instance, scores the lowest on the Reock scale of all of the House and Senate Districts combined, with a Reock score of just 0.05. *See* Aff. ¶¶ 55, 57. Senate District 34 is a narrow, coastal district stretching from Fort Lauderdale northward to Lake Park. Connected solely by I-95 for about half a mile, this district extends a single arm into Del Rey Beach. As it winds its way to Fort Lauderdale, it expands into a bubble to encompass the city. Neighboring Senate District 29 hardly fares any better. This similarly long and narrow district snakes along the outer banks and the shoreline from Fort Lauderdale up towards Jupiter and then wraps around the top of Senate District 34 and grabs West Palm Beach. The district has a Reock score of just 0.17. Aff. ¶ 57.

Senate District 1 in the Florida panhandle is yet another example. With a Reock score of just 0.123, *id.*, this district is a long, narrow arc running along the Gulf Coast from the Alabama border all the way to Gulf County. Additionally, Senate District 6, with a similarly low Reock score of 0.128, *id.*, snakes around the Jacksonville area, follows St. Johns River southward, extends to grab part of St. Augustine Beach, crosses the river to grab Palatka, and then extends all the way down to Daytona Beach. To its right, Senate District 9 runs from the Jacksonville Beach area all the way down to Daytona Beach, reaching around the southern part of Senate District 4 and extending all the way inland at some points into St. Johns River. This district has a Reock score of just 0.177. *Id.*

On the west coast of the State, Senate District 30, with a Reock score of 0.19, *id.*, stretches from Cape Coral, jumps over the water to Sanibel Island, jumps back over the water to Fort Meyers Beach, and then heads down the coast all the way to the Everglades, grabbing Naples and Marco Island as it winds its way down. Senate District 12, in the middle of the State, has a Reock score of 0.225, *id.*, snaking around northern Seminole County, grabbing Apopka and Winter Garden, and cutting the city of Orlando in half. Finally, Senate District 19 is a jagged district with arms extending in every direction, resembling a scorpion with a long tail. With a Reock score of 0.240, *id.*, this district starts in Tampa, extends southward to cross the Bay, crosses from Hillsboro County into Pinellas County,

grabs part of St. Petersburg, jumps back over the Bay, and then snakes down to Bradenton. These are just a few examples of some of the biggest offenders of the compactness rule in the Senate map.

The House Plan is, on the whole, much more compact than the Senate Plan, but there are still a handful of districts that have contorted boundaries. For instance, House District 88 has the lowest Reock score—0.08—of all of the House districts. Aff. ¶ 58. This is a long and narrow district running through Palm Beach County along I-95, often encompassing little more than the width of the highway itself. House District 89 runs parallel to House District 88 and has a Reock score of 0.205. *Id.* House District 117 juts out from the southern part of the Miami-Dade area and extends inland, heading south and turning in toward the central part of the State. With a Reock score of 0.215, *id.*, this district is very jagged. With a Reock score of 0.225, *id.*, House District 115 weaves around the southern part of Miami-Dade, resembling a monkey wrench with a long handle and a two-tiered head.

A quick glance at the Senate and House maps side by side reveals that the two plans bear no relationship to one another, as they divide up the state in entirely different shapes and using entirely different techniques. The House Plan's configuration, while not completely in line with constitutional principles, is more

easily remedied, and makes clear that the Senate Plan easily could have respected the compactness rule and other constitutional goals.

To the extent the justification for non-compactness in either plan is racial fairness, this argument fails. In fact, as noted above, *see supra* Section III, many of these non-compact districts fail the minority voting rights provision precisely because they contort boundary lines in unnatural ways that disadvantage minority voters. Nor can the lack of compactness be blamed on an attempt to achieve partisan fairness, as both the Senate and House Plans fail this first-order constitutional principle. *See supra* Section II. In sum, it is clear that although the Florida Constitution now requires compact districts, *compare In re HJR 1987*, 817 So. 2d at 831, the Florida Legislature approached the redistricting process as if it had full license to ignore compactness altogether.

VII. THE SENATE AND HOUSE PLANS FAIL TO RESPECT POLITICAL AND GEOGRAPHICAL BOUNDARIES

Finally, Amendment 5 requires that "districts shall, where feasible, utilize existing political and geographical boundaries." Fla. Const. art. III, § 21(b). The basic purpose of this provision is to keep communities together and sensibly adhere to natural boundaries across the state. As this Court has already recognized, "[t]he 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 . . . are avoided. . . .

[T]he 'city' and 'county' terminology honors this community-based standard for drawing legislative and congressional boundaries, and further describes the standard in terms that are readily understandable to the average voter . . . ." *Advisory Op. to Att'y Gen. re Standards for Establishing Legislative District Boundaries*, 2 So. 3d at 187-88 (footnote omitted).

Several benefits flow from adherence to this principle. First, when districts respect political subdivision lines, it is easier for election administrators to create precincts in which all voters receive the same ballot. Second, legislators elected from districts comprising whole counties and whole cities may be better able to respond to the needs of their constituents. *See Bush*, 517 U.S. at 974 (noting that failure to adhere to political subdivision boundaries "caused a severe disruption of traditional forms of political activity," as "[c]ampaigners seeking to visit their constituents had to carry a map to identify the district lines, because so often the borders would move from block to block," and "voters did not know the candidates running for office because they did not know which district they lived in") (internal quotation marks and citation omitted). Third, because the extent to which a redistricting map follows political and geographical subdivision lines can be objectively measured, this criterion can be easily applied by the Legislature and evaluated by a court. Florida's political subdivision boundaries are objective, neutral, and fair proxies for groups of people who share a common interest.

Unfortunately, the Legislature's Senate Plan entirely undermines this criterion. Of the 40 Senate districts, only eleven (28 percent) do not divide any counties. Seventeen districts (nearly 43 percent) cut one or two county lines, while an additional 12 districts (30 percent) cut three or more counties. Aff. ¶ 61. One of the worst offenders is Senate District 1, which unnecessarily cuts through no less than five counties. This district begins in Escambia County, cuts off the coastal part of Santa Rosa County, cuts Okaloosa County in half, and then cuts through Walton and Bay Counties to grab their coastal sections. Senate District 3 also cuts across five counties. Running parallel to Senate District 1, this district takes the inland parts of Escambia, Santa Rosa, Okaloosa, Walton, and Bay Counties, as well as all of Holmes and Jackson Counties. Senate District 4, while crossing fewer counties than these other districts, contains all of Nassau County and cuts *twice* into Duval County, taking the western and eastern parts of the county separately.

Senate District 6 also cuts five counties—Duval, St. Johns, Putnam, Flagler, and Volusia. It also cuts Daytona Beach in half. To the east of District 6, Senate District 9 cuts four counties. It begins up in the southern part of Duval County and takes the beaches of Jacksonville, Atlantis, and Neptune. It lops off two-thirds of St. Johns County and slices through Flagler County on its way down the coast, crosses into Volusia County, and then stretches an arm into Daytona Beach.

Senate District 26 also cuts four counties. It begins by taking the southern third of Polk County, encompasses all of Hardy, DeSoto, Highland, Okeechobee, and Glade Counties, then proceeds to cut Charlotte County in half, slices off the western three-quarters of St. Lucie County, and takes the western three-quarters of Martin County. Furthermore, this district cuts the municipality of Port St. Lucie in half. Bizarrely enough, Senate District 26 spans Polk County in the center of the state, Charlotte County in the west, and St. Lucie and Martin in the east, bringing together into one massive district communities that are far flung and have very little in common with one another. To its east, Senate District 25 divides the counties of Indian River, St. Lucie, Palm Beach, and Martin, and splits the city of Jupiter in half.

The Senate Plan also fails to respect geographic boundaries as it twists and turns through Florida's many waterways.[9] As described above, Senate District 1 is unnecessarily connected in large part by stretches of water instead of land. Senate District 6 crosses over St. Johns River not once but twice, while Senate Districts 19 and 22 both jump over Tampa Bay several times. (Senate District 19 also crosses the Manatee River to reach Brandenton.)

[9] To the extent a county is itself drawn to cross a waterway, as is Charlotte County, we do not include it in considering which districts violate this constitutional provision.

Senate District 30 is another good example of the Senate Plan's lack of respect for political and geographical boundaries. It cuts through the cities of Fort Meyers Beach and Bonita Springs, and the district's only connection to Sanibel Island is water; in fact, it cuts the bridge to the island in half. Senate District 30 also slices through Collier and Lee Counties. In other words, this district manages three violations with a single boundary line—splitting counties, municipalities, and geographic features all at once.

The fact that most of these divisions are entirely unnecessary is made apparent by a comparison to the House Plan. Unlike the Senate Plan, in which only 28 percent of the districts divided no county lines, in the House Plan almost 76 percent of the districts (91 out of 120) contain no county cuts at all. *See* Aff. ¶ 60. Given that there are three House districts to every Senate district, this comparison suggests that simply combining House districts to develop a more sensible Senate Plan would have eliminated many of the problems that contaminate the Senate map.

The House Plan does, however, contain several districts with unnecessary political subdivision cuts. House District 70, for instance, cuts across four counties (Pinellas, Hillsborough, Manatee, and Sarasota) as well as three major metropolitan areas (St. Petersburg, Bradenton, and Sarasota). This district also splits the town of Palmetto. House District 105, meanwhile, grabs part of Miami-

Dade County and then spans all the way across the state to grab parts of Collier and Broward Counties, dividing three counties in its wake. It also splits off the western third of the city of Miramar and divides the city of Doral. Residents of Miramar would be bewildered indeed to find themselves stuck in a district with Floridians clear on the other side of the state. In fact, several House districts in that area divide up multiple counties and municipalities. House District 100 cuts through Hollywood, Dania Beach, North Miami, and North Miami Beach. House District 101 is entirely in Broward County but cuts up Hollywood, takes a quarter of Miramar, and takes a quarter of Pembroke Pines. House District 102 straddles Broward and Miami-Dade Counties, takes a substantial part of Miramar and Pembroke Pines, and cuts the city of Miami Gardens in half. And House District 103 takes the remaining part of Miramar as well as half of Hialeah and cuts through the cities of Medley and Doral. Finally, House District 117 appears devoid of any geographic rationale; it starts by cutting off part of Miami, heads due south to cut Coral Gables in half, cuts the city of Pinecrest in half, and takes part of Palmetto Bay.

Thus, the House Plan is far from perfect on this measure, but on the whole it is vastly better than the Senate Plan. The violations in each Plan correspond with each plan's compactness violations. Like the compactness violations, these divisions are unnecessary to meet the higher-order constitutional principles. In

fact, in most cases, these divisions serve to further the Plans' constitutional flaws with respect to partisan and racial fairness. *See supra* Sections II and III. Once the Legislature failed to abide by its constitutional duty with respect to the primary criteria, those failures trickled down to the last criteria, producing a redistricting scheme—and in particular a Senate Plan—that is infected with illogical district lines in service of party politics.

CONCLUSION

For all of the foregoing reasons, the Florida Democratic Party respectfully requests that this Court find the Florida Legislature's Joint Resolution of Apportionment, CS/SJR 1176, constitutionally invalid. Should this Court find, however, that it has insufficient time to conduct a complete review of the constitutional issues within the confines of the period outlined in Article III, Section 16, the Florida Democratic Party requests that the Court's holding be without prejudice to the right of any party to file a subsequent challenge to the validity of the plan. *See In re HJR 1987*, 817 So. 2d at 832.

Respectfully submitted this 17th day of February, 2012.

s/ Joseph W. Hatchett
Joseph W. Hatchett (Bar # 34486)
106 E. College Ave., Suite 1200
Tallahassee, Florida 32301
Tel: (850) 224-9634
Fax: (850) 222-0103
E-mail: joseph.hatchett@akerman.com

Jon L. Mills (Bar # 148286)
Karen C. Dyer (Bar # 716324)
Elan M. Nehleber (Bar # 79041)
121 S. Orange Ave., Suite 840
Orlando, Florida 32801-3233
Telephone: (305) 539-8400
Facsimile: (305) 539-1307
E-mail: jmills@bsfllp.com
E-mail: kdyer@bsfllp.com
E-mail: enehleber@bsfllp.com

Marc Elias (admitted *pro hac vice*)
Kevin J. Hamilton (admitted *pro hac vice*)
John Devaney (admitted *pro hac vice*)
Abha Khanna (admitted *pro hac vice*)
700 13th St., N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6200
Fax: (202) 654-6211
Email: MElias@perkinscoie.com
E-mail: KHamilton@perkinscoie.com
E-mail: JDevaney@perkinscoie.com
E-mail: AKhanna@perkinscoie.com

Counsel for the Florida Democratic Party

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to the following parties listed below 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.

Counsel for the Florida Senate Michael A. Carvin Jones Day 51 Louisiana Avenue N.W. Washington, DC 20001 (202) 879-7643 Andy Velosy Bardos The Florida Senate 404 S. Monroe Street, Suite 409 Tallahassee, FL 32399 (850) 487-5229 ***Counsel for the Florida House Of Representatives*** Miguel A. De Grandy Miguel De Grandy, P.A. 800 S. Douglas Road, Suite 850 Coral Gables, FL 33134 (305) 444-7737; Fax (305) 443-2616 George T. Levesque General Counsel Florida House of Representatives 422 The Capital Tallahassee, FL 32399 (850) 488-0451	Charles Talley Wells Gray Robinson, P.A. 301 E. Pine Street, Suite 1400 Orlando, FL 32801 (407) 843-8880; Fax (850) 222-3494 George N. Meros, Jr. Jason L. Unger Allen C. Winsor Charles Burns Upton, II Gray Robinson, P.A. P.O. Box 11189 Tallahassee, FL 32302 (850) 577-9090; Fax (850) 577-3311 ***Counsel for the Honorable Pamela Jo Bondi*** Timothy David Osterhaus Deputy Solicitor General Office of the Attorney General The Capitol, PL-01 Tallahassee, FL 32399 (850) 414-3681; Fax (850)410-2672
Counsel for Common Cause Florida, the National Council Of La Raza and the League Of Women Voters Of Florida, Inc. Ronald Gustav Meyer Meyer, Brooks, Demma & Blohm P.O. Box 1547 Tallahassee, FL 32302 (850) 878-5212	

Jessica Ring Amunson Michael B. DeSanctis Kristen M. Rogers Paul M. Smith Jenner & Block, LLP 1099 New York Avenue, N.W., Suite 900 Washington, DC 20001 (202) 639-6000 J. Gerald Hebert J. Gerald Hebert, P.C. 191 Somervelle Street, Unit 415 Alexandria, VA 22304 (703) 628-4673	s/ Joseph W. Hatchett Joseph W. Hatchett

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

s/ Joseph W. Hatchett
Joseph W. Hatchett