IN THE SUPREME COURT OF FLORIDA

Case No. SC12-1

IN RE: JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT

BRIEF OF THE FLORIDA SENATE

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PRELIMINARY STATEMENT

References in this Brief to the Appendix filed by the Attorney General on February 10, 2012, are designated as "(App. [page #])".

All emphases are supplied unless otherwise indicated.

STATEMENT OF CASE AND FACTS

The Legislature's enactment of SJR 1176 completed an open, fair, and inclusive redistricting process. The Speaker of the House and the President of the Senate charged the House Redistricting Committee and the Senate Committee on Reapportionment to conduct "the most open, transparent and publicly participatory reapportionment process in Florida's history." (App. 5412) The Committees jointly held twenty-six public hearings across the State. (*Id*. 999) The recorded attendance exceeded 4,700 people, of whom more than 1,600 testified. (*Id*.)

The House and Senate created web applications that enabled the public to create their own redistricting maps. (*Id*. at 1000) By January 11, 2012, the public had submitted 174 maps, including 46 of Senate districts. (*Id*.) This extraordinary public participation is best evidenced by a comparison with the last redistricting cycle, when the Legislature received four maps from the public. (*Id*. 6531)

The Senate Committee held seven meetings from September 2011 to January 2012, and its professional staff published an initial proposal for Senate districts on November 28, 2011. (*Id*. 1001, 6156–57) Staff prepared the proposal without reference to election results, voter-registration data, or incumbent addresses. (*Id*. 6829) The Senate then opened additional channels for public input, inviting comment by telephone, e-mail, and the internet. (*Id*. 5891, 6234–38)

After it voted to introduce the proposal, the Committee published a substitute that incorporated input received from supervisors of elections and the public. (*Id*. 6367–75) On January 11, 2012, the Committee adopted the substitute and reported the bill favorably. (*Id*. 6450-52) Only one member of either party proposed an amendment to the Senate Plan, and the introducer temporarily postponed the amendment, which was never brought up for a vote. (*Id*. 6404)

On February 9, 2012, the Senate passed SJR 1176 by a vote of 31 to 7. *See* Fla. S. Jour. 483 (Reg. Sess. 2012). Seven of twelve Democratic Senators, three of six African-American Senators, and all three Hispanic Senators voted in favor of it. *See id*. No Senator offered an amendment on the floor, and no Senator from the minority party proposed an alternative plan for a vote at any stage. In fact, members of the minority party—including those who voted against SJR 1176—repeatedly praised the fairness and openness of the process. (App. 5450–51, 5529–30, 5543–44, 5547–48, 6165–66, 6606, 6661–62, 6691–92, 6807–08)

SUMMARY OF ARGUMENT

This Court's review of the Joint Resolution is "extremely limited," and the Court should declare the Senate Plan facially valid on all issues properly before it. *First*, the Senate Plan facially complies with the one-person, one-vote requirement because its 1.99% overall population deviation is far lower than the 10% deviation allowed by the federal and Florida constitutions. *Second*, the Senate Plan facially

complies with the contiguity requirement because no Senate district is divided by the territory of another district.

The Senate Plan on its face also complies with the new standards in Amendment 5. The Court, however, should decline to resolve these or any other claims in this proceeding because they implicate "fact-intensive" questions beyond the Court's "extremely limited" truncated review. *In re House Joint Resolution 1987*, 817 So. 2d 819, 825, 831 (Fla. 2002). This Court has already held that it cannot "properly address . . . in the present proceeding" claims of racial discrimination under the Voting Rights Act or the federal or state constitution. *Id.* at 829. This Court also has held that this proceeding is not "the proper forum to address . . . fact-intensive" political gerrymandering claims. *Id.* at 831.

In any event, there are no reasonable grounds for concern that the Senate Plan departs from constitutional requirements. As a threshold matter, the open and inclusive process and broad support for the Plan should alleviate any concern that it is unconstitutional, or discriminates against either political or racial minorities. The Senate Plan was the product of a fair and transparent process of unprecedented length, involving 26 public hearings and extraordinary public participation. It passed the Senate with strong bipartisan support, including a majority of Democratic Senators, and a supermajority of six of the nine minority Senators. In fact, the minority party did not even propose an alternative plan for a vote.

On the substance, the Senate Plan scrupulously adheres to federal and state requirements. The Senate adhered to the recommendations of the Florida NAACP and LatinoJustice PRLDEF with respect to minority districts. Specifically, the Senate Plan preserves without retrogression all "performing" minority districts and creates two new districts with Hispanic majorities. The Senate also formulated the Senate Plan without reference to political party, voter registration, or incumbent residence data, reflecting that it did not favor or disfavor any political party or incumbent. And the Senate Plan succeeds in utilizing political and geographical boundaries where feasible and in achieving compactness as Amendment 5 directs.

Therefore, as demonstrated more fully below, the Court should enter a judgment declaring the Senate Plan facially valid.

ARGUMENT

I. STANDARD OF REVIEW

A. This Court's Review Is Limited To Facial Validity

This Court's "extremely limited" review in this proceeding "only pass[es] upon the facial validity" of the Legislature's reapportionment plan "and not upon any as-applied challenges." *In re House Joint Resolution 1987*, 817 So. 2d at 824. Thus, the only claims that the Court considers are "adherence to the one-person, one-vote constitutional requirement" and "the state constitutional requirement that the districts contain contiguous, overlapping, or identical territory." *Id.* "[F]act-

intensive" claims, including allegations of political gerrymandering or race-based discrimination in violation of the Voting Rights Act or the federal or state constitution, are not "properly address[ed]" in this proceeding. *Id.* at 829–31; *see also id.* at 836 (Lewis, J., concurring) (suggesting that, at least absent "clear error," the Court is unable to resolve fact-intensive voting-rights claims).

This limited scope of review makes perfect sense. *First*, this Court is "ill-equipped to handle" any fact-finding, *Harvard v. Singletary*, 733 So. 2d 1020, 1022 (Fla. 1999), particularly in the "thirty-day window" provided for the Court's review, *In re House Joint Resolution 1987*, 817 So. 2d at 829. "Such claims are better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings based on the evidence presented." *Id.*

Second, all legislative enactments, including a joint resolution of apportionment, are "presumed valid" and constitutional. *Id.* at 825. This presumption reflects the fact "that legislative reapportionment is primarily a matter for legislative consideration and determination" commanding "judicial restraint" and deference. *Id.* at 824. Indeed, the United States Supreme Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task" because it implicates the unique competence and judgment of the elected branches. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978); *see also Upham v.*

Seamon, 456 U.S. 37, 41 (1982) ("[W]e have recognized that reapportionment is primarily a matter for legislative consideration and determination."). This Court, therefore, will uphold the validity of the Legislature's plan "unless it clearly appears beyond all reasonable doubt that, under any rational view," the plan positively conflicts with constitutional requisites. *In re Apportionment Law*, 263 So. 2d 797, 805–06 (Fla. 1972); *see id.* at 806 (The "propriety and wisdom" of a redistricting plan "are exclusively matters for legislative determination.").

Third, "in light of the constitutional time limitations placed on the Court," *In re House Joint Resolution 1987*, 817 So. 2d at 829, the Court has ordered simultaneous briefing, and the parties have no opportunity to file responsive briefs. Resolving fact-intensive questions in the absence of such an opportunity would violate due process, particularly because "the Legislature and other proponents of the redistricting plan must be afforded an opportunity to respond to any evidence of discriminatory effect." *Id.* at 831; *see also Perry v. Del Rio*, 67 S.W.3d 85, 94 (Tex. 2001) (concluding, in a redistricting case, that due process guarantees a "meaningful opportunity to be heard").

B. The New Amendment 5 Standards Are Fact-Intensive And Therefore Unsuited To This Court's Limited Review

This limited scope of review is particularly appropriate due to the additional substantive considerations imposed by Amendment 5, which was approved by Florida voters in November 2010 and codified as Article III, Section 21 of the

Florida Constitution. Amendment 5 prescribes "[s]tandards for establishing legislative district boundaries," and reiterates the equal population and contiguity requirements. *See* Art. III, §§ 21(a), (b), Fla. Const. It also codifies five additional standards, and divides all seven standards into two tiers. *See id.* §§ 21(a)–(b).

The four Tier-One standards direct that:

> 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.

Id. § 21(a). The three Tier-Two standards direct that "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." *Id.* § 21(b).

The Tier-Two standards are subordinate, and do not apply where compliance "conflicts with the [Tier-One] standards" or "with federal law." *Id.* Moreover, the "order in which the standards . . . are set forth" within each tier "shall not be read to establish any priority of one standard over the other within that subsection." *Id.* § 21(c). Thus, when standards within a single tier conflict, it is the Legislature's sole province to reconcile them. *See id.* And because Amendment 5 does not limit the Legislature to the enumerated standards, it does not prevent consideration of other redistricting criteria that do not conflict with those standards. *Brown v. Sec'y of State of Fla.*, No. 11-14554, 2012 WL 264610, at *8 (11th Cir. Jan. 31, 2012).

The Amendment 5 standards other than equal population and contiguity present precisely the kind of "fact-intensive" questions that this Court cannot "properly address . . . in the present proceeding." *In re House Joint Resolution 1987*, 817 So. 2d at 829. Indeed, this Court has already concluded that claims concerning alleged violations of the Voting Rights Act or of federal or state constitutional prohibitions on racial discrimination are "fact-intensive" and not suited to review in this truncated proceeding. *Id.* at 824. This Court also has held that "[t]he present proceeding before this Court is not the proper forum to address" "fact-intensive" political gerrymandering claims. *Id.* Under those prior holdings, then, Amendment 5's requirements concerning minority voting rights and political favoritism are plainly "fact-intensive" and unsuited to review here. Moreover, it is clear that Amendment 5's Tier-Two requirements to "utilize" political and geographical boundaries "where feasible" and to achieve "compact[ness]," Art. III, § 21(b), Fla. Const., also require fact-bound policy judgments about standards lacking any judicially cognizable "bright line," and about their interaction with the "fact-intensive" Tier-One standards, *see infra* Parts IV.C–D.

The fact-intensive nature of these five requirements is not the only reason that this Court cannot review them here. Redistricting requirements are often in tension with each other—and the resolution of such conflicts is precisely the kind of nuanced policy judgment entrusted to the Legislature. *See, e.g.*, Art. III, § 21(c),

Fla. Const.; *see also Wise*, 437 U.S. at 539; *Upham*, 456 U.S. at 41; *In re Apportionment Law*, 263 So. 2d at 805–06. As the United States Supreme Court has recognized, the equal population requirement frequently creates tension with compactness and political boundaries requirements. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983) ("We have recognized that some deviation may be necessary to permit States to pursue other legitimate objectives such as maintaining the integrity of various political subdivisions and providing for compact districts of contiguous territory."); *Mahan v. Howell*, 410 U.S. 315, 323–28 (1973); *see also In re House Joint Resolution 1987*, 817 So. 2d at 826–27. The equal population requirement also conflicts with minority voting rights requirements because it removes the flexibility of using underpopulated districts to expand or preserve minority voting strength. *See infra* Part IV.A.

Amendment 5's minority voting rights requirements frequently will come into conflict with other redistricting criteria. Indeed, "in creating a strengthened minority district it [may be] necessary to extend fingers in several directions in order to include pockets of minority voters," which may run counter to political and geographic boundaries and compactness requirements. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 546 (Fla. 1992) (plurality op.). Moreover, because minority voting so strongly correlates with party affiliation, it can be quite difficult to disentangle minority voting rights considerations from

political gerrymandering or incumbent favoritism. *See Bartlett v. Strickland*, 556 U.S. 1, 22 (2009) (plurality op.) (The "easiest and most likely alliance for a group of minority voters is one with a political party."); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (noting that "race and political affiliation" often "are highly correlated"). Moreover, in addition to Amendment 5's *statewide* protection against retrogression of minority voting power, Section 5 of the Voting Rights Act protects against such retrogression in five counties, complicating the minority voting rights analysis and its potential conflict with other criteria. *See infra* Part IV.A.

Amendment 5's political and geographical boundaries requirement thus may come into tension with equal population and minority voting rights requirements. It also may run counter to the compactness requirement because Florida's unconventional geography and city boundaries create irregular shapes and land areas unsuited to compact geometries. *See infra* Part IV.C. And compactness, in turn, not only conflicts with other redistricting criteria, but is an amorphous concept with no agreed-upon definition or standard. *See infra* Part IV.C.

The difficulty in striking a balance among these competing requirements is no mere abstraction. The redrawing of even a single district in order to elevate a single requirement to greater prominence can create statewide "ripple effects."[1]

[1] *See, e.g.*, *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 316 (D. Mass. 2004) (per Selya, C.J.; Woodlock, J.; and Ponsor, J.) ("[W]e are cognizant that the movement of a single precinct may cause a ripple effect felt

The imprecision of some Amendment 5 standards and the interplay between them thus underscore the conclusion that the Senate's implementation of those standards calls for a "fact-intensive" judgment outside this Court's "extremely limited" review. *In re House Joint Resolution 1987*, 817 So. 2d at 824.

II. The Senate Plan Is Facially Valid Under The One-Person, One-Vote Requirement

The Equal Protection Clause of the United States Constitution requires that state legislative districts be "as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). This standard—and its analogue in the Equal Protection Clause of the Florida Constitution—ensure that "each person's vote carries the same weight—that is, that each legislator represents the same number of voters." *In re House Joint Resolution 1987*, 817 So. 2d at 825. Amendment 5 reiterated this requirement. *See* Art. III, § 21(b), Fla. Const. (directing that "districts shall be as nearly equal in population as is practicable").

This one-person, one-vote mandate does not require that "state legislative districts" achieve exact population equality, but permits "minor deviations from mathematical equality." *Brown*, 462 U.S. at 842. Any "apportionment plan with a maximum population deviation under 10% falls within this category of minor

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several districts away."); *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 100 (Cal. Ct. App. 2006) ("[Redistricting] is complicated by what is known as the 'ripple effect,' whereby casting one district on the water produces ripples felt throughout the state. If uncontrolled, this effect may result in the initial choice of a perfect district in one place leading to intolerably imperfect districts elsewhere.").

deviations" and is presumed to comply with the one-person, one-vote requirement. *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993); *see also Brown*, 462 U.S. at 842. Moreover, divergences based on "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds*, 377 U.S. at 579, such as a "desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory," are permissible. *Id.* at 578; *see also Mahan*, 410 U.S. at 328 (allowing divergence "to advance the rational state policy of respecting the boundaries of political subdivisions").

In 2002, this Court held that a *2.79%* overall population deviation "achieved a mathematical preciseness in the districts that complies with the equal protection requirements of both the Florida and the United States Constitutions." *In re House Joint Resolution 1987*, 817 So. 2d at 827. The Senate Plan is therefore plainly permissible because it accomplishes an even smaller population deviation. Under the 2010 Census, Florida's population is 18,801,310, making 470,033 people the ideal population for each of Florida's 40 Senate districts. (App. 890) The most populous Senate district under the Senate Plan is District 3, which has a population of 474,685 people and deviates from the ideal population by 4,652 people, or 0.99%. (*Id.*) The least populous Senate district is District 23, which has a population of 465,343 people and deviates from the ideal population by 4,690 people, or 0.99%. (*Id.*) The overall deviation, therefore, is 9,342 people, or less

than *1.99%*—well below the 10% deviation permitted by the federal and state constitutions and the 2.79% this Court upheld in 2002. The Senate Plan is facially valid under the one-person, one-vote requirement.

III. The Senate Plan Is Facially Valid Under The Contiguity Requirement

The Florida Constitution requires that districts consist of "contiguous, overlapping or identical territory." Art. III, § 16(a), Fla. Const.; *see id.* § 21(a). Because "contiguous" means "in actual contact," a district satisfies this requirement where no part of it is "isolated from the rest by the territory of another district." *In re House Joint Resolution 1987*, 817 So. 2d at 827. A district is not contiguous if parts of it "touch only at a common corner or right angle." *Id*.

In a contiguous district, a person can travel from any point in the district to any other point without leaving the district. *Id*. at 828. This does not require a "paved, dry road," or "convenience or ease of travel, or travel by terrestrial rather than marine forms of transportation." *Id*. The "presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district, does not violate this Court's standard for determining contiguity." *Id*. Thus, ten years ago, the Court upheld a district that crossed "Lake Okeechobee without connecting territory on the lake's northern or southern shores." *Id*.

An examination of the Senate Plan demonstrates that the districts are contiguous. No district is divided into parts that either do not touch at all or that

touch only at a common corner. While some Senate districts cross bodies of water, no part of any district is isolated from the rest by the territory of another district. The Senate Plan therefore facially complies with the contiguity requirement.

IV. The Remaining Amendment 5 Standards Are Fact-Intensive, And The Senate Plan Contains No Clear Error In Their Application

Because the Senate Plan comports with the one-person, one-vote and contiguity requirements, it is entitled to be upheld under this Court's clear precedent. *See In re House Joint Resolution 1987*, 817 So. 2d at 824. Again, even in isolation, the remaining Amendment 5 standards—minority voting rights, political favoritism, utilization of political and geographical boundaries, and compactness—inherently involve "fact-intensive" questions that this Court cannot "properly address . . . in the present proceeding." *Id.* at 829; *see supra* Part I.B.

And, as noted, any effort to somehow consider these criteria in isolation ignores the reality of how redistricting plans are actually created. It entails a complex balancing of criteria that are often in tension, requiring the line-drawer to engage in a complicated reconciliation of different priorities. Any effort to focus on one element in isolation is inherently unrealistic and, indeed, counter-productive because any effort to "fix" the isolated "problem" will have a negative ripple effect on other criteria. Amendment 5 entrusts that nuanced balancing act and harmonization of competing requirements to the Legislature, *see* Art. III, § 21(c), Fla. Const.—and there is no way for this Court to meaningfully review that

judgment in this "thirty-day window," let alone without a developed factual record and responsive briefing. *In re House Joint Resolution 1987*, 817 So. 2d at 825.

But even if the Court were to review these issues here, it could not find any error, let alone a "clear error," affecting the Senate Plan's facial validity. *See id*. at 836 (Lewis, J., concurring). *First*, the process for enacting the Plan was inclusive and transparent. The unprecedented level of public participation and the extensive use of public input to draw districts undercuts any allegation of facial infirmity.

The committee bill originally prepared by professional staff was based, subject to legal requirements, on the testimony delivered at 26 public hearings, feedback at six interim committee meetings, and 46 citizen-drawn maps. (App. 1000) The committee bill was published on November 28, 2011, and the public was invited to comment. (*Id*. 1001) Based on feedback from the public and supervisors of elections, professional staff made minor improvements, and a new map was published and widely publicized on December 30, 2011. (*Id*. 6529–31) The Senate passed that plan with bipartisan support, majority Democratic support, and super-majority support from minority Senators. *See* Fla. S. Jour. 483 (Reg. Sess. 2012). Seven of the twelve Senators from the minority party voted in favor of the Senate Plan. Three of the six African-American Senators and all three Hispanic Senators—a two-thirds majority of minority Senators—voted in favor of the Senate Plan. This voting record belies any contention that the Senate Plan

reflects an intent to discriminate against minorities or any political party.

Second, at no point during the legislative process did any Senator from the minority party introduce any alternative plan for a vote. That no facial failing was discovered through the public's extensive participation, and that nothing revealed through that process motivated the minority party to propose an alternative plan, further demonstrate the Senate Plan's facial validity.

Third, the Senate Plan adhered to the recommendations of the Florida NAACP and LatinoJustice PRLDEF regarding the creation of minority districts. (*Id*. 6600–01, 6646, 6671–72, 6708–09, 6852) The Senate Plan, therefore, cannot credibly be attacked as abridging minority opportunity or voting strength.

Fourth, the Senate drew its Plan without any political data or incumbent addresses. In fact, its redistricting software included no such data. (*Id*. 5786–87)

Moreover, even a cursory review of each of the remaining Amendment 5 standards demonstrates that there is nothing in the Plan that could call into question its validity. Thus, even if the Court were to reverse its precedent and review these requirements, it should declare the Senate Plan valid.

A. The Minority Voting Rights Standards Are Fact-Intensive, And No Clear Error Appears On The Face Of The Senate Plan

Amendment 5 created two distinct protections for racial and language minorities. *See Advisory Opinion to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 188–89 (Fla. 2009) (plurality op.).

First, Amendment 5 codified the retrogression principle of Section 5 of the Voting Rights Act, and extended it statewide by prohibiting reapportionment plans drawn with the "intent or result of . . . diminish[ing] [racial or language minorities'] ability to elect representatives of their choice." Art. III, § 21(a), Fla. Const.; *compare* 42 U.S.C. § 1973c(b) (prohibiting redistricting plans that have "the purpose of or will have the effect of diminishing the ability of any citizens . . . on account of race or color . . . to elect their preferred candidates of choice" in any covered jurisdiction). *Second*, Amendment 5 codified the protections of Section 2 of the Voting Rights Act by prohibiting plans drawn with the "intent or result of prohibiting denying or abridging of the equal opportunity of racial or language minorities to participate in the political process." Art. III, § 21(a), Fla. Const.; *compare* 42 U.S.C. § 1973(b) (prohibiting redistricting plans that afford minorities "less opportunity than other members of the electorate to participate in the political process"); *see also Brown*, 2012 WL 264610, at *8 (noting that the voting-rights provisions of Florida's companion Amendment 6 "follow[] almost verbatim the requirements embodied in the Voting Rights Act").

Section 5 of the Voting Rights Act "suspend[s] all changes in state election procedure," including redistricting plans, in jurisdictions covered by the Act "until they are submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General" of the United States. *Nw. Austin Mun.*

Util. Dist. No. 1 v. Holder, 129 S. Ct. 2504, 2509 (2009); *see also Beer v. United States*, 425 U.S. 130, 133 (1976). Such preclearance is granted only if the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Nw. Austin*, 129 S. Ct. at 2509; *see also* 42 U.S.C. § 1973c(a). To determine whether the change complies with Section 5, the district court or the Department of Justice compares the change to the "benchmark" practice then in effect and denies preclearance unless it is shown that the new practice will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. This preclearance procedure ordinarily involves extensive factual development and fact-finding, including expert testimony. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 349–53 (2000); 28 C.F.R. § 51.27, 51.28.

Because five Florida counties (Collier, Hardee, Hendry, Hillsborough, and Monroe) are covered jurisdictions under Section 5, any changes to Florida's legislative apportionment laws—whether enacted by the Legislature or ordered by this Court—are subject to preclearance. *See Nw. Austin*, 129 S. Ct. at 2509; *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982) ("[T]he presence of a court decree does not exempt the contested change from § 5."). Therefore, the Legislature submitted Amendment 5 to the Justice Department for preclearance shortly after its enactment. (App. 1016–27) The Legislature asserted that

Amendment 5 "preserve[s] without change the Legislature's prior ability to construct effective minority districts" and that, "in promoting minority voting strength, the Legislature may continue to employ whatever means were previously at its disposal." (*Id.* 1023) The Legislature maintained that Amendment 5 is not retrogressive because the Tier-One minority voting rights standards "hold[] minorities harmless from the [other] restrictions imposed by" Amendment 5. (*Id.* 1024) No party that filed comments on the Legislature's submission disputed this ultimate conclusion. (*Id.* 1028–77) The Department of Justice precleared Amendment 5 on March 31, 2011. (*Id.* 1078)

This Court held in 2002 that claims of discrimination in violation of the Voting Rights Act or federal or state constitutional norms require "fact-intensive review" unavailable in the "thirty-day window" provided for this proceeding. *In re House Joint Resolution 1987*, 817 So. 2d at 825. This Court thus should decline to review the Senate Plan's compliance with Amendment 5's voting rights requirements in this proceeding. *See id.*; *see also Easley*, 532 U.S. at 242 (Because "the legislature 'must have discretion to exercise the political judgment necessary to balance competing interests,' . . . courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.'" (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis in *Easley*).

In this regard, it is important to note that it is essentially undisputed that Amendment 5's voting-rights provisions incorporate Section 2 and Section 5 of the Voting Rights Act, for a number of reasons. *First*, the textual similarities are obvious. *See Brown*, 2012 WL 264610, at *8 & n.9. *Second*, this Court has held that, in the interpretation of an initiative amendment, the informational materials available to the electorate when the amendment is adopted are highly relevant. *Williams v. Smith*, 360 So. 2d 417, 420 n.5 (Fla. 1978). In a fact-finding proceeding, it would be shown that those materials (including statements of the amendment sponsor and civil-rights organizations) supported this construction. *See, e.g.*, Amici Curiae Br. of Florida State Conference of NAACP Branches and Democracia Ahora, Inc., at 4–5, *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010) (No. SC10-1362). *Third*, Section 2 and Section 5 are illuminated by decades of judicial interpretation, and therefore provide definite and workable standards, which facilitates sound judicial and legislative administration. *Fourth*, the creation of race-based mandates different from Section 2 and Section 5 would raise serious constitutional concerns. In a series of decisions, the Supreme Court has carefully calibrated Section 2 and Section 5 to comport with constitutional limitations on race-based redistricting. *See Nw. Austin*, 129 S. Ct. at 2511–13; *Bartlett*, 556 U.S. at 21–22 (plurality op.); *LULAC v. Perry*, 548 U.S. 399, 445–46 (2006) (plurality op.); *Miller*, 515 U.S. at 923. The Court has cautioned that further extensions of

race into redistricting might violate the promise of racial neutrality embodied in the Equal Protection Clause. *Bartlett*, 556 U.S. at 21–22; *LULAC*, 548 U.S. at 446.

In sum, just as the Court declined to review compliance with the Voting Rights Act, it should not wade into the fact-intensive issue of compliance with Amendment 5's minority voting rights protections. But even if this Court reviews for "clear error," *see In re House Joint Resolution 1987*, 817 So. 2d at 836 (Lewis, J., concurring), it should uphold the Senate Plan because it facially complies with those requirements.

1. On Its Face, The Senate Plan Does Not Diminish Minority Voters' Ability To Elect Representatives Of Their Choice

Ability To Elect Standard. Amendment 5's retrogression principle tracks a recent amendment implementing an "ability to elect" standard in Section 5 of the Voting Rights Act. *Compare* Art. III, § 21(a), Fla. Const. *with* 42 U.S.C. § 1973c(b). Prior to that 2006 amendment, the United States Supreme Court held that the Section 5 retrogression standard was not assessed "solely on the comparative *ability* of a minority group *to elect* its candidate of choice." *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), *superseded by statute* at 42 U.S.C. § 1973c. Instead, the Supreme Court held, compliance with Section 5 could be achieved even if the number of performing minority districts was reduced. *Id.* at 481.

Thus, under *Ashcroft*, jurisdictions could justify some reduction in the number of ability-to-elect districts by "creat[ing] more influence or coalitional

districts." *Id.* at 482. An "influence" district is one where minority voters constitute a minority and "may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 481–85. A "coalition" district is also a district where minorities are not a majority, but minority-preferred candidates can win "by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group." *Id.* at 481. Broadly stated, in coalition districts, minority-preferred candidates are more likely to win than in "influence" districts, but "perhaps not quite as likely" to win as in majority-minority districts. *Id.* at 480. In short, *Ashcroft* held that Section 5 allowed a covered jurisdiction to replace majority-minority or "safe" districts with "influence and coalitional districts," particularly if the new plan did not "change[] the minority group's opportunity to participate in the political process." *Id.* at 482.

In 2006, Congress overruled *Ashcroft* by specifically amending Section 5 to replace *Ashcroft's* flexible standard with a straightforward prohibition that directly forbids any diminution in minorities' ability to elect. Congress stated that *Ashcroft* "allow[s] the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give 'influence' to the minority community while removing that community's ability to elect candidates." H.R. Rep. No. 109-478, at 44 (2006). Congress also warned that "[i]f covered jurisdictions are permitted to break up districts where minorities form a

clear majority of voters and replace them with vague concepts such as influence, coalition, or opportunity . . . this may actually facilitate racial discrimination against minority voters." S. Rep. No. 109-295, at 20 (2006). Congress declared that permitting "these trade-offs is inconsistent with the original and current purpose of Section 5." H.R. Rep. No. 109-478, at 44. Accordingly, after the 2006 amendments overruled *Ashcroft*, it was no longer permissible under Section 5 to "create[] the risk that the minority group's preferred candidates may lose" or otherwise "risk having fewer minority representatives in order to" create more influence or coalition districts. *Ashcroft*, 539 U.S. at 481–83.

Specifically, Congress amended Section 5's text to prevent any voting changes, including reapportionment plans, that "have the effect of diminishing the *ability* of [minorities] *to elect* their preferred candidates of choice." 42 U.S.C. § 1973c(b). As Congress explained, the new "Section 5 is intended to be specifically focused on whether the electoral power of the minority community is more, less, or just as able to elect a preferred candidate of choice after a voting change as before." H.R. Rep. No. 109-478, at 46. This exclusive focus on minority voters' "ability to elect" their candidates of choice ensures that "changes that leave a minority group less able to elect a preferred candidate of choice . . . cannot be precleared under Section 5." *Id*. Thus:

> By overruling *Ashcroft*, the new section 5, at a minimum, seeks to prevent tradeoffs between influence districts and ability-to-elect

> districts. . . . For the supporters of the new section 5, . . . *Ashcroft* opened the possibility that under the cloak of influence districts, jurisdictions would create districts in which minorities had no influence at all. Regardless of whether one agrees with that take on *Ashcroft*, it is clear that the [2006 amendment's] ability-to-elect language attempts to remove the possibility of a tradeoff with influence districts.

Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 177 Yale L. J. 174, 236 (2007). Moreover, the prohibition against diminishing the ability to elect does not apply only to majority-minority districts. Under the new standard,

> Diminishing a district's ability to elect does not necessarily mean reducing it from a safe district to a hopeless district . . . . It could mean reducing a safe district to a competitive district, or a competitive district to a hopeless district or any downward shifts along that very wide spectrum.

Id. at 243–44; *see also LULAC*, 548 U.S. at 479–80 (Stevens, J., dissenting).

Amendment 5 incorporates this "ability to elect" formulation of the retrogression prohibition that Congress adopted in 2006. *See* Art. III, § 21(a), Fla. Const. (protecting minorities' "ability to elect" candidates of choice). Thus, under Amendment 5, a plan may not leave a minority group "less able to elect a preferred candidate of choice," or eliminate performing minority districts, even if it replaces them with "influence and coalitional districts." H.R. Rep. No. 109-478, at 44–46.

In addition to Amendment 5's *statewide* protections of minority voting power, Section 5 prohibits diminishing minorities' ability to elect in the five covered counties. While Section 5 and Amendment 5 have the same *substantive*

retrogression standard, they differ in terms of the territory covered, and therefore the geographical scope of the retrogression analysis. Since Section 5 applies only to the five covered counties, it protects from retrogression only minority voters who reside *within those counties*. *See* 42 U.S.C. § 1973c. Thus, the question under Section 5 is only whether minorities within those counties have the same ability to elect. Even if an ability-to-elect district is maintained, Section 5 is violated unless the minorities in the covered counties remain within that district to the same extent as under the "benchmark" plan. Stated differently, while the location of an ability-to-elect district may be shifted to different counties under Amendment 5, a shift to non-covered counties would violate Section 5.

For example, benchmark Senate District 39 is the home district of minority voters in Collier and Monroe Counties, both of which are covered by Section 5. To preserve the ability-to-elect district that existed in the benchmark plan, and to avoid a denial of preclearance, the Senate extended the district (as in the benchmark plan) into the City of Miami to capture additional minority voters. (App. 695) Indeed, ten years ago, the Department of Justice denied preclearance to a Florida House plan that removed minority voters in Collier County from a majority-minority district, even though the plan made up for that move by creating a successor district in non-covered counties. *See* U.S. Dep't of Justice Letter (July 1, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_070102.php.

This imperative to comply with Section 5 within the covered counties thus ties the Legislature's hands, requiring that minority districts stay anchored in the covered counties, even if moving them would be preferable under neutral principles.

The Senate Plan's Preservation Of Minority Voters' Ability To Elect. The Senate Plan facially complies with Amendment 5 because it does not diminish any minority group's "ability to elect representatives of [its] choice." Art. III, § 21(a), Fla. Const. Indeed, during the drafting of the Senate Plan, the Senate Committee on Reapportionment agreed by unanimous consent that professional staff should draw districts in which minorities are "as likely" as in the benchmark districts to elect candidates of their choice. (App. 6004, 6006, 6833)

The benchmark plan contains six African-American districts. (*Id.* at 5761) The Senate relied on a map submitted by the Florida NAACP as the guidepost for drawing African-American districts. (*Id.* at 6600–01, 6646, 6671–72, 6708–09, 6852) As the maps and statistics in the appendix to this Brief depict, the Senate Plan preserves all six of these districts and, therefore, does not diminish the ability of African-American voters to elect their candidates of choice.[2]

[2] Two of those districts—Districts 18 and 29—were underpopulated by 65,211 people (13.9%) and 72,899 people (15.5%) respectively under the 2010 Census. Because areas contiguous to those districts had a lower black voting-age population (BVAP) than the existing underpopulated districts, the total BVAP in each of those districts declined slightly as compared to the benchmark plan. (App. 890, 922) This slight change, besides being unavoidable, has no cognizable effect on African-Americans' ability to elect their preferred candidate in those districts.

The benchmark plan also contains three performing Hispanic-majority districts, all of which the Senate Plan preserves. It also adds two more Hispanic-majority districts, although Hispanics constitute only a thin VAP majority: 50.4% in District 35 and 50.5% in District 14. (*Id*. 890) District 14 was added in Central Florida based on LatinoJustice PRLDEF's proposal (*id*. 6620), while the other was added in Miami-Dade County. All three Hispanic Senators voted for the Plan.

Some of the plans submitted by groups or individuals seek to accomplish other redistricting objectives by dismantling safe minority districts and replacing them with minority "influence" or "coalition" districts. (App. 6689, 6707–09) But that approach runs counter to the constitutional and statutory mandate to preserve without diminishment minority voters' "ability to elect" candidates of their choice, Art. III, § 21(a), Fla. Const.; 42 U.S.C. § 1973c(b), and severs constituent-representative relationships, to the disadvantage of minority and other voters.

In short, it is crystal clear that the Senate Plan facially complies with Amendment 5's "ability to elect" requirement. Art. III, § 21(a), Fla. Const.

2. The Senate Plan Facially Complies With Amendment 5's Equal Opportunity Requirement

Amendment 5's prohibition on plans drawn with "the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process" is modeled on Section 2 of the Voting Rights Act. Art. III, § 21(a), Fla. Const.; *compare* 42 U.S.C. § 1973(b). This Court

already has determined that Section 2 claims are outside its "extremely limited" review because they involve a "complex evidentiary standard" and "fact-intensive circumstances." *In re House Joint Resolution 1987*, 817 So. 2d at 824–29.

A Section 2 vote dilution claim requires three threshold showings: "(1) The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group must be politically cohesive, and (3) the majority must vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." *Bartlett*, 556 U.S. at 11 (plurality op.) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)); *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

The third requirement—racial bloc voting—is particularly unsuited to this Court's truncated review because there is "no simple doctrinal test for the existence of legally sufficient racial bloc voting." *Gingles*, 478 U.S. at 58 (plurality op.); *see also id.* at 83 (White, J. concurring) (disagreeing with plurality's interpretation of racial bloc voting). In fact, "the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices," and "[t]he amount of white bloc voting that can generally minimize or cancel black voters' ability to elect representatives of their choice . . . will vary from district to district according to a number of factors." *Id.* at 56 (plurality op.). In other words, "the degree of

racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances." *Id.* at 58; *see also id.* at 56 & n.24 (listing "illustrative, not comprehensive" factors); *LULAC v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (holding that a court reviewing a section 2 claim also must consider "nonracial voting preferences," such as partisan politics, to ascertain the extent of racial bloc voting). Indeed, no majority opinion of the Supreme Court has resolved the definition of racial bloc voting. *See Bartlett*, 566 U.S. at 16–19.

Even after a party has made the threshold showings, a court must engage in a fact-bound inquiry into "the totality of the circumstances . . . to determine, based upon a searching practical evaluation of past and present reality, whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79; *see also Bartlett*, 556 U.S. at 12 (plurality op.); *De Grandy*, 512 U.S. at 1011. "This determination is peculiarly dependent on the facts of each case," *Gingles*, 478 U.S. at 79, because "the ultimate conclusions about equality of inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of the relevant facts," *De Grandy*, 512 U.S. at 1011.

Thus, this Court should adhere to its precedent and decline to review any claim under Section 2 or its Amendment 5 counterpart. *See In re House Joint Resolution 1987*, 817 So. 2d at 824–29. But if this Court were to address such claims, it should declare the Senate Plan facially valid. Indeed, any claimed

violation of the equal opportunity requirement necessarily fails in the absence of proof that another majority-minority district could have been created, and that the failure to create it resulted in unequal opportunities for minority voters. *See Bartlett*, 556 U.S. at 11 ("The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district."); *De Grandy*, 512 U.S. at 1008 (Section 2 "requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice."). This cannot be shown. In fact, the Senate Plan adhered to proposals of the Florida NAACP and LatinoJustice PRLDEF regarding the creation of majority-minority districts. (App. 6852)

For these same reasons, any allegations that the Senate Plan involves illegal "packing" of minority voters likewise fail. The concept of "packing" necessarily requires that excess minority voters in a super-majority-minority district are "wasted" because they could have contributed to the creation of an *additional* minority district elsewhere. Moreover, since Section 2 potentially requires only districts in which minorities are a numerical majority, *see Bartlett*, 556 U.S. at 22, it might sometimes require that a district be "unpacked" to the extent necessary to create an additional majority-minority district—but never to create mere influence districts, crossover districts, or coalition districts. *See id.*; *LULAC*, 548 U.S. at 446 (plurality op.) (extending legal protection to influence districts "would

unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions"); *Perry v. Perez*, 132 S. Ct. 934, 944 (2012) (per curiam); *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 668–71 & n.3 (5th Cir. 2009) (concluding that Section 2 does not require districts to be unpacked where an additional majority-minority district cannot be created); *Bone Shirt v. Hazeltine*, 461 F. 3d 1011 (8th Cir. 2006) (finding packing where a portion of the district's 90% minority population could be combined with a neighboring district to create a second majority-minority district). Thus, "packing" might occur when a minority group has "sufficient numbers to constitute a majority in three districts" but is "packed into two districts in which it constitutes a super-majority," *Voinovich*, 507 U.S. at 153, but it does not occur absent the potential for an additional majority-minority district. No "packing" can be shown, and the Plan is facially valid.

B. The Political Favoritism Prohibition Is Fact-Intensive, And The Senate Plan Contains No Clear Error

Amendment 5 provides that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Art. III, § 21(a), Fla. Const. This provision is akin to a prohibition on political gerrymandering. *Compare id. with Davis v. Bandemer*, 478 U.S. 109 (1986), *and Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004). Ten years ago, this Court held that "[t]he present proceeding . . . is not the proper forum to address" political gerrymandering claims. *In re House Joint Resolution 1987*, 817 So. 2d at 831.

Indeed, political gerrymandering and favoritism claims present "fact-intensive" issues unsuited to this Court's truncated review, *see id.*, for at least four reasons. *First*, those claims examine the "intent" and motivation of the Legislature's various members. Art. III, § 21(a), Fla. Const. But "[p]roving the motivation behind official action is often a problematic undertaking," *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), and "is often an unsatisfactory venture," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983). Indeed, "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co.*, 461 U.S. at 216.[3] Congress itself has warned that it is "inordinately difficult" to ascertain a discriminatory "purpose" for voting procedures enacted by legislatures, even in the racial context, since they typically involve varied interests of myriad legislators selecting among countless proposals. *See Gingles*, 478 U.S. at 44; S. Rep. No. 97-417, at 36–37 (1982).

Second, an inquiry into the intent of legislators is especially difficult in the political realm, as the legacy of political gerrymandering claims under the federal

[3] *See also Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. . . . It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed.").

constitution demonstrates. In 1986, the United States Supreme Court held in *Davis v. Bandemer* that political gerrymandering claims are justiciable, *see* 478 U.S. at 118–20—but "the six-Justice majority could not discern what the judicially discernable standards" for such claims "might be," *Vieth*, 541 U.S. at 279 (plurality op.). In the eighteen years following *Bandemer*, the lower courts did not "succeed[] in shaping the standard that the [Supreme] Court was initially unable to enunciate." *Vieth*, 541 U.S. at 279. This led a four-Justice plurality in *Vieth* to conclude that "political gerrymandering claims are nonjusticiable" because "no judicially discernible and manageable standards have emerged." *Id.* at 281. Justice Kennedy agreed in a concurring opinion that no workable standard had yet emerged. *See id.* at 311 (Kennedy, J., concurring).

As this Court recognized ten years ago, a plaintiff advancing a political gerrymandering claim under the Equal Protection Clause must "establish a factual basis . . . of actual discriminatory effect"—which involves a complex fact-bound inquiry. *In re House Joint Resolution 1987*, 817 So. 2d at 831. The reasons that it is extremely difficult, if not "impossible to assess the effects of partisan gerrymandering," *Veith*, 541 U.S. at 287 (plurality op.), were set forth by both the dissenting and plurality opinions in *Veith.* As Justice Souter's dissent noted, "[t]he choice to draw a district line one way, not another, always carries some consequences for politics," *id.* at 343 (Souter, J., dissenting), and the plurality

explained that a political party's electoral fortunes may rise and fall for reasons unrelated to redistricting. Indeed, unlike race, partisan affiliation is "not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Id.* at 287 (plurality op.). Moreover, "the political party which puts forward an utterly incompetent candidate will lose even in its registration strongholds." *Id.*

Significantly, all Justices in *Veith* agreed with the *Bandemer* plurality that an intent or effect of disfavoring a political party cannot be shown from the fact that a party has "failed to achieve representation commensurate with its numbers, or [found] its winning of elections more difficult." *Id.* at 281 (citing *Bandemer*, 478 U.S. at 132); *see id.* at 338 (Stevens, J. dissenting); *id.* at 352 n.7 (Souter, J. and Ginsburg, J., dissenting); *id.* at 357–58 (Breyer, J. dissenting) (absence of "proportional representation" of each party's statewide registration is insufficient).

The Oregon Supreme Court's decision in *Hartung v. Bradbury* reinforces this conclusion. That case involved a redistricting challenge brought under a state law that prohibited the drawing of any district "for the purpose of favoring any political party, incumbent legislator or other person." *Hartung v. Bradbury*, 33 P.3d 972, 980 (Or. 2001) (quoting Or. Rev. Stat. § 188.010(2)). The Oregon Supreme Court rejected that challenge, confirming that "the mere fact that a particular reapportionment may result in a shift in political control of some

legislative districts . . . falls short of demonstrating such a purpose." *Id.* at 987.[4]

In short, since it is extremely difficult to assess even whether a plan has the *effect* of "favor[ing] or disfavor[ing] a political party," it is a Sisyphean task to discern whether the Legislature had such an *intent* (and quite impossible in the brief appellate context here). After all, it is widely recognized that "effect" is easier to establish than whether a multi-member legislature *intended* such an effect. *Gingles,* 478 U.S. at 44; S. Rep. No. 97-417, at 36–37. If this is so in the *racial* context, where there are established standards for assessing a discriminatory "result" or "effect," it is doubly true in the political context where there concededly is no cognizable norm demarking an impermissible "effect."

Third, it likewise is unclear how district drawing can even have the effect of favoring or disfavoring an incumbent and, thus, evince an intent to do so. *See* Art. III, § 21(a), Fla. Const. To cite but one example, it is quite difficult to discern, as a general matter, whether incumbent pairings favor of disfavor incumbents. Courts routinely have held that "avoiding contests between incumbent Representatives" is a legitimate redistricting objective. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Vieth*, 541 U.S. at 284 (describing as legitimate objective "protection of

[4] The laws of several states contain similar prohibitions. *See, e.g.*, Art. XXI, § 21(e), Cal. Const.; Art. II, § 2A, Del. Const.; Art. IV, § 6, Haw. Const.; Art. II, § 43(5), Wash. Const.; Iowa Code § 42.4(5); Mont. Code Ann. § 5-1-115(3); Or. Rev. Stat. § 188.010(2); Wash. Rev. Code § 44-05-090(5). *Hartung* appears to be the only case in which any of these provisions was the subject of litigation.

incumbents of all parties"). Conversely, pairing incumbents is a well-recognized, traditional *gerrymandering* tool designed to disfavor incumbents or the minority party.[5] Moreover, the neutral, traditional principle of preserving district cores (where it does not conflict with superior requirements) may often have the effect, though not the intent, of maintaining separation between incumbents.

Some might nonetheless argue that pairing incumbents is somehow required to rebut the appearance that incumbents have been *favored*. In light of this stark conflict between competing principles, any resolution of whether incumbent pairings or other effects on incumbents favors or disfavors them requires, at a minimum, a searching, nuanced analysis of the redistricting plan as a whole—an examination not even remotely realistic here. And, again, even if such an *effect* could reliably be discerned, it would not be remotely possible to fairly assess the significantly more complicated question of whether it was *intentional*.

Finally, political gerrymandering claims are fact-intensive and inappropriate for this Court's review due to the strong correlation between race and partisan

[5] *Larios v. Cox*, 300 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004) (overturning plan where "Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible"), *summ. aff'd*, 524 U.S. 947 (2004); *Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 402 (W.D. Va. 1991) (discussing plan that paired Republican incumbents); S. Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 552 (Nov. 2004) ("Contemporary partisan gerrymandering" may involve "redrawing the lines to place the residences of two incumbents in the same district.").

affiliation. *See, e.g.*, *Bartlett*, 556 U.S. at 22 (plurality op.); *Easley*, 532 U.S. at 242. Given the "high[] correlat[ion]" between race (and ethnicity) and political affiliation, *Easley*, 532 U.S. at 242, there is a strong likelihood that mandatory efforts to preserve and create minority districts could be misperceived as an action intended to favor (or disfavor) a political party or incumbent. Given that all such minority districts have direct political consequences in the district itself and adjacent districts (in light of high correlations between race and party), completely neutral efforts to avoid minority retrogression or vote dilution could be erroneously adjudged to be motivated by politics. Thus, at a minimum, the most careful and searching scrutiny is required to disentangle proper efforts to help minorities from improper efforts to favor political parties or incumbents.

If this Court reviews the Senate Plan's compliance with Amendment 5's political and incumbent favoritism prohibition, it should certainly find the Plan facially valid. The Senate went to great lengths to adhere to this prohibition, and the record contains no evidence of intentional partisan or incumbent favoritism. In fact, out of an abundance of caution, the Senate excluded election histories and voter registration data from the redistricting software that professional staff used to draw the Senate districts. (App. 5786–87, 6831–33) The software thus displayed no visual or statistical information about political parties and incumbents, and the Senate maintained no list of incumbents' addresses. (*Id*. 6534) Discussions

between Senators and professional staff were conducted on the express premise that personal or partisan advantage would not be discussed or considered. (*Id*.)

Tellingly, this nonpartisan process resulted in strong bipartisan support. Seven of twelve members of the minority Democratic party voted for the Joint Resolution, *see* Fla. S. Jour. 483 (Reg. Sess. 2012), and members of the minority party—including those who voted against the Joint Resolution—repeatedly praised the fairness and openness of the process (App. 5450–51, 5529–30, 5543–44, 5547–48, 6165–66, 6606, 6661–62, 6691–92, 6807–08). The unprecedented speed and harmony with which the Legislature accomplished redistricting, standing alone, establishes the exclusion of partisan and personal calculations, and that the Legislature did not draw any districts with an improper "intent to favor or disfavor a political party or an incumbent." Art. III, § 21(a), Fla. Const.

C. Amendment 5's Political And Geographical Boundaries Standard Is Fact-Intensive, And The Senate Plan Contains No Clear Error

Amendment 5 directs that "districts shall, where feasible, utilize existing political and geographical boundaries." Art. III, § 21(b), Fla. Const. This Tier-Two standard is subordinate to Tier-One and federal law requirements. *See id.*

The political and geographical boundaries requirement directly presents the kind of "fact-intensive" issues that cannot be meaningfully reviewed in this truncated proceeding. *In re House Joint Resolution 1987*, 817 So. 2d at 824. *First*, this requirement frequently conflicts with other redistricting criteria. As discussed,

the one-person, one-vote mandate often requires a departure from political and geographical boundaries. *See supra* Part II. Moreover, as this Court has experienced, federal or state minority voting rights requirements may require "extend[ing] fingers in several directions in order to include pockets of minority voters" without adherence to political and geographical boundaries. *In re Senate Joint Resolution 2G*, 601 So. 2d at 546 (plurality op.). Finally, it is a "plain fact" that boundary requirements "tend[] to conflict" with compactness norms. *Matter of Legislative Districting of State*, 475 A.2d 428, 440 (Md. 1984).

Equally important, Amendment 5's political and geographical boundaries requirement not only is in tension with *other* criteria, but also is *internally* inconsistent because it necessitates choices between political boundaries and geographical boundaries. Because political and geographical boundaries are usually not identical, it is often not feasible or desirable to draw districts that utilize *both* kinds of boundaries in equal measure. The decision between competing alternatives is left to the Legislature's discretion for at least four reasons.

First, Amendment 5 creates no priority between political and geographical boundaries, and leaves to the Legislature "to establish any priority of one . . . over the other." Art. III, § 21(c), Fla. Const. The Legislature therefore can elect to treat geographical boundaries as more inviolable than political boundaries, treat them on par with each other, or elevate certain geographical boundaries over certain

political boundaries, or vice versa. The Constitution, for example, would find no fault with a decision to follow the St. Johns River through Putnam County or the Peace River through Charlotte County, even though doing so would break political boundaries. In fact, Legislature heard testimony that geographical boundaries, which tend to be visible and static over time, are *superior* for use as district lines to political boundaries, which tend to be invisible and subject to change.[6] And the preference given to political or geographical boundaries might differ according to the different regions and features of the State.

Second, unlike political boundaries, which generally refer to municipal and county boundaries, *see Advisory Opinion to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 179 (Fla. 2009) (plurality op.), geographical boundaries lack a precise definition and are not readily discernible by an appellate court on a bare factual record. They may include natural boundaries such as bays, lakes, rivers, or bodies of water, or man-made demarcations such as highways or well-traveled roadways. For example, Senate

[6] For example, a representative of the Leon County Supervisor of Elections Office urged the Legislature to prefer visible geographical boundaries, such as "a railroad or a river or something you could describe to a person," to municipal boundaries, which are invisible and subject to change through annexations. (App. 5668–69) Jim Bagby, a city councilman from Destin, testified to a similar effect. (*Id*. at 5653–54 ("[P]eople don't know necessarily [where] the county line is . . . , unless they live right there. But they know where Interstate 10 is, they know where Highway 98 is, they know where the Choctawhatchee Bay is, okay, everybody knows that, so they know in an instant where they are."))

District 1 breaks county boundaries but utilizes municipal and geographical boundaries to form its perimeter, including the Intercoastal Waterway, the Yellow River, Interstate 10, and parts of the boundaries of Pensacola and Lynn Haven. (App. 690.) The choice to select such boundaries and choose between them is uniquely the Legislature's prerogative.

Third, Amendment 5 requires the Legislature to "*utilize*" political and geographical boundaries "where feasible." Art. III, § 21(b), Fla. Const. This requirement stands in stark contrast to the political and geographical boundaries requirements in some other states, which require *preservation* of political subdivisions, or prohibit the *breaking* of political boundaries. *See, e.g.*, Art. IV, § 2, Me. Const. ("Each Representative District shall cross political subdivision lines the least number of times necessary."); Art. II, § 3(3), N.C. Const. ("No county shall be divided in the formation of a senate district."); Art. IV, § II(1), N.J. Const. ("Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties."). Amendment 5 far more closely resembles the Arizona Constitution, which directs the "use" of political and geographical boundaries "[t]o the extent practicable." Art. IV, § 1(14)(E), Ariz. Const. In light of this language, the Arizona courts have not mechanistically applied this flexible directive and have deferred to the line-drawer's judgment. *See Ariz. Minority Coalition for Fair Redistricting v. Ariz.*

Indep. Redistricting Comm'n, 121 P.3d 843, 869 (Ariz. Ct. App. 2005) (upholding a district that used the Colorado River but divided members of the Navajo Nation).

The Legislature, with its ability to balance competing policies in the redistricting sphere, is better equipped to determine when the use of boundaries is "feasible." *See Wise*, 437 U.S. at 539; *Upham*, 456 U.S. at 41. And the Legislature may "utilize" boundaries in various ways: it can use them as district lines or reference them in determining district lines. In fact, a district contained entirely *within* political or geographical boundaries might not break any boundary—but also might not *utilize* any boundary at all.

Finally, many of Florida's municipal boundaries, such as in the City of Orlando, reflect a patchwork of finger-like and flagpole annexations that do not lend themselves to use as district lines. And many of Florida's waterways meander across the State and carve irregular shapes in the State's unconventional geography, making them less than optimal for use as district lines.

The Court therefore should refuse any invitation to wade into the policy judgments inherent in the Legislature's compliance with this requirement. *See In re House Joint Resolution 1987*, 817 So. 2d at 824. But if this Court were to engage in such review, it should declare the Plan facially valid because the Senate utilized political and geographical boundaries where feasible. The number of counties divided into more than one Senate district decreased from 45 to 31, and

the number of cities divided into more than one Senate district decreased from 126 to 54. (App. 891) Where the Senate Plan divides cities and counties, district lines tend to follow geographical boundaries—an equally permissible alternative. And where Senate districts diverge from political and geographical boundaries, cogent explanations exist, such as efforts to protect the voting rights of minorities. There is no clear error in the Senate Plan's application of the boundaries requirement.

D. Amendment 5's Tier-Two Compactness Requirement Is Fact-Intensive And Demonstrates No Facial Error In The Senate Plan

Amendment 5 directs that "districts shall be compact." Art. III, § 21(b), Fla. Const. This Tier-Two standard is subordinate to Tier-One and federal law requirements. *See id.*

The Senate Plan's compliance with this requirement falls outside the Court's limited review here for at least two reasons. *First*, compactness is perhaps the paradigmatic example of an elusive concept with no precise meaning. *See Davenport v. Apportionment Comm'n*, 319 A.2d 718, 722 (N.J. 1974); *Schneider v. Rockefeller*, 293 N.E.2d 67, 72 (N.Y. 1972). "Unfortunately, there is no litmus test for compactness; it has been described as such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law." *Johnson v. Miller*, 926 F. Supp. 1460, 1471–72 n.11 (N.D. Fla. 1996) (per curiam), *aff'd Miller v. Johnson*, 515 U.S. 900 (1995). In fact, because "[i]ts origins as a constitutional requirement lie in an intention to provide an electorate with effective

representation rather than with a design to establish an orderly and symmetrical pattern of electoral districts," compactness "has meaning only within an appropriate factual context." *Opinion to the Governor*, 221 A.2d 799, 802 (R.I. 1966); *see also State ex rel. Davis v. Ramacciotti*, 193 S.W.2d 617, 618 (Mo. 1946) ("[A] determination [of compactness] would require careful investigation of all the facts, and the hearing of evidence or a stipulation.").

Even with a full factual record, courts have failed to articulate a single governing standard or formula for compactness. *See* Richard G. Niemi, *Measuring Compactness and the Role of a Compactness Standard*, 52 J. Pol. 1155 (Nov. 1990) ("The search for *the* measure of compactness is illusory [because compactness] is 'multidimensional,' referring to geographic dispersion, perimeter, and population characteristics of a district, no one of which is adequate to give a proper measure of compactness." (emphasis in original)). Some courts have treated compactness primarily (though not exclusively) as a geographical requirement, inquiring whether (1) the shape of the district is regular or bizarre,[7] (2) the territory of the district is closely united,[8] and (3) the shape of the district is

[7] *Hickel v. Southeast Conference*, 846 P.2d 38, 45–46 (Alaska 1992); *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 869 (Ariz. Ct. App. 2005).

[8] *Schrage v. State Bd. of Elections*, 430 N.E.2d 483, 486 (Ill. 1981); *Matter of Legislative Districting of State*, 475 A.2d at 443.

influenced by irregularities in the physical boundaries of the state.[9] While some courts have used geometric formulas as aids, *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 209, 211–12 (Colo. 1982); *Davenport v. Apportionment Comm'n*, 304 A.2d 736, 743 (N.J. Super. Ct. App. Div. 1973), no such formula is "completely satisfactory," H.P. Young, *Measuring the Compactness of Legislative Districts*, 13 Leg. Stud. Q. 105 (1988).[10] And all courts agree that, just as a statute is not invalid merely because a better statute can be written, a districting plan is not invalid merely because more geometrically compact districts can be created.[11] *Cf. In re Senate Joint Resolution 2G*, 597 So. 2d 276, 285 (Fla. 1972) ("[T]here may be a better plan. However, our job is not to select the best plan, but rather to decide whether the one adopted by the Legislature is valid.").

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[9] *Davenport*, 319 A.2d at 722; *Schneider*, 293 N.E.2d at 72.

[10] *See also* Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. Rev. 1, 43 (1995) ("Most scholars agree that there appears to be no reliable test of whether a districting plan is . . . reasonably compact. Researchers have proposed more than two dozen compactness measures, all of which have serious defects and many of which are mutually inconsistent, vary widely in their evaluations of the compactness of a given district, and result in high ratings to extremely oddly-shaped districts." (marks and footnote omitted)).

[11] *Beaubien v. Ryan*, 762 N.E.2d 501, 506 (Ill. 2001) ("Our court has expressly held . . . that the ability to devise more compact formulations is not a sufficient basis for invalidating a map . . . ."); *Matter of Legislative Districting of State*, 475 A.2d at 439 ("[I]t is not for the judiciary to determine whether a more compact district could have been drawn than that under challenge."); *In re Reapportionment of Hartland, Windsor & West Windsor*, 624 A.2d 323, 335 (Vt. 1993) ("The question is not whether there is a better alternative plan, . . . but whether the Legislature's plan violates the legal standards.").

Courts have also concluded that "irregularity of shape or size of a district is not a litmus test for proving" non-compactness, *Matter of Legislative Redistricting*, 475 A.2d at 443, emphasizing that compactness analysis "must be done with the overriding necessity of maintaining effective representation," *Parella v. Montalbano*, 899 A.2d 1226, 1252 (R.I. 2006); *In re Reapportionment of Hartland, Windsor & West Windsor*, 624 A.2d 323, 330 (Vt. 1993) ("[Compactness] concern[s] the ability of citizens to relate to each other and their representatives" and "the ability of representatives to relate effectively to their constituency." (quoting *Wilson v. Eu*, 823 P.2d 545, 553 (Cal. 1992))). Thus, these courts have considered whether (1) constituents in the district are able to relate to and interact with one another,[12] (2) whether constituents in the district are able to access and communicate with their elected representatives,[13] and (3) whether the district is united by commerce, transportation, and communication.[14] These Courts have recognized that the purpose of compactness is not to promote "aesthetically pleasing" districts. *Matter of Legislative Districting of State*, 475 A.2d at 443.

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[12] *Wilson*, 823 P.2d at 553; *In re Reapportionment of Hartland, Windsor & West Windsor*, 624 A.2d at 330.

[13] *In re 2003 Legislative Apportionment of House of Representatives*, 827 A.2d 810, 816 (Me. 2003); *Parella*, 899 A.2d at 1252; *Jamerson v. Womack*, 423 S.E.2d 180, 185–86 (Va. 1992).

[14] *Matter of Legislative Districting of State*, 475 A.2d at 443; *Schneider*, 293 N.E.2d at 72; *In re Reapportionment of Hartland, Windsor & West Windsor*, 624 A.2d at 330–31.

All of these difficulties are compounded by Florida's unique, non-compact shape and uneven residential patterns, which (unless violence is done to the overarching objective of providing voters with effective representation) essentially preclude a series of circular or square-shaped districts.[15] Striking the balance among these various considerations is a function best performed by the Legislature. *See* Art. III, § 21(c), Fla. Const.; *Wise*, 437 U.S. at 539; *Upham*, 456 U.S. at 41. That is particularly true given the Court's limited "thirty-day window," and the lack of any opportunity for factual development or responsive briefing. *In re House Joint Resolution 1987*, 817 So. 2d at 825.

Second, as the foregoing discussion demonstrates, "compactness cannot be considered in isolation." *Beaubien*, 762 N.E.2d at 506. "The formulation of redistricting plans involves complicated considerations requiring careful study and a weighing of factors." *Id.* "[A]n insistence on narrow, exact or inflexible measures of compactness would make adherence to the additional requirements . . . virtually impossible." *Id.* Relatedly, compactness must be assessed on a statewide and holistic basis, rather than by viewing an individual district in isolation. Niemi,

[15] *Cf. Matter of Legislative Districting of State*, 475 A.2d at 442–43 ("[T]he State's geography inhibits the geometric fashioning of districts of symmetrical compactness"); *Bay Ridge Cmty. Council v. Carey*, 454 N.Y.S.2d 186, 189 (N.Y. Sup. Ct. 1982) ("This Court must take judicial notice of the fact that New York State is one of the oddest shaped states in the United States."); *Opinion to the Governor*, 221 A.2d at 802 ("[Rhode Island] with its irregular boundaries, its bays and its inlets, its islands, its rivers and lakes and its many other geographical features is . . . not susceptible to being divided into circular planes or squares.").

52 J. Pol. at 1158 (noting that compactness considers how districts can "be fitted together" in "multiple, fully compact districts").

Since a compactness requirement often creates conflicts with other redistricting criteria, it is the Legislature's function to choose the most appropriate resolution of those conflicts. *See* Art. III, § 21(c), Fla. Const.; *Schneider*, 293 N.E.2d at 72 ("[T]he constitutional requirement of compactness is peripheral in its thrust, forbidding a complete departure, yet leaving to the determination and discretion of the Legislature the degree of compactness which is possible in the total representation picture."). In the first place, some compactness often must be sacrificed to achieve equal population. *See supra* Part II. That is particularly true where, as here, "[t]he population density of this state is quite uneven, and therefore attempts to achieve . . . substantial equality of population will ordinarily necessitate drawing of districts that are not models of geometric compactness." *Commonwealth ex rel. Specter v. Levin*, 293 A.2d 15, 23 (Pa. 1972).

Moreover, federal and state minority voting rights protections often require the preservation or creation of non-compact districts. *See supra* Part III.A; *see also In re Senate Joint Resolution 2G*, 601 So. 2d at 546 (plurality op.). This effect is especially widespread in Florida, where minority districts are contained in the northeast, southeast, central and central-western areas of the State.

Finally, Amendment 5's compactness requirement is at odds with its

political and geographical boundaries requirement. "[C]ompactness could be achieved more easily if . . . due regard for boundaries were not required." *Matter of Legislative Districting of State*, 475 A.2d at 440. This reconciliation of jarring standards is illustrated by the line between new Senate Districts 17 and 22: that line is not straight, but only because it utilized municipal boundaries as it crossed Pinellas County. (App. 692) Similarly, simply glancing at the Orlando municipal lines confirms that they are irreconcilable with most notions of compactness. It is the function of the Legislature, rather than this Court, to balance these competing requirements. *See* Art. III, § 21(c), Fla. Const.

Nevertheless, if this Court were to review the Senate Plan's facial validity under the compactness requirement, it should uphold the Plan. Districts in the Senate Plan are more compact in every sense than those in the benchmark plan. They were also constructed upon logical and neutral redistricting principles, as the individual district descriptions in the Senate Staff Analysis make clear. (*See* App. 1006-15) For example, the Senate heard extensive and compelling testimony that the farming communities in Northwest Florida would receive better representation in districts separate from the Gulf Coast, and that commerce and transportation in the Panhandle run east and west, not north and south. (App. 1410–14, 1427, 5619–24) Panhandle farmers testified with great earnestness against their division and submergence into two vertical districts dominated by the Gulf Coast. (*Id*.) The

Senate Plan therefore divides northern and southern Panhandle regions into separate districts to maintain their effectiveness as representational units.

Moreover, while a mere visual inspection of a redistricting plan is insufficient to determine compactness, the Senate Plan's districts are substantially more regular and orderly in appearance than the benchmark districts. The benchmark plan's District 3 protruded into District 6, which in turn protruded into District 4. (App. 697.) The Senate Plan eliminates these protrusions. (*Id*. 690) In the benchmark plan, District 7 radiated from the Atlantic Coast into Clay and Marion Counties (*id*. 700)—but the Senate Plan confines the district to the boundaries of Volusia County (*id*. 693). In the benchmark plan, narrow District 27 crossed Lake Okeechobee and traversed the state from the East Coast to the West Coast (*id*. 701); the Senate Plan creates a rural district in the interior of the state (*id*. 694). Finally, the benchmark plan's District 21 encircled District 23, meeting the Gulf Coast in Manatee and Lee Counties (*id*. 699), but the Senate Plan corrals this district within a more limited territory (*id*. 692). There is no facial error, let alone a clear error, in the Senate's application of the compactness requirement.

CONCLUSION

For the foregoing reasons, the Court should declare the Senate Plan valid.

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

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I certify that the font used in this brief is 14-point Times New Roman and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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