

**IN THE SUPREME COURT OF FLORIDA**

Case No.: SC12-460

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

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IN RE: 2012 JOINT RESOLUTION OF APPORTIONMENT  
CS/SJR 2-B

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**BRIEF OF FLORIDA DEMOCRATIC PARTY  
IN OPPOSITION TO THE JOINT RESOLUTION**

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## STATEMENT OF THE CASE

On March 9, 2012, this Court, by a 5-2 vote, issued its Opinion declaring the overall Florida Senate Plan (hereinafter “CS/SJR 1176”) facially invalid, finding that the Florida Legislature acted with improper intent in apportioning Florida Senate districts under Article III, Section 21 of the Florida Constitution. *In Re: Senate Joint Resolution of Legislative Apportionment 1176*, Case No. SC12-1, 37 Fla. L. Weekly S181, 2012 WL 753122 (Fla. Mar. 9, 2012) (hereinafter “Supreme Ct. Op.” or “Opinion”). In addition to invalidating CS/SJR 1176 in its entirety, this Court held that eight specific Senate districts were constitutionally invalid.<sup>1</sup> Supreme Ct. Op. at 189. The Legislature was thus charged with adopting a new apportionment plan for the Senate that must comply with the decision of this Court and the Florida Constitution. *See* Art. III, § 16(d), Fla. Const.

On March 22, 2012, the Senate passed proposed CS/SJR 2-B (hereinafter “CS/SJR 2-B” or “Proposed Plan”) in a purported attempt to remedy the multiple violations contained in the previous plan. The House adopted the joint resolution on March 27, 2012, and, pursuant to Article III, Section 16(e), the Attorney General submitted the joint resolution to this Court on April 5, 2012, to decide the validity of the new apportionment plan.

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<sup>1</sup> This Court held Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 unconstitutionally invalid. *See* Supreme Ct. Op. at 189.

Pursuant to this Court’s Order of March 13, 2012, and as provided by Article III, Section 16(c) and (e), Florida Constitution, the Florida Democratic Party (hereinafter “FDP”) submits this brief challenging the constitutionality of the Senate apportionment plan contained in CS/SJR 2-B. Together with this brief, the FDP also submits alternative Senate maps that divide the State into 40 districts for the purpose of demonstrating how the apportionment might be done in a constitutional manner. *See* Appendix Tab A.

In the Appendix (“App”) accompanying this Brief, the FDP has provided its alternative redistricting maps (App. Tab B), together with the following data:

- Expert Affidavit of Steven Ansolabehere (App. Tab A)
- Description of data, software and criteria used to create FDP’s alternative maps (App. Tab C);
- Reports comparing the compactness of FDP alternative districts with those proposed by the Legislature (App. Tab D);
- Population summary for FDP alternative maps (App. Tab E);
- Reports showing use of political and geographic boundaries by FDP in drafting alternative maps (App. Tabs F& G);
- Reports showing the degree to which core 2002 districts were retained in FDP alternative maps, and as compared with the plans proposed by the Legislature (App. Tab H);
- Current Senators’ addresses (App. Tab I);
- Current Senators and their potential districts under CS/SJR 2-B (App. Tab J); and
- Current Senators and their potential districts under the FDP’s alternative map (App. Tab K).

## SUMMARY OF ARGUMENT

In its March 9, 2012 Opinion regarding the Senate’s initial invalid plan, CS/SJR 1176, this Court provided an authoritative interpretation of the recently adopted Article III, Section 21, Florida Constitution, concluding that there is no “acceptable level of improper intent” in a reapportionment plan. Supreme Ct. Op. at 43. Neither can there be a “mostly valid” redistricting plan. The standards are thus exacting, both under the Constitution and the rulings of this Court. Indeed, this Court emphasized that the Legislature must follow a consistent and reasoned approach in applying the standards to the entire redistricting plan. Supreme Ct. Op. at 112, 129, 132 & 199. The Senate’s Proposed Plan, CS/SJR 2-B, fails this test because it reveals an intent to favor incumbents and contains multiple districts that plainly and directly violate constitutional standards.

In its Opinion invalidating the Legislature's initial plan, this Court found indisputable facts establishing that Senate Plan CS/SJR 1176 was “rife with objective indicators of improper intent,” Supreme Ct. Op. at 184, and thus invalid in its entirety. The Court also found the eight districts invalid based on looking at “the reapportionment maps themselves and objective statistical data.” Supreme Ct. Op. at 198. Significantly, this case presents many of the indisputable facts and data that caused the Court to strike down the Legislature's first attempt at reapportionment. For the same reasons the Court struck down that attempt, it

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should invalidate the Legislature's second effort at crafting a Senate plan that meets the exacting standards that apply here.

In response to this Court's declaration invalidating the first plan, the Florida Legislature reconvened to address this Court's Opinion. While purporting to address all the specific issues detailed in the Opinion, the Legislature actually fell short in multiple respects. As an initial matter, proposed Plan CS/SJR 2-B is rife with the type of incumbent protection that contributed to this Court's decision to strike down the initial plan. There are only two incumbents paired to run against each other, and the average core of the baseline districts remains very similar to those in the invalid plan - 60.5%, as opposed to 64.2% for the Senate Plan invalidated in CS/SJR 1176. Clearly, these incumbent protections, like that in the invalid plan proposed in CS/SJR 1176, are sufficient to invalidate the overall plan proposed by the Legislature in CS/SJR 2-B.

Additionally, the Legislature's minute improvements to the compactness of some districts does not absolve its complete failure to address compactness issues in a number of other districts. In fact, in one region, Northeast Florida, the districts are made *less* compact, cross political and geographical boundaries and dilute minority voting strength in the area. The Senate's modifications to the districts in the Volusia County region exemplify the compactness problems that pervade the Proposed Plan. As this Court described in depth, a district that is non-compact and

does not utilize political and geographical boundaries is “constitutionally suspect and often indicative of racial and partisan gerrymandering.” Supreme Ct. Op. at 77& 91. Lack of compactness can only be justified by a showing that the drafting deviation was necessary to avoid racial retrogression or dilution. In the absence of this constitutional necessity, non-compact districts are invalid. “[W]hen the Court analyzes the tier-two standards and determines that specific districts violate those standards without any other permissible justification, impermissible intent may be inferred.” Supreme Ct. Op. at 48. No such justifications exist for the compactness deficiencies identified in Proposed Districts 6, 7 and 8 in North Central Florida; Proposed Districts 13 and 14 in Central Florida; Proposed Districts 21 and 32 in South Central Florida; and Proposed District 39 in South Florida.

The districts could have been drawn in compliance with the constitutional mandates. The FDP’s alternative Map attached to this Brief demonstrates that the Legislature had clear options to comply with constitutional standards, but that it chose not to do so. Consequently, the Senate plan contained in CS/SJR 2-B must be declared invalid.

This Court will doubtlessly take no joy in the task of drawing a Senate plan as is now required under Article III, Section 16, Florida Constitution.

Nevertheless, this Court is qualified, competent and well prepared to do so. In fact, it was the intent of the framers of Article III, Section 16, that, when needed,

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the Court be the final guardian of the citizens' rights to a fair redistricting plan, and one that complies with the constitutional standards. In 2012, that time has come.

### **STANDARD OF REVIEW**

This is an original action under Article III, Sections 16(e), Florida Constitution. Pursuant to those provisions, this Court is charged with determining the facial validity of a joint resolution of legislative apportionment. *See* Supreme Ct. Op. at 8; *In re Apportionment Law Appearing as Senate Joint Resolution 1E, 1982 Special Apportionment Sess.: Const. Validity vel non*, 414 So. 2d 1040, 1052 (Fla. 1982); *In re Apportionment Law Appearing as Senate Joint Resolution Number 1305, 1972 Reg. Sess., Constitutionality vel non*, 263 So. 2d 797, 808 (Fla. 1972). As this Court has noted, this review is limited to compliance of the joint resolution with the standards contained in Article III, Sections 16(a) and 21, Florida Constitution. *See* Supreme Ct. Op. at 36-37. Although this Court's review does not include a formal evidentiary review, the Court has evaluated district data using the MyDistrictBuilder and District Builder software used by the Legislature in the course of the apportionment process, as well as Maptitude for Redistricting. *See* Supreme Ct. Op. at 31-32. Use of commonly available data (including data from the U.S. Census) and shared programs allows this Court to evaluate the constitutional standards with regard to undisputed facts.

## ARGUMENT

The Senate's Proposed Plan is invalid under the Florida Constitution. The purpose behind Article III, Section 21, was "to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations," while also requiring "legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts . . . are avoided." Supreme Ct. Op. at 3-4 (quoting *Advisory Opinion to the Attorney General re: Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175 (Fla. 2009)). Construing the newly adopted constitutional provisions consistent with the intent of the framers and the understanding of the voters who adopted the provision in 2010, this Court held that the new provisions include more stringent requirements than are found in the United States Constitution or in prior versions of the Florida Constitution. Supreme Ct. Op. at 4.

The new standards contained in Article III, Section 21, consist of two tiers, each of which contains three requirements. Tier-One standards prohibit the favoring or disfavoring of a political party or incumbent, prohibit racial and language minority discrimination, and require districts to consist of contiguous territory. Tier-Two standards require districts to be as nearly equal in population

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as practicable and mandate that districts be compact, and where feasible, make use of political and geographical boundaries. The Constitution requires that the Tier-Two standards must yield when necessary to comply with Tier-One priority standards. Supreme Ct. Op. at 69. Any breach of Tier-Two standards by the Legislature must be justified, however, by a showing that this was necessary to comply with a Tier-One priority standard. Supreme Ct. Op. at 4-5, 38-39. Failure to meet Tier-Two standards suggests an unconstitutional intent in violation of Tier-One standards as well. Supreme Ct. Op. at 48. In its review of CS/SJR 1176, this Court found that the Senate apportionment plans violated both tiers of Article III, Section 21. For the reasons set forth below, the Court should similarly find that CS/SJR 2-B continues to violate the Florida Constitution.

**I. CS/SJR 2-B CREATES A SERIES OF DISTRICTS THAT VIOLATE TIER-TWO STANDARDS WITHOUT CONSTITUTIONAL JUSTIFICATION.**

As this Court noted in its earlier decision invalidating the previous Senate plan, “a disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms.” Supreme Ct. Op. at 95 & 132. The plan proposed under CS/SJR 2-B, like the unconstitutional plan in CS/SJR 1176, includes several violations in the Tier-Two

requirements relating to compactness and the use of political and geographical boundaries.

Article III, Section 21(b), Florida Constitution, provides, “Unless compliance with the standards in this [Tier] conflicts with the standards in [Tier One] or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.” Addressing the compactness requirement, this Court has emphasized that the requirement contains no modifiers whatsoever, mandating simply that “districts shall be compact.” Supreme Ct. Op. at 129. Non-compact districts are often a sign of unconstitutional partisan and racial gerrymanders that, absent demonstrated justification, establish an inference of improper intent. “A compactness requirement serves to limit partisan redistricting and racial gerrymanders,” Supreme Ct. Op. at 77, and any deviation from that requirement is unlawful unless the Legislature demonstrates the deviation is required to comply with a Tier-One standard. There are no Tier-One justifications for the stark deviations from the compactness requirement that pervade CS/SJR 2-B.

The Court's Opinion establishes that compactness should be measured based on commonly accepted tests -- the Reock test and the Area/Convex Hull test -- and simple visual review. Supreme Ct. Op. at 84-85. Emphasizing the importance of

visual review, this Court explained that “[a]s a geographical inquiry, a review of compactness begins by looking at the ‘shape of a district’; the object of the compactness criterion is that a district should not yield ‘bizarre designs.’” Supreme Ct. Op. at 83 (quoting *Hickel v. Se. Conference*, 846 P.2d 38, 45 (Alaska 1992)). “Compact districts should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement.” Supreme Ct. Op. at 83. The Court found that violations of compactness were notable from visual inspection of the Senate plan CS/SJR 1176. “A visual inspection of the plan reveals a number of districts that are clearly less compact than other districts, with visually bizarre and unusual shapes.” Supreme Ct. Op. at 128-29.

Adding to the information provided by visual inspection, the Reock testing method “measures the ratio between the area of the district and the area of the smallest circle that can fit around the district. The measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale.” Supreme Ct. Op. at 84-85. On the other hand, the Area/Convex Hull method “measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district. The measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness. A circle, square, or any other shape with only convex angles has a score of 1.” Supreme Ct.

Op. at 85. All of these methods have been “used to assist courts in assessing compactness.” *See* Supreme Ct. Op. at 84-85, 128-129 & 156-159.

Here, the same type of indisputable visual evidence and test results that led to this Court's findings of non-compactness with respect to the initial plan establishes that multiple districts in the proposed plan violate the compactness requirement. As the Court has provided “our proper scope of review encompasses those challenges that may be determined from the reapportionment maps themselves and objective statistical data before us. During these expedited proceedings, modern technology has provided this Court with an abundance of information in a very short period of time.” Supreme Ct. Op. at 198 &199.

In the district-by-district analysis that follows, it is shown through "the reapportionment map[] itself and objective statistical data" that at least six districts in the proposed plan violate the compactness requirement.<sup>2</sup> Moreover, as is also shown below proposed districts in CS/SJR 2-B also fail to utilize existing political and geographic boundaries and are unconstitutional on that additional ground.

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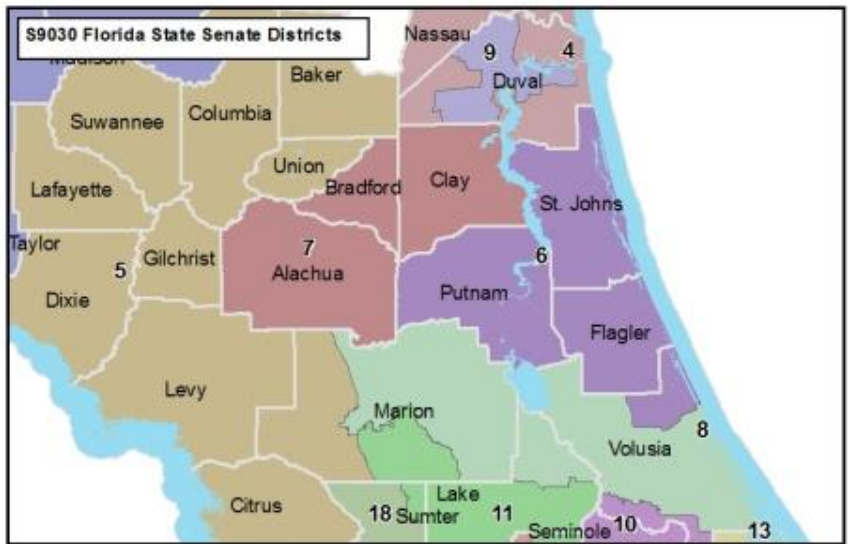
<sup>2</sup> Supreme Ct. Op. at 198-99.  
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**A. Proposed Districts 6, 7 and 8 in Northeast Florida are invalid because District 8 is non-compact and crosses multiple boundaries and because all of these districts diminish the ability of minority voters to elect the candidates of their choice.**

Proposed Senate District 8 is patently non-compact, as confirmed by a visual inspection of the District and the mathematical measures used by this Court.

Proposed District 8’s bizarre shape starts in the middle of the Marion County, cutting off the northern portion of Lake County to the coastline in Volusia County,



splitting all three Counties. It is the fourth least compact district under the Reock method, with a score of 0.24 (closer to 1 is better), while its Area/Convex Hull measure is 0.73. In fact, the Senate reconfigured this District so that it is *less compact* than was District 8 under the invalid plan, CS/SJR

1176, which had a better Reock score of 0.28. It is evident that Proposed District 8's non-compactness is not a result of attempting to utilize existing political or geographical boundaries. In fact, both Marion and Volusia Counties are each split into three districts; Marion is split by Districts 5, 8 and 11, and Volusia is split by Districts 6, 8 and 10. Further, Proposed District 8 splits three municipalities, Deltona, Orange City, and heavily black-populated Daytona Beach.

Contrary to the legislature's probable contention, compliance with minority voting rights provisions does not justify District 8's Tier-Two violations. In fact, Districts 6, 7, and 8 together affirmatively violate the constitutional minority voting requirements. In Proposed Map CS/SJR 2-B, the Legislature redrew Current Senate District 1 as Proposed Senate District 9 (located in Duval County), and created these three proposed districts to the south. None of these new districts would be able to elect a Black preferred candidate. Thus, Proposed Senate District 8 and neighboring Proposed Senate District 6 actually dilute the minority representation of communities that previously had representation in the benchmark district, Current Senate District 1.

Under the Current Map, District 1 is drawn in a bizarre and unique manner, snaking its way from Duval County through St. Johns and Flagler counties and encompassing the northern portion of Volusia County with an appendage extending westward through Putnam County. The bizarre shape can potentially be

justified in order to ensure the representation of black voters in Northern Volusia County (primarily in Daytona Beach) and black voters in Putnam County (primarily in Palatka).

Although Current Senate District 1 is not a majority-minority district, an analysis of the voting behavior reveals the black voters are currently able to elect their representatives of choice.<sup>3</sup> It is a black opportunity district, with a Black VAP of 46.9%. Current Senate District 1 has consistently performed Democratic; Alex Sink (D) won 60.5% of the votes in the 2010 gubernatorial election, versus 36.9% for Governor Scott (R), and President Obama (D) won 65.2% of the votes in the 2008 presidential election, versus 34.0% for Senator McCain (R). For the 2010 General Election, Democrats made up 58.5% of registered voters, and 69.3% of the registered Democrats were black (“showing opportunity for black voters among Democrats,” Supreme Ct. Op. at 152). Further, 87.5% of black voters were registered Democrats (“showing voting cohesion among black voters in general,” Supreme Ct. Op. at 152). As to the registered voters who actually voted in the 2010 general election, the numbers are quite similar: Democrats made up 58.3% of registered voters, 69.0% of the Democrats were black, and 92.7% of the black

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<sup>3</sup> The election results and voter registration statistics in the 2002 Current Senate Map, 2012 Proposed Senate Map and the FDP’s alternative Map were obtained “using the House’s redistricting software and the House’s voter registration and election data.” Supreme Ct. Op. at 151.

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voters were Democrats. Black voters would have also controlled the Democratic primary, with 68.0% of the Democrats in the primary being black.<sup>4</sup> This analysis, used previously by this Court, indicates that the black voters in Current District 1 were able to elect their candidates of their choice.

Proposed Senate District 8 is not a majority-minority district or a minority opportunity district, with only a 10.0% Black VAP. An analysis of the voting behavior reveals that the black voters located within this District are likely unable to elect their representative of choice even though they are highly cohesive, overwhelmingly voting Democratic. Additionally, less than half of the Democrats in Proposed District 8 are black. Under the Proposed Plan CS/SJR 2-B, District 8 is a competitive district that favors Republicans; Proposed District 8 would have voted 44.9% for Alex Sink (D) and 50.2% for Governor Scott (R) in the 2010 gubernatorial election, and 49.7% for President Obama (D) and 49.0% Senator McCain (R) in the 2008 presidential election. Democrats would make up 39.5% of registered voters, and 17.4% of the registered Democrats would be black (showing

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<sup>4</sup> This Court stated that “when we interpret our state provision prohibiting the diminishment of racial or language minorities’ ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.” Supreme Ct. Op. at 61. Further, under Section 5, “the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group’s ability to elect its preferred candidates.” Supreme Ct. Op. at 62. A functional analysis must be conducted in order to determine diminishment.

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less opportunity for black voters among Democrats). Further, 83.6% of black voters would be registered Democrats (“showing voting cohesion among black voters in general,” Supreme Ct. Op. at 152). As to the registered voters who actually voted in the 2010 general election, the numbers are quite similar: Democrats would make up 38.2% of registered voters, 16.6% of the Democrats would be black, and 90.0% of the black voters would be Democrats. Black voters would not have controlled the Democratic primary, with 15.2% of the Democrats in the primary being black. The analysis indicates that the District will likely not afford black voters the ability to elect candidates of their choice. Therefore, District 8 not only cannot be justified for racial fairness purposes, but the district actually reduces the ability of a substantial number of black voters to elect candidates of their choice.

Proposed Senate District 6, also formerly part of benchmark District 1, is not a majority-minority District, having a total Black VAP of 10.6%, and fails to afford black voters an opportunity to elect the candidates of their choice. An analysis of voting behavior conducted using MyDistrictBuilder reveals that the black voters located in Volusia and Putnam Counties are no longer able to elect their preferred candidates, even though they previously were able to do so in Current District 1. Under this design, Proposed District 6 would perform Republican; it would have voted 39.5% for Alex Sink (D) and 56.9% for Governor

Scott (R) in the 2010 gubernatorial election, and 42.9% for President Obama (D) and 56.0% for Senator McCain (R) in the 2008 presidential election. Democrats would make up 36.3% of registered voters, and 21.2% of the registered Democrats would be black. Further, 83.8% of black voters would be registered Democrats. As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 33.8% of registered voters, 19.4% of the Democrats would have been black, and 89.4% of the black voters would have been Democrats. Black voters would not have controlled the Democratic primary, with 19.2% of the Democrats in the primary being black. The analysis indicates that black voters in Proposed District 6 would be unable to elect their candidate of choice even though there is cohesion among the black population.

This configuration further harms the black voters in Proposed District 7 (primarily in Alachua County) who were in the heart of Current Senate District 14, where they have consistently been able to elect their preferred candidates. Proposed District 7, unlike the previous Democratic benchmark, would perform Republican. Although Current Senate District 14 has a Black VAP of 18.2%, black voters were able to elect candidates of their choice. Current Senate District 14 consistently voted Democratic; Alex Sink (D) won 50.5% of the votes in the 2010 gubernatorial election, versus 45.9% for Governor Scott (R), and President

Obama (D) won 50.4% in the 2008 presidential election, versus 48.1% for Senator McCain (R). For the 2010 General Election, Democrats made up 50.0% of registered voters, and 26.2% of the registered Democrats were black (“showing opportunity for black voters among Democrats,” Supreme Ct. Op. at 152). Further, 87.0% of black voters were registered Democrats (“showing voting cohesion among black voters in general,” Supreme Ct. Op. at 152). As to the registered voters who actually voted in the 2010 general election, the numbers were quite similar: Democrats made up 50.6% of registered voters, 23.2% of the Democrats were black, and 92.7% of the black voters were democrats. And even though black voters did not control the Democratic primary, with only 19.8% of the Democrats voting in the primary being black, the analysis still confirms that black voters in Current District 14 were able to elect candidates of their choice.

Black voters in the benchmark District 14 would be placed in Proposed District 7. Unlike Current District 14, Proposed District 7 is now Republican leaning and has a Black VAP of 15.3%; it would have voted 43.9% for Alex Sink (D) and 53.0% for Governor Scott (R) in the 2010 gubernatorial election, and 45.5% for President Obama (D) and 53.3% for Senator McCain (R) in the 2008 presidential election. Democrats would make up 40.2% of registered voters, and 26.6% of the registered Democrats would be black. Further, 83.3% of black voters would be registered Democrats. As to the registered voters who actually voted in

the 2010 general election, the numbers would be similar: Democrats would make up 39.2% of registered voters, 23.5% of the Democrats would be black, and 88.1% of the black voters would be Democrats. Additionally, black voters would not have controlled the Democratic primary, with 19.1% of the Democrats voting in the primary being black. This analysis indicates that black voters in Proposed District 7 would be unable to elect candidates of their choice, unlike black voters in benchmark District 14.

As a result of the redraft of this area of Northeast Florida into Districts 6, 7 and 8, black voters will no longer be able to elect their candidates of choice in any of these districts. Clearly, minority voters in this region have had their ability to elect candidates of their choice diminished in direct conflict with Article III, Section 21(a).

The alternative maps provided by the Florida Democratic Party show that the Legislature could have drawn a plan that complied with Article III, Section 21. The FDP's map is more compact, splits fewer counties, and does not dilute minority voting rights. Thus, the alternative map indicates that the Legislature's Proposed Senate Map CS/SJR 2-B should be held invalid for failing to adhere to the constitutional mandates.

FDP's alternative District 8 is visually and quantitatively more compact and utilizes county boundaries. The FDP alternative map redrafts Senate District 8 to



include the entirety of Volusia County, thereby respecting County boundaries, and has a Reock score of 0.33, and an Area/Convex Hull measure of 0.81. Under the FDP's alternative map, District 8 would not be a majority-minority District and has a Black VAP of 10.3%. However, it would be a competitive district that may lean toward the candidates preferred by black voters; it would have voted 47.2% for Alex Sink (D) and 48.3% for Governor Scott (R) in the 2010 election, and 52.8% for President Obama (D) and 45.9% for Senator McCain (R) in the 2008 election. Democrats would make up 40.4% of registered voters, and 18.2% of the registered Democrats would be black. Further, 82.4% of black voters would be registered Democrats. As to the registered voters who actually voted in the 2010 general election, the numbers would be similar: Democrats would make up 39.2% of registered voters, 16.6% of the Democrats would be black, and 88.7% of the black voters would be Democrats. Additionally, black voters would not have controlled the Democratic primary, with 15.3% of the Democrats voting in the primary being black. This analysis indicates that black voters in the alternative District would have a greater opportunity to elect candidates of their choice, unlike black voters in the Senate's Proposed District 8.

The FDP alternative map draws Senate District 7 to include all of Alachua and Putnam counties and part of Marion County. It is visually more compact than the Senate's Proposed District 7, containing two entire counties and only one split

county, and has a high Reock score of 0.50 and an Area/Convex Hull measure of 0.80, and is more compact than the Senate's Proposed District 7. The FDP's alternative District 7 has a Black VAP of 16.8% and would perform Democratic; it would have voted 50.4% for Alex Sink (D) and 45.8% for Governor Scott (R) in 2010, and 52.3% for President Obama (D) and 46.3% for Senator McCain (R) in 2008. Democrats would make up 48.1% of registered voters, and 26.8% of the registered Democrats would be black. Further, 86.8% of black voters would be registered Democrats. As to the registered voters who actually voted in the 2010 general election, the numbers would be similar: Democrats would make up 48.1% of registered voters, 23.8% of the Democrats would be black, and 92.3% of the black voters would be Democrats. However, black voters would not have controlled the Democratic primary, with 19.4% of the Democrats voting in the primary being black. This analysis indicates that black voters in the alternative District 7 would be able to elect candidates of their choice, like the black voters in benchmark District 14. The Senate's Proposed District 7, on the other hand, diminishes black voters' ability to elect their preferred candidates.

Under the FDP alternative map, District 6 would include all of Clay, St. Johns, and Flagler counties. Although slightly less compact than the Senate Proposal with a Reock measure of 0.37 and an Area/Convex Hull measure of 0.69, this configuration was specifically designed to provide protection to black voters in

the neighboring districts that previously had an ability to elect their preferred candidates but no longer have the ability under the Senate's Proposed Plan and to avoid splitting minority communities. FDP's alternative District 6 has a 8.2% Black VAP. The District would perform Republican; it would have voted 32.9% for Alex Sink (D) and 63.7% for Governor Scott (R) in the 2010 gubernatorial election, and 34.9% for President Obama (D) and 64.1% for Senator McCain (R) in the 2008 presidential election.

Democrats would make up 28.3% of registered voters, and 19.2% of the registered Democrats would be black. Further, 78.6% of black voters would be registered Democrats. As to the registered voters who actually voted in the 2010 general election, the numbers would be similar: Democrats would make up 25.4% of registered voters, 19.0% of the Democrats would be black, and 83.3% of the black voters would be Democrats. Black voters would not have controlled the Democratic primary, with 20.0% of the Democrats voting in the primary being black. This analysis indicates that black voters in the alternative District 6 would be unable to elect candidates of their choice. Although *slightly* less compact than the Senate's District 6, it was necessary in order to protect minority voters in the neighboring districts.

Thus, the FDP has demonstrated that this group of districts can be drawn much more compactly, utilizing political and major geographical boundary lines,

where feasible, while abiding by the minority voting protection provision. Article III, Section 21(a) states, “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[.]” Here, the Proposed Plan is invalid because it was drawn with intent to dilute black voters’ ability to elect their preferred candidates and it actually reduced their ability.<sup>5</sup> Because this group of districts in the proposed plan is non-compact and splits political boundaries it is suspect and must be justified to comply with Tier-One standards. Not only are minority rights not enhanced or protected, they are diminished.

**B. Proposed Districts 21 and 32 in South Central Florida are invalid because they are non-compact and cross multiple boundaries, while having no Tier-One justification.**

Proposed Senate District 32 is the least compact District in CS/SJR 2-B, with a Reock score of 0.23 and an Area/Convex Hull measure of 0.83. The District is also non-compact from visual inspection and fails to utilize political and geographical boundaries; Proposed District 32 contains portions of four counties, meandering from Indian River County, through the eastern portions of St. Lucie and Martin Counties, to the northeast corner of Palm Beach County. Further,

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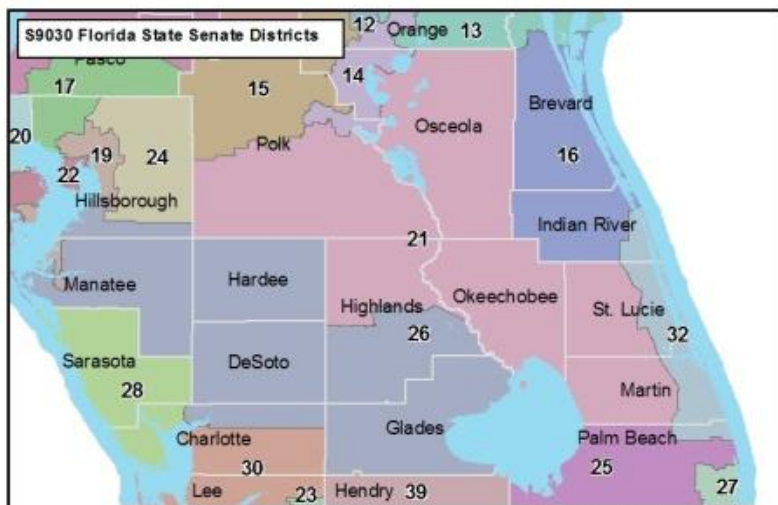
<sup>5</sup> The Senate voted down an amendment proposed by the incoming Minority Leader Chris Smith to keep Volusia County as a whole in order to avoid splitting Daytona Beach. *See* Senate Floor Debate Tr. (Mar. 22, 2012), at G758-84.

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Proposed District 32 is very thin and follows the coastline. It appears the Senate may be using a “communities of interest” principle. The Court rejected a ‘functional’ definition for compactness and found that “communities of interest” is not part of the current constitutional “compactness” requirement. Supreme Ct. Op. at 77-82, 128-129 & 147.

There is no possible Tier-One justification for the configuration of District 32 because there is no minority voting issue in that district. In fact, the minority

voting age population is so small that it has no chance of electing a candidate of choice based on the make-up of the district. With a total Black VAP of 10.4%, Proposed District 32 is not a majority-minority district and fails to afford black voters an opportunity to elect the candidates of their choice. An analysis of



voting behavior conducted using MyDistrictBuilder confirms that the black voters located in District 32 are unable to elect their preferred candidates, even though there is cohesion among the black population.<sup>6</sup>

Proposed Districts 16 and 21 are relatively compact according to quantitative measures, with Proposed District 16 having a Reock score of 0.44 and an Area/Convex Hull measure of 0.84, while Proposed District 21 has a Reock score of 0.37 and an Area/Convex Hull measure of 0.71. However, proposed District 21 is visually non-compact and crosses through a number of county boundaries. It contains Okeechobee County, in its entirety, and portions of Osceola, Polk, St. Lucie and Martin Counties. It clearly disregards the Tier-Two standards of compactness and utilizing political and geographical boundaries without any Tier-One justification. No objective data indicates that Proposed

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<sup>6</sup> Proposed District 32 in CS/SJR 2-B would have voted 43.7% for Alex Sink (D) and 52.6% for Governor Scott (R) in the 2010 gubernatorial election, and 47.8% for President Obama (D) and 51.2% for Senator McCain (R) in the 2008 presidential election. Democrats would make up 35.0% of registered voters, and 21.2% of the registered Democrats would be black (“showing opportunity for black voters among Democrats,” Supreme Ct. Op. at 152). Further, 95.3% of black voters would be registered Democrats (“showing voting cohesion among black voters in general,” Supreme Ct. Op. at 152). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar. Democrats would have made up 31.3% of registered voters, 19.0% of the Democrats would have been black, and 88.8% of the black voters would have been Democrats. Black voters would not have controlled the Democratic primary, with 18.5% of the Democrats in the primary being black.

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District 21 was drafted in a non compact way in order to promote or protect black voters.

Proposed District 16, which contains all of Brevard County and the majority of Indian River County, will be affected by the redrawing of Districts 21 and 32 in order to comply with Article III, Section 21.

The Florida Democratic Party's alternative map demonstrates that the Legislature's plan could have been drawn more compactly, while utilizing political and geographical boundaries in order to comply with the Constitution. Under the FDP alternative, District 21 would have a Reock measure of 0.40, while District 32 would have a Reock measure of 0.39.

Overall, the configuration of Proposed Districts 21 and 32 in CS/SJR 2-B appears to favor incumbents. For example, Proposed District 32 contains 71.5% of the core of Current District 28, which is a strong indicator of incumbent bias. The lack of compliance with the Tier-Two standards mandated in the Florida Constitution is clearly not justified by any Tier-One standard and therefore is suspect as a political gerrymander.

In sum, Northeast Florida includes the least compact District in the state, fails to utilize political or geographical boundaries, has no Tier-One justification for gerrymandering, and, in fact has objective indications suggesting that there is a Tier-One violation of incumbent favoritism.

**C. Proposed Districts 13 and 14 in Central Florida are invalid because they are non-compact and cross multiple boundaries, while having no Tier-One justification.**

Proposed Senate Districts 13 and 14 in CS/SJR 2-B are demonstrably non-compact and contain unjustified appendages. Proposed District 13 contains portions of Brevard and Orange Counties, while proposed District 14 meanders from Orange County, through part of Osceola County, and into Polk County. Visual inspection of Districts 13 and 14 demonstrates their non-compactness.

Proposed District 13 is notable for the appendage that loops through the northern part of Orlando. This Court has noted that such appendages make proposed districts suspect: “Compact districts should not have an unusual shape, a bizarre design, *or an unnecessary appendage* unless it is necessary to comply with some other requirement.” Supreme Ct. Op. at 83 (emphasis added). Currently, two Senate incumbents live in the bizarre, hook-like appendage.<sup>7</sup> Proposed District 13 has a Reock score of 0.42 and an Area/Convex Hull measure of 0.79. The unjustified appendage extending into Orlando makes it constitutionally

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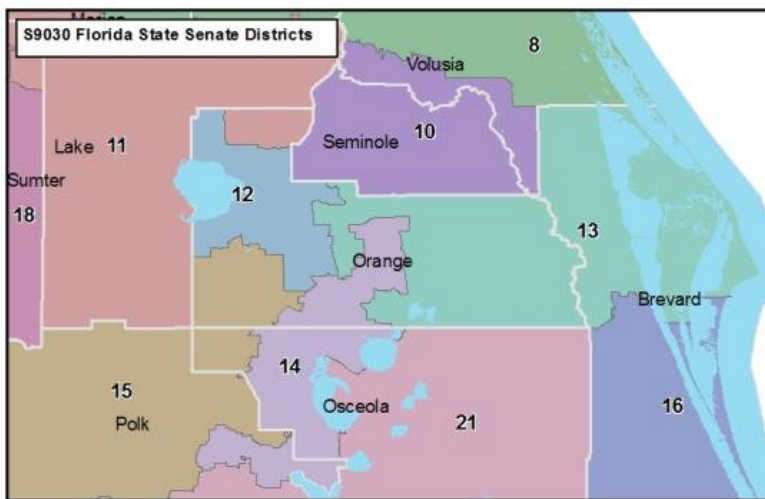
<sup>7</sup> Published reports indicate that one of the two incumbents located in Proposed District 13 will be moving to a neighboring district. See Aaron Deslatte, *Florida redistricting: Senate tries again with new map*, MIAMI HERALD, Mar. 17, 2012, available online at: [http://articles.orlandosentinel.com/2012-03-17/news/os-redistricting-senate-maps-20120317\\_1\\_new-senate-lines-senate-district-andy-gardiner](http://articles.orlandosentinel.com/2012-03-17/news/os-redistricting-senate-maps-20120317_1_new-senate-lines-senate-district-andy-gardiner) (last accessed 4/9/2012).

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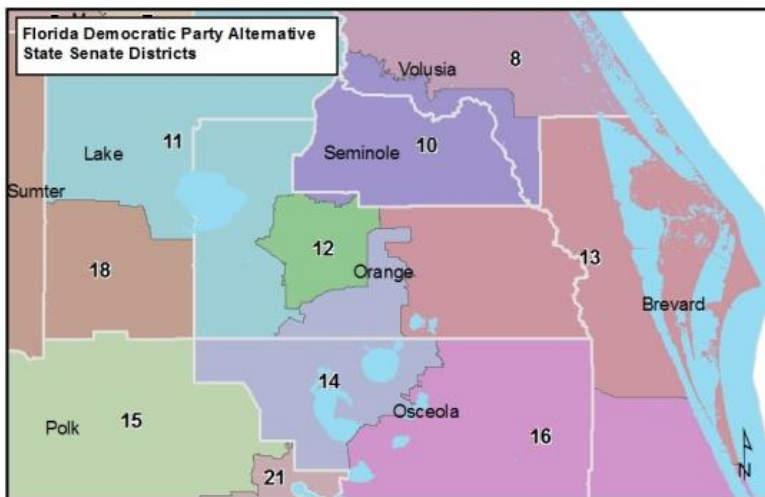


suspect. In addition, it fails to utilize boundaries and actually divides four municipalities in Orange County (Edgewood, Maitland, Orlando and Winter Park).

Proposed District 14 is one of the least compact districts found in CS/SJR 2-B, with a Reock score of 0.27 and an Area/Convex Hull measure of 0.64. It is a newly created district that does not completely correspond to any current Senate district, but does contain large parts of Current Senate Districts 19 and 24 in Orange County, together with pieces of Districts 15 and 26 in Osceola County.



Proposed District 14 contains part of one municipality in Orange County (Orlando) and part of two municipalities in Polk County (Davenport and Haines City).



The Proposed District 14 creates a district that now contains a 50.0% Hispanic VAP. While Districts 13 and 14 are plainly non-compact, the FDP alternative plan

shows that the districts can be much more compact and still protect minority voting rights. Further, the Senate has not justified the deviations from the constitutional compactness requirement and failure to utilize political and geographical boundaries because they have not performed a functional analysis to justify the district as they drew it. *Cf.* Supreme Ct. Op. at 126 and 130. As this Court noted in its previous Opinion, an alternative district that shows how political and geographical boundaries can better utilized and made more compact “demonstrates that the Senate District...violates the constitutional standards of compactness and utilizing existing political and geographical boundaries.” Supreme Ct. Op. at 155.

As the alternative plan submitted by the FDP shows, the Legislature could have chosen to comply with the Tier-Two standards, while also maintaining a district with substantial minority representation. The alternative model submitted by the FDP shows that the Legislature could have drawn districts that were substantially more compact, visually and statistically. Where the Proposed Districts 13 and 14 have Reock scores of 0.42 and 0.27, respectively, the FDP alternatives for Districts 13 and 14 would have Reock scores of 0.48 and 0.44, respectively.

The Legislature has not demonstrated any need to deviate from the Tier-Two standards as mandated by the Constitution as interpreted by this Court. Accordingly, this Court should find that Proposed Districts 13 and 14 are invalid

because the Legislature does not justify their non-compactness and failure to utilize political and geographical boundaries.

**D. Proposed District 39 in South Florida is invalid because it is visually and statistically non-compact and crosses multiple boundaries, while having no Tier-One justification.**

The Senate plan contained in CS/SJR 2-B contains a final glaring example of non-compactness. The oddly-shaped Proposed District 39 encompasses all of Monroe and Hendry Counties, the eastern portion of Collier County and the western part of Miami-Dade County.<sup>8</sup> Proposed District 39 contains two strange arms which extend from western Miami-Dade County to envelope Proposed Districts 37 and 40, capturing populations in northern Miami and several southern cities. The northern arm contains one barely contiguous loop that captures part of eastern Miami.

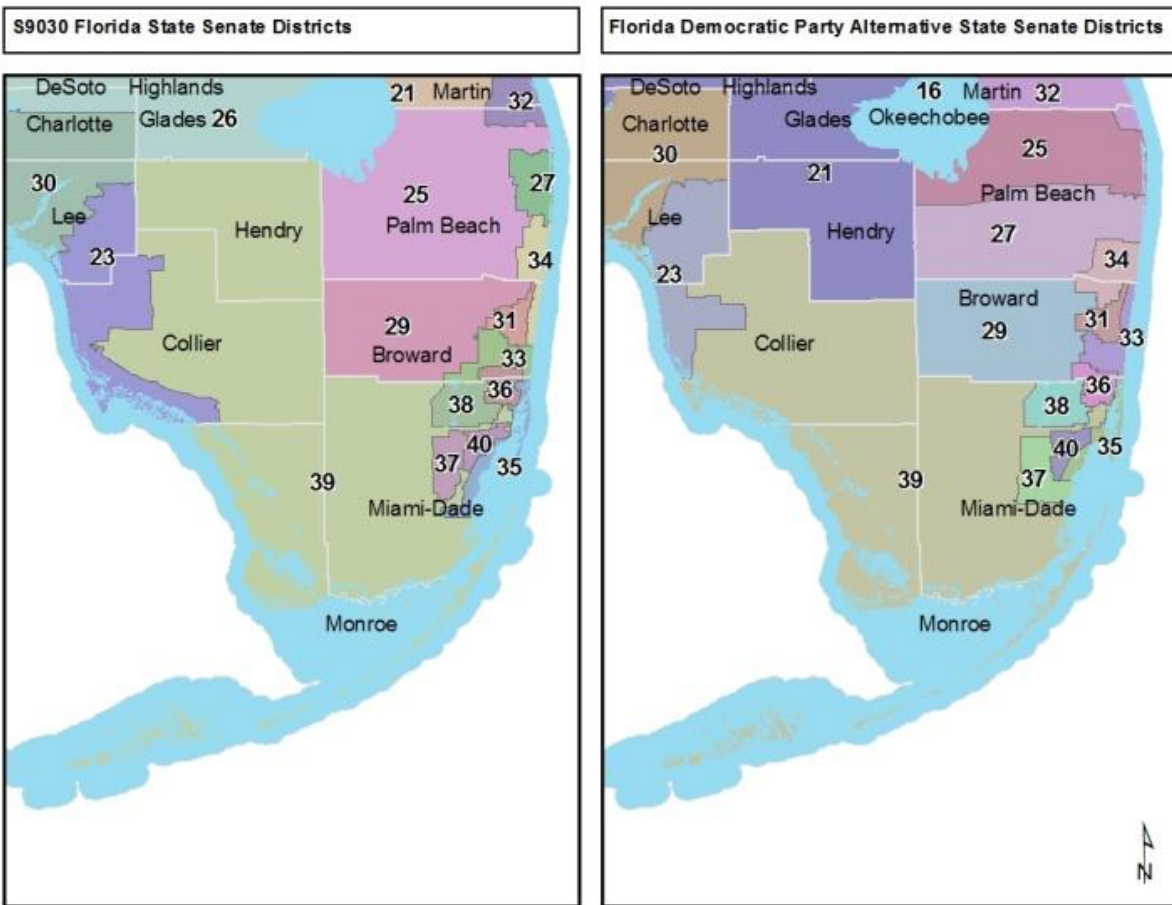
Although Proposed District 39 contains two entire counties, it divides several other political entities. Proposed District 39 contains parts of two additional counties (Miami-Dade and Collier). The District also contains pieces of three municipalities in Miami-Dade County (Doral, Homestead, and Miami).

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<sup>8</sup> Proposed District 39 is identical to the District 40 under the former Senate plan submitted under CS/SJR 1176. While this Court considered whether the adjacent districts may have been drawn to favor incumbents, the Opinion did not contain more than a cursory analysis of CS/SJR 1176's proposed District 40. *See Supreme Ct. Op.* at 177-78.

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The non-compactness of this odd district is evident from statistical measurements and from visual inspection. Proposed District 39 has a Reock score of 0.23, and an Area/Convex Hull score of 0.43. In fact, the Reock score for Proposed District 39 is lower than that of the current 2002 District, which had Reock score of 0.26. The deviations from compactness in Proposed District 39 are in the form of its two strange arms.



There is no Tier-One justification for proposed District 39’s drastic departure from compactness and failure to utilize political and geographical boundaries. Proposed Senate District 39 would give black voters the opportunity

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to elect their preferred candidates of choice; however, the FDP's alternative map shows that the District can be drawn more compactly and allow black voters to elect their representatives of choice, without packing them into the District.

The Senate's proposed District has a 35.3% Black VAP. However, it would perform solidly Democratic; it would have voted 66.2% for Alex Sink (D) and 31.3% for Governor Scott (R) in the 2010 gubernatorial election, and 70.5% President Obama (D) and 28.8% for Senator McCain (R) in the 2008 presidential election. Democrats would make up 57.3% of registered voters, and 58.0% of the registered Democrats would be black ("showing opportunity for black voters among Democrats," Supreme Ct. Op. at 152). Further, 86.9% of black voters would be registered Democrats ("showing voting cohesion among black voters in general," Supreme Ct. Op. at 152). As to the registered voters who actually voted in the 2010 general election, the numbers would be quite similar: Democrats would make up 58.3% of registered voters, 60.0% of the Democrats would be black, and 91.8% of the black voters would be Democrats. Black voters would have controlled the Democratic primary, with 62.3% of the Democrats voting in the primary being black.<sup>9</sup> The analysis confirms that black voters can elect their candidate of choice.

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<sup>9</sup> In Current Senate District 39, by comparison, President Obama (D) received 68.0% of the votes, and Alex Sink (D) received 63.7% of the votes.

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In the FDP alternative, black voters would control the Democratic primary, with 57.5% of the Democrats voting in the primary being black. FDP's alternative District 39 is has a better Reock score of 0.24, and an Area/Convex Hull measure of 0.46. The district does not have a southern arm, but the northern arm has been retained in order to meet the Tier-One priority purpose of preventing a diminution of minority votes in the new district. FDP's alternative district confirms that the Legislature's Proposed District 39 can be drawn in a more compact manner, while not unnecessarily packing black voters into the district.<sup>10</sup> Additionally, the creation of Proposed District 39 contains the southern half of Current Senate District 34, breaking apart a Democratic district without unnecessarily improving minorities' representation in Senate District 39.

In sum, Proposed District 39 is obviously a non-compact district and needlessly divides several cities, crossing multiple political and geographical boundaries in contravention of Article III, Section 21(b), all with no justification under the Tier-One standards of Article III, Section 21(a). Under Article III, Section 21(b), only the necessity of complying with the Tier-One standards of Article III, Section 21(a) would justify such a departure from compactness as is

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<sup>10</sup> The FDP's alternative for Senate District 39 would retain some 54.2% of Current Senate District 39, while the Senate's Proposed District 39 contains 75.2% of Current District 39. This indicates partisan favoritism.

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contained in the Legislature’s proposed District 39. Accordingly, this Court should find the Senate plan invalid with respect to Proposed District 39.

**II. CS/SJR 2-B CONTINUES TO VIOLATE ARTICLE III, SECTION 21(a), BY IMPROPERLY FAVORING INCUMBENTS BECAUSE THE PLAN CONTINUES TO PRESERVE CORE DISTRICTS AND AVOIDS PITTING INCUMBENTS AGAINST EACH OTHER.**

The Proposed Senate Plan continues to contain many of the same problems that resulted in the invalidity of CS/SJR 1176. The same sources of undisputed facts lead to the same conclusion of incumbent bias that this Court reached before. The plan has non-compact districts, retains core constituencies for incumbents, and pits very few incumbents against each other. As this Court has stated, “this Court does not disregard obvious conclusions from the undisputed facts.” Supreme Ct. Op. at 47. The obvious conclusion is that this plan favors incumbents.

This Court’s earlier Opinion specified the factors which objectively may indicate an improper motivation in violation of Article III, Section 21(a). *See* Supreme Ct. Op. at 44 (“[T]he focus of the analysis must be on both direct and circumstantial evidence of intent.”). These indicators of intent may include factors such as the effects of the plan, the shape of districts, and the demographics of the area. *See* Supreme Ct. Op. at 44-45. “One piece of evidence in isolation may not indicate intent, but a review of all the evidence together may lead this Court to the

conclusion that the plan was drawn for a prohibited purpose.” Supreme Ct. Op. at 45. In CS/SJR 2-B, there are multiple objective indicators of improper intent.

First, the multiple unjustified deviations from compactness are not only a violation of the constitutions tier 2 standards but also is indicative of Tier 1 violations such as favoring or disfavoring incumbents.<sup>11</sup> This Court made it clear that the failure to comply with the Tier-Two standards, like compactness, “serves as an objective indicator of impermissible legislative purpose proscribed under tier one (e.g., intent to favor a political party or an incumbent).” Supreme Ct. Op. at 188.

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<sup>11</sup> Furthermore, as was shown by the discussion *supra*, in Part I, CS/SJR 2-B’s failure to comply with the Tier-Two requirements of compactness and the use of political and geographical boundaries that are not justified by tier one standards provide further indisputable facts that support an intent to favor incumbents. As this Court noted previously, “[t]he term ‘political gerrymander’ has been defined as ‘[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.’” Supreme Ct. Op. at 41 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 271n.1 (2004)).

As discussed in Part I, *supra*, the Senate plan proposed by CS/SJR 2-B contains several visually and statistically non-compact districts in four distinct regions of the State:

1) Northeast Florida, notably District 6 in Volusia, Flagler, Putnam and St. Johns Counties and District 8 in parts of Volusia, Lake and Marion Counties;

2) Central Florida, notably Districts 13 and 14 in Brevard, Orange and Osceola Counties;

3) South Central Florida, notably District 32 in parts of Indian River, St. Lucie, Martin and Palm Beach Counties and District 21 in Okeechobee County, and parts of Osceola, Polk, St. Lucie and Martin Counties; and

4) South Florida, notably District 39 in Monroe and Miami-Dade Counties.



Second, the new plan avoids pitting incumbents against each other. In its earlier Opinion, this Court noted that there was not a single Senate incumbent pitted against any other incumbent and that fact was an indicator of improper intent. Supreme Ct. Op. at 124. Notwithstanding the Court’s admonition, the newly adopted CS/SJR 2-B only pits two incumbents against each other (in Proposed District 13). In fact, public information suggests that Senator Simmons will be moving to District 10 and thus running for reelection in the neighboring district.<sup>12</sup> This would mean, just like the plan held invalid by this Court, CS/SJR 2-B would not pit any incumbents against each other.

Third, and yet another indicator of incumbent bias is that the new plan retains the core of previous districts for multiple incumbents, this Court stated that “the drawing of a new district so as to retain a large percentage of the incumbent’s former district” serves as an indicator of intent to favor an incumbent. Supreme Ct. Op. at 47. This Court struck down Senate plan under CS/SJR 1176 in part because several incumbents were “given large percentages of their prior constituencies.” Supreme Ct. at 124-125. “These percentages are of even greater concern given that the 2002 Senate plan was drawn at a time when intent to favor a political party or an incumbent was permissible and there were no requirements of compactness or utilizing existing boundaries.” Supreme Ct. Op. at 125. In the

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<sup>12</sup> See *supra* note 7, and accompanying text.  
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now-invalidated Senate plan, new districts were composed, on average, of 64.2% of their predecessor 2002 districts. The districts drawn under CS/SJR 2-B similarly retain large percentages of an incumbent's former district. The objective data shows that the average proposed Senate districts preserves 60.5% of its predecessor 2002 districts. In CS/SJR 2-B, eighteen Proposed Districts still contain more than 60.0% of their 2002 predecessor districts, ten Proposed Districts contain more than 70.0% of the 2002 core, and three Proposed Districts contain more than 80.0% of their 2002 core.<sup>13</sup> These factors together lead to the conclusion that the map is drawn to favor incumbents. As this Court said, “[w]hen analyzing whether the challengers have established an unconstitutional intent to favor an incumbent, we must ensure that this Court does not disregard obvious conclusions from the undisputed facts.” Supreme Ct. Op. at 47. The obvious conclusion from these undisputed facts is that the plan was drawn to favor incumbents.

This Court's earlier decision provided a specific explanation of the requirements of Article III, Section 21 in the apportionment of legislative seats. Notwithstanding that explanation, the Senate plans presented by CS/SJR 2-B

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<sup>13</sup> The following Proposed Districts contain more than 60.0% of their previous core districts: 2 (62.2%); 3 (81.5%); 5 (70.1%); 9 (62.2%); 10 (64.7%); 11 (74.9%); 17 (67.0%); 19 (76.7%); 24 (77.4%); 26 (63.6%); 28 (89.0%); 32 (71.5%); 33 (71.5%); 35 (64.1%); 37 (64.5%); 38 (84.6%); 39 (75.2%); and 40 (66.2%).

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continues to demonstrate an intent to favor incumbents. This new constitutional standard against political bias is strict and specific. As this Court said:

In contrast to the federal equal protection standard applied to political gerrymandering, the Florida Constitution prohibits drawing a plan or district with the intent to favor or disfavor a political party or incumbent; **there is no acceptable level of improper intent.** It does not reference the word —invidious—as the term has been used by the United States Supreme Court in equal protection discrimination cases, *see, e.g., Brown v. Thompson*, 462 U.S. 835, 842 (1983), and Florida’s provision should not be read to require a showing of malevolent or evil purpose.

Supreme Ct. Op. at 43. Clearly CS/SJR 2-B demonstrates improper intent in violation of Article III, Section 21, Florida Constitution.

### **CONCLUSION**

After this Court invalidated the Senate plans proposed under CS/SJR 1176 in its March 9, 2012 Opinion, the Legislature had the opportunity to redraw its plan and correct the mistakes identified by the Court. The new Senate plan proposed under CS/SJR 2-B is still replete with evidence of an intent to favor incumbents and the dominant political party. There is no evidence that the functional analysis required for racial and language minorities was conducted in the drafting of the plan even after explicit instructions to do so by this Court. Supreme Ct. Op. at 130. Deviations from compactness and failure to utilize existing boundaries still

are not justified by a showing of necessity to comply with the Tier-One requirements under Article III, Section 21(a), Florida Constitution.

Under Article III, Section 16(f), Florida Constitution, this Court has the obligation to make a judicial apportionment, in the event of a failure by the Legislature to make a valid apportionment in an extraordinary apportionment session. Because this is an extraordinary situation, it is now this Court's duty under the Florida Constitution to produce an apportionment plan for the Senate that meets the requirements of Article III, Section 21, Florida Constitution.

Respectfully submitted this 10<sup>th</sup> day of April, 2012.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing, along with the FDP Appendix, was furnished by hand delivery or federal express this, 10<sup>th</sup> day of April, 2012 to the following parties listed below. Service was made to all parties appearing on the most recently revised service list at the time of service.

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**CERTIFICATE OF TYPEFACE COMPLIANCE**

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