IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC12-460

IN RE: JOINT RESOLUTION OF LEGISLATIVE APPORTIONMENT

BRIEF OF THE FLORIDA STATE CONFERENCE OF NAACP BRANCHES IN OPPOSITION TO JOINT RESOLUTION OF APPORTIONMENT

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STATEMENT OF THE CASE AND FACTS

The Florida State Conference of NAACP Branches (hereinafter, "Florida NAACP") is a statewide, grassroots organization that has a strong interest in state redistricting and this Court's review of the enacted state legislative redistricting plans. First, the Florida NAACP was a strong proponent of the Amendments 5 and 6, a ballot initiative before Florida voters in November of 2010. The Florida NAACP strongly supported the Amendment in large part because the language of the minority voting rights provisions tracked the language used in Sections 2 and 5 of the Voting Rights Act of 1965. As this Court acknowledged, no parties dispute that the Florida constitution now incorporates the principles embodied in the federal Voting Rights Act. March 9 Op. 51.

Second, given the passage of those Amendments and their ensuing incorporation into the state constitution, the Florida NAACP, representing its members who are black voters across the state, has a vested interest in ensuring the full and correct application of the minority voting rights protections now enshrined in the state constitution.

This Court first had the opportunity to interpret how Amendment 5 should be applied following the February 9, 2012, passage of Senate Joint Resolution 1176, a reapportionment plan redrawing the state's 120 House and 40 Senate districts. Pursuant to Art. III, § 16(c) of the Florida Constitution, the Attorney

General petitioned this Court for a declaratory judgment to determine the validity of the enacted redistricting plans. Art. III, § 16(c), Fla. Const. The Florida Democratic Party, a coalition of groups including the League of Women Voters (hereinafter, "the Coalition"), and the City of Lakeland all filed briefs in opposition to the enacted State House and Senate plans. March 9 Op. 8 n. 2. The Florida NAACP filed a comment directed to the interpretation of the minority voting rights provisions. *Id*.

On March 9, 2012, this Court issued an opinion declaring the redistricting plan for the Florida House of Representatives to be constitutionally valid under the Florida Constitution. As it related to the minority voting rights provisions, this Court rejected the Florida Democratic Party's assertions that the House plan packed black voters into minority districts in an effort to minimize their influence elsewhere. March 9 Op. 107. The Court noted instead that "[n]one of the black majority-minority districts is a super-majority district requiring the Legislature to "unpack" it on this record." *Id.*

This Court declared the redistricting plan for the Florida Senate to be constitutionally invalid. This Court found that the Senate plan was "rife with objective indicators of improper intent," March 9 Op. 124, and identified eight Senate districts that violated the new constitutional redistricting criteria. March 9 Op. 149, 156, 161, 165, 175. The invalidation of two of those districts—old

Senate District 1 and old Senate District 29—was based on the Senate's decision to maintain the cores of the districts, despite resulting non-compactness, in order to avoid retrogression. March 9 Op. 153, 167. Because this Court believed that opponents of the Senate plan had demonstrated that each of these districts could be "drawn much more compactly and remain a minority-opportunity district," March 9 Op. 155, the Court found these districts to be in violation of the state constitution. The Florida Legislature was thus forced to adopt a new redistricting plan for the Florida Senate.

On March 14, the Florida Legislature reconvened in a special session to redraw the lines for the state's 40 Senate districts. April 5 Pet. Decl. Judg. 2. On March 27, the legislature passed Senate Joint Resolution 2-B, a revised Senate redistricting plan, and on April 5, 2012, the Florida Attorney General petitioned this Court for declaratory judgment to determine the constitutional validity of the revised Senate plan. *Id*.

SUMMARY OF ARGUMENT

While the Florida NAACP would strongly protest the packing of black voters into super-majority districts, the Florida NAACP also opposes the dismantling of black opportunity districts that are not packed, simply in the name of making them more compact and thus risking a diminished ability to elect. This

is not consonant with the Tier 1 provisions of the new Florida constitutional redistricting provisions.

Before this Court can declare that the Senate Districts 9 and 31 alterations, which significantly reduce the black population in the districts, comply with the state constitution, it must have before it more substantial evidence about the extent of racially polarized voting in those regions. Without such evidence, approving these districts is simply gambling on the future ability of minority voters to participate in the political process. Finally, even based on the limited evidence before this Court, there are serious questions about the continued ability of black voters to elect the candidates of their choice in Senate Districts 9 and 31. Senate District 9 is now a district in which black voters would have constituted only 40.11% of the electorate in the 2010 general election. Senate District 31 is now a district in which black voters constitute only 43.29% of the citizen voting age population. Both changes represent significant diminishments of African-American voting strength in the districts. Therefore, the Florida NAACP respectfully requests that this Court find that the newly revised State Senate redistricting plan does not comply with the Florida constitution.

ARGUMENT

I. Standard of Review

In its March 9, 2012 opinion, this Court clarified the standard of review it would employ in its review of state legislative redistricting plans pursuant to Art. II, § 16(c) of the Florida Constitution. The Court noted that while "the advent of new constitutional requirements undoubtedly increases the Legislature's apportionment obligations, the House and Senate plans still come to this Court with an initial presumption of validity." March 9 Op. 19. Despite this presumption, the Court noted that "the operation of this Court's process in apportionment cases is far different than the Court's review of ordinary legislative acts, and it includes a commensurate difference in our obligations." *Id*. at 20. Under this unique standard of review, "judicial relief would be warranted where the Legislature has failed to reapportion according to federal and state constitutional requisites." *Id.* at 21 (internal citations omitted).

This Court plainly rejected the state's arguments that challengers must prove facial invalidity beyond a reasonable doubt, noting that particular principle of statutory construction has never been applied to this Court's review of legislative redistricting plans and that the reasonable doubt standard is "ill-suited" for this type of original proceeding. March 9 Op. 23. Instead, this Court would conduct a meaningful review and "enforce adherence to the constitutional requirements,"

striking down plans that do not comply with the new constitutional provisions. *Id.* at 26. That same standard of review would apply in the Court's instant inquiry.

II. A Functional Analysis of Non-retrogression Requires An Examination of Racially Polarized Voting Trends

A functional analysis is required to determine whether an enacted state legislative redistricting plan violates the state constitutional protections against the diminishment of minority voters' ability to elect the candidates of their choice. March 9 Op. 62-63. However, where the minority population percentage of an "ability to elect" district is lowered and pushed to the very edge of that ability, the Florida NAACP argues that the functional analysis of retrogression must include more evidence and analysis than what is currently before this Court.[1] The Florida NAACP believes this need for expanded analysis is consistent with Department of Justice's application of the non-retrogression standard and with the spirit behind the approval of the redistricting amendments by Florida voters.

"Florida now has a statewide non-retrogression requirement independent of Section 5." March 9 Op. 51. As this Court acknowledged, the non-diminishment language mirrors the language in Section 5 of the Voting Rights Act, and this

[1] *See*, Florida NAACP Comment in In Re: Senate Joint Resolution of Legislative Apportionment 1176, Case No. SC12-1, at p. 6. "The multitude of factors that may be considered under a function analysis include: a district's minority voting age population, taking into account citizenship and registration rates); the extent of racially polarized voting; whether minority groups form voting coalitions, the effect of incumbency in past elections; and other factors that may affect turnout rates by race."

Court is guided by interpretation of that federal provision. *Id*. Thus, it is important for this Court to consider the purpose behind Section 5 of the Voting Rights Act. Section 5 of the Voting Rights Act was enacted in 1965 in order to "shift the advantage of time and inertia from the perpetrators of the evil to its victim." *Beer v. United States*, 425 U.S. 130, 140 (1976). That is, Congress found that the time and expense burden placed on minority voters when their only option was to pursue Section 2 litigation was inadequate to fully protect the voting rights of those vulnerable voters. *Shelby Co. v. Holder*, 811 F. Supp. 2d 424, 502 (D.D.C. 2011). Likewise, the voters of Florida made that same determination, and this Court should recognize that in order to comply with the state constitutional non-retrogression requirement, the Florida Legislature faces a substantial burden in demonstrating that a redistricting plan will not diminish the ability of minority voters to elect their candidates of choice. While there is no likely mechanism by which the voters of Florida could have required the state to obtain preclearance, March 9 Op. 60 n. 26, that does not negate the fact that in order to comply with the spirit of the Amendment, which adopts a Section 5 standard, the state must demonstrate that the plan is not retrogressive.

The evidence considered by this Court, both in its previous and instant consideration, does not allow for such a conclusion. While a functional analysis of retrogression does require review of the types of data listed by this Court,

including voting-age populations, voting-registration data, voting registration of actual voters, and election results history, March 9 Op. 67, the nature of the data considered within those categories can impact the overall analysis. The presence of legally-significant racially polarized voting affects the functional analysis. This Court does not currently have before it a record sufficient to determine the extent that significant reduction of the black voting age population in a district would, in light of racially polarized voting, diminish the ability of black voters to continue electing their candidate of choice.

The true extent of racially polarized voting in specific areas of the state cannot be reliably determined because the probative value of the statewide reconstituted elections available for examination and use on the House MyDistrictBuilder redistricting website is limited. First, the list of elections available does not include a sufficient number of racially-contested elections—that is, elections in which voters have a choice between an African-American and non-African-American candidate. These elections are the most probative in assessing the presence and extent of racially polarized voting. *See Davis v. Chiles*, 139 F.3d 1414, 1417 n. 5 (11th Cir. 1998), *cert denied sub nom Davis v. Bush*, 526 U.S. 1003 (1999) (noting that elections involving black candidates are more probative of racially polarized voting); *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1208 n. 7 (5th Cir. 1989) ("[T]he evidence most

probative of racially polarized voting must be drawn from elections including both black and white candidates."); *Jenkins v. Manning*, 116 F.3d 685, 692, 694-95 (3rd Cir. 1997) (affirming a decision to discount elections that were not racially-contested); *Rural W. Tenn. African-Am. Affairs Council v. Sundquist*, 209 F.3d 835, 840-41 (6th Cir. 2000) (approving a lower court decision to consider more probative black-versus-white elections). In fact, of the eleven elections available on the MyDistrictBuilder website,[2] only two are racially contested elections—the 2008 presidential general election and the 2010 United States Senate race. hus, the elections examined offer some insight into how Democratic the districts are, but are not overwhelmingly probative of the extent of racially polarized voting in the districts.

Moreover, it is important to also consider endogenous elections if possible, or at least county-level analysis in counties constituting the contested districts. An example of an endogenous election is a State Senate race in one of the districts in question. An exogenous race is any other electoral race, such as city council or county commission. In most instances, an endogenous election is the best indicator of how voting historically operates in the kind of election at stake. *See Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999) (stating that the 11th

[2] Election data available on the State House's MyDistrictBuilder website: 2010 Governor, 2010 CFO, 2010 Attorney General, 2010 Commissioner of Agriculture, 2010 US Senate, 2008 Presidential, 2006 Governor, 2006 CFO, 2006 Attorney General, 2006 Commissioner of Agriculture, and 2006 US Senate.

Circuit considers endogenous elections to be more probative); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir. 1995) (in general, endogenous elections are more probative than exogenous elections); *Rural W. Tenn.*, 209 F.3d at 841 (finding that the District Court was correct to discount exogenous elections). Where there are no contested endogenous elections to examine, examining county-wide or local races may still give a better understanding of the extent of racially polarized voting in the region. Candidates in state legislative races do not have the finances that candidates in national or state-wide races have, meaning that they have less opportunity to make their case publicly or to get voters to look beyond their race. Thus, while the 2008 Presidential general election was a racially contested one, it does not adequately represent what a black candidate for a State Senate seat would face in a race against a white candidate, where black voters did not constitute a majority of the electorate and racially polarized voting is present. Even county-wide elections, though exogenous, are more indicative of electoral atmosphere that black voters would have to operate within in order to participate effectively in the political process. The state passed its new Senate plan without consideration of any of these more probative elections.

Additionally, because, as this Court acknowledges, March 9 Op. 61, Congress overruled the United States Supreme Court decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), when it reauthorized and amended the Voting

Rights Act in 2006, it is instructive to look at why the District Court in *Ashcroft* found the Georgia state legislative redistricting plan to be retrogressive and in violation of Section 5. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002). In overruling the Supreme Court, which reversed the District Court's decision, Congress was, in essence, agreeing with the interpretation of the District Court. The three-judge district court panel in *Ashcroft* found that the Georgia State Senate redistricting plan did not warrant preclearance because the State had not demonstrated that lowering the black voting age population and lowering the percentage of registered voters who were black to below 50% in certain districts would not have a retrogressive effect on the ability of black voters to elect their candidates of choice. 195 F. Supp. 2d at 93-94.

Specifically, the District Court in *Ashcroft* made several findings relevant to this Court's current inquiry. First, the *Ashcroft* court noted "an analysis of local and regional elections demonstrate[d] the presence of racially polarized voting in the benchmark Senate districts." *Id.* at 94. This is significant because in the instant action, no party has conducted such an analysis. Thus, the record before this Court is not adequate to conclude that the proposed changes will not be retrogressive for black voters. Second, the *Ashcroft* court found reconstituted statewide election results to be inadequate to demonstrate a lack of retrogression because "African American candidates of choice running for State Senate seats are

unlikely to receive the same levels of white crossover voting as may occur in statewide elections." *Id*. Again, this is another indicator that the record before this Court may be inadequate to risk the ability of minority voters to elect candidates of their choice in districts with significantly reduced BVAP percentages. The Supreme Court reversed and remanded the District Court, finding, in essence, that the State could choose to trade ability-to-elect districts for a larger number of minority influence districts in the state. *Georgia v. Ashcroft*, 539 U.S. at 483.

The Congressional "*Ashcroft* fix" was intended to redirect the focus of the Section 5 analysis to whether "the electoral power of a community [was] **more, less, or just as able** to elect a preferred candidate of choice." H.R. Rep. No. 109-478, at 44 (2006) (emphasis added). Congress decided that if a change rendered that community **less able** to elect a candidate of choice, then that change was retrogressive and would not be precleared. *Id*. at 46. While the *Ashcroft* District Court decision was overruled, the subsequent Congressional enactment revives the relevance of the district court's analysis, which appropriately took into consideration the effects of racially polarized voting on a smaller minority electorate in a proposed district. This Court should also take this into consideration, and, in accordance with Section 5 interpretation, apply the Tier 1 requirements of Amendment 5 in a manner that vigorously protects the full ability of minority voters to elect the candidates of their choice.

Indeed, there are a number of objections interposed by the Department of Justice in recent years that raise questions about some of the changes made to black opportunity districts similar to the changes made in the Florida Senate redistricting plan. Just this year, the Department of Justice objected to a redistricting plan for the county commissioners of Galveston County, Texas, in part because jurisdiction did not demonstrate that the reduction of the total minority voting age population from 60.9 to 58.6 percent (reducing the black voting age population from 35.2 to 30.8 percent) in Precinct 3 would not have a retrogressive effect on black voters. *See* Objection Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to James E. Trainor II, Beirne, Maynard & Parsons (March 5, 2012). In 2003, the Department objected to a redistricting plan for the City of Plaquemine, Louisiana, that would have reduced the black voting age population in one of the districts from 51.1 percent to 48.5 percent, noting "analysis of elections shows that the level of racial polarization in voting for the city's board of selectmen, as well as other elections within the city, is such that this level of reduction, although relatively small, calls into question the ability of black voters to elect their candidate of choice." *See* Objection Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Nancy P. Jensen, Capital Region Planning Commission (December 12, 2003). In 2002, the

Department objected to an annexation that would have decreased the percentage of black voters in a minority district from 59.3 percent to 50.3 percent. *See* Objection Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to C. Samuel Bennett II, Clinton City Manager (December 9, 2002). These are all objections where minor changes in district demographics were determined to be retrogressive following an intensely local examination of probative elections and racially polarized voting trends.

Finally, the Coalition submitted additional authority relating to instances in which the Department of Justice had, since 2006, precleared a redistricting plan that had reduced the minority composition of ability-to-elect districts. *See*, Coalition Notice of Supplemental Authority, March 2, 2012. One of the cases highlighted by the Coalition was the Department of Justice preclearance of the South Carolina State Senate Plan. That plan reduced the black voting age population in several districts, although none were reduced from above 50% to below 50%. What was most relevant to that preclearance was the extensive racially polarized voting analysis performed by Dr. Richard Engstrom on behalf of the State, which the State offered to the Department of Justice as part of its preclearance submission.[3] Dr. Engstrom looked at the results of two reconstituted

[3] *See*, "South Carolina Senate Preclearance Submission – S. 185," available at: http://redistricting.scsenate.gov/PreclearanceSubmissionsS815.html; and "Exhibit 14 – Report by Richard Engstrom, Ph.D.," available at

statewide elections, but he also analyzed endogenous elections and countywide elections in counties contained in the Senate Districts at question. Engstrom Report, p. 4-6. Based on this extensive research, Dr. Engstrom was able to conclude that with the ascertained levels of racially polarized voting, the change in district demographics would not diminish the ability of black voters to elect their candidates of choice. No party has conducted that type of analysis in the instant case, and therefore, this Court cannot be certain that the significant changes to the demographics of Senate Districts 9 and 31 will not have a retrogressive effect on black voters.

When Florida voters approved Amendments 5 and 6 in November of 2010, Section 5 protections were enshrined in the Florida State Constitution. Those protections are unique, and embrace a resistance to approving changes that could endanger the ability of minority voters to continue electing their candidates of choice. The Florida NAACP urges this Court to recognize that the Constitution now adopts that approach, removing the burden from minority voters to have to engage in time-consuming and expensive Section 2 litigation in order to protect the gains for which its members have struggled so extensively. Significant changes to districts must be viewed in light of the extent of racially polarized voting in the

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http://redistricting.scsenate.gov/Exhibits/Exhibit%2014%20-%20REPORT%20BY%20RICHARD%20ENGSTROM,%20PHD/Exhibit%2014%20-%20Report%20by%20Richard%20Engstrom%20PhD.pdf

region. Where racially polarized voting exists to a legally-significant extent such that proposed district changes would lessen the ability to elect, those changes must be rejected as contrary to Florida's constitutional requirements.

III. Senate District 9 As Drawn Will Diminish the Ability of Black Voters to Elect Their Candidate of Choice

The Florida NAACP believes that Senate District 9 as drawn in SJR 2-B will diminish the ability to elect their candidates of choice in the Northeast Florida area. While the newly enacted version of this district is very similar to the one proposed by the Coalition and discussed approvingly by this Court in its March 9 opinion, the Florida NAACP believes that there is insufficient evidence to determine whether this configuration of the black opportunity district in Northeast Florida does not adequately protect the ability of black voters to elect their candidates of choice, and, as such, this Court should err on the side of caution when determining whether the Senate's enacted plan violates the state constitutional protections guaranteed to minority voters.

The changes in the demographics of this district are not insignificant. In the benchmark district (Senate District 1), the black voting age population was 45.54% of the district (45.81% in DOJ-BVAP). In Senate District 9 in the newly enacted plan, the district is 41.62% in BVAP. In the revised district, black voters would have constituted 42.80% of registered 2010 voters, and only 40.11% of the actual voters in the 2010 general election. Black voters are thus not a majority of voters

of the general electorate and will not be able to control the election of a candidate of their choice absent substantial cross-over voting.

This version of the district also now strands a significant number of black voters in the Daytona Beach area in a district in which they will no longer have the ability to elect their candidate of choice. Black voters in Volusia County have greatly benefitted from their contributions to the elections of Senator Anthony Hill and Senator Audrey Gibson, the two African-American Senators that have represented old Senate District 1 since 2002. Both Senators have maintained offices in Daytona Beach.[4] Volusia County NAACP members believe that they will suffer significant political harm from no longer being able to elect an African-American candidate sensitive to their needs and interests.

The reconstituted results of the 2010 U.S. Senate race in the newly revised district are very troubling, and indicate that there will not be sufficient crossover voting for African-Americans to continue electing the candidates of their choice. This election, more than any other considered election, reveals the effects of racially polarized voting in the area. In that election, Rubio (R) would have gotten 42.28% of the vote, Meek (D) would have gotten 39.55% of the vote, and Crist (I)

[4] S*ee*, Senator Audrey Gibson, "District Offices," available at: http://www.flsenate.gov/Senators/s1; Archive of Senator "Tony" Hill, available at: http://archive.flsenate.gov/cgi-bin/View_Page.pl?Tab=legislators&Submenu=1&File=index.html&Directory=Legislators/senate/001/

would have gotten 16.83% of the vote. When given a moderate white alternative (Crist) to a black Democrat (Meek), approximately 15% of registered Democrats in the revised district would have voted for Crist.[5] In the revised district, the black candidate would not have been the top vote-getter in that election.

Moreover, the effect of legally-significant levels of racially polarized voting in the region cannot be discounted when considering whether a substantial drop in black voting age population in a district will diminish the ability of black voters in the district to elect their candidate of choice. During the last redistricting cycle, a three-judge federal panel found a "substantial degree of racially polarized voting in…south Florida and northeast Florida." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1298-99 (S.D. Fla. 2002). While *Martinez* was a vote dilution case under Section 2, the finding and presence of racially polarized voting is still relevant in a retrogression inquiry.

Even elected officials spoke out against the revisions to this district. Senator Audrey Gibson, the current representative of Senate District 1, familiar with voting patterns in the region, spoke out against the redrawing of the district in this manner.[6] Racially polarized voting is a persistent problem in Northeast Florida,

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[5] Registered Democrats made up 54.33% of the actual 2010 general election voters, but the Democratic candidate Meek received only 39.55% of the vote.

[6] *See* Matt Dixon, "Senate OKs Revised District Map," *The St. Augustine Record*, March 23, 2012, available at: http://staugustine.com/news/local-news/2012-03-23/senate-oks-revised-district-map (last accessed 4/9/2012).

and the Florida Senate has not taken that fully into account when risking the ability of black voters to elect their candidates of choice by lowering the black voting age population in the newly revised Senate District 9.

If the well-founded concerns of the Florida NAACP play out, black voters in the region will have no remedy. If the combination of racially polarized voting in the region with the lowering of the black voting age population in the district result in the African-American candidate of choice losing, black voters will be irreparably harmed. The district presumably cannot be drawn to meet the 50% mark, and thus, Section 2 litigation would be foreclosed. And black voters in the Daytona Beach region will be harmed regardless of the outcome of future Senate District 9 elections, as they will be deprived of their ability to elect a candidate of their choice, responsive to their specific needs. There is simply not enough evidence before this Court to determine that racially polarized voting in Northeast Florida will not impede African-American electoral participation in non-majority districts. This Court should not risk such harm, and should find that the newly revised Senate District 9 violates the state constitutional prohibition against drawing a district that would diminish the ability of minority voters to elect their candidates of choice.

IV. Senate District 31 As Drawn Will Diminish the Ability of Black Voters to Elect their Candidate of Choice

The Florida NAACP believes that the newly enacted Senate District 31 will diminish the ability of black voters to elect their candidates of choice. The benchmark district—Senate District 29—was 58.49% in Black Voting Age Population (BVAP). In the plan that this Court invalidated on March 9, the corresponding district was kept largely the same. This Court took objection to the district because the Coalition offered a more compact version of the district that this Court believed would not be retrogressive for black voters. What the Senate ultimately enacted looks nothing like that Coalition-proposed district. Instead, black voters not only lost a majority-black district without gaining another district in which black voters will be able to elect their candidates of choice—they are also faced with a district in which there is a significant lag in black citizen population, meaning that they will have an even more diminished ability to elect the candidates of their choice.

As mentioned before, under the benchmark plan, the district (then numbered Senate District 29) was 58.49% in BVAP. The benchmark district was 56.62% in Black Citizen Voting Age Population (BCVAP). In the newly enacted plan, the corresponding African-American opportunity district (now Senate District 31) is, by numbers alone, dramatically different. The revised district is 47.75% in BVAP (and 48.03% in DOJ-BVAP, which includes multi-racial designations). More problematic are the citizenship numbers—the revised district is only 43.29%

BCVAP. Thus, there is almost a 5% lag in black voting age population that is actually eligible to vote. This factor must be considered in determining whether black voters will continue to have an ability to elect their candidates of choice.

While the statewide reconstituted elections applied to newly enacted Senate District indicate that it is a strong Democrat district, for the reasons mentioned above in Section I, these reconstituted statewide elections alone are not sufficient to guarantee that black voters will continue to have the ability to elect the candidates of their choice. Racially polarized voting, while perhaps less pervasive in Broward County than in Northeast Florida, can still play a legally-significant role in preventing black voters, who would have constituted only 48.46% of actual voters the 2010 general election, from electing their candidate of choice. Again, the federal District Court in *Martinez* acknowledged the presence of significant racially polarized voting in the South Florida region. 234 F. Supp. 2d at 1298.

In the newly revised district, Black voters would have constituted only 45.40% of registered voters in the 2010 elections. Thus, Black voters are no longer a majority of registered or turned-out voters in the district, and must now depend on white crossover voters. Their ability to elect candidates of choice did not depend on that factor in the benchmark district. And, by looking at the 2010 Senate race, it seems that a significant number of white Democrats would vote for a moderate white Independent over a black Democrat. This calls into question the

ability of black voters to elect their candidate of choice—if they retain that ability only when there is no moderate alternative to the Black Democrat, the Florida NAACP considers diminished the ability of black voters to elect their candidate of choice.

Without careful examination of a number of racially-contested elections, specific to the region in question, the Senate has risked the ability of black voters to elect their candidates of choice on the basis of insufficient number and types of statewide reconstituted elections. Rather than even adopting the version of the district proposed by the Coalition, the Senate instead constructed a district that even further diminished the ability of black voters to fully participate in the political process.

The version of Senate District 31 that the Coalition offered in their submitted plan was significant in this Court's finding that the Senate's first attempt at redistricting was constitutionally invalid. While the Coalition offered a version of the district that was substantially more compact than the benchmark district, it remained a district in which black voters were still a majority of the population and a majority of the voters. The Coalition's Senate District 29 was 53.44% in BVAP and 51.42% in BCVAP. Black voters would have been 52.58% of 2010 registered voters in the district, and would have been 54.99% of the actual voters in the 2010 general election.

Again, this Court should consider the remedies available should this risky gamble fail and black voters are rendered unable to elect their candidate of choice in this district. Those voters would have no choice but to engage in slow and expensive federal court litigation, and that is precisely the type of situation that Section 5, and, in turn now, the amendments to the Florida Constitution, were designed to avoid. This is simply a situation in which compactness must give way to a certain extent to preserve ability of black voters to elect their candidate of choice.

CONCLUSION

Based on limited evidence and incomplete analysis, the Florida legislature has enacted a state Senate redistricting plan that imperils the hard-fought ability of black voters to continue to participate in the political process as they were able to in the benchmark plan. For the foregoing reasons, the Florida NAACP requests that this Court find the Florida Legislature's Senate Joint Resolution 2-B constitutionally invalid on the grounds that two of the Senate districts will diminish the ability of minority voters to elect candidates of their choice.

Dated: April 9, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was furnished on the 9th day of April by U.S. Mail to the following parties, appearing on the most recently revised service list at the time of service:

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The brief was also sent via electronic mail to the abovementioned parties.

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CERTIFICATE OF TYPEFACE COMPLIANCE

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

__/s/ Charles G. Burr_____

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