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

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

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

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases:

Florida Constitutional Provisions:

Other Authorities:

SUMMARY OF ARGUMENT

Article III, Section 21 of the Florida Constitution guarantees all citizens fair districts throughout the State. A "mostly valid" plan is not constitutional. In its original March 9, 2012 Opinion, this Court specifically instructed the Legislature to apply the standards to the entire redistricting plan in a consistent and reasoned manner. *See 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 "Sup. Ct. Op." or "Opinion"). Despite guidance from the Court, the proposed Senate plan (hereinafter "CS/SJR 2-B" or "Proposed Plan") not only violates mandatory compactness, but in at least one instance, the Proposed Plan is worse than the plan invalidated by the Court (hereinafter "CS/SJR 1176"). The Senate's justifications for its constitutional violations are simply inadequate.

Even with the Court's specific direction, the Proposed Plan still contains the two strongest indicia of intent to favor incumbents. The plan proposed by CS/SJR 2-B, at most, pits one pair of incumbents against each other, and more likely, it pits none. Like the plan invalidated by the Court, the Proposed Plan continues to sustain high percentages of the average core of the benchmark districts, especially in those districts with actual incumbents.

In the Senate's Answer Brief (hereinafter "Ans. Br."), it failed to justify the several individual districts that violate the constitutional mandates of compactness and utilizing political and geographical boundaries, further indicating intent to protect incumbents.

A disregard for the constitutional mandates set forth in Tier-Two is "constitutionally suspect and often indicative of racial and partisan gerrymandering." Sup. Ct. Op. at 91, 95. The Florida Democratic Party (hereinafter "FDP") and the Coalition[1], collectively "Opponents", previously submitted alternative plans to demonstrate the Legislature's ability to comply with the constitutional mandates interpreted by the Court, and its failure to actually do so. The fundamental defects of the proposed gerrymandered districts without any rational justification suggest an intent to favor incumbents and has the detrimental effect of diminishing minorities' "ability to elect representatives of their choice," specifically prohibited by Article III, Section 21. The Proposed Plan, like the invalidated plan in CS/SJR 1176, "is rife with objective indicators of improper intent which, when considered in isolation do not amount to improper intent, but when viewed cumulatively demonstrate a clear pattern." Sup. Ct. Op. at 124. In sum, the plan continues to exhibit elements of improper intent to favor incumbents and contains multiple non-compact districts that make this plan invalid.

[1] The League of Women Voters of Florida, The National Council of La Raza, and Common Cause Florida are collectively referred to as the "Coalition."

ARGUMENT

I. THE SENATE HAS FAILED TO JUSTIFY THE TIER-TWO VIOLATIONS OF COMPACTNESS AND FAILURE TO USE POLITICAL AND GEOGRAPHICAL BOUNDARIES.

The Senate's Plan in CS/SJR 2-B is invalid in its entirety because several districts do not comply with the mandatory constitutional requirements of compactness and utilizing political and geographical boundaries. Article III, Section 21(b) requires that districts "**shall be compact**" and "where feasible, utilize existing political and geographical boundaries" unless there is a Tier-One justification. Clearly, the Legislature has failed its constitutional duty to demonstrate the necessity to deviate from these Tier-Two requirements.

The Court has defined compactness with specificity. Districts must be visually and quantitatively compact. Sup. Ct. Op. at 83-85. In its March 9 Opinion invalidating the Senate's previous plan, the Court used the Reock and Area/Convex Hull tests, as both compactness measures have gained "relatively broad acceptance in redistricting." Sup. Ct. Op. at 83-85.

In the Senate's plan, there are severely gerrymandered districts with unnecessary appendages and low compactness scores without reasonable constitutional justification. The Senate states that the Court identified six Senate

districts – invalidated Districts 1, 6, 12, 19, 34 and 40[2] – with low compactness scores, yet it fails to mention that the Court also stated that, "[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. These districts include Districts 1, 3, 6, 9, 10, 12, 14, 19, 27, 29, 30, and 34." Sup. Ct. Op. at 128-129. In CS/SJR 2-B, the invalidated districts are equivalent to proposed Districts 1, 2, 9, 6, 15, 12, 14, 19, 27, 34, 23, and 31, respectively. The proposed plan did not address all of the bizarre and non-compact districts, even though the Senate was on notice and aware of the low compactness scores and visually unusual shapes in these districts. CS/SJR 2-B contains eight districts with Reock scores of less than 0.30 – proposed Districts 8, 14, 19, 32, 34, 35, 39, and 40. In fact, four of the 40 Senate districts still have Reock scores under 0.25 – proposed Districts 8, 19, 32, and 39. Even more inexplicably, proposed District 8 in CS/SJR 2-B now has a Reock score of 0.24, making it even less compact than the district in the invalidated CS/SJR 1176, which had a Reock score of 0.28.[3]

Although this Court stated that "our role is not to select the "best plan," Sup. Ct. Op. at 155, the Court used alternative plans to demonstrate that the Senate's

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[2] In CS/SJR 2-B, the invalidated Senate Districts are equivalent to Proposed Districts 1, 9, 12, 19, 31 and 39, respectively.

[3] Additionally, proposed Districts 19 and 39 both have a Reock score of 0.23, the same score as their benchmark districts (19 and 40) in the invalidated map. 1176, and District 32 went from 0.22 in the invalidated map (benchmark district 25) to 0.23 in SJR 2-B.

district "violate[d] the constitutional standards of compactness and utilizing existing political and geographical boundaries. The alternative plan shows how political and geographical boundaries can be better utilized and demonstrates how [the Senate district] can be made more compact…without violating Florida's minority voting protection provision." Sup. Ct. Op. at 155.

A. <u>Northeast Florida</u>

Proposed District 8 is one of the least compact districts in the Senate map and has no valid justification. District 8's bizarre shape clearly demonstrates the failure to utilize political and geographical boundaries, and splits a highly black-populated city, Daytona Beach. In fact, proposed District 8 has a Reock score of 0.24, even lower than the 0.28 Reock score in the invalidated plan. Although proposed District 8 has one of the lowest Reock scores in the proposed plan and is visually non-compact, the Senate argues that it still meets the compactness standard, because the Area Convex Hull score is 0.73. Additionally, the Senate states that District 8's "shape was influenced by changes made in northeast and central Florida, and by the Senate's desire to respect county integrity to the extent possible." Ans. Br. at 49. However, as already noted in the Florida Democratic Party's (hereinafter, "FDP") initial brief, the redrawing of Northeast Florida actually *reduces* the opportunity for minorities to elect their preferred candidates.

In the Current Senate map, black voters located in Current Districts 1 and 14 are able to elect their candidates of choice. *See* Ans. Br. at 36 (Current District 1 is a "historically performing African-American district[]".) Black voters in these districts are overwhelmingly registered as Democrats.[4] These districts' populations are now mostly fragmented among proposed Districts 6, 7, 8, and 9. When the Senate redrew a portion of Current District 1 into proposed District 9, it affected the ability of minority voters to elect their candidates of choice in all three of the districts drawn below it – proposed Districts 6, 7, and 8. While the proposed Senate map allows the black voters located in proposed District 9 to elect their preferred candidates, it places the black voters who were once able to elect their candidates of choice in Current Districts 1 and 14 into two white Republican districts and one white Republican leaning district, even though the black voters overwhelmingly vote Democratic. The Senate chose to split Daytona Beach, "rather than split a county that would otherwise be kept whole (Clay)," explaining that the "Legislature was not bound to split Clay County to preserve Daytona Beach." Ans. Br. at 45. But splitting Daytona Beach greatly diminished the opportunity of the black voters who once had an ability to elect their preferred candidates. As demonstrated by the Opponents' alternative maps, keeping District

[4] The data from MyDistrictBuilder shows that 83.8%, 83.3%, 85.6% and 86.7% of the black voters in Districts 6, 7, 8 and 9, respectively, would be registered Democrats.

8 entirely within Volusia County allows District 8 to become compact while affording black voters a greater chance at electing their candidates of choice. In light of these alternatives, any Senate justification falls away, as the Senate cannot claim that the now *less* compact District 8 was drawn to protect minority voting rights.

B. Central Florida

Proposed District 14 is one of the least compact districts in the proposed plan, with a Reock score of 0.27. The Senate suggests that District 14 is a newly created Hispanic majority-minority district. The FDP provided an alternative compact district that also protects Hispanic voting rights.

The Senate claims that proposed District 14 is a majority-minority district, because it has a Hispanic VAP of 50.0%. Ans. Br. at 69. However, data shows that Hispanic voters strongly influence the District. Proposed District 14 would perform Democratic. In proposed District 14, Democrats would make up 47.1% of registered voters and 47.5% of the registered Democrats would be Hispanic. Further, only 51.5% of Hispanic voters would be registered Democrats, thus showing less cohesion among Hispanics than exists among black voters in the area (who have a Democratic voter registration of 79.6%). Notably, Hispanic voters would not have controlled the Democratic primary, comprising only 28.3% of the Democrats voting in the primary election in 2010.

The alternative FDP District 14 is an opportunity district which only slightly changes the Hispanics ability to elect their representatives of choice. It is a better alternative that demonstrates compliance with both Tier-One and Tier-Two standards and significantly increases compactness, with a Reock score of 0.44. The alternative District 14 has a Hispanic VAP of 46.5% and would perform Democratic. In alternative District 14, Democrats would make up 45.1% of registered voters and 46.4% of the registered Democrats would be Hispanic. Further, 51.6% of Hispanic voters would be registered Democrats. Similarly, Hispanic voters would comprise of 28.0% of the Democrats voting in the primary election in 2010, only three-tenths of a percent difference from the Senate's proposed plan. For this negligible change, there is a substantial increase in compactness in the FDP alternative plan.

C. <u>South Central Florida</u>

Proposed District 32 is the least compact district in the State according to the Reock test for compactness with a score of 0.23 and fails to utilize political and geographical boundaries.[5] Further, the Senate has not provided a valid justification for its deviation from the Tier-Two mandates. The Senate argues that the Court rejected the challenge to proposed District 32 (District 25 in the

[5] The Court stated that an alternative to the equivalent district in the previous Senate Plan was not provided to show that it could have been drawn to better comply with the Constitution. Sup. Ct. Op. at 176. Here, the FDP provides a more constitutional alternative to proposed District 32.

invalidated map) and therefore any challenge is now barred. Ans. Br. at 78. But the Court held the *entire* plan invalid, and as a result, the Senate drafted an entirely new plan, CS/SJR 2-B, all of which is now under mandatory review. Even though the Senate states that District 32 does not follow the "communities of interest" method, there is no other justification for the long shape that follows the coastline. The districts in the panhandle were held invalid for following the "communities of interest" method; therefore proposed District 32 is invalid as well. Opponents have provided alternative maps to demonstrate that proposed District 32 can be drawn much more compactly with a Reock score of 0.39 and utilize political and geographical boundaries.

D. <u>Southeast Florida</u>

Proposed District 39 is non-compact. Opponents provide specific examples of more compact districts that also comply with the constitutional mandates in the minority protection provision. The Senate's Proposed District 39 has a Reock score of 0.23. Although this district, formerly District 40, was changed from the district in the invalidated plan, it still is one of the worst districts in compactness terms.

Not only is the district quantitatively non-compact, it contains an unjustified appendage. The FDP's alternative District 39 is better because it is more compact, preserves minority opportunity and has allowed for fairly pairing of two Senate

incumbents against each other in neighboring alternative District 40. Appendix to FDP Br. Tab K. The only conclusion is that proposed District 39 is invalid.

II. *RES JUDICATA* DOES NOT PRECLUDE THIS COURT'S REVIEW OF THE ENTIRE SENATE PLAN PRESENTED BY CS/SJR 2-B.

In its Brief, the Senate claims that the principle of *res judicata* operates to preclude this Court from considering claims or challenges to the Senate plans beyond those districts which change as a result of this Court's decision invalidating the Senate plan in CS/SJR 1176. Ans. Br. at 18-19. Such an argument misstates both the nature of the constitutional review mandated for this Court, as well as the nature of the Court's Opinion.

Traditionally, for *res judicata* to apply, the following elements are required: 1) Judgment on the merits in prior action; and 2) Four Identities: a) Identity of the thing sued for; b) Identity of the cause of action; c) Identity of the persons and parties to the actions; and d) Identity of the quality or capacity of the persons for or against whom the claim is made. *See, e.g., Topps v. State,* 865 So. 2d 1253, 1255 (Fla. 2004); *Albrecht v. State*, 444 So. 2d 8, 11-12 (Fla. 1984). Although this is a similar action under the same constitutional provision, the necessary identities are not all present. Most significantly, the thing challenged in this action is a new and separate legislative resolution of apportionment.

Certainly if, under a new Legislative Joint Resolution, there are newly created districts and new arguments not available at the previous proceeding, there can be no *res judicata* result. That is the case here. Article III, Section 16(c) & (e) provide for the Court to consider the "validity" of the apportionment resolution. There was no finding of "partial validity" in CS/SJR 1176. Rather, the plan was found invalid, with the Court specifying several problems which were fatal to the plan statewide. This is a new plan because the first one was struck down—in its entirety—by the Court for being unconstitutional. The redrawing of any district, in turn logically changes the entire map, because one district cannot be considered in isolation.

The case cited by the Senate, *Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), does not apply to the situation in this case. In the *Referenda* case, this Court considered an identical initiative proposal, for which only the ballot title and summary had changed from the one previously invalidated by this Court. *Id.* at 505. The language of the initiative proposal at issue was identical. By contrast, this Court is considering an entirely different Senate Joint Resolution than the previously one invalidated by this Court. In short, there is no identity of the thing complained of, as is

traditionally required for a court to find *res judicata* applicable. This Court did not explicitly hold valid any part of the previous plan.

Likewise, the Senate asserts that *res judicata* can apply in the redistricting context. Ans. Br. at 19. Indeed, were one to challenge the facial validity of the House plans, *res judicata* might legitimately bar a court from reconsidering what this Court has held valid. The two cases cited by the Senate, *McNeil v. Legislative Apportionment Commission*, 828 A. 2d 840, 857-62 (N.J. 2003), and *Snyder v. Munro*, 721 P.2d 962, 963-64 (Wash. 1986), both involve repeated challenges in both federal and state courts to the same state redistricting law. Here, by contrast, a new reapportionment resolution is under consideration by the Court, and that consideration is not due to any action of Opponents, but results from a constitutionally mandated automatic review by this Court. This proceeding before this Court is a new case, evaluating a new map under newly established legal principles.

Just as significantly, in its March 2012 Opinion, the Court has provided the authoritative interpretation of the new standards that allows parties to challenge the map differently under these new legal standards. This Court's consideration of CS/SJR 1176 represented a case of first impression for the new reapportionment standards provided by Article III, Section 21. Opponents, like the Legislature, did not have the authoritative interpretation of the Constitution before them when

arguing about CS/SJR 1176, and they are entitled to argue that the revised plan submitted under CS/SJR 2-B fails to meet those standards. All parties to the litigation, including the Florida Legislature, are capable of taking this Court's interpretation and applying it to the newly adopted plans. [6]

It is also important to remember that the situation of 2012 was both novel and unprecedented. In its first decision, this Court was considering a new constitutional provision. Future courts, legislatures and opponents alike will all enjoy the benefit of this Court's interpretation of the Constitution. Clearly, future litigants will use all arguments available, rather than "reserving some claims for the second proceeding," Ans. Br. at 20, thus unlikely for future apportionment challenges.

III. THE SENATE PLAN IN CS/SJR 2-B IS INVALID BECAUSE IT EVINCES AN INTENT TO FAVOR INCUMBENTS.

A. Pitting Incumbents Against Each Other

As this Court has made clear, an inference of improper intent can be drawn from whether a plan pairs incumbents against one another. The pairing of

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[6] The principle of *res judicata* is a rule of expediency intended to help foreclose endless litigation over an identical situation, but one which can bow to the needs of justice. *See, e.g., Universal Const. Co. v. City of Fort Lauderdale*, 68 So. 2d 366, 369 (Fla.1953); *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952) (noting that *res judicata* prevents "interminable litigation"). In the case of the validity of legislative apportionment, the Florida Constitution itself acts to terminate litigation under the process mandated by Article III, Section 16, and this Court's decision will provide final certainty on the validity of CS/SJR 2-B as well.

incumbents is not considered in isolation, but together with other factors, such as the retention of core districts and lack of compactness. Sup. Ct. Op. at 124-25.

The proposed Senate plan apparently has only one pairing of incumbents; however, Senator Simmons stated that he would move to a district with no incumbent. The result will be no incumbent pairing and there will be no improvement from the previous invalid plan.[7]

B. Retention of Core Districts.

In its prior decision, this Court noted that the retention of core incumbent districts is another indicator that may reveal an improper intent to favor incumbents. The Senate argues that new districts under CS/SJR 2-B, contain, on average, 60.5% of predecessor districts, lower than initial 64.2% in the invalidated plan. The Senate further notes that the House plan had 59.7% core district retention, and suggests no substantial difference exists. Ans. Br. at 28. However, the actual impact of retaining core districts on incumbents in districts who may legally run again is higher. *See* FDP Br. at 37 n.13. Under CS/SJR 2-B, 18 Proposed Senate Districts still contain more than 60.0% of their 2002 predecessor

[7] 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 (last accessed 4/9/2012).

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.

Thus, the two important factors that actually favor incumbents and promote their reelection – running against another incumbent and maintaining their core districts – provide clear intent to favor incumbents. Particularly where the Senate was on notice that these factors constituted evidence of unconstitutional intent, this fact proves the Senate plan invalid for an improper intent to favor incumbents.

CONCLUSION

For the failure by the Legislature to follow this Court's instructions and draft a Senate plan in compliance with Article III, Section 21, Florida Constitution, this Court should hold CS/SJR 2-B invalid, and, pursuant to the provisions of Article III, Section 16(e), Florida Constitution, itself draft a Senate apportionment plan that complies with the standards of the Constitution.

Respectfully submitted this 16th day of April, 2012.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by hand delivery or federal express this, 16th 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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I HEREBY CERTIFY that this reply brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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