IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC12-460

IN RE: JOINT RESOLUTION OF LEGISLATIVE APPORTIONMENT

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

Charles G. Burr
Florida Bar No. 0689416
BURR & SMITH, LLP
Grand Central Place
442 W Kennedy Blvd., Suite 300
Tampa, FL 33606
Telephone: (813) 253-2010
Facsimile: (813) 254-8391

Victor L. Goode
Dorcas R. Gilmore
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
Telephone: 410-580-5673
Facsimile: 410-358-9350

Allison J. Riggs
*Admitted *Pro Hac Vice*
Anita S. Earls
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 W. Highway 54
Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Facsimile: 919-323-3942

Counsel for Florida State Conference of NAACP Branches

Table of Contents

TABLE OF AUTHORITIES

Cases

Regulations

PRELIMINARY STATEMENT

Pursuant to this Court's order of March 13, 2012, the Florida State Conference of NAACP Branches (hereinafter, "Florida NAACP") respectfully submits this reply brief to the April 13, 2012 brief of the Florida Senate. Historically, the Florida NAACP, on behalf of its thousands of statewide members, has fought many battles to ensure that the state implements electoral districts that allow minority voters to participate fully and fairly in the electoral process. Today it continues to advocate for the protection of minority voting gains made as a result of those earlier battles. The newly enacted Florida State Senate redistricting plan diminishes those gains, and diminishes the ability of minority voters to elect candidates of their choice, and thus violates the Florida Constitution.

ARGUMENT

Nothing in the Florida Senate's initial brief effectively refutes or weakens the points and arguments set forth in the Florida NAACP's initial brief. The Senate's arguments misinterpret the extent of the analysis that this Court will conduct in order to ensure facial compliance with the state constitutional redistricting guidelines. Moreover, the Senate continues to ignore the necessity of thoroughly analyzing the impact of racially polarized voting on a reduced black electorate in Senate Districts 9 and 31. Finally, the Senate fails to respond to the fact that lower citizenship rates in Senate District 31 render the redrawn version

substantially less than a majority black district. All of these factors, in light of the arguments made in the Florida NAACP's initial brief, warrant a finding by this Court that the revised Senate plan does not comply with the Florida Constitution and cannot be approved.

First, the Senate argues that the problems that the Florida NAACP highlighted with respect to retrogression in Senate Districts 9 and 31 are based on speculation rather than facts, but this assertion misses the entire point of a retrogression analysis. By its very nature, a retrogression analysis must include predictive judgments on future electoral performance of a district. This is not speculation, but rather must be an informed analysis of electoral conditions specific to the district in question. The United States District Court for the District of Columbia, in its December 2011 memorandum opinion interpreting the non-retrogression standard under Section 5 in the Texas redistricting context, noted that the term "ability to elect" is "used both for districts that have afforded minority voters the ability to elect their preferred candidate in the past and **those that predictively will do so in the future**." *Texas v. United States* (TBG-RMC-BAH), 2011 WL 6440006, at *12, n. 7 (D.D.C. Dec. 22, 2011) (emphasis added). Indeed, the concept of non-retrogression—a protection against future loss—is one that "requires a greater degree of certainty that an event can occur." *Id.*

While there is not an identical mechanism for review in place under Art. II, Sec. 16(b) of the Florida Constitution as there is under Section 5 of the Voting Rights Act, a non-retrogression standard is meaningless if the State is not required, in order to establish facial compliance, to demonstrate that the change will not diminish the ability of minority voters to elect the candidates of their choice. The voters of the state of Florida intended, when they approved Amendments 5 and 6, to guarantee a meaningful and robust protection of the right to vote against potential redistricting plans that unfairly dilute the voting strength of minority voters. It is also not reconcilable with this Court's probing analysis of compliance with the new constitutional requirements evidenced in its March 9 opinion. In line with that approach, in order to comply with the Tier 1 minority voting rights provision, the Florida Senate is required to do more—it must, based on adequate evidence, demonstrate that in a district where the minority population is substantially lowered, racially polarized voting would not prevent black voters from continuing to elect their candidate of choice. The Florida Senate has not even considered adequate evidence, let alone made that determination.

Second, the Senate does not acknowledge in its brief any of the issues relating to racially polarized voting raised by the Florida NAACP. A functional analysis that does not include careful consideration of racially polarized voting is not adequate for assessing potential retrogression. A three-judge panel in the

District Court for the District of Columbia, interpreting the non-retrogression standard after the 2006 Amendments to the Voting Rights Act, noted: "[a]t the outset, a court addressing a proposed voting plan under Section 5 must determine whether there is cohesive voting among minorities and whether minority/White polarization is present in the jurisdiction submitting the plan." *Texas v. United States*, 2011 WL 6440006 at *28. That court further recognized that "[p]olarized voting between minorities and Whites often renders minority voters powerless to elect their candidate of choice because White voters will not cross over to elect a minority-preferred candidate." *Id.* at *29. A district that would enable black voters to elect their preferred candidate only when that candidate is White is an example of how racially polarized voting interferes with the ability of black voters to elect their candidate of choice. And in newly revised Senate District 9, the reconstituted election results from the 2010 United States Senate race reveal troubling evidence of a lack of White cross-over voting when the black-preferred candidate is, himself, black.

Although dismissed by the Senate in its initial brief, the Florida NAACP agrees with the Florida Democratic Party's position that the newly revised plan is detrimental to black voters in Daytona Beach, and that it will "dilute the minority representation of communities that previously had representation in the benchmark district, Current Senate District 1." FDP Br. 13; Senate Br. 46-47. While the

Florida NAACP believes this harm flows from the failure of newly revised Senate District 1 to include Daytona Beach, this Court could and should consider the impact of the proposed change on minority voters in Volusia County as a whole. In the revised Senate plan, that sizable African-American community, accustomed to being represented by the candidate of its choice, would be stranded in a district in which it most certainly will not be able to elect its candidate of choice or one responsive to its interests and needs. And, while this Court is guided by Section 5 interpretation, this Court also noted that it "must remain mindful that [it is] interpreting an independent provision of the state constitution." March 9 Op. 61-62. Thus, the fact that the Department of Justice has not interposed an objection on this basis is not binding on this Court's analysis.

Additionally, the Senate's defense of Senate District 31 in its initial brief does nothing to refute the points raised by in the Florida NAACP's brief. Regardless of the voting age population number with which the analysis starts, an examination of citizenship rates reveal that the new Senate District 31 is not an majority-black district in citizen voting age population. The Department of Justice and courts conducting a retrogression analysis most certainly take into account the effect of citizenship rates, as does the 11th Circuit when confronted with vote dilution cases. *See*, *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir.1997) ("[T]he proper statistic for deciding whether a minority group is

sufficiently large and geographically compact is voting age population as refined by citizenship.")

In its 2011 Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, the Department of Justice noted that "[c]ircumstances, such as differing rates of electoral participation within discrete portions of a population may impact on the ability of voters to elect candidates of choice." 76 Fed. Reg. 7470 (Feb. 9, 2011), at 7471. In areas of the state of Florida with sizable immigrant populations, a lower minority citizenship rate is one such circumstance, and this Court should consider that factor. Likewise, the D.C. District Court in the Texas redistricting Section 5 case repeatedly discussed and considered the effect of the redistricting changes on the **citizen** minority voting group's ability to elect its candidate of choice. *See Texas v. United States*, 2011 WL 6440006, at *25, 31.

Because the federal decennial census does not inquire as to citizenship, citizenship data is commonly derived from the Census Bureau's American Community Survey (ACS) data that is collected on a 5-year rolling basis. *See*, "Voting Age Population by Citizenship and Race (CVAP)," United States Census Bureau, available at http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html. The MyDistrictBuilder function on the State House of Representative website includes some ACS data, but not the ACS citizenship data. The Florida

NAACP was able to obtain citizenship rates by disaggregating block-group level citizenship data (the lowest level of geography to which the ACS provides data) collected by the 2005-2009 Survey down to the block level and re-aggregating the data to the district level—much in the same way that the reconstituted election data is constructed by MyDistrictBuilder. *See*, Petition for Declaratory Judgment, February 10, 2012, *In Re: Joint Resolution of Legislative Apportionment*, Case No. SC12-1, Appendix Tab B.

The American Community Survey citizenship data indicates that Senate District 31 is only 43.29% black in citizen voting age population. The Florida Senate could have easily considered such data when making such a drastic change to a district that elected a candidate of choice of black voters. If it had done so, they would have seen the substantial gap between voting age and citizenship rates in Senate District 31 as drawn, and that this gap results in a district that is far from a majority district in minority citizen voting age population.

CONCLUSION

Based on the foregoing arguments, and those presented in its initial brief, the Florida NAACP respectfully urges this Court to find that the revised Senate plan violates the minority voting rights protections now encoded in the state constitution. If this Court does find that the revised Senate districts again violate Florida's new constitutional guidelines for state legislative redistricting, and thus is

forced, under Article III, Section 16(f) of the Florida Constitution, to redraw the districts itself, the Florida NAACP respectfully urges this Court to refrain from significantly reducing the black voting age population in districts that currently allow black voters to elect their candidate of choice absent an evidentiary basis that indicates that racially polarized voting in the particular region will not prevent black voters from continuing to exercise that ability to elect.

Dated: April 16, 2012

Respectfully submitted,

/s/ Allison J. Riggs

Allison J. Riggs
Admitted *Pro Hac Vice*
Anita S. Earls
SOUTHERN COALITION FOR SOCIAL JUSTICE
Durham, NC 27707
Telephone: 919-323-3380 ext. 117
Facsimile: 919-323-3942

Charles G. Burr
Florida Bar No. 0689416
BURR & SMITH, LLP
Grand Central Place
442 W Kennedy Blvd.
Suite 300
Tampa, FL 33606
Telephone: (813) 253-2010
Facsimile: (813) 254-8391
Local Counsel

Victor L. Goode
Dorcas R. Gilmore
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
Telephone: 410-580-5673
Facsimile: 410-358-9350

Counsel for Florida State Conference of NAACP Branches

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was furnished on the 16th day of April by U.S. Mail to the following parties, appearing on the most recently revised service list at the time of service:

Ronald A. Labasky
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, FL 32301
(850) 222-7718
Attorney for Florida State Association of Supervisor of Elections

Joseph W. Hatchett
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, FL 32302
(850) 224-9634
Attorney for Florida Democratic Party

John M. Devaney
Mark Erik Elias
Perkins Cole, LLP
700 13th Street, N.W., Suite 600
Washington, D.C. 20005
(202) 654-6200
Attorneys for Florida Democratic Party

Abha Khanna
Kevin J. Hamilton
Perkins Cole, LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101
(206) 359-8312
Attorneys for Florida Democratic Party

Jon L. Mills
Boies, Schiller & Flexner, LLP

100 S.E. Second Street, Suite 2800
Miami, FL 33131
(305) 539-8400
Attorney for Florida Democratic Party

Elan Michelle Nehleber
Karen Caudell Dyer
Boies, Schiller & Flexner, LLP
121 S. Orange Avenue, Suite 840
Orlando, FL 32801
(407) 425-7118
Attorneys for Florida Democratic Party

Ronald Gustav Meyer
Meyer, Brooks, Demma & Blohm
P.O. Box 1547
Tallahassee, FL 32302
(850) 878-5212
Attorney for Common Cause Florida, League of Women Voters, and National Council of La Raza

Jessica Ring Amunson
Kristen M. Rogers
Michael B. Desanctis
Paul M. Smith
Jenner & Block, LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001
(202) 639-6000
Attorneys for Common Cause Florida, League of Women Voters, and National Council of La Raza

J. Gerald Hebert
J. Gerald Hebert, P.C.
191 Somerville Street, Unit 415
Alexandria, VA 22304
(703) 628-4673
Attorney for Common Cause Florida, League of Women Voters, and National Council of La Raza

Christopher Busch
David Allen Theriaque
Steven Brent Spain
Theriaque & Spain
433 N. Magnolia Drive
Tallahasee, FL 32308
(850) 224-7332
Attorneys for City of Lakeland, Florida

Timothy James McCausland
228 S. Massachusetts Avenue
Lakeland, FL 33801
(863) 834-6010
Attorney for City of Lakeland, Florida

Michael A. Carvin
Jones Day
51 Louisiana Avenue N.W.
Washington, D.C. 20001
(202) 879-7643
Attorney for the Florida Senate

Raoul G. Cantero
Jason N. Zakia
White & Case, LLP
200 South Biscayne Boulevard, Suite 4900
Miami, FL 33131
(305) 371-2700
Attorneys for the Florida Senate

Andy Velosy Bardos
404 S. Monroe Street, Suite 409
Tallahassee, FL 32399
(850) 487-5229
Attorney for the Florida Senate

Cynthia Skelton Tunnicliff
Peter M. Dunbar
Pennington, Moore, Et. Al.

215 South Monroe Street, Second Floor
Tallahassee, FL 32301
(850) 222-3533
Attorneys for the Florida Senate

Miguel A. De Grandy
800 S. Douglas Road, Suite 850
Coral Gables, FL 33134
(305)444-7737
Attorney for the Florida House of Representatives

George T. Levesque
Fl. House of Representatives
422 The Capitol
Tallahassee, FL 32399
(850) 488-0451
General Counsel for the Florida House of Representatives

Charles Talley Wells
Gray Robinson, P.A.
301 E. Pine Street, Suite 1400
Orlando, FL 32801
(407) 843-8880
Attorney for the Florida House of Representatives

Allen C. Winsor
Charles Burns Upton, II
George N. Meros, Jr.
Jason L. Unger
Gray Robinson, P.A.
P.O. Box 11189
Tallahassee, FL 32302
(407) 843-8880
Attorneys for the Florida House of Representatives

Timothy David Osterhaus
Office of Attorney General
The Capitol, Pl-01
Tallahassee, FL 32399
(850) 414-3681

__/s/ Allison J. Riggs_____

Allison J. Riggs
Admitted *Pro Hac Vice*

CERTIFICATE OF TYPEFACE COMPLIANCE

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

__/s/ Allison J. Riggs_____

Allison J. Riggs
Admitted *Pro Hac Vice*