IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1905

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, *et al.*,

Appellants,

L.T. Case No. 1D14-3953

vs.

KEN DETZNER, *et al.*,

Appellees.
_____/

ON DISCRETIONARY REVIEW OF AN ORDER OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA, CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL AS PASSING UPON A QUESTION OF GREAT PUBLIC IMPORTANCE

THE FLORIDA SENATE'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE AND FACTS

On October 9, 2015, the trial court issued its Order Recommending Adoption of Remedial Map (the "Order") in which it recommended the adoption of Plan CP-1 submitted by the LOWV Plaintiffs. This Court should disapprove that recommendation and instead adopt one of the plans submitted by the Senate (Plans 9062 and 9066) as the remedial congressional map.

The trial court's recommendation is based on an incorrect assumption: that this Court directed the Legislature to draw a new congressional plan from scratch. But it did not; instead, the Court directed the Legislature to redraw specific districts—5, 13, 14, 21, 22, 25, 26 and 27—in specific ways. Unlike the plan the trial court recommended, Plan 9062 preserves current District 16 (which this Court did not require to be redrawn) while reducing unnecessary splits to Hillsborough County's population. If, however, this Court's task is to select the "best" congressional plan without regard to the current map, then the Court should adopt Plan 9066, which is the only plan that preserves 50 counties.

The trial court also failed to heed this Court's direction to focus on the areas of agreement between the two legislative chambers. Despite finding no evidence that the Legislature's map drawers had any intent to favor or disfavor a political party or incumbent, the trial court recommended a plan drawn by the LOWV Plaintiffs because of slight improvements to tier-two metrics in South Florida. In

so doing, the trial court overlooked the importance of an open and transparent redistricting process, and instead allowed parties with unknown motivations to lurk in the shadows looking for ways to modify the Legislature's work. The trial court also failed to recognize that District 26 in Plan CP-1 diminishes the ability of Hispanics to elect the candidate of their choice.

A. Factual Background

On November 2, 2010, Florida voters approved Amendment 6, which established new standards applicable to congressional districts in Florida. Amendment 6 was codified as Article III, Section 20 of the Florida Constitution. On February 9, 2012, the Florida Legislature adopted a congressional redistricting map designated as H000C9047 (Plan 9047). *See* Ch. 2012-2, Laws of Fla. Immediately thereafter, two groups of plaintiffs (the "Romo Plaintiffs" and the "LOWV Plaintiffs") commenced these actions challenging the constitutionality of Plan 9047 under Article III, Section 20 (R1: 51-62, R86: 11217-35).

On July 10, 2014, the trial court issued a final judgment holding that Districts 5 and 10 in Plan 9047 were drawn in violation of Article III, Section 20 (R84: 11088-11128). In August 2014, the Legislature held a special session to enact a remedial redistricting plan in accordance with the final judgment (SR7: 765-67). The trial court approved the remedial plan (Plan 9057) (SR13: 1720-23).

Plaintiffs appealed both the trial court's final judgment and its order approving the remedial plan. On July 9, 2015, this Court issued an opinion affirming the trial court's "factual findings and ultimate determination that the redistricting process and resulting map were 'taint[ed]' by unconstitutional intent to favor the Republican Party and incumbents." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015) ("*Apportionment VII*"). The Court found, however, that the trial court "failed to give the proper effect to its finding of unconstitutional intent, which mandated a more meaningful remedy commensurate with the constitutional violations it found." *Id*. The Court then ordered the Legislature to remedy deficiencies it found in eight districts. *Id*. at 413. The Court also "provide[d] specific directives that the Legislature must follow in redrawing the districts." *Id*. at 414. The Court held that "District 5 must be redrawn in an East–West manner," *id*. at 403; that "Districts 13 and 14 must be redrawn to avoid crossing Tampa Bay," *id*. at 409; that "District 25 must be drawn to avoid splitting Hendry County," *id*. at 411; and that "Districts 26 and 27 "must be redrawn to avoid splitting Homestead," *id*. at 410. As for Districts 21 and 22, the Court stated that "we leave it for the Legislature to determine how to redraw these districts, with the understanding that tier-two compliance could be improved." *Id*. at 413. This Court relinquished jurisdiction to the trial court for 100 days to allow the court to issue a recommendation on the Legislature's plan. *Id*. at 417.

The Legislature convened in special session from August 10 to August 21, but the House and Senate could not agree on remedial plan (House Ex. 149; Senate Ex. 4-4). On August 24, the House moved this Court for further relinquishment of jurisdiction. In its September 4 order on the House's motion, this Court directed the trial court to "hold a hearing in which it shall consider 'proposed remedial plans from the parties' . . . especially focusing on the map passed during the special session by the House [Plan 9071], and any amendments offered thereto; the map passed during the special session by the Senate [Plan 9062], and any amendments offered thereto; and the areas of agreement between the legislatives chambers" (J.A. 7).

Preparation of the Senate's Proposed Remedial Plans

The Senate's proposed remedial plans are the product of an iterative legislative process that began when President Andy Gardiner and Speaker Steve Crisafulli directed professional staff of the Senate Committee on Reapportionment and the House Select Committee on Redistricting to work with legal counsel to develop a base congressional map complying with this Court's redistricting decisions and all other relevant legal standards. Jay Ferrin, the staff director of the Senate Committee on Reapportionment; Jason Poreda, the staff director of the House Select Committee on Redistricting; and Jeff Takacs, a special advisor to the House Select Committee on Redistricting (collectively, "Professional Staff") drew

a base map (Plan 9065) with direction from counsel for the House, including Matthew Carson, George Meros, and Andy Bardos (collectively, "House Counsel"), and counsel for the Senate, including George Levesque, Raoul Cantero, and Jason Zakia (collectively, "Senate Counsel") (F.S.A. 1-3; J.A. 146-49, 600-01). Professional Staff drew the base map in a secure room at the Capitol with no other individuals present (J.A. 148). Professional Staff carefully deliberated over every decision regarding the base map before drawing a line (J.A. 148-49). They reviewed this Court's July 9 opinion and sometimes sought guidance from House and Senate Counsel (J.A. 148-49). Professional Staff strove to keep counties whole, and to follow political and geographic boundaries when necessary to split counties (J.A. 601-02). While preparing the base map, Professional Staff did not interact with members of the Legislature, political consultants, other staff, or members of Congress (J.A. 150). Only Mr. Ferrin, Mr. Poreda, and Mr. Takacs drew lines on the base map (J.A. 154). Professional Staff did not consider political data other than to perform a functional analysis as required under the tier-one standards (J.A. 154, 619). Professional Staff did not have access to incumbent addresses during the map-drawing process (J.A. 279-80).

The President and Speaker also established procedures requiring any legislator who proposed an amendment to the base map to identify the individuals who drew the map, the criteria used, and the data used (F.S.A. 1-3; J.A. 151-52,

574-75). The Legislature considered amendments at public committee meetings, public meetings between the respective committee chairs, and public floor proceedings (Senate Exs. 3-1 to 5-7; House Exs. 122 to 153).

As one of the House's map-drawers testified, the base map was always intended to be the starting point for debate—not necessarily the end product (J.A. 153, 572, 574, 600-01). Just as this Court's opinion called for an open, public debate about the maps, so, too, the Senate believed that Senators should be able to work with staff to develop and present for consideration plan amendments that could improve the base map (J.A. 371-72).

On August 5, Professional Staff released the base map to both the public and the Legislature (J.A. 155-56). On August 11, Professional Staff explained their decision-making process at a concurrent meeting of the Senate Committee on Reapportionment and the House of Representatives Select Committee on Redistricting (Senate Ex. 3-2). The Legislative Parties invited public comment, but Plaintiffs declined to participate at that hearing or any other subsequent meeting (J.A. 159-60). The Legislative Parties also invited the public to submit proposals through a public portal, but Plaintiffs did not submit any maps (J.A. 161). Meanwhile, Jay Ferrin, the Senate's map drawer, held recorded meetings with Senators from both parties to develop proposed amendments (J.A. 611).

On August 16, Senator Tom Lee directed and approved Plan 9054, drawn by

Jay Ferrin, as an amendment to Senate Bill 2-B (F.S.A. 9). The following day, the Senate Committee on Reapportionment adopted the amendment (Senate Ex. 3-4 at 68). The Senate passed Plan 9054 as Senate Amendment 876908 to House Bill 1-B on August 19, in a 28-8 vote (Senate Ex. 4-3 at 217). Plan 9054 modified six central Florida districts in the base map (9, 10, 11, 15, 16, and 17). The remaining 21 districts were unchanged. Plan 9054 kept two more cities whole than did the base plan; reverted District 16—which this Court did not require to be redrawn—to its enacted configuration, and split the population of Hillsborough County three times (instead of four) (F.S.A. 9-11; J.A. 33-34).

On August 20, the House approved House Amendment 179133 (Plan 9071) to Senate Amendment 876908, restoring its versions of Districts 10 and 16 and modifying Districts 9, 11, 15, 17, 18, 20, 21, 22, and 23 (J.A 38). Plan 9071 split four fewer cities than the base plan and two fewer than Plan 9054 (J.A. 33, 39; F.S.A. 10).

On August 21, Senator Bill Galvano directed and approved Plan 9062, which was drawn by Jay Ferrin, for filing as an amendment (J.A. 44). Plan 9062 merged the House's changes to the base map in Plan 9071 (Districts 18, 20, 21, 22, and 23) and the Senate's changes to the base map in Plan 9054 (Districts 9, 10, 11, 15, 16, and 17). Plan 9062 retained 16 of the 27 districts (1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 19, 24, 25, 26, and 27) as drawn in the base map (J.A. 33, 44). Plan 9062

kept as many cities and counties whole as Plan 9071, and had virtually identical compactness scores (J.A. 39, 45). The difference was that—as with Plan 9054—Plan 9062 reverted District 16 to its enacted configuration and split the population of Hillsborough County only three times (*id.*). In a 23-5 vote, the Senate approved and passed Plan 9062 as Senate Amendment 284802 to House Amendment 179133 (Senate Ex. 4-4 at 313). The House refused to concur in the amendment, and the special session adjourned on August 21 (House Ex. 149; Senate Ex. 4-4).

On August 27—six days after the Legislature adjourned without passing a plan—in an effort to reach a compromise between the House and the Senate, Senator Galvano submitted Plan 9066 (J.A. 50, 585). Jay Ferrin drew Plan 9066 at Senator Galvano's direction, and both Senator Galvano and Senate Counsel reviewed Plan 9066 before its public release (J.A. 585-86, 627-28). Plan 9066 incorporates the House's changes to the base map in Plan 9071 (Districts 11, 18, 20, 21, 22, 23), but alters the configuration of four districts: 9, 15, 16, and 17 (J.A. 585-86, 628). Twenty-three of the 27 districts in Plan 9066 are identical to those in Plan 9071 (J.A. 585-85, 628). Plan 9066 keeps both Manatee and Sarasota Counties whole, and thus has more intact counties (50) than any other proposed plan (or any prior plan) (J.A. 629).

B. Course of Proceedings and Disposition Below

On September 11, the House submitted Plan 9071 for the trial court's consideration, while the Senate submitted Plans 9062 and 9066. The LOWV Plaintiffs submitted plans designated as Plans CP-1, CP-2, and CP-3; and the Romo Plaintiffs submitted their own plan (the "Romo Plan").

The trial court held a three-day evidentiary hearing on September 24, 25, and 28 in which heard testimony from the Legislature's three map drawers (Messrs. Ferrin, Poreda, and Takacs) as well as Senators Lee and Galvano. The trial court also heard testimony from the Legislative Parties' two expert witnesses, Dr. Dario Moreno and Dr. Baodong Liu. The LOWV Plaintiffs offered testimony from their map drawer, John O'Neill, as well as their expert, Dr. Allan Lichtman, and the Romo Plaintiffs offered testimony from their map drawer and expert, Dr. Stephen Ansolabehere.

On October 9, the trial court issued the Order, which recommended the adoption of Plan CP-1. The court first compared the House and Senate's three plans. It found that "[b]oth the House and Senate have legitimate reasons for preferring their respective configurations" and said that while "[i]t is a close call[,] I find the House Map (9071) preferable to either Senate map" (Order at 5). As to Plans 9071 and 9062, the Order found that "compactness is slightly better in 9071," and—while noting that Plan 9062 "was purportedly designed to address the

perceived 'donor' status of Hillsborough County"—the Order stated that Plan 9062 "makes no similar effort to address the 'donor' status of other counties in the map, and it exacerbated the 'donor' status of Orange County" (Order at 6). Meanwhile, the Order acknowledged that Plan 9066 preserves one more county than Plan 9071, but found that it "decreases somewhat the visual and numerical compactness of the four districts that differ between it and the House Map" (Order at 6-7).

The Order then compared Plan 9071 with Plaintiffs' alternatives. As an initial matter, the trial court found that "[i]t appears that the Legislature took appropriate steps to guard against improper partisan influence in the drawing of its base map and in opening up the process of amendments to public scrutiny" (Order at 8). It also found no "evidence that the staff map drawers had a conscious intent to favor or disfavor a political party or incumbent" (Order at 10). Notwithstanding these findings, however, the Order examined whether "some other configuration best fulfills the Court's directions and all constitutional requirements" and found that Plan CP-1 is "the best tier two performing map of the group" (Order at 5, 12). Despite acknowledging that "changes which improve tier two performance somewhat" may be "motivated by a desire to affect political performance," the Order held that "it is the Legislature that bears the burden of defending its proposed maps, not the Plaintiffs. While evidence that a map drawer might be a partisan or have a bias is certainly relevant, it would not be a reason to

automatically reject it" (Order at 9). The Order also rejected the Legislative Parties' argument that Plan CP-1 diminished the ability of Hispanics to elect candidates of their choice in District 26, relying on Hispanic VAP, registration, and general election turnout figures, but not primary data (Order at 18). The Order then recommended the adoption of Plan CP-1 (Order at 19).

C. Standard of Review

This Court reviews pure questions of law *de novo*. *Rippy v. Shepard*, 80 So. 3d 305, 306 (Fla. 2012). When a question involves both legal and factual issues, this Court reviews a trial court's factual findings for competent, substantial evidence, and its legal determinations *de novo*. *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013). Therefore, while this Court should review the trial court's factual findings for competent, substantial evidence, it should review *de novo* the question of "which map proposed by the parties—or which portions of each map—best fulfills the specific directions in the Court's July 9, 2015, opinion and all constitutional requirements" (J.A. 7-8).

SUMMARY OF ARGUMENT

The Order recommends the adoption of the Florida House's configuration of Central Florida, also found in Plaintiffs' plans. The Order fails to recognize, however, that this Court did not require the Legislature to draw Florida's congressional districts completely from scratch, and instead directed the

Legislature to redraw specific districts—5, 13, 14, 21, 22, 25, 26, and 27—in specific ways. The Senate designed Plan 9062 to preserve current District 16 while reducing the number of splits to Hillsborough County from four to three. Because any resulting difference in compactness is negligible, Plan 9062 is a superior map.

If, however, this Court's task is to select the "best" congressional plan without regard to the current map, then the Senate's second map, Plan 9066, offers an improved configuration of Central Florida. Plan 9066 keeps both Sarasota and Manatee Counties intact, and therefore is the only plan offered in this litigation—or ever—to keep 50 whole counties intact. In light of this Court's prior emphasis on the importance of adhering to county lines, Plan 9066 is superior to the House's map and Plaintiffs' alternatives.

This Court should also refuse to adopt the Plaintiffs' alternative configurations of South Florida and instead approve the design passed by both the House and Senate. In its July opinion, this Court directed the Legislature to conduct itself in a manner that recognized the importance of transparency and neutrality in drawing the state's congressional districts. The Order found that the Legislature took appropriate steps to guard against improper partisan influence in designing a base map, that the map drawers did not have a conscious intent to

favor or disfavor a political party or incumbent. The Legislature did not modify the base map's design of South Florida in the amendatory process.

Notwithstanding these findings and this Court's direction to focus on the areas of agreement between the legislative chambers, the Order recommended the adoption of a plan drawn by the LOWV Plaintiffs. But the Court should decline to adopt maps that were drawn in secret, instead of in the open and transparent legislative process this Court envisioned in *Apportionment VII*. Article III, Section 20 provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Thus, contrary to the trial court's findings, when the Plaintiffs offer a map of their own as the congressional map of Florida, their intent is just as relevant as the Legislature's. Here, as the Order recognized, changes that allegedly improve tier-two performance may be motivated by a desire to affect political performance. And the LOWV Plaintiffs even stated to the Legislature that they desired District 26 to become "more Democratic." Moreover, all of Plaintiffs' alternatives, including Plan CP-1, diminish the ability of Hispanics to elect candidates of their choice in District 26, which becomes a Democrat-leaning district where Hispanics represent only a fraction of the voters in the Democrat primary. This Court should reject the trial court's recommendation and instead approve either Plan 9062 or 9066.

ARGUMENT

I. THE FLORIDA SENATE'S CONFIGURATIONS OF CENTRAL FLORIDA ARE SUPERIOR TO THE CONFIGURATION IN THE PLANS OFFERED BY THE HOUSE AND PLAINTIFFS

No party contests how the Legislature redrew four of the eight invalidated districts districts—5, 13, 14, and 25. As to District 5, both chambers simply inserted District 5 from the Romo A map, which this Court endorsed in *Apportionment VII*. *See* 172 So. 3d at 404-05. Both chambers also drew Districts 13 and 14 to avoid crossing Tampa Bay; and drew District 25 to keep Hendry County whole.

As to Districts 21 and 22, both chambers stacked them one on top of the other to increase compactness, as the Court had suggested (but not required). *Id.* at 411-12. The LOWV Plaintiffs do not contest that configuration; and in fact incorporated it into Plans CP-2 and CP-3. The Romo Plaintiffs did object to Districts 21 and 22, but, as explained below, they drew their alternative plan with the intent to unpair two Democratic incumbents.

As for Districts 26 and 27, Plaintiffs did not argue that the Legislature failed to comply with the Court's direction to avoid splitting Homestead. Rather, they complained that the Legislature should have drawn District 26 to improve performance for Democrats (F.S.A. 7).

The map passed by the Senate (Plan 9062) is identical to the map passed by the House (Plan 9071) except for six districts in Central Florida, including District 16. Plaintiffs' alternatives, including Plan CP-1, adopt the House's configuration of Central Florida. Because this Court only directed the Legislature to redraw the eight invalidated districts (and any affected districts), however, the Senate worked to implement the specific changes the Court required, rather than redraw other portions of the map. Plan 9062 is superior because it retains current District 16, which the Supreme Court did not invalidate, and avoids unnecessary splits to Hillsborough County. The trial court's recommendation fails to address the fact that this Court did not require the Legislature to redraw District 16, nor does it account for the effect of preserving District 16 on the compactness of each map.

If, however, the objective of this remedial proceeding is to select the best map without regard to whether this Court specifically invalidated particular districts, then Plan 9066, which keeps 50 counties whole, is the superior plan. Indeed, Plan 9066 is the only plan offered in this litigation—or ever—to preserve 50 counties. Because this Court has given greater weight to adherence to county lines over other tier-two criteria, it should adopt Plan 9066.

A. Plan 9062 Preserves Current District 16 and Reduces a Split to Hillsborough County

The Order states that "the House and Senate have legitimate reasons for preferring their respective configurations" in Central Florida and that its choice

was a "close call" (Order at 5). It recommended the configuration in Plan 9071, however, because the plan's "compactness is slightly better" (Order at 6). The Order failed to recognize, however, that the House achieved this slight increase in compactness by changing District 16, which this Court did not require redrawn.

In *Apportionment VII*, this Court invalided eight districts (5, 13, 14, 21, 22, 25, 26, and 27). It did not require the Legislature to redraw the entire map: "we have ultimately determined that requiring the entire map to be redrawn is not the remedy commensurate with the constitutional violations found in this case." 172 So. 3d at 413. Instead, the Court "instructed the Legislature on which districts must be redrawn—Districts 5, 13, 14, 21, 22, 25, 26, and 27—and provided precise guidelines as to the deficiencies in these districts." *Id*.

The Senate concluded that changes to districts that this Court did not require fixed went beyond the Court's mandate. While a conscientious map drawer can always find ways to make marginal improvements to a map, that was not the Court's instruction. Instead, the Senate's map drawer testified that he understood that the Court's directive was to fix "the specifically invalidated districts"—not to draw a "whole new map" (J.A. 680). This remedial proceeding is therefore not a contest over which is the best map, as the Order apparently assumed, but of which map best complies with the Court's specific directives.

Plan 9062 incorporates 21 of the 27 districts in Plan 9071, but it is superior to that plan and Plaintiffs' alternatives. Plan 9062 reduces the number of times Hillsborough County is split and restores District 16, which did not have to be changed, to its enacted configuration.[1] District 16 in Plan 9062 includes all of Sarasota County and 98.2% of the population of Manatee County (J.A. 622). Conversely, District 16 in Plan 9071 splits Sarasota County nearly in half and adds population from Manatee County and southern Hillsborough County.

The Senate's decision to leave current District 16 intact does not affect the overall compactness of Plan 9062 as compared to Plan 9071, nor does it add to the total number of county and city splits. While the Order stated that it prefers Plan 9071 because "compactness is slightly better in 9071" (Order at 9), the difference in average compactness is so slight that the plans share the same Reock and Convex Hull scores:

Tier-Two Metrics for Plans 9071 and 9062

Plan	Reock Ratio	Convex Hull	Polsby-Popper	Whole Counties	Whole Cities
H110C9071	0.43	0.76	0.35	49	390
S026C9062	0.43	0.76	0.34	49	390

[1] The only difference between District 16 in Plan 9057 and District 16 in Plan 9062 is the addition of an unpopulated area in Egmont Key (J.A. 621).

This Court has never relied on the third compactness measure the Order cites (Polsby-Popper), and even that metric only shows a statistically insignificant difference of .01.

Nonetheless, the Order cites two tables the House prepared that show slight differences in mean compactness in Districts 9, 10, 11, 15, 16, and 17. But the table includes District 16, which this Court did not require to be redrawn, and which Plan 9062 preserves. Excluding District 16 from the analysis shows that Plans 9062 and 9071 are essentially even in compactness:

Compactness of Plans 9071 and 9062

	Plan 9071			Plan 9062		
District	**Reock Ratio**	**Convex Hull**	**Polsby-Popper**	**Reock Ratio**	**Convex Hull**	**Polsby-Popper**
	0.51	0.82	0.40	0.54	0.81	0.35
9	0.63	0.87	0.46	0.56	0.85	0.39
10	0.49	0.89	0.49	0.64	0.85	0.36
11	0.52	0.80	0.33	0.53	0.81	0.32
15	0.33	0.76	0.26	0.34	0.78	0.34
17	0.57	0.79	0.46	0.61	0.77	0.36

Indeed, a map drawer for the House acknowledged that the plans are "similar in numeric compactness" (J.A. 243).

Plan 9062 also consolidates 99.1% of the population of Hillsborough County into Districts 14 and 15, with the remaining portion in District 12. By contrast,

Plan 9071 disperses the population of Hillsborough throughout four districts, as shown below:

Population of Hillsborough County in Proposed Districts 12, 14, 15, and 16

Plan	CD12	C14	C15	C16
S026C9062	11,451 (0.9%)	696,345 (56.7%)	521,430 (42.4%)	0 (0.0%)
H110C9071	11,451 (0.9%)	696,345 (56.7%)	363,759 (29.6%)	157,671 (12.8%)

No party has presented any evidence that the Senate drew districts with improper intent. While Plaintiffs chose to base their plans on the House's map, they never argued that any of the six districts that differ in 9062 violate any of the tier-one or tier-two standards. And the House's objections to the Senate's plans specifically noted that "[t]o be clear, the House does not impugn or question the intent of the Senate. It does not impugn or question the intent of any individual Senator. The House does not contend that the Senate, or any Senator, drew Plan 9062 or Plan 9066 with an intent to favor or disfavor a political party or an incumbent" (Senate Ex. 31).

During the hearing (and in its objections to the Senate plan), the House made it crystal clear that it was not implying that Senator Lee proposed changes to Central Florida for any improper purpose. Senator Lee testified that he asked Jay Ferrin to draw a map that reduced splits in Hillsborough County so that it would not continue to be a "donor county," as it had been in previous redistricting cycles

(J.A. 373-74, 615-16). Senator Lee also suggested that a district should tie southeastern Hillsborough with Manatee County due to the economic ties between the regions (J.A. 378-79). He thus suggested changes that would restore District 16—which this Court did not require to be changed—to its configuration in Plan 9047, and would consolidate eastern Hillsborough County (J.A. 388). Senator Lee's meetings with Mr. Ferrin were recorded (J.A. 375). Senator Galvano testified that he felt that the Lee amendment was an improvement because it restored the previous unchallenged version of District 16 while improving the tier-two metrics (J.A. 577-78). In fact, Plan 9054 (the precursor to Plan 9062) kept two more cities whole than did the base plan (9065), while retaining the same average compactness scores (F.S.A. 10; J.A. 33).

Senator Lee's proposal to amend the configuration of Central Florida was appropriate. The Constitution imposes the duty to draw districts on the Legislature—that is, on the officials that voters elect to represent them and who are familiar with those areas. It does not impose that duty on unelected staff. The Florida Constitution does not prohibit amendments to the base map as long as they comply with tier-one and tier-two standards. Here, there is no allegation that Plan 9062 violated those standards.

The trial court nevertheless appeared to agree with the House's argument that the Senate did not use a "consistent methodology" because it reduced splits in

Hillsborough County but not to other counties. The Order states that Plan 9062 was "designed to address the perceived 'donor' status of Hillsborough County, but it makes no similar effort to address the 'donor' status of other counties in the map, and it exacerbated the 'donor' status of Orange County" (Order at 6). But the trial court never explained why a reduction in splits to Hillsborough County is only an improvement if there is a "similar effort to address the 'donor' status of other counties in the map." Moreover, House map drawer Jeff Takacs admitted that the decision to reduce the number of population splits in Hillsborough County was consistent with the map drawers' decision, when drawing the base map, to reduce the number of times that Marion County was split from four to three (J.A. 335).

The evidence contradicts the trial court's conclusion that Plan 9062 "exacerbated the 'donor' status of Orange County." As shown in the table below, Districts 7 and 8 are identical in Plans 9071 and 9062. Meanwhile, Plan 9062 shifts some of the population of Orange County in District 10 to District 9:

Population of Orange County in Proposed Districts 7, 8, 9, and 10

Plan	CD7	CD8	CD9	CD10
H110C9071	273,627 (39.3% share)	14,940 (2.1% share)	161,044 (23.1% share)	696,345 (100% share)
S026C9062	273,627 (39.3% share)	14,940 (2.1% share)	238,853 (34.3% share)	618,536 (88.8% share)

In Plan 9062, Orange County's share of District 9 grows from 23.1% to 34.3%, giving Orange County voters greater influence over that district. While

Orange County's share of District 10 falls from 100% to 88.8%, Orange County voters unquestionably continue to control the district. If anything, Plan 9062 gives voters in Orange County a stronger voice in District 9. District 10 follows geographic and political boundaries; and even though it extends into Lake County, neither Lake County nor Orange County is split any more times in Plan 9062 than in 9071. Moreover, Plan 9071 keeps District 10 wholly in Orange County by, in part, changing a district—District 16—that this Court did not require changed.

Thus, the configuration of Central Florida in Plan 9062 is superior to its counterpart in Plan 9071. It restores District 16 while reducing splits to Hillsborough County, and it does not violate any tier-one or tier-two criteria. This Court should adopt it.

B. Plan 9066 Keeps More Counties Intact Than Any Other Plan

If—contrary to this Court's specific direction in *Apportionment VII*—the mandate was *not* to redraw specific districts in specific ways, but instead to reconfigure unchallenged districts to draw the best plan, then this Court should again reject the Order's recommendation and adopt Plan 9066, which keeps more counties whole than any other map offered in this case (or ever). Plan 9066 was drawn after the special session to try to bridge the differences between the House and the Senate. It incorporates 23 of the 27 districts in Plan 9071 (all but Districts 9, 15, 16, and 17). Like the House's plan, District 16 in Plan 9066 enters southern

Hillsborough County, but it does not split Sarasota County, which is placed entirely within District 17. Plan 9066 thereby keeps 50 of Florida's 67 counties whole—one more than in any map offered in this litigation or in any previous congressional plan (J.A. 684-85). No party alleged that these changes in Plan 9066 violate any tier-one standards (Senate Ex. 31; J.A. 320).

As one of the House's own map drawers acknowledged, a county line is the best political boundary available (J.A. 240). Mr. Poreda testified that one of his goals was to keep as many counties whole as possible, that keeping counties intact was a "big deal," and that keeping an extra county whole would be a "good thing" (J.A. 240, 243). Another House map drawer, Mr. Takacs, criticized Plan 9066 for splitting an additional city, but that city is Longboat Key, which straddles two counties (Sarasota and Manatee) (J.A. 317). He also testified that his methodology was to maximize the number of counties kept whole (J.A. 329).

In *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So 3d. 597 (Fla. 2012) ("*Apportionment I*"), this Court lauded the House's emphasis on keeping counties whole. *Id.* at 637. The Court noted that "[t]he House also considered municipal boundaries and geographical features, but decided that county lines were usually preferable to other boundaries." *Id.* at 646. The Court quoted the House's brief with approval: "County boundaries are substantially less likely to change than municipal boundaries, and—unlike municipalities—all

counties are contiguous. Moreover, although all Floridians have a home county, millions live outside any incorporated area. Additionally, by using a strategy of keeping counties whole, the House Map necessarily keeps many municipalities whole within districts. And importantly, numerous Floridians advocated an emphasis on county boundaries at the twenty-six public meetings during the summer of 2011." *Id.* at 646-47.

Meanwhile, this Court also stated that "[t]he Florida Constitution does not mandate, and no party urges, that districts within a redistricting plan achieve the highest mathematical compactness scores;" and that "lower compactness measurements may result from the Legislature's desire to follow political or geographical boundaries or to keep municipalities wholly intact." 83 So. 3d at 635. Thus, "if an oddly shaped district is a result of this state's 'irregular geometry' and the need to keep counties and municipalities whole, these explanations may serve to justify the shape of the district in a logical and constitutionally permissible way." *Id*. at 636.

Therefore, keeping counties whole is even more important than keeping cities whole or maintaining the highest possible compactness scores. Plan 9066 is the only plan to keep 50 counties intact, and it has two fewer aggregate splits to counties than the House plan.

The Order acknowledges that Plan 9066 "splits neither Sarasota nor Manatee County, and thus preserves one more county" (Order at 6). It notes that Plan 9066 splits the City of Longboat Key, but acknowledges that it "straddles the boundary between Sarasota and Manatee Counties." The court states that Plan 9066 "decreases somewhat the visual and numerical compactness of the four districts that differ between it and the House Map" (Order at 6-7). But, as shown below, Plans 9071 and 9066 are nearly identical in mean compactness:

Tier-Two Metrics for Plans 9071 and 9066

Plan	Reock Ratio	Convex Hull	Polsby-Popper	Whole Counties	Whole Cities
H110C9071	0.43	0.76	0.35	49	390
S026C9066	0.43	0.76	0.34	50	389

Indeed, a map drawer for the House acknowledged that the plans are "similar in numeric compactness" (J.A. 322). And House map drawer Jason Poreda admitted that as to Plan 9066, "from a pure map-drawing perceptive, as I stated to my colleagues at the time, it was a good map" (J.A. 298).

Rather than assess the overall compactness of the plans, the Order focused on the compactness of the four districts that differ (Order at 7). But the court never explains why these marginal differences in compactness (e.g., a difference in mean Reock of two-hundredths) carry more weight than Plan 9066's ability to keep 50 counties intact. *See Apportionment I*, 83 So. 3d at 637.

The Order also stated that Plan 9066 "does not include any district wholly within Orange County." This is incorrect. District 10 in Plan 9066 is entirely within Orange County (J.A. 52). Indeed, District 10 is the same in Plans 9066 and 9071.

The Order does not address the Romo Plaintiffs' meritless contention that District 9 in Plan 9066 diminishes the ability of Hispanics to elect candidates of their choice through crossover voting. The trial court already found in the Final Judgment that "there is no evidence before me to suggest that [District 9] was entitled to tier-one protection" (R84. 11120). And the Romo Plaintiffs could not identify any history of crossover voting in District 9 that would allow minorities to elect a candidate of their choice (J.A. 566). In any event, District 9 in Senate Plan 9066 has a *greater* Hispanic VAP than in the Romo Plan (32.7% vs. 31.7%). Thus, there is no evidence to suggest that Plan 9066 improperly diminished the ability of Hispanics to elect candidates of their choice.

For these reasons, if the Court decides that it should adopt the "best map" regardless of whether it previously invalidated particular districts, it should adopt Plan 9066, which keeps 50 counties whole.[2]

[2] If the Court concludes that Plan CP-1 is without fault, Plan 9066 can be seamlessly merged with CP-1 to maximize the improvements in both plans.

II. THE COURT SHOULD ADOPT THE LEGISLATURE'S CONFIGURATION OF SOUTH FLORIDA INSTEAD OF ONE THAT DIMINISHES HISPANICS' ABILITY TO ELECT OR ONE THAT DELIBERATELY UNPAIRS INCUMBENTS

All of Plaintiffs' maps, including the one the Order recommends (Plan CP-1), follow Plan 9071 but reconfigure portions of South Florida. The Court should reject these alternatives and adopt the Legislature's configuration of that region. To begin with, this Court should prefer a plan that is the product of an open and transparent process, rather than one drawn in secret. Moreover, while the Legislature's configuration of South Florida satisfies all of the tier-one and tier-two criteria, Plaintiffs' configurations diminish the ability of Hispanics to elect the candidate of their choice in District 26. Meanwhile, Plan CP-1 is less visually compact than the Legislature's configuration and changes districts that this Court did not require the Legislature to redraw. And the Romo Plaintiffs' map drawer admitted that he designed the Romo Plan to unpair Democrat incumbents. Plans 9062 and 9066 do not suffer from their defects, and this Court should adopt one as the remedial congressional plan.

A. The Court Should Approve a Plan Drawn in an Open and Transparent Legislative Process, Not a Plan Drawn in Secret

This Court's September 4 order instructed the trial court to "especially focus[ ] on the map passed during the special session by the House [Plan 9071], and any amendments offered thereto; the map passed during the special session by

the Senate [Plan 9062], and any amendments offered thereto; and the areas of agreement between the legislatives chambers." Even though both chambers agreed on the configuration of South Florida, however, and the trial court found that the map drawers did not act with the intent to favor a political party or incumbent, the trial court nonetheless selected a plan drawn by the LOWV Plaintiffs. But this Court should prefer a constitutional plan drawn in an open and transparent legislative process, as the Court directed in *Apportionment VII*—a process both LOWV and Romo Plaintiffs eschewed—rather than a plan drawn in secret by a contractor for a political microtargeting firm.

This Court's opinion called for an open and transparent process that would enable the public to participate and have their ideas considered, and that is what occurred in the Legislature. *See Apportionment VII*, 172 So. 3d at 416 ("We have every confidence that the Legislature, given this guidance, will conduct itself in a manner that will fulfill the purpose of the Fair Districts Amendment, including the need for transparency and neutrality in drawing the state's congressional districts."). Indeed, the trial court found that "[i]t appears that the Legislature took appropriate steps to guard against improper partisan influence in the drawing of its base map and in opening up the process of amendments to public scrutiny" (Order at 8). Although the Legislature was not able to agree on a map, the House and Senate committees met publicly several times to discuss the maps, both jointly and

separately (Senate Exs. 3-1 to 5-7). Those meetings were public. Any meetings between a senator and the Senate's map drawer to discuss changes to the base map were recorded (J.A. 611). The map drawers publicly explained the decisions they made during the map-drawing process (Senate Ex. 3-2). None of the map drawers viewed or used political performance information during the special session, except as necessary to conduct a functional analysis for minority-performing districts (J.A. 154, 619).

Moreover, the trial court specifically found that the map drawers designed Districts 20 to 27 without intent to favor a political party or incumbent. It noted that Districts 20-27 are the same in Plans 9071, 9062, and 9066, and were unchanged from the base map prepared by staff (Order at 9) (Plans CP-2 and CP-3 have the same configuration of Districts 20-25). In light of this, the trial court found that "the intent or motivation of the map drawers takes on particular importance. And I do not find from the evidence that the staff map drawers had a conscious intent to favor or disfavor a political party or incumbent" (Order at 9-10). The trial court also found that "[t]he fact that 9071 has the effect of favoring a political party in Districts 26 and 27 is simply not enough to convince me that those districts were drawn with that specific intent" (Order at 10).

Plaintiffs did not operate under the same constraints as the Legislature. Plaintiffs declined to participate in public process, despite the Senate's invitation

(F.S.A. 4). Their maps were drawn in secret, without public scrutiny, and unrecorded, thus leaving their motives unclear (J.A. 736). They had the ability to review political performance both while drawing the maps and afterward, to ensure that it met their expectations. And, rather than propose their maps publicly to the Legislature, they waited until the special session ended and sprang them forth in litigation, giving the public and the trial court the least opportunity to review and consider their proposals.

The Order states that "[o]n the issue of partisan intent, it is the Legislature that bears the burden of defending its proposed maps, not the Plaintiffs. While evidence that a map drawer might be a partisan or have a bias is certainly relevant, it would not be a reason to automatically reject it" (Order at 13). This may be true to show merely that a legislative map could have been drawn better; but once a party—*any* party—presents a map to be the congressional map for the State of Florida, that party is under the same constitutional constraints. Its districts, too, and its entire map, cannot be drawn to favor or disfavor a political party or an incumbent. Article III, Section 20 contains no exception for plans submitted by partisans during redistricting litigation. In approving Amendment 5 for placement on the ballot, this Court plainly stated "it can logically be presumed that if the Legislature fails to comply with the Constitution and follow the applicable standards, the entity responsible for redrawing the boundaries must also comply

with these standards." *See Advisory Opinion to Attorney Gen. re Standards For Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 185 (Fla. 2009).

Yet the Romo Plaintiffs admitted that their counsel discussed their map with the Democratic Congressional Campaign Committee—whose mission is to elect Democrats to Congress (F.S.A. 13-14). Asked about those discussions, the Romo Plaintiffs' expert acknowledged that he had to await instructions as to whether "the client was going to move forward with the map or not" (J.A. 559). And the Romo Plaintiffs' expert admitted that he picked a map that would avoid pairing two incumbent Democrat members of Congress (J.A. 562-63). Meanwhile, the Coalition Plaintiffs hired a Washington, D.C.-based microtargeting firm that works almost exclusively for Democrats (J.A. 745-46). Moreover, in a letter to the Legislature, the Coalition Plaintiffs explicitly sought changes to District 26 to make it "more Democratic" (F.S.A. 7). While the trial court nonetheless found "no evidence to suggest that CP-1 was drawn with improper partisan intent," the Legislative Parties could not engage in any discovery (which this Court prohibited) that could have uncovered information about Plaintiffs' motives. Moreover, as the trial court itself noted, "changes which improve tier two performance somewhat" may be "motivated by a desire to affect political performance" (Order at 9).

Unlike Plaintiffs, the Legislature acted in an open, transparent manner throughout this map drawing process. And the trial court specifically found that

the Legislature's map drawers did not act with intent to favor or disfavor a political party (Order at 10). Because the Legislature acted in a manner consistent with this Court's directions in *Apportionment VII*, the Court should adopt the Legislature's configuration of South Florida.

B. Plaintiffs' Alternative Maps Diminish the Ability of Hispanics to Elect Candidates of Their Choice in District 26

Even if this Court were to place no weight on the open and transparent process by which the Legislature drew its plans, it should still prefer the Legislature's configuration of South Florida over Plan CP-1, as well as Plaintiffs' other alternatives. As explained below, the trial court's criticism of the process by which the Legislature drew District 26 is misplaced. The trial court also misconstrued the expert testimony offered by the parties, and its cursory analysis of the ability of Hispanics to elect candidates of their choice in District 26 fails to follow this Court's precedent.

1. Professional Staff Worked Carefully to Redraw District 26 to Avoid Splitting Homestead

In *Apportionment VII*, this Court instructed the Legislature to redraw CD26 to avoid splitting Homestead. All three plans submitted by the Legislature do so in the same manner. Both Districts 26 and 27 are Hispanic majority districts, and all parties agreed that to conform with the Florida Constitution as well as the Section 2 of the Voting Rights Act, they must remain so.

Plaintiffs presented no evidence—direct or circumstantial—that these districts were drawn with unconstitutional intent. Rather, the evidence showed that these districts were carefully drawn to comply with the Supreme Court's directive to keep the city of Homestead whole while preserving the ability of Hispanics to elect the candidates of their choice (J.A. 446-51). The trial court heard testimony that Professional Staff began by drawing two drafts—one (Draft01) keeping Homestead entirely within District 26, and one (Draft02) keeping Homestead entirely within District 27—and compared the results (J.A. 165, 302, 604-05). Professional Staff then performed a functional analysis using registration and primary data and confirmed that both districts still performed for Hispanics (J.A. 165-66, 302, 356, 605-06). They then considered the compactness scores of the two alternatives, and elected to adopt the version keeping Homestead within District 26 because it had a better Convex Hull score (J.A. 166-67, 302, 606). They did not believe the Supreme Court directed the Legislature to "balance" the political composition of the districts, as that would violate the Florida Constitution; instead, their mandate was to unite Homestead (J.A. 285, 340-41, 358, 604, 685-86).

After placing Homestead in District 26, Professional Staff then worked to equalize the population in the two districts (J.A. 167). They elected to divide the districts by following the Florida Turnpike, which they considered to be the most

recognizable roadway in the area (J.A. 167-68, 606-07). They followed the Turnpike north until it was necessary to cut east through a neighborhood towards another major roadway—Southwest 97th Avenue—so that the districts would have equal population (J.A. 169-71, 303). In the course of dividing the districts, Professional Staff did not have any knowledge of the racial or political characteristics of any particular neighborhoods, nor did they deliberately include or exclude any particular neighborhoods from District 26 (J.A. 171-72, 302-03, 608-09, 687).

The trial court faulted the map drawers for a supposed "cursory analysis regarding performance for minorities" in District 26 and 27 (Order at 10), but it did not find that Districts 26 and 27 either diminish the ability of Hispanics to elect candidates of their choice, or unnecessarily pack Hispanics. And Plaintiffs made no such accusations.

The trial court also criticized the Legislature for not attempting to redraw District 26 in response to a letter from the LOWV Plaintiffs which called for the district to become "more Democratic" (F.S.A. 7). It stated that the Legislature "seemed uninterested in exploring other possible configurations to see if these districts could be drawn more compact and reduce county and city splits" and criticized the Legislature for "shutting down any further consideration" of Districts 26 and 27 in response to Plaintiffs' letter (Order at 11). But the Legislature did not

"shut down" anything—any legislator could propose maps that modified District 26 and 27, and any member of the public could submit maps for the Legislature's consideration. Plaintiffs never did.

Moreover, the trial court acknowledges that if the Legislature "has drawn the map without regard to political performance, then it would be improper for it to 'correct' the political effect of the map in certain districts when someone complains" (Order at 11). Because the map drawers did not act with improper intent (Order at 10), it was entirely appropriate for the Legislature to decide not to make any "corrections" to District 26.

Nonetheless, the trial court suggests that the "[t]here was no reason why the Legislature could not have taken another look at the South Florida districts, not for political performance but for better tier two compliance" (Order at 11). It is difficult to reconcile the trial court's suggestion that the Legislature should revisit any district when members of public offer criticism with its prior finding that relying on public input "may not be the best way to protect against partisan influence" (R84. 1114). Moreover, the Legislature could have revisited any portion of the map to find ways to improve tier-two compliance—not just the portion of the map where Plaintiffs believed needed to be "more Democratic." And the Legislature did just that, amending the base plan to reduce city splits (J.A. 234, 631-32). Neither the Plaintiffs nor anyone else offered a more-compact

configuration of District 26. The Legislature had no obligation to redraw District 26 after Plaintiffs reviewed it, considered political data, and decided they were dissatisfied with the district's political performance.

2. Expert Testimony Demonstrated that Plaintiffs' Alternatives Would Diminish the Ability of Hispanics to Elect Candidates of Their Choice in District 26

Plaintiffs' changes to District 26 increase the percentage of Democrat registered voters so that the district is more likely to elect a Democrat than in either the benchmark, Plan 9047, or the Legislature's three proposed plans. The Legislature presented expert testimony, however, that Hispanics do not control the Democrat primary in District 26 as they do the Republican primary; indeed, they are the third-largest ethnic group, behind non-Hispanic whites and blacks (J.A. 429-31). Thus, Plaintiffs' versions of District 26 are likely to nominate either a white or a black – but *not* a Hispanic – Democrat (J.A. 443, 463).

As shown in the chart below, Plaintiffs' alternative configurations increased registered Democrats, turning the district from a toss-up district into one where white or black Democrats are likely to prevail.

Party Registration, District 26

Plan	Democrat	Republican	No Party Affiliation
Benchmark District 25	35.2	34.5	30.3
Plan 9047	35.6	35.2	29.3
Plans 9062 and 9066	34.1	36.0	29.9
CP-1	37.2	33.1	29.7
CP-2	36.5	34.0	29.5
CP-3	36.5	33.9	29.6
Romo Plan	36.6	33.8	29.6

As the Romo Plaintiffs' expert testified, in a Democrat-leaning district, the primary acquires increased significance (J.A. 499-500). But the evidence showed that a Hispanic candidate of choice is not likely to prevail in a contested Democrat primary. The benchmark contained three districts in South Florida in which Hispanic voters were able to elect the candidates of their choice. The expert testimony of Dr. Moreno established that the creation of performing Hispanic districts is a sensitive and difficult task. Hispanic voters are less cohesive than African Americans. As the third-largest demographic in District 26, with only 22% of the actual electorate, Hispanics do not control the Democrat primary (J.A. 60, 66, 72, 78, J.A. 431). As Dr. Moreno testified, in Districts 26 and 27, the Legislature provided a path to electoral success for the Hispanic-preferred candidate (J.A. 435). Plaintiffs' alternatives do not. For example, as Dr. Moreno

testified, in 2012 President Obama carried District 26 in Plan CP-1 by 11 percentage points (J.A. 429). Dr. Moreno testified that while Democrats may nominate a Hispanic in a toss-up district, in a safer district (as Plaintiffs propose) Democrats would be more likely to nominate a non-Hispanic white candidate or a black candidate (J.A. 432-33, 435-36). Thus, Hispanics will not control the Democrat primary, while Democrats will control the general election. These forces ensure that Hispanics will be unable to elect their preferred candidate in Plaintiffs' District 26. At least, their ability to elect the candidate of their choice will be diminished.

The trial court acknowledged that Dr. Moreno "has a good bit of knowledge and expertise about elections in South Florida," but criticized Dr. Moreno for comparing Plan CP-1 to Plan 9071, rather than the benchmark plan in 2002. But the trial court's own analysis confirmed that District 26 in Plan CP-1 increases performance for Democrats as compared to the benchmark plan (Order at 16-17).

The trial court also acknowledged that the Legislative Parties' argument that District 26 in Plan CP-1 will not elect a Hispanic candidate of choice was "cogent" and "logical" (Order at 14). Nonetheless, it found the opinions of the LOWV Plaintiffs' expert, Dr. Allan Lichtman, to be persuasive, even though Dr. Lichtman

presented no analysis of the Democrat primary election in District 26.[3] The Order acknowledges the Legislature Parties' argument that Dr. Lichtman "did not address the effect that a smaller Hispanic vote share in the Democratic primary would have in a district that is now more Democratic leaning" (Order at 15). The Order then states, however, that Dr. Lichtman "was present at the hearing and available for cross examination about his methods and conclusions. He could have been asked about this specific concern, but the Defendants chose not to do so" (Order at 15). But it is not the Legislative Parties' responsibility to solicit Dr. Lichtman's opinions through cross-examination. If Dr. Lichtman had an opinion about whether a Hispanic candidate of choice was likely to emerge from a Democrat primary in District 26, he should have disclosed it in his report. *See Thomas v. Wal-Mart Stores, Inc.*, 60 So. 3d 440, 444 (Fla. 3d DCA 2011) ("condemn[ing] the practice of allowing experts to develop or change their opinion during . . . trial"). Because he failed to so, the Legislature's criticism is entirely appropriate.

Plaintiffs suggested that District 26 can be a coalition district, but safe minority districts cannot be substituted with "influence or coalition districts."

[3] The Order cites language from Dr. Lichtman's opinion that "according to the range of most pertinent factors, [District 26] in CP-1 is a Hispanic opportunity district beyond any reasonable doubt" (Order at 15). But the pertinent question is whether District 26 is a Hispanic-*performing* district, not whether it is a Hispanic *opportunity* district. *See Apportionment I*, 83 So. 3d at 625 ("[T]he 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.").

Apportionment I, 83 So. 3d at 624 (citations omitted). Moreover, one of the Legislative Parties' experts, Dr. Baodong Liu, testified that Miami-Dade County is characterized by racially polarized voting between blacks and Hispanics, and that the prospects of such a coalition are slim (F.S.A. 25). The trial court found that Dr. Liu's opinion "makes sense" but criticized him for not offering evidence of a black-and-white coalition defeating a Hispanic candidate—even though the court acknowledged that Dr. Liu did provide such an example (Order at 15). And Dr. Moreno confirmed Dr. Liu's analysis by noting that no successful black-and-Hispanic coalitions have emerged in South Florida (J.A. 439-40). Meanwhile, Plaintiffs' sole example of an alleged coalition between black and Hispanic voters resulted in the election of a white Democrat (J.A. 410-11).

3. The Order Does Not Follow this Court's Two-Step Diminishment Analysis

While the trial court acknowledged "th[e] erosion of Hispanic control of the Democratic primary" in Plan CP-1's District 16, it dismissed these concerns by observing that "[t]he district has Hispanic voting age population of 68.3% and Hispanics comprise 54.7% of registered voters . . . [and i]n 2010, Hispanics comprised 50.3% of the general election electorate" (Order at 18). The court then found that "[i]n South Florida elections with similar demographic statistics, Hispanics have consistently elected the candidate of their choice" (Order at 18).

The trial court cites this Court's decision in as *Apportionment I* as the basis for this cursory analysis (Order at 18).

This Court has never endorsed a functional analysis that ignores primary data. Instead, the Court has considered whether a minority candidate of choice would emerge from a primary. *See Apportionment I*, 83 So. 3d at 667 ("Black voters would have also controlled the Democratic primary, with 67.3% of the Democrats voting in the primary being black. This analysis indicates that the district will likely afford black voters the ability to elect candidates of their choice."); *id*. at 668 ("Black voters would have also controlled the Democratic primary, with 64.3% of the Democrats voting in the primary being black. This analysis indicates that the district will likely afford black voters the ability to elect candidates of their choice.").

In its discussion of District 5 in *Apportionment VII*, this Court applied a two-step analysis to determine whether a minority candidate of choice would prevail. First, the Court considered whether the candidate is "likely to win a contested Democratic primary." 172 So. 2d at 405. In that case, the Court found that District 5 would perform for a black candidate "since black voters constitute 66.1% of registered Democrats." *Id*. The Court then considered whether that candidate is "likely to win the general election," and concluded that the candidate would prevail "since Democratic voters outnumber Republicans 61.1% to 23.0%." *Id*.

In this case, in Plaintiffs' configurations of District 26, a Democrat is "likely" to win the general election. As explained above, Plaintiffs change the party balance from one that is essentially even in the benchmark and in Plan 9047 to configurations that provide Democrats with a three- or four-point advantage in party registration. And in Plan CP-1, President Obama carried District 26 in 2012 by 11 percentage points (J.A. 429).

Meanwhile, the trial court acknowledged that in Plan CP-1's District 16, "when it comes to control of the Democratic primary, Hispanics made up only 22.8% of the Democratic primary electorate in 2010, compared to 26.7% in Benchmark District" (Order at 17). The court also noted that "[b]lacks are the second most represented group in the 2010 Democratic primary electorate under CP-1, with Hispanics falling to third" (Order at 17). The trial court never explained how in those circumstances a Hispanic candidate of choice "likely to win a contested Democratic primary." *Apportionment VII*, 172 So. 2d at 405. And the expert testimony of Dr. Moreno demonstrated that Hispanics would not control the Democratic primary (J.A. 432-33, 435-36).

In any event, the Legislative Parties need not show that the Plaintiffs' configurations District 26 will *eliminate* Hispanic's ability to elect whom they choose, but only that it *diminishes* that ability—that is, reduces the chances. *Apportionment I*, 83 So. 3d at 624-25 (noting that the question is whether

minorities are "more, less, or just as able to elect" their candidates). Since under the benchmark plan District 26 is a toss-up district, increasing non-Hispanic registered Democrats and decreasing registered Republicans will necessarily diminish Hispanics' ability to elect the candidate of their choice.

Because Plaintiffs' alternative configurations of Districts 26 and 27 would diminish the ability of Hispanics to elect candidates of their choice, the Court should instead adopt the Legislature's configuration of the districts.

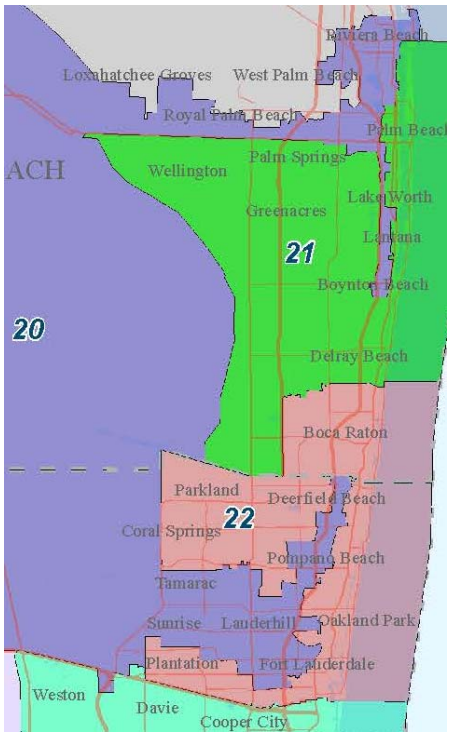
C. Plan CP-1 Has Additional Defects Not Found in the Senate's Plans

While in two of their plans (Plans CP-2 and CP-3) the LOWV Plaintiffs reconfigured only Districts 26 and 27, in the plan the Order recommends (CP-1), they redrew *all* of South Florida, including Districts 20 through 27. But, as noted above, this Court did not require the Legislature to redraw the entire map: "we have ultimately determined that requiring the entire map to be redrawn is not the remedy commensurate with the constitutional violations found in this case." *Apportionment VII*, 172 So. 3d at 413. Instead, this Court only required the Legislature to redraw eight Districts (5, 13, 14, 21, 22, 25, 26 and 27) along with necessary changes in adjacent districts. *Id*. Here, while the trial court relied on the tier-two metrics of Plan CP-1 when it issued its recommendation (Order at 12), any improvements in those districts are the product of changes to several districts that this Court did not invalidate, such as Districts 20 and 24. In fact, CP-1's gains of

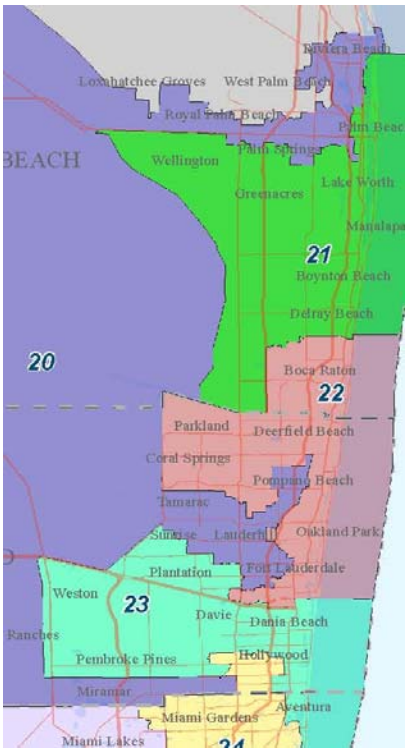
keeping eight more cities whole were largely attributable to substantial revision to District 20, a district that was not challenged; and resulted in an additional appendage in that district.

Moreover, this Court has held that before consideration of numerical scores, 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. *Apportionment I*, 83 So. 3d at 634. Here, the LOWV Plaintiffs modified District 20 to add a bizarre appendage, even though that district already contains two long claws going east:

Plans 9062 and 9066



Plan CP-1



This Court has consistently found such features anathema. *See Apportionment I*, 83 So. 3d at 634 ("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."). When drawing the base map, Professional Staff considered, and rejected, a similar concept because they believed that adding a third appendage would not look visually compact and would raise questions about the plan's adherence to the tier-two standards (J.A. 237).

The Order's findings that the LOWV Plaintiffs' map drawer "seemed to have no trouble improving tier-two compliance considerably" and that Plan CP-1's "metrics are much better" overstate the actual numbers, as Plan CP-1 increases the mean Convex-Hull number in the region by one-hundredth of a point, and the mean Reock score by three-hundredths (Order at 12-13). And, as the court recognized, "changes which improve tier two performance somewhat" may be "motivated by a desire to affect political performance" (Order at 9), such as the LOWV Plaintiffs' desire to make District 26 "more Democratic" (F.S.A. 7). In any event, these small differences do not outweigh the lack of visual compactness.

D. The Romo Plaintiffs Drew Their Map With the Intent to Unpair Two Democrat Incumbents

This Court should follow the trial court's recommendation not to adopt the Romo Plan, including its vertical configuration of Districts 21 and 22. In *Apportionment VII*, this Court noted that "the challengers individually attacked the

validity of Districts 21 and 22, contending that these districts could have been drawn in a more constitutionally compliant manner by 'stacking' them on top of each other, in a horizontal configuration, rather than configuring the districts to run vertically, parallel to each other along the Atlantic coast." *Apportionment VII*, 172 So. 3d at 411. While the Court did not require the Legislature to "necessarily redraw the districts in a 'stacked,' horizontal configuration," it did require to the Legislature "to redraw these two districts, with the understanding that tier-two compliance could be improved." *Id*. at 412-13.

Professional Staff determined that the compactness of Districts 21 and 22 would not significantly change with alternative north-south configurations; so to improve compactness, they drew the districts in an east-west configuration similar to the draft plan that this Court cited with approval (J.A. 199-200, 305, 609-10).

Plaintiffs presented no evidence that this decision to draw Districts 21 and 22 in a stacked configuration was improper. The LOWV Plaintiffs did not contest them. The Romo Plaintiffs, however, claimed that District 21 and 22 violate tier-one criteria because they pair two incumbent Congress members. The pairing of incumbents, however, was a consequence of stacking the districts. And this Court has noted that the Constitution "prohibits intent, not effect." *See Apportionment I*, at 617 ("We recognize that any redrawing of lines, regardless of intent, will inevitably have an effect on the political composition of a district and likely

whether a political party or incumbent is advantaged or disadvantaged. . . . In short, redistricting will inherently have political consequences, regardless of the intent used in drawing the lines. Thus, the focus of the analysis must be on both direct and circumstantial evidence of intent.").

Moreover, the Romo Plaintiffs' deliberate attempt to avoid the pairing of two incumbents evinces an improper intent to favor incumbents, thus violating tier-one standards. Indeed, the Romo Plaintiffs readily conceded that their configuration is designed to unpair two incumbents. Their expert testified that he considered incumbent data when designing his map (J.A. 533-34). He reviewed several configurations of Districts 21 and 22 along with incumbent addresses and selected a version that avoids pairing the incumbents (J.A. 562). He acknowledged, however, that this configuration was "much less compact" and had more splits than the version designed by the Legislature—it split the City of Boca Raton—and that the Legislature's version provided a "significant improvement" in compactness and is "substantially better" in city splits (J.A. 536, 548-49).

In *Apportionment I*, 83 So. 3d at 654, this Court criticized the Senate for *not* pairing incumbents. Yet that is precisely what the Romo Plaintiffs did when they drew Districts 21 and 22. By contrast, the Legislature did not consider incumbent addresses when designing any of its districts (J.A. 610-11).

To the extent the Romo Plaintiffs justify their configurations because they maintain "communities of interest," this Court held that the "belief that in the drawing of the districts, the factor of communities of interest could be elevated above the constitutional mandates" was "erroneous." *Apportionment I*, 83 So. 3d at 662. Here, both districts the Romo Plaintiffs propose are *less* compact than in the legislature's configuration, as seen in the charts below.

Compactness of District 21

Plan	Reock Ratio	Convex Hull	Polsby-Popper
Plans 9062 and 9066	0.37	0.64	0.24
Romo Plan	0.29	0.60	0.25
Plan 9057	0.28	0.60	0.26

Compactness of District 22

Plan	Reock Ratio	Convex Hull	Polsby-Popper
Plans 9062 and 9066	0.41	0.70	0.15
Romo Plan	0.18	0.64	0.11
Plan 9057	0.18	0.61	0.13

As the trial court correctly held, there was "no justification for this less tier-two compliant configuration" (Order at 13). Therefore, this Court should reject Romo Plaintiffs' alternative configurations of Districts 21 and 22.

CONCLUSION

Plans 9062 and 9066 closely adhere to the tier-two standards set forth in Article III, Section 20 without sacrificing compliance with the tier-one standards. If the mandate was to redraw the invalidated districts while minimizing effects to other districts, then Plan 9062 best satisfies that criteria. If the Court believes that it should select the best plan without regard to the configuration of districts in Plan 9057, then it should adopt Plan 9066, which preserves more counties (50) than any other plan submitted in this case, or ever. Therefore, the Senate respectfully requests that this Court should adopt either Plan 9062 or Plan 9066.

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CERTIFICATE OF SERVICE

I certify that on October 16, 2015, a copy of the foregoing was served by e-mail to all counsel on the attached service list.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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