Filing # 20884178 Electronically Filed 11/21/2014 11:56:29 PM

RECEIVED, 11/21/2014 23:58:52, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA et al.,
Appellants,
v.

KEN DETZNER, et al.,
Appellees.

Case No.: SC14-1905
L.T. No.: 2012-CA-00412; 2012-CA-00490

ON APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA, CERTIFIED BY THE DISTRICT COURT FOR IMMEDIATE RESOLUTION

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PRELIMINARY STATEMENT TO ASSIST THE READER

Consistent with naming conventions this Court has been using, the following shorthand terms are used for this Court's prior decisions regarding constitutional challenges to the 2012 apportionment process:

Apportionment I – *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012) (validating state house plan and invalidating state senate plan)

Apportionment II – *In re Senate Joint Resolution of Legislative Apportionment 2–B*, 89 So. 3d 872 (Fla. 2012) (validating second state senate plan)

Apportionment III – *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So. 3d 198 (Fla. 2013) (allowing fact-based challenge to state senate plan)

Apportionment IV – *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 137 (Fla. 2013) (holding that need to obtain in discovery legislative communications regarding reapportionment process was so compelling as to outweigh claim of legislative privilege)

Apportionment V – *League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510 (Fla. 2014) (granting all writs relief to allow evidence obtained regarding legislative intent to be used during trial pending appeal over whether evidence was privileged)

Apportionment VI – *Bainter v. League of Women Voters of Fla.*, No. SC14-1200, 2014 WL 5856169 (Fla. Nov. 13, 2014) (finding that any claim of privilege for evidence at issue in *Apportionment V* had been waived)

Citations to the Record on Appeal are as follows:

- (R__:___) indicate citations to the Record on Appeal previously filed in *Bainter v. League of Women Voters of Fla.*, No. SC14-1200. This Court granted Appellants' Motion to Utilize that record in this appeal by order dated October 31, 2014;

- (SR(1-24):___) indicate citations to the Supplemental Record on Appeal filed by the clerk of the lower tribunal, also pursuant to this Court's order, of materials filed since the *Bainter* record was com-

piled. This supplemental record was transmitted to the Court on October 30, and November 6, 2014;

- (SR25:___) indicates citations to the supplemental record attached to Appellants' unopposed motion to supplement the record, filed on November 21, 2014;

- (SR26:___) indicates citations to the supplemental record attached to Appellants' opposed motion to supplement the record, filed on November 21, 2014;

- (T__:____) indicates citations to the trial transcript, which was included at the end of the *Bainter* record and subject to its own volume numbering separate from the record on appeal;

- (Ex. CP-___) indicates citations to the Coalition Plaintiffs' exhibits admitted at trial, which were filed by the clerk of the lower tribunal on a disc with the *Bainter* record;

- (Ex. RP-__) indicates citations to the Romo Plaintiffs' exhibits admitted at trial, which were filed by the clerk of the lower tribunal on a disc with the *Bainter* record;

- (Ex. LD-___) indicates citations to the Legislative Defendants' exhibits admitted at trial, which were filed by the clerk of the lower tribunal on a disc with the *Bainter* record; and

- (App. ___) indicates citations to Appellants' Appendix, which has been filed simultaneously with this brief. The Appendix is comprised of the following documents and their corresponding citations to the record:

    - App. 1-36 (CP Remedial Plan A and stats) – SR16:2212-47

    - App. 37-72 (CP Remedial Plan B and stats) – SR16:2248-83

    - App. 73-75 (Romo Remedial Plan and stats) – SR16:2284-85

- App. 76-160 (Jt. Ex. 1 – 2012 Congressional Plan, 2002 Congressional Plan, Published Legislative Draft Maps, Romo Trial Map A, Romo Trial Map B) – SR24: 3462-3548

- App. 161-164 (revised plan (9057) and stats) – SR7:746-49

- App. 165-209 (final judgment and order adopting remedial plan) – R86:11289-11329; SR16:2306-09

To assist the Court in keeping track of the many interested individuals involved in this case beyond the named parties, the pages in the statement of the case and facts where the major individuals are mentioned are as follows:

Pursuant to their Second Motion to Determine Confidentiality filed on November 21, 2014, Appellants are filing redacted and unredacted versions of this brief. The text that is hidden in the redacted version is highlighted in grey in the unredacted version.

STATEMENT OF THE CASE AND FACTS

Challenging the Florida Legislature's 2012 apportionment of congressional districts as violating the constitutional ban on partisan gerrymandering imposed by the recently approved FairDistricts Amendments, the Appellants appeal a final judgment of the trial court that resolved nearly all disputes of fact in their favor, but ruled against them on several issues of law. They contend that while the trial court correctly found the entire 2012 apportionment plan to be unconstitutional, it erred by only requiring two districts to be redrawn, by allowing the Legislature to provide the remedy by quickly passing a new plan that is largely the same as the old plan, and by then deferring to the Legislature's decision to maintain an apportionment scheme that ensures continued Republican domination over an electorate evenly divided between the two political parties. They ask this Court to invalidate the entire apportionment plan and to impose a meaningful remedy pursuant to its

> solemn obligation to ensure that the constitutional rights of its citizens are not violated and that the explicit constitutional mandate to outlaw partisan political gerrymandering and improper discriminatory intent in redistricting is effectively enforced.

Apportionment IV, 132 So. 3d at 137.[1]

Summary of Procedural History

This litigation arises from three related actions before the circuit court. Appellants The League of Women Voters of Florida, Common Cause, Brenda Ann

[1] See Preliminary Statement for full citations to *Apportionment* decisions.

Holt, J. Steele Olmstead, Robert Allen Schaeffer, and Roland Sanchez-Medina, Jr. (collectively, "Coalition Plaintiffs"), filed two complaints, one challenging the congressional apportionment plan and one challenging the Senate apportionment plan adopted after this Court invalidated the initial Senate plan. (R86:11,217-35; R87:11,357-74.) The remaining complaint, filed by Appellants Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, and Bonita Agan (collectively, "Romo Plaintiffs," and together with Coalition Plaintiffs, "Plaintiffs"), challenged the congressional plan only. (R1:51-62.) The two congressional cases were consolidated for trial and are the subject of this appeal. (R7:855-56.) The Senate case has not been set for trial.

The main defendants are the Florida Senate and its president and the Florida House of Representatives and its speaker (collectively, the "Legislature"). The Secretary of State and Attorney General are also nominal defendants, though they have largely taken no position on the merits of this litigation. The Florida NAACP intervened on behalf of the defendants. (R14:1894-95.)

After the Legislature unsuccessfully fought Plaintiffs' discovery requests for evidence of its communications and work product regarding the 2012 apportionment process (culminating in *Apportionment IV*, which largely rejected claims of legislative privilege) and non-party Republican political operatives unsuccessfully fought Plaintiffs' discovery requests for their communications regarding the pro-

cess (culminating in *Apportionment V*, which stayed a district court order that would have prohibited the evidence from being used at trial, and *Apportionment VI*, which held that the evidence was properly compelled over claims of First Amendment and trade secret privilege), the case proceeded to a twelve-day bench trial before the Honorable Terry P. Lewis. Plaintiffs presented their evidence and arguments as to why the 2012 congressional apportionment plan violated the FairDistricts Amendments, as interpreted by this Court in *Apportionment I*, and the Legislature presented its evidence and arguments to the contrary.

The trial court ultimately entered a detailed order, labeled as a "final judgment,"[2] finding that the congressional apportionment plan was constitutionally invalid, concluding that at least two districts (5 and 10) would have to be redrawn, and rejecting Plaintiffs' challenges directed at other districts. (R86:11,289-329.)

The Legislature moved the trial court to clarify that the 2014 election would proceed under the unconstitutional 2012 Congressional Plan. (R85:11,131.) The Legislature argued that it alone was authorized to draw and adopt a remedial plan. (R85:11,130) Concerned that allowing the Legislature to devise its own "remedy" would only reward its misconduct, Plaintiffs urged the trial court to immediately

[2] The order is not a true final judgment because it only adjudicated the validity of the congressional apportionment plan and did not address the remedy requested in the Plaintiffs complaints. *E.g., Casino, Inc. v. Kugeares*, 354 So. 2d 936, 937-38 (Fla. 2d DCA 1978). Even if it were final, the Plaintiffs' notice of appeal was timely to appeal it.

adopt a remedial plan (1) offered by Plaintiffs, (2) drawn by the court, or (3) drawn by an independent expert. (SR14:1940.) Alternatively, Plaintiffs urged the trial court to issue specific guidance to the Legislature if it was to be allowed to draw the remedial plan. (SR14:1952-54.) Plaintiffs also requested adjustment of election deadlines for the 2014 election to ensure that Florida's citizens would not be forced to vote again in unconstitutional districts. (SR14: 1941-44.)

Following an evidentiary hearing, on August 1, 2014, the trial court denied the Legislature's request to defer any remedy until after the 2014 election, but permitted it to redraw the congressional plan. (SR3:230-35.) Declining to issue specific instructions, the trial court ordered the Legislature to adopt a remedial plan by August 15, 2014. (SR3:234.)

After the Legislature convened a special session and adopted a new plan that revised Districts 5 and 10 (the "Revised Plan"), Plaintiffs filed objections contending that this new plan was as unconstitutional as the first; the trial court conducted an evidentiary hearing on August 20, 2014. (SR16:2186; SR20:2583-2716.) Two days later, the court issued an order overruling Plaintiffs' objections and adopting the Revised Plan. (SR16:2306-09.) Because there was inadequate time to affect the 2014 elections and a special election was not feasible, the trial court ordered that the 2014 elections proceed under the invalidated 2012 Congressional Plan, with the Revised Plan to go into effect for the 2016 elections. (SR16:2309.)

Plaintiffs timely appealed, the First District certified the judgment for direct review by this Court, and this Court accepted jurisdiction and set an expedited briefing schedule on October 23, 2014. A detailed review of the background, a few material points of procedural history, and the evidence presented at trial follows.

The Unabashedly Partisan 2002 Redistricting Process

Before the FairDistricts Amendments, redistricting was an openly partisan affair. The controlling political party engaged in a "raw exercise of majority legislative power" to craft districts offering the maximum partisan benefit. *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002). To give but one example, in the 2002 redistricting litigation, the Legislature defended against charges of racial gerrymandering by claiming that *political* – not racial – considerations drove the 2002 congressional redistricting plan. Indeed, the Legislature stipulated that it prepared that plan with the "intent ... to draw the congressional districts in a way that advantage[d] Republican incumbents and potential candidates." *Id.* at 1340.

Paid partisan operatives are another longstanding tradition in Florida redistricting. (T1: 27-28.) Longtime Republican political operative Richard Heffley ("Heffley"), for example, was a "key figure" in the 1992 and 2002 redistricting cycles. (T15:1925; *see also* T1:26-27; T13:1615-16.) As described in more detail below, Mr. Heffley's fingerprints, along with those of other like-minded operatives, are all over the maps at issue in this case as well.

This overtly partisan regime had its intended effect. Under the admittedly gerrymandered 2002 Plan, Republican Rick Scott would have won 17 of 25 districts (68%) in the 2010 gubernatorial election, and Republican John McCain would have won 15 of 25 districts (60%) in the 2008 presidential election, despite nearly even numbers of Democratic and Republican voters.[3] In the final congressional election actually conducted under the plan, Republicans won 19 out of 25 districts (76%). (R9:1246-47; T4:509-11.)

Legislative Opposition to the FairDistricts Amendments

Satisfied with the status quo favoring the party in power, the Legislature's Republican leadership vigorously opposed the FairDistricts Amendments. They held public hearings and press appearances to purportedly "expose" the amendments' impact, (T6:727-728); advocated a misleading financial impact statement to undermine public support, *Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 161 (Fla. 2009); challenged the ballot initiative, *Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009); and offered a "poison pill" counter-amendment to confuse voters into diluting the Amendments' effect, *Fla. Dep't of*

[3] Unless otherwise indicated herein, compactness, demographic, and election data are derived from the data sheets in Plaintiffs' Appendix (App. 1-164). As explained in the Preliminary Statement, these portions of the Appendix are comprised of the following pages of record: SR7:746-49; SR16:2212-2285; SR24:3462-3548.

State v. Fla. State Conf. of NAACP Branches, 43 So. 3d 662 (Fla. 2010). After these efforts to defeat the FairDistricts Amendments at the ballot box failed, the House joined in unsuccessful federal litigation to invalidate Amendment 6 (governing congressional redistricting), *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271 (11th Cir. 2012), and the Legislature unsuccessfully tried to convince the U.S. Department of Justice to interpret the amendments so as to restore the Legislature's prior discretion (Ex. CP-46.)

To justify his campaign against the FairDistricts Amendments, former Speaker of the House Dean Cannon claimed that it was a "bad idea" to take discretion away from the "political branch" in redistricting. (T13:1621-22.) Rejecting the intent and language of the FairDistricts Amendments, Cannon claimed that voters should not "take the politics out of politics." (T13:1621-22.)

The Appearance of an Open and Transparent Public Process

After the FairDistricts Amendments became law, the Legislature claimed its opposition was a thing of the past. (T4:398-99.) Cannon pledged that, in enacting Florida's new maps after the 2010 census, the Legislature would conduct "the most open, transparent and publicly participatory reapportionment process in Florida's history." (Ex. CP-619 at 8.) The Legislature then purported to undertake what would normally be hallmarks of transparent decision-making. It held 26 public hearings across the state, solicited and received comments from members of the

public, permitted the public to submit proposed redistricting plans for consideration, and conducted formal committee and subcommittee meetings in public view. (R77:10,137; Ex. LD-34A; Ex. LD-34B; Ex. LD-34C.)

The Legislature later defended its redistricting plans by representing to the trial court and to this Court that the process was open and transparent. (R77:10,137; T5:528, 550-52; T6:644-45.) *See* Senate Ini. Br. in SC12-1 at 1-2 (representing that the 2012 redistricting process was "open, fair, and inclusive," involved "extraordinary public participation," and was praised for its "fairness and openness"); House Ini. Br. in SC12-1 at 2-3 (detailing alleged "public input" and "outreach" in redistricting process). Taking the Legislature at its word when conducting its facial review, this Court commended the Legislature for its ostensible efforts at public participation. *Apportionment I*, 83 So. 3d at 664.

Collusion with Partisan Operatives to Subvert the Open Process

In December 2010, Cannon authorized a meeting at the Republican Party of Florida ("RPOF") headquarters between partisan operatives and the legislative staffers and attorneys overseeing the redistricting process. (T7:852-53; R86: 11,311.) The following individuals from the Legislature attended: (1) Alex Kelly, staff director for the House Redistricting Committee; (2) Chris Clark, chief legislative aide for current Senate President Don Gaetz, who was then Chairman of the Senate Committee on Reapportionment; and (3) counsel for the House and Senate.

(T1:20; T7:842, 845; R86:11,311-12.) Republican operatives who participated, either in person or by telephone, were: (1) Heffley, a Republican consultant who worked with Gaetz; (2) Marc Reichelderfer, a Republican consultant who worked with Cannon; (3) Patrick Bainter, a Republican consultant and the owner of consulting and polling firm Data Targeting, Inc.; (4) Frank Terraferma, a Republican consultant who worked with Speaker of the House Will Weatherford, who was then Chair of the House Redistricting Committee; (5) Benjamin Ginsberg, a Washington, D.C. attorney who represented the Republican National Committee in redistricting matters; (6) Joel Springer, director of Senate campaigns for the RPOF; and (7) Andrew Palmer, director of House campaigns for the RPOF. (T1:20; T7:842, 845; R86:11,311-12.)

Reichelderfer described the December 2010 meeting as a gathering of "people that were traditionally involved in the redistricting process" to discuss how to proceed under the FairDistricts Amendments. (T1:27-28.) Although the meeting's attendees generally claimed that they could not recall what was discussed, one topic of particular interest was whether legislators' redistricting-related communications with political operatives could be protected as privileged. (T1:30-32; R86:11,312.) Reichelderfer prepared a memorandum after the meeting that included the following topics, among others: "What is our best operational theory of the language in [the Amendments] related to retrogression of minority districts?";

"Central FL Hispanic seats? Pros and Cons"; "Evolution of maps – Should they start less compliant and evolve through the process – or – should the first map be as near as compliant as possible and change very little? or other recommendations?"; and "Communication with outside non-lawyers – how can we make that work?" (Ex. CP-246; R86:11,312-13.)

In January 2011, Cannon authorized a second non-public meeting – this time at the office of the House's outside counsel. (T1:43-44; T5:538-40; T7:852-53.) Attendees included: (1) Gaetz; (2) Weatherford; (3) Kelly; (4) John Guthrie, staff director for the Senate Committee on Reapportionment; (5) counsel for the House and Senate; (6) Ginsberg by telephone; (7) Reichelderfer; (8) Heffley; and (9) Bainter. (T4: 394-95; T5:538-40; T7: 849-51; R86:11,311-12.) No Democrats were invited to or attended either meeting. (T4:450.)

Several of the meeting attendees claimed that the political operatives were told that they would not have a "seat at the table" in the redistricting process. (T1:45; T4:396; T5:540-41; R86:11,312.) According to Reichelderfer, this decision was based on a determination that communications between the partisan operatives and the Legislature would not be privileged. (T1:46.) Nevertheless, no one articulated what lines not to cross, and the take-away was that the political operatives could participate in the public process "just like any other citizen." (R86:11,312.)

As it turned out, the partisan operatives did not need a **visible** "seat at the table," as they created and exploited ample covert ways to collaborate with the Legislature by secretly providing maps drafted or edited by the partisan operative to assure continued Republican domination. On June 1, 2011, Gaetz emailed information to the Legislature about upcoming public redistricting hearings. (R86:11,316; Ex. CP-28 & CP-468.) Although ostensibly directed only to legislators, the email's metadata reveals blind copies to Heffley and Terraferma. (R86:11,316; Exs. CP-28 & CP-468.) By the summer of 2011, the RPOF began paying Heffley $20,000.00 per month for unspecified redistricting and Senate campaign services and had employed Terraferma as its director of House campaigns. (T15:1165, 1934-39.)

Gaetz offered no explanation for secretly copying these operatives. (T5:581-82.) Generally, he testified that he welcomed involvement from political operatives as "member[s] of the public" and "laid out an open invitation to all Floridians ... to collaborate with each other to submit maps." (T5:529-30, 536-37; R86:11,316.) Gaetz likewise admitted that he was "led to believe on several occasions" that "individuals other than those who actually hit the send button ... might have had input into the submission of maps," although he disavowed knowledge about maps submitted by operatives specifically. (T5:535-36.)

On June 15, 2011, another non-public meeting occurred in Washington, D.C., at the offices of the National Republican Congressional Committee ("NRCC"), a group whose mission is to elect Republicans to Congress. (Ex. RP-172; T4:447, 449.) Dubbed a "Florida Leadership Meeting," the meeting's invitees included high-ranking representatives of the NRCC, Weatherford, Gaetz, Clark, Kris Money (an RPOF employee who served as Weatherford's fundraiser) (T4:448), and Terraferma. Notably, the meeting's organizer made a point of describing Terraferma as a "genius map drawer." (T18:2304; Ex. RP-172.)

Substantial details showing the lengths the operatives went to secretly send to collaborators in the Legislature maps they developed to maximize Republican seats were derived from discovery obtained from Bainter and are set forth in Part I of the supplement to this brief filed under seal pursuant to this Court's order of November 20, 2014.

The Legislature's Map-Approval Process

The drawing of the 2012 congressional plan was overseen and directed primarily by Cannon, Weatherford, and Gaetz – the same legislators who either met with or authorized meetings with the partisan operatives at the outset of the redistricting process. (T4:368, 371-72; T5:525; T13:1626.) Although numerous legislators were assigned to the House Redistricting Committee and Senate Committee on Reapportionment, most committee members and other legislators did not have

meaningful involvement in the map-drawing process. (T4:369-70, 374-75, 377-78, 382; T7:861-62; SR23:3204-08, 3214, 3285, 3287-88, 3290.)

The principal legislative staffers tasked with drafting congressional districts were Kelly and Jason Poreda for the House and Guthrie for the Senate. (T6:724-26; T23:2879-80, 2887.) Before joining the House's staff, Kelly and Poreda worked for the RPOF. (T7:832; T23:2876.) At the time of their hiring, Kelly had very limited redistricting experience, and Poreda had no redistricting experience at all. (T7:834; T24:2979.) Guthrie had served as staff director for the Senate Committee on Reapportionment in the overtly partisan 1992 and 2002 redistricting processes. (T6:724.) All of the legislators and staffers overseeing the redistricting process had opposed the FairDistricts Amendments. (T4:398; T5:527; T6:729; T7:837-38; T13:1606; T24:2982-83.)

After the public hearings, the Legislature released a series of proposed congressional maps. The Senate released plans as follows: (1) S000C9002 on November 28, 2011; (2) S000C9006 on December 30, 2011; and (3) S004C9014 on January 12, 2012. (SR25:3559-60.) The Senate then approved plan S004C9014 as CS/SB 1174 by a vote of 34-2. (SR25:3560.) On December 6, 2011, the House released seven proposed plans: H000C9001, H000C9003, H000C9005, H000C9007, H000C9009, H000C9011, and H000C9013. (SR25:3559.) On January 17, 2012, the House Congressional Redistricting Subcommittee favorably reported

H000C9009, H000C9011, and H000C9013 to advance to the full House Redistricting Committee, and those plans were re-designated as H000C9041, H000C9043, and H000C9045, respectively. (SR25:3559-60.) On January 20, 2012, H000C9043 emerged from the House Redistricting Committee as its final proposal to be used in negotiations with the Senate. (Ex. CP-639 at 110-11.) Accordingly, as of late January 2012, the final plans publicly proposed by the respective chambers of the Legislature were H000C9043 (House) and S004C9014 (Senate).

The House and Senate differed in their treatment of districts with significant minority populations. The Senate did not conduct a functional analysis and merely drew the minority districts to follow the core of the benchmark districts in the admittedly gerrymandered 2002 plan. (T7:810-11, 820-21; T20:2597-99, 2606-07.)

For the House, Kelly and Poreda purportedly assessed minority voting strength in their heads as they reviewed data and drafted maps. (T8:927-28; T23:2885.) They did not generate notes or written computations, and the House did not prepare a written functional analysis. (T8:929-30; T23:2885; T24:2996-97.) Based on Kelly and Poreda's "analysis," the House claimed that each of its publicly proposed plans complied with the minority protection requirements of the Florida Constitution and federal law, including the Voting Rights Act ("VRA"). (T8:930; Ex. CP-114 at 20.)

Continued Involvement of Operatives

In addition to the currently sealed evidence obtained from Bainter, which is detailed in Part I of the accompanying supplemental brief, the continued, secret involvement of the political operatives in the process was demonstrated by other evidence presented in open court.

Throughout the map-drawing process, the key legislators and staffers overseeing the redistricting process provided the partisan operatives with special access not available to the general public. For example, on October 11, 2011, while the political operatives were preparing maps for submission to the Legislature, Terraferma emailed Weatherford and described a meeting at RPOF headquarters between Heffley and Kirk Pepper, Cannon's deputy chief of staff. Terraferma stated that the two men "were huddled on a computer. Congressional redistricting if I had to guess?" (Ex. CP-352.) After his meeting with Heffley at the RPOF, Pepper acted as a secret conduit, conveying confidential redistricting maps and other information to the partisan operatives, and the operatives in turn gave feedback that influenced the Legislature's map-drawing efforts.

From November 2011 to January 2012, Kelly transmitted to Pepper a steady stream of draft congressional plans prepared by the Legislature. (T3:233.) Pepper then provided at least 24 such draft plans to Reichelderfer via email attachments or temporary DropBox links through his personal email account and, in at least one

instance, by delivering a thumb drive to Reichelderfer containing draft maps. (T1:84; T3:263; Ex. CP-263-69, CP-281-82, CP-289-90, CP-293-94, CP-296, CP-972, CP-974.) Reichelderfer received most legislative draft maps before their public release. In some cases, Reichelderfer received draft maps that the Legislature never released to the public. (T1:109; T3:259-60; Ex. CP-1037, CP-1041-44, CP-263-69, CP-281-82, CP-289-91, CP-293-94, CP-296, CP-971-72, CP-974, and CP-1056.) And in all cases, the official redistricting record and the Legislature's document production revealed no trace of what Kelly and Pepper had done because they concealed and deleted any evidence of such transmissions. (T3:308, 320-21; T10:1150-52; T13:1663.)[4]

Cannon hired Kelly from the RPOF to serve as staff director of the House Redistricting Committee. (T7:832.) Cannon described Kelly as "loyal" to him and a person who would follow instructions. (T13:1611-12.) Pepper, Reichelderfer, and Cannon were personal friends and maintained a close business relationship in connection with their political endeavors. (T3:242.) Cannon considered Pepper and Reichelderfer to be part of his "inner circle." (T1:10-12; T3:243; T13:1631-35.) After Cannon ended his term as Speaker, he founded a consulting firm and hired Pepper. (T3:236; T13:1632-33.)

[4] Remarkably, Reichelderfer had several draft maps that the Legislature prepared but deleted and did not produce in discovery. (Ex. CP-225.)

Upon receiving the Legislature's confidential draft maps, Reichelderfer provided direct feedback to Pepper and Cannon about perceived inadequacies in those maps. For instance, soon after receiving the Senate's first draft congressional map from Pepper, Reichelderfer advised Pepper that Representative Daniel Webster's district (Enacted District 10) was "a bit messed up," and Pepper responded by inquiring "Performance or geography?" (Ex. CP-285.)[5] In another exchange with Reichelderfer, Cannon said "we are in fine shape" as long as "the Senate accommodates the concerns that you [Reichelderfer] and Rich [Heffley] identified in the map that they put out tomorrow." (Ex. CP-276.)[6]

Reichelderfer and Heffley also received inside, non-public knowledge about the 2012 redistricting process, including the timeline for releasing proposed maps and which House-proposed map would likely advance in the process. (Ex. CP-389, CP-965.) For example, in an email exchange on December 9, 2011, Terraferma asked Reichelderfer which of the seven House-released congressional maps was

[5] Pepper offered transparently false testimony to explain this exchange, claiming that he was using some sort of bizarre code in which words do not convey their ordinary meaning. According to Pepper, the question, "performance or geography … ?," was "a blunt [and] sarcastic" response intended to "tell[] [Reichelderfer] to be quiet." (T2:158-61.) The trial court readily discredited Pepper's explanation as "unusual and illogical." (R86:11,317.)

[6] According to Cannon, the "concerns" Reichelderfer and Heffley expressed were that the proposed maps of the House and Senate would be so different that reconciliation would be difficult. (T13:1641-43.) The trial court rejected Cannon's explanation as a "stretch given the language used." (R86:11,318.)

the most "relevant." Reichelderfer responded – correctly as it turned out – that "I think it is 9011." (Ex. CP-389.)[7]

The partisan operatives' discussions and revisions to enhance Republican performance in the draft maps corresponded closely with the Legislature's ultimate decisions. In early November 2011, Reichelderfer began modifying the Legislature's draft maps to enhance Republican performance, and he exchanged his work with other operatives. For example, Reichelderfer adjusted the districts so that the analog to Enacted District 5 would have Black voting age population ("VAP") over 50% and the analog to Enacted District 9 would have Hispanic VAP over 40%. (T1:84-85; Ex. CP-264, CP-1045-54.) These revisions ultimately made their way into the final plan, and altered the performance of Enacted Districts 5, 7, 9, and 10 from four Democratic performing or leaning seats in early maps (such as H000C9001) to two Democratic and two Republican performing seats.

Similarly, on November 28, 2011, Terraferma exchanged emails with Heffley and Reichelderfer regarding S000C9002, the proposed congressional map released that day by the Senate. Terraferma stated, "that CD 25 [Enacted District 26] is pretty weak :(" Heffley responded, "The House needs to fix a few of these." Ter-

[7] H000C9011 was selected by the House Redistricting Committee to advance through the process and was revised to become H000C9043, the House's final proposed congressional map that was then used as the baseline for the enacted map, H000C9047. (SR25:3559-60; T8:939-40; T23:2904.)

raferma responded to Heffley, copying Reichelderfer, "yes." (Ex. CP-387.) In S000C9002, Proposed Districts 18 and 25 (Enacted Districts 26 and 27) did not divide Homestead as did Terraferma's maps and the maps publicly submitted under the name of Posada. (Exs. CP-506, CP-336, CP-1445 at 1, 5, CP-586, CP-587.) Ultimately, the Legislature "fixed" this issue by adopting the House configuration of Enacted Districts 26 and 27, which divided Homestead to Republican gain. (Ex. CP-523.)

The Florida-based operatives were also in frequent communication with Washington, D.C.-based Republican redistricting leaders. Terraferma and Heffley sent proposed Senate and congressional districts to Ginsberg for review, and in October 2011 they stayed overnight at Ginsberg's home in Washington, D.C. to discuss Florida redistricting issues. (T10:1208-09; T11:1246; T15:2025-26; Ex. CP-361.) In addition, Tom Hofeller ("Hofeller"), head of redistricting for the Republican National Committee ("RNC"), visited Terraferma and Heffley in Tallahassee in September 2011 to review the draft maps prepared by Terraferma. (T10:1206-07; T15:2023-24.) Later in the redistricting process, Terraferma sent Hofeller the Senate's initial draft congressional map, and Hofeller commented that Proposed District 3 (Enacted District 5) "needs to be over 50% [Black VAP] to justify its departure from the neutral state criteria safely." (Ex. CP-386.) After this Court approved the redrawn state Senate Plan on a facial review, Hofeller praised Heffley

for his involvement: "*Congratulations on guiding the Senate through the thicket*. Looks as if, so far, the Democrats have not realized the gains they think they were going to get." Heffley responded: "Thanks. Big win. Worse [sic] case minus 2. 26-14." (R83:10,885 (emphasis added).)[8]

Non-Public Meetings to Finalize the 2012 Congressional Plan

Between January 20, 2012 and January 24, 2012, Weatherford, Gaetz, Kelly, and Guthrie met outside of public view to negotiate the final version of the 2012 Congressional Plan. (T4:417; T5:583-84; T6:761-62.) Before these meetings, Cannon met with Weatherford, Pepper, and Kelly to provide directions for negotiations, and then-Senate President Michael Haridopolis ("Haridopolis") similarly met with Gaetz. (T3:309-11; T4:412-13, 416-17; T6:686-87; T8:941-42.) If Weatherford, Gaetz, Haridopolis, and Cannon had met together in the same room, their meeting would have needed to be publicly noticed and open under Article III, Section 4(e) of the Florida Constitution. Instead, they structured seriatim meetings between sets of only two legislators to keep their discussions secret. As a result, there is no written record of what was said or done at the closed meetings during which the 2012 Congressional Plan was finalized.

[8] Romo Plaintiffs obtained this email from the RNC and NRCC on the last day of trial after protracted litigation in the Superior Court of the District of Columbia, but the trial court denied Plaintiffs' request to reopen their case to offer the email into evidence. (R84:11,086-87 (under seal).) Plaintiffs challenge this ruling in Part IV of their argument.

Testimony at trial revealed that in these closed-door meetings, the attendees considered S004C9014 and a modified version of H000C9043 that had never been reviewed, discussed, or approved at any public meeting of the House Redistricting Committee. (T4:417-21, 427; T5:588-89; T8:959-61; T19:2447-48.) The discussions and resulting agreements affected virtually every district in the 2012 Congressional Plan. (T24:3025-29.) The following are the primary decisions that resulted from the late-January 2012, closed-door meetings:

(a) During the initial meeting between Cannon, Weatherford, Pepper, and Kelly, Cannon anticipated that the Senate would ask to raise District 5's Black VAP over 50%, and he directed Kelly and Weatherford to agree. (T8:942-43, 947-48.) The Senate did, in fact, make such a request, and as Cannon instructed, the House agreed. (T4:417-20.) There was conflicting testimony over the rationale for this decision, but no one contended that it was required by Section 2 of the VRA. (T4:361, 415-16; T5:585-86; T6:762-64; T8:943-44.)

(b) The Senate requested, and the House agreed, to increase District 9's Hispanic VAP from 39.6% in the House-proposed map to 41.4% in the ultimately enacted map. The Senate's given reason for the request was a general desire to increase minority voting strength in District 9. (T4:427; T5:588-89; T19:2447-48.)

(c) A bicep-shaped appendage was added to District 10, returning a portion of the district's benchmark population to incumbent Representative Daniel

Webster, a Republican. (T24:3009-11; T7:786-87; *compare* Ex. CP-1146, *with* Ex. CP-1147 at 18.) This feature had been present in the Senate's proposed plans, but absent from the House's proposed plans.

(d) The Senate requested, and the House agreed, to take a portion of Hendry County out of District 25 and to put it into District 20. The reason given by the Senate for the request was to address unspecified Section 5 preclearance concerns in regard to District 20. (T7:783-84; T19:2440-42.)

(e) The Senate and the House increased the Black and Hispanic VAP of District 14 by several percentage points beyond what was in H000C9043. (T5:590-91; T8:959-61.) The Legislature offered no explanation for this decision other than its evident belief that increasing the minority VAP was "less-risky" – but not required – under the VRA and Article III, Section 20. (T8:959-61.)

(f) Gaetz rejected proposed House versions of Districts 21 and 22 that were in an East-West, rather than a North-South, configuration. (T8:950-54; Ex. CP-905.) Kelly offered undisputed testimony that the rejected versions of Districts 21 and 22 were more compact than the versions in the 2012 Congressional Plan and broke fewer municipal and county boundaries without affecting minority voting strength in neighboring District 20. (T8:950-53.) Gaetz offered no explanation for his summary rejection of the proposed North-South configuration. (T5:590-91; T8:954.)

(g) The Legislature adopted the House configuration of Districts 26 and 27, which divided Homestead. (T23:2911-12.) The Senate configuration in S004C9014, by contrast, kept Homestead whole. (Ex. CP-507, CP-523, SR26:4135.)

Enactment of the 2012 Congressional Plan

The joint plan that emerged from the non-public meetings in late January 2012 was H000C9047. On February 2, 2012, the House approved H000C9047 as an amendment to CS/SB 1174. (SR25:3560.) The House then passed CS/SB 1174 by a vote of 80-37, and the Senate passed CS/SB 1174 by a vote of 32-5. (SR25:3560.) On February 16, 2012, Governor Rick Scott signed CS/SB 1174 into law, and H000C9047 became the 2012 Congressional Plan. (SR25:3560.)

The Legislature relied disproportionately on the Consultant Drawn Maps in preparing the 2012 Congressional Plan and the initial state Senate plan (the "Initial Senate Plan"). Of over 125 maps publicly submitted during the 2012 redistricting process, at least nine are currently known to be Consultant Drawn Maps. *See* http://www.flsenate.gov/Session/Redistricting/Plans. Because Plaintiffs discovered that these nine maps were Consultant Drawn Maps, in part, through the documents produced by Bainter, which are presently under seal, those maps are identified in Part I of the supplement to this brief.

In public statements, the Legislature admitted that it relied in whole or in part on the Consultant Drawn Maps for fifteen state Senate and congressional districts. Because Plaintiffs discovered that these were Consultant Drawn Maps from the currently sealed Bainter documents, these maps and the names under which they were submitted are set forth in Part II of the supplemental brief.

In addition to instances where the Legislature expressly relied on the operatives' work product, many features of the 2012 Congressional Plan correspond closely with points of emphasis for the partisan operatives. This is particularly true of the decisions made in the non-public meetings in late January 2012. For example, the operatives focused on increasing the Black VAP of District 5 over 50%; increasing the Hispanic VAP of District 9 over 40%; addressing the configuration of District 10 for incumbent Daniel Webster; and improving the Republican performance of District 26 – all attributes of the 2012 Congressional Plan that were affected by the meetings in late January 2012. (R86:11,319-20, 11,322-23.)

Throughout the process that led to enactment of the 2012 Congressional Plan, the Legislature's selections increasingly benefitted the Republican Party. The House's seven initial proposed congressional plans had as few as 14 Republican seats (H000C9001) based on the 2008 presidential election. (SR24:3486.) Yet the House selected H000C9011 as the draft plan to move forward, one of the best Republican performing plans, with 16 Republican seats based on the 2008 presiden-

tial election. (SR24:3506.) After further modification, the enacted map performed better for Republicans than any of the prior House or Senate drafts. Under the 2012 Congressional Plan, Republican Rick Scott and Republican John McCain would have won 17 out of 27 districts (63%) in the 2010 gubernatorial election and the 2008 presidential election – roughly the same as under the openly gerrymandered 2002 Congressional Plan. (SR24:3464.) This is true even though, based on 2010 data, registered Democrats outnumbered registered Republicans in Florida by a margin of 53% to 47%, and the Republican candidates in the 2010 and 2008 elections received only 50.6% and 48.6% of the statewide vote, respectively. *Apportionment I*, 83 So. 3d at 642.

The Legislature's Destruction of Redistricting Records

The Legislature carefully sanitized the public record to maintain the façade of openness and hide the involvement of the operatives. Legislators and staffers destroyed virtually all communications with political operatives, preserving only records that supported their assurances of transparency and public participation. (R86:11,311.) Other techniques employed by the Legislature to avoid public detection included use of personal – rather than official – email accounts and delivery of documents on thumb drives and other non-traceable methods. (T1:96-98; T3:264-66, 270-71; Ex. CP-263-69, CP-289-90, CP-294, CP-296, CP-304.) Plaintiffs were

only able to obtain some but not all of the purged records from the third-party political operatives who had not destroyed them.

The Legislature destroyed these records even though, and evidently because, it knew litigation was inevitable. As early as 2009, the Legislature argued to this Court that litigation would increase as a result of the FairDistricts Amendments. *See Advisory Op. to Att'y Gen.*, 2 So. 3d at 165. Long before any redistricting challenge was filed, the Legislature retained expert consultants in anticipation of litigation. (Ex. RP-119 & RP-176.) And eliminating any doubt that the Legislature expected litigation, the Legislature represented to the trial court:

> In the redistricting process, litigation was "imminent" long before the days preceding the filing of Plaintiffs' Complaints. Litigation was more than a bare, foreseeable possibility – it was a moral certainty. From start to finish, **this** redistricting process, more than any other, was conducted in an atmosphere charged with litigation.

(R25:3488; *see also* R26:3530 (same).)

Pre-Trial Proceedings

Passage of the 2012 Congressional Plan in February left little time for judicial review before the November election. This Court's expedited review in *Apportionment I*, nevertheless, offered hope that the trial court might give similar scrutiny to the 2012 Congressional Plan and possibly avoid elections under an unconstitutional map. Accordingly, Plaintiffs filed their complaints shortly after enactment

of the 2012 Congressional Plan and, with leave of the trial court, sought expedited summary judgment review in March 2012. (R9:1089-1142.)

Despite various objective indicia of partisan intent in the 2012 Congressional Plan, the trial court felt constrained to deny summary judgment. Believing that it had to treat this case like any other challenge to legislation, the trial court applied a strong presumption of constitutionality and held that Plaintiffs were required to prove the 2012 congressional plan unconstitutional beyond a reasonable doubt. (R15:2087.) The trial court further determined that it could not properly conduct a facial review in the summary judgment context because of factual questions. (R15:2090.) The denial of summary judgment meant that 2012 votes were cast in unconstitutional districts, and the proceedings below rapidly devolved into a war of attrition marked by the Legislature's scorched-earth litigation tactics, costly discovery battles, and challenges directed at the constitutionality of Plaintiffs' alternative maps. (R36:4640-66; R55:7242-44; R57:7273-7472; R58:7473-7537; R76:9988.)

Meanwhile, claims of legislative privilege by the Legislature and associational privilege by partisan operatives[9] hampered and delayed Plaintiffs' discovery

[9] As this Court is well aware, the Legislature was not the only impediment in discovery. Bainter's litigation tactics, which this Court found to be "designed to delay and obfuscate the discovery process," *Apportionment VI*, 2014 WL 5856169 at *2. The Romo Plaintiffs also had to fight the RNC and NRCC's associational privilege claims in a D.C. superior court, and that delay prevented them from offer-

efforts, requiring multiple trips up through the First District and to this Court in *Apportionment IV*, *Apportionment V*, and *Apportionment VI*. (*See, e.g.*, R17:2424-80; R36:4676-4719; R37:4767-4910; R38:4911-30.) After much time and expense, these privilege assertions were overcome at least in part in part. (R21:2903-12; R76:9991-93.) Nevertheless, on the eve of trial, Plaintiffs remained limited in their ability to document much of the collusive, separate process that tainted the 2012 Congressional Plan.[10]

The Trial Court's Invalidation of the 2012 Congressional Plan.

After a twelve-day trial, the trial court issued an order invalidating the 2012 Congressional Plan. (R86:11,289-11,329.) Concluding that "[t]here is just too much circumstantial evidence of it, too many coincidences, for me to conclude otherwise" (R86:11,310; *see also* R86:11,291, 11,298, 11,309), the trial court found that the Legislature "cooperat[ed] and collaborat[ed]" with partisan political operatives "to taint the redistricting process and the resulting map with improper partisan intent." (R86:11,310.)

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ing into evidence a damning email finally ordered to be produced in D.C. just as the Tallahassee trial was drawing to a conclusion. (R83:10,883-10,917.)

[10] It was not until May 2, 2014 – two weeks before trial – that Plaintiffs finally obtained the key evidence from Bainter of how substantially the operatives had subverted the public process and then falsely testified in deposition about what they had done. (R76:9991-93).

Despite that overwhelming evidence, the trial court ordered changes only to Districts 5 and 10 (and surrounding districts). (R86:11,306-23.) Although the trial court reconsidered its prior conclusion that Plaintiffs must show unconstitutionality beyond a reasonable doubt, (R86:11,293-96), it nevertheless emphasized its "limited role" in redistricting and concluded it was bound to defer to the Legislature's policy preferences, even in a process found to be tainted with partisan intent. (R86:11,296). The trial court believed its primary focus should be on tier-two requirements as the "more reliable" indicator of intent and thus looked primarily for "flagrant" tier-two deviations. (R86:11,304, 11,324.)

Proceeding on that assumption, the trial court found unjustified tier-two deviations in the appendage in District 5 protruding into Seminole County and the bicep-shaped appendage in District 10 reaching into downtown Orlando and Winter Park. (R86:11,319-23.) These appendages were linked to unnecessary increases in the minority populations of Districts 5 and 9 (R86:11,319-22); caused Districts 7 and 10 to perform for Republicans, unlike the analogous districts in earlier House draft map H000C9001 (R86:11,318-23); corresponded with modifications made in the partisan operatives' maps (R86:11,318); benefitted Republican incumbents Daniel Webster and John Mica, as well as Democratic incumbent Corrine Brown, an ardent opponent of the FairDistricts Amendments who joined with the Republicans in at least two of their legal challenges (*Brown v. Sec. of State of Fla.*, 668

F.3d 1271 (11th Cir. 2012); *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010)) (R86:11,320, 11,322); and resulted from an agreement reached, in an eleventh-hour closed-door meeting, on the pretext of benefitting minorities (R86:11,319-20, 11,322.)

The trial court otherwise rejected Plaintiffs' challenges to Districts 13, 14, 21, 22, 25, 26, and 27. (R86:11,323-29.) For anything less than what it considered a flagrant tier-two deviation, the trial court deferred to the Legislature's selected configuration, "even if a general intent to favor or disfavor a political party or incumbents was proven" (R86:11,297), and gave no weight to the fact that legislative leaders repeatedly selected non-compact district configurations that helped Republicans overall. (*See, e.g.*, R86:11,326.)

Finally, the trial court summarily rejected Plaintiffs' whole map challenge, believing that challenges to the whole map and challenges to individual districts represented "a false dichotomy, a distinction without difference." (R86:11,296.) Accordingly, the trial court collapsed its finding of overall partisan intent with the individual district challenges, giving no independent significance to the former. (R86:11,296-97.)

The Special Session to Enact a Revised Plan

The Legislature convened a special session to enact a new congressional plan on August 7, 2014. (SR6:726.) Although the public and press clamored for a

truly open and transparent process in redrawing the districts, the Legislature disregarded those pleas and conducted a special session permeated by secrecy and exclusion.

Before holding the first public meeting in the special session, Republican leaders conducted private meetings to decide the features of a revised congressional plan, designated H000C9057. (*See, e.g.*, SR10:1217.) The Legislature's leadership again conducted seriatim two-legislator meetings to avoid public scrutiny. Senator Bill Galvano and Representative Richard Corcoran, who chaired the redistricting committees in the special session, met privately with staff and counsel to negotiate the revised plan. (SR9:1058, 1069-70; SR10: 1217, 1231-32.) Galvano met with Gaetz and, separately, Corcoran met with Weatherford. (SR9:1141-42, 1146; SR10:1347-48.) Because the four legislators avoided the sunshine laws by not meeting in the same room, there is no known record of what occurred at the meetings, or how the process of drawing the revised plan was conducted. In lieu of a record, the Legislature offered bald assurances that its non-public meetings were "a series of thorough, thoughtful, and businesslike discussions driven by counsel and professional staff." (SR6:725.)

Conspicuously absent from the non-public meetings were Democrats. Although the Republican leadership feigned inclusiveness, Democratic legislators re-

peatedly expressed dismay about their exclusion. (SR11:1432, 1439-40, 1445, 1451, 1453-54.)

Coalition Plaintiffs sent several letters to the Legislature requesting an open and transparent process, submitting exemplar remedial maps (the "Coalition Remedial Maps"), and explaining the advantages of the Coalition Remedial Maps over the Revised Plan. (SR8:934-948.) The letters went unanswered and undiscussed, as did requests for the Legislature to publicly post the Coalition Remedial Maps and introduce them for legislative consideration. (SR8:942.) During the floor debate, Corcoran deflected questions about a proposed East-West configuration of District 5 in Plaintiffs' alternative maps because it was purportedly "not before" the Legislature. (SR10:1331-32.)

On August 11, 2014, the Legislature adopted the revised plan negotiated in the non-public meetings without a single modification by a vote of 25 to 12 in the Senate and 71 to 38 in the House. On August 13, 2014, Governor Scott signed the revised plan into law.

The Revised Plan's Minimal Changes to the 2012 Congressional Plan

The Legislature's stated goal was "to keep [changes to the districts] as narrow as possible," and the Revised Plan indeed made only minimal changes. (SR10:1330.) Primarily, it removed District 5's appendage into Seminole County and District 10's bicep-shaped appendage. (SR9:1112, 1117; SR10:1210, 1212.)

The plan otherwise maintained a serpentine North-South configuration of District 5, slightly fattening it with areas of Putnam and Marion Counties. (SR9:1115-17.) These narrow changes ensured that overwhelming Republican performance was unchanged. Under the Revised Plan, Republican Rick Scott would have won 17 districts based on the 2010 gubernatorial election and the Republican presidential candidates would have won 16 districts based on the 2008 and 2012 elections.

SUMMARY OF ARGUMENT

This case serves not only as a bellwether to guide future redistricting cycles, but also a stark reminder of why the FairDistricts Amendments were necessary in the first place. At stake is "the fundamental democratic right" of the voters of Florida "to elect representatives of their choice" in districts "drawn in compliance with the Florida Constitution." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 148 (Fla. 2013) ("*Apportionment IV*"). The trial court rightly found that the Legislature conducted a parallel redistricting process in the shadows of the public process, collaborating with partisan operatives to enact a congressional plan infused with partisan intent. Implicit in this finding is that the "entire legislative structure is a façade," as it is the fruit of unconstitutional districts. *League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510, 516 (Fla. 2014) (Lewis, J., concurring).

Although the trial court correctly invalidated Districts 5 and 10 in the 2012 Congressional Plan, it rejected Plaintiffs' remaining individual district challenges and allowed the Legislature to adopt a Revised Plan making only minor changes that left the Legislature's partisan handiwork largely untouched. For the sake of "the validity and operation of our democratic system of government in Florida" and "public faith in that system," this result cannot stand. *Id.*

First, the trial court erroneously considered entire plan and individual district challenges to be a "false dichotomy" and a "distinction without difference." As a result, the trial court failed to treat its finding of partisan intent in the plan generally as an independent constitutional violation and gave the Legislature undeserved deference in its individual district review. Based on the overall improper intent, the Court should require the entire plan redrawn or, at least apply strict scrutiny and put the burden on the Legislature to establish its districts' constitutionality.

Second, the trial court erred in accepting the Legislature's modifications to Revised District 5 as a remedy to the constitutional defects identified in the Invalidity Judgment. Revised District 5 remains a bizarrely shaped, grossly non-compliant district that both benefits the Republican Party by leaching Democrats from surrounding areas and marginalizes minorities by denying them an additional opportunity district in Central Florida. The Court should eliminate this relic of an era in which partisanship gerrymandering plagued the redistricting process.

Third, the trial court erred in rejecting Plaintiffs' specific challenges to Districts 13, 14, 21, 22, 25, 26, and 27. In considering these districts, the trial allowed all but the most egregious tier-two defects to stand and accepted *post hoc* rationalizations for district configurations when Plaintiffs showed the justifications actually offered by the Legislature to be pretextual. The trial court's unduly deferential review would not be appropriate even without a finding of partisan intent in the plan as a whole. It is certainly improper after such a finding.

Fourth, the trial court adopted a Revised Plan that did not correct the constitutional violations in the 2012 Congressional Plan. Because the Legislature has twice defied its constitutional mandate, this Court should adopt and impose compliant districts. But if this Court allows the Legislature another opportunity, it should specifically identify the tier-one and tier-two violations in the Revised Plan. The Legislature must then address those defects, curing any tier-two defects and eliminating the partisan effect of any district drawn with partisan intent.

ARGUMENT

Article III, Sections 20 and 21 of the Florida Constitution, approved by the voters in 2010 and commonly known as the "FairDistricts Amendments," placed "stringent new standards for the once-in-a-decade apportionment of legislative districts" for Florida's seats in Congress and for the Florida House of Representatives and Senate. *Apportionment I*, 83 So. 3d at 597.

This case represents the culmination of a series of legislative apportionment decisions in which this Court has been fulfilling its "solemn obligation to ensure that the constitutional rights of its citizens are not violated and that the explicit constitutional mandate to outlaw partisan political gerrymandering and improper discriminatory intent in redistricting is effectively enforced." *Apportionment IV*, 132 So.3d at 137.

Emphasizing that there can be "no acceptable level of improper intent" by the Legislature to engage in partisan gerrymandering, this Court previously validated the 2012 state House redistricting plan despite a dramatic statewide partisan imbalance created by the districts because "[e]xplanations other than intent to favor or disfavor a political party could account for this imbalance." *Apportionment I*, 83 So. 3d at 617, 643.

When it validated the House districts despite the partisan imbalance, the Court lauded the Legislature for what appeared to be an "unprecedented transparent reapportionment process," but it later warned that if that process turned out to be a sham and, instead, it was proven that "there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party," that would be "precisely what the Florida Constitution now prohibits." *Apportionment IV*, 132 So. 3d at 149.

In findings that were not limited to any one of the Legislature's apportionment plans or to any particular districts, the trial court found that the Appellants had proven exactly this, and it required the Legislature to redraw two congressional districts that it found violated the FairDistricts Amendments. The Appellants now ask this Court to find that the entire congressional redistricting plan must be redrawn, or at the very least the challenged districts and those surrounding them. They further ask this Court to impose a meaningful remedy that will at least reduce, if not completely cure, the dramatic partisan imbalance that resulted from the Legislature's illegal intent and corrupt process – whether that be a judicial remedy for the constitutional violation or, if the Court finds it is powerless to impose a remedy itself, a legislative remedy that is guided by sound judicial advice and direction so that the citizens of this state are not forced to endure further elections based on unconstitutional districts.

I. THE APPLICABLE LEGAL STANDARDS.

A. Appellate Standard of Review

This Court has articulated the following standard for reviewing a trial court's determination whether a legislative enactment is constitutional:

> A trial court's ruling concerning the constitutionality of a statute following a trial wherein the parties introduce conflicting evidence is generally a mixed question of law and fact. . . . [T]he proper standard of review in such cases is as follows: the trial court's ultimate ruling must be subjected to de novo review, but the court's factual findings

> must be sustained if supported by legally sufficient evidence. Legally sufficient evidence is tantamount to competent substantial evidence.

N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 626-27 (Fla. 2003) (footnotes omitted).

The application of the FairDistricts Amendments' constitutional standards to the facts is a legal issue reviewed de novo and findings of fact are not even required for tier-two principles. *See Apportionment I*, 83 So. 3d at 634 (recognizing that "compactness does not require … a unique and factual determination that appellate courts are completely unable to review the matter absent a trial record"); *id.* at 640 (recognizing that "compliance with the tier-two principles is objectively ascertainable").

B. Standard of Review of Redistricting Process

This Court has already held that even in the absence of proof of improper intent, the highly deferential standards of construction applicable to claims that statutes are unconstitutional do not apply to challenges to the constitutionality of apportionment plans. *Apportionment I*, 83 So. 3d at 607-08. Nonetheless, where improper intent has not been shown, "this Court will defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate constitutional requirements." *Id.* at 608. But the standard that should apply once intent to violate the constitutional prohibitions against partisan gerrymandering has been proven is an issue of first impression in this Court.

Because that improper intent has been proven by overwhelming circumstantial evidence in this case, the Legislature's apportionment plan should be entitled to no deference and instead be subjected to strict scrutiny. *Cf., e.g., Turner v. State*, 937 So. 2d 1184, 1185 (Fla. 5th DCA 2006) (holding that strict scrutiny applies when reviewing a statute that "implicates fundamental rights"). This is the only way to give meaning to this Court's recognition of the fundamental nature of the citizens' rights created by the FairDistricts Amendments:

> [W]e recognize the crucial role legislative apportionment plays with respect to the right of citizens to elect representatives. Indeed, the right to elect representatives – and the process by which we do so – is the very bedrock of our democracy. To ensure the protection of this right, the citizens of the state of Florida, through the Florida Constitution, employed the essential concept of checks and balances, granting to the Legislature the ability to apportion the state in a manner prescribed by the citizens and entrusting this Court with the responsibility to review the apportionment plans to ensure they are constitutionally valid. The obligations set forth in the Florida Constitution are directed not to the Legislature's right to draw districts, but to the people's right to elect representatives in a fair manner so that each person's vote counts equally and so that all citizens receive "fair and effective representation." Once validated by the Court, the apportionment plans ... will have a significant impact on the election of this state's elected representatives for the next decade.

Apportionment I, 83 So. 3d at 599-600.

In addition, Article III, Section 20 requires consideration of minority protection in redistricting. The U.S. Supreme Court has consistently held that strict scrutiny applies when redistricting decisions are predominantly race-based, even if for purportedly "benign" or "remedial" reasons. *Shaw v. Reno*, 509 U.S. 630, 642-43

(1993) (*Shaw I*); *see also Bush v. Vera*, 517 U.S. 952, 984 (1996) ("[W]e subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign … or whether they misuse race … without a compelling justification"). In *Apportionment I*, this Court similarly held that race-based decisions demand "close judicial scrutiny," so that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Apportionment I*, 83 So. 3d at 627 (quoting *Shaw I*, 509 U.S. at 657).

Consistent with strict scrutiny, this Court urged vigilance in considering minority protection claims to ensure they are not used as a "pretext for drawing districts with the intent to favor a political party or an incumbent" or a "shield against complying with Florida's other important constitutional imperatives." *Id.* at 640.

A strict scrutiny standard requires the Legislature to prove that its action was the least intrusive means to further a legitimate and compelling state interest. *N. Fla. Women's Health*, 866 So. 2d at 625 & n.16; *see also Johnson v. Mortham*, 926 F. Supp. 1460, 1467 (N.D. Fla. 1996) (imposing burden on state to justify race-based configuration of predecessor to District 5 in 1992 plan). This burden-shifting approach is widely followed by other states in redistricting challenges. *See, e.g.*, *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1249 (Colo. 2002) (requiring state to justify division of county by "showing that less drastic alternatives

could not have satisfied the equal population requirement of the Colorado Constitution") (internal quotation marks and citation omitted); *In re Legislative Districting of State*, 370 Md. 312, 368 (2002) ("We hold that the State has failed to meet its burden to establish the constitutionality of the Plan and, in particular, that in its formulation, due regard was given to natural boundaries and the boundaries of political subdivisions.").

The trial court correctly rejected the Legislature's argument that Plaintiffs must prove unconstitutionality beyond a reasonable doubt (R86:11,294-95.) This Court declined to apply a proof-beyond-a-reasonable-doubt standard in *Apportionment I* because "[u]nlike a legislative act promulgated separate and apart from an express constitutional mandate, the Legislature adopts a joint resolution of legislative apportionment solely pursuant to the 'instructions' of the citizens as expressed in specific requirements of the Florida Constitution governing this process." 83 So. 3d at 607-08. In explaining why Plaintiffs' interests in enforcing Article III, Section 20 outweigh legislative privilege, this Court explained that congressional redistricting similarly involves a "specific constitutional mandate" regarding congressional redistricting that renders it "entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction." *Apportionment IV*, 132 So. 3d at 150.

C. Standards Imposed by FairDistricts Amendments

As this Court observed, the FairDistricts Amendments impose "stringent new standards" on the Legislature's authority to draw congressional districts. *Apportionment I*, 83 So. 3d at 597. The Amendments were intended to "act as a restraint on the Legislature" and to end Florida's unfortunate history of political and racial gerrymandering. *Id*.; *see also id*. at 639 ("There is no question that the goal of minimizing opportunities for political favoritism was the driving force behind the passage of the Fair Districts Amendment.").

Now, Article III, Section 20 requires all congressional redistricting plans to comply with two "tiers" of legal criteria. Tier one provides:

> No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

Art. III, § 20(a), Fla. Const. Tier two provides:

> Unless compliance with the standards in this subsection conflicts with the standards in [tier one] or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

Art. III, § 20(b), Fla. Const.

1. Tier-One Prohibitions Against Partisan Gerrymandering and Dilution of Minority Voting Strength[11]

Partisan Intent. The first tier-one criterion prohibits the Legislature from drawing any redistricting plan or individual district with partisan intent. "This new requirement in Florida prohibits what has previously been an acceptable practice, such as favoring incumbents and the political party in power." *Apportionment I*, 83 So. 3d at 615. Because the prohibition is stated in "absolute terms," *id*. at 640, "there is no acceptable level of improper intent." *Id*. at 617; *see also id*. at 615 ("[T]he voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process."); *see also Apportionment IV*, 132 So. 3d at 138 (prohibiting partisan intent in the redistricting process "is a matter of paramount public concern") (internal quotation marks and citation omitted).

In evaluating the Legislature's intent, "the focus of the analysis must be on both direct and circumstantial evidence of intent." *Apportionment I*, 83 So. 3d at 617. "[O]bjective indicators … can be discerned from the Legislature's level of compliance with … tier-two requirements," and a "disregard for these principles can serve as indicia of improper intent." *Id*. at 618. Thus, the Court must "evaluate the shapes of districts together with … objective data, such as the relevant voter

[11] The tier-one contiguity requirement is not at issue in this case.

registration and elections data, incumbents' addresses, and demographics." *Id*. Although the focus of the constitutional analysis is on intent rather than result, the Court may consider "the effects of the plan" as evidence of intent, *id*. at 617, and should not "disregard obvious conclusions from the undisputed facts," *id*. at 619.

In addition to the objective data that this Court's review was necessarily limited to due to the posture of *Apportionment I*, the Court must now also evaluate "fact-intensive claims" of improper intent. *Apportionment IV*, 132 So. 3d at 140. For example, and crucially important in this case, evidence that the Legislature communicated and collaborated with partisan operatives during the redistricting process is "clearly … important evidence in support of the claim that the Legislature thwarted the constitutional mandate" because the "existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits." *Id.* at 149; *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (explaining that the "specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes," and that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role"). As this Court has emphasized:

> [I]f in fact there was a separate, secret process undertaken by the Legislature to create the 2012 congressional apportionment plan in violation of the article III, section 20(a), standards, the voters clearly intended for the Legislature to be held accountable for violating the

> Florida Constitution and to curb unconstitutional legislative intent in this and future reapportionment processes.

Apportionment IV, 132 So. 3d at 151.

Minority Protection. In addition to prohibiting partisan intent, tier one also mandates that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Art. III, § 20(a), Fla. Const. Because this language tracks Sections 2 and 5 of the federal VRA, the Court should be "guided by prevailing United States Supreme Court precedent" interpreting the VRA when it interpreting this provision of the Florida Constitution. *Apportionment I*, 83 So. 3d at 619-20. That precedent makes clear that "the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would **actually diminish** a minority group's ability to elect its preferred candidates." *Id*. at 625 (emphasis added); *see also id*. at 620 ("Consistent with the goals of . . . the VRA, Florida's corresponding state provision aims at safeguarding the voting strength of minority groups against both impermissible dilution and retrogression.").

A "minority group's ability to elect a candidate of choice depends upon more than just population figures." *Id*. at 625. As a result, "a slight change in percentage of the minority group's population in a given district does not necessarily

have the cognizable effect on a minority group's ability to elect its preferred candidate of choice." *Id.*; *see also id.* at 627 ("[W]e reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision.").

> [T]o determine whether a district is likely to perform for minority candidates of choice, the Court's analysis … will involve the review of the following statistical data: (1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history.

Id. at 627.

The Legislature must necessarily perform a proper "functional analysis" of those factors when drawing districts. *See id.* (explaining that "the ramifications of the [Senate's] failure to conduct a functional analysis" infected much of the Initial 2012 Senate Plan). Without a proper functional analysis, the Legislature may not justify a district on the ground that it is intended to protect minority rights. *See id.* at 666 (finding reliability of Senate's minority protection claim "questionable" where Senate did not conduct functional analysis). The purpose of a functional analysis is, in part, to allow the Legislature and the Court to determine when tier-two criteria "should yield because of a conflict with the tier-one standard of minority voting protection." *Id.* at 669.

The Legislature may not use the duty to protect minority voting rights as a pretext for violating other constitutional criteria, including the ban on partisan ger-

rymandering. *See, e.g.*, *id*. at 640 ("It is critical that the requirement to protect minority voting rights when drawing district lines should not be used as a shield against complying with Florida's other important constitutional imperatives … ."). For example, the Legislature may not "pack" racial or language minorities into a district unnecessarily—thereby decreasing the voting strength for minorities in adjacent districts—under the guise of protecting the minorities' ability to elect a candidate of choice in the "packed" district. Similarly, the Legislature may not move minorities from district to district for political reasons under the façade of minority protection. *Apportionment I*, 83 So. 3d at 640; *see also id.* at 693 (Perry, J., concurring) (expressing concern that "under the guise of minority protection, there is – at the very least – an appearance that the redistricting process sought to silence the very representatives of the people the Legislature indicates it is trying to protect").

For example, in *Apportionment I*, the Legislature argued that Senate District 6 was drawn to protect minority voting rights. The challengers disagreed, arguing that Senate District 6 "used Florida's minority voting protection provision as a pretext for partisan favoritism." *Id.* at 665. After closely scrutinizing the relevant data, including plaintiffs' alternative maps, this Court held that Senate District 6 was unconstitutional because it departed from the tier-two requirements of compactness and using pre-existing boundaries more than necessary to protect minority voting rights was therefore not narrowly tailored to the purpose of protecting minority

rights. *See id*. at 669. That line of reasoning is consistent with this Court's approach to a strict scrutiny analysis, *id.* at 699 (Canady, J., dissenting), and is consistent with the analysis of other courts applying strict scrutiny standards. For example, in *Johnson*, the court held that the record belied the Legislature's claim that it "create[d] an African-American majority-minority district" to "further the state's redistricting interest of complying with the Voting Rights Act" because the court found that "Republicans in the State Senate were more interested in aggregating Democrats in a single district … than in creating an African-American majority-minority district." 926 F. Supp. at 1490 Applying a similar level of scrutiny, this Court struck down not only Senate District 6 and three others for deviating from tier-two requirements more than necessary to comply with tier-one requirements. *Apportionment I*, 83 So. 3d at 672-75.

To show that it had a compelling interest in drawing a district to comply with the VRA, the Legislature "must have had a strong basis in evidence to support that justification before it implements the [race-based] classification." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) ("*Shaw II*"); *Miller v. Johnson*, 515 U.S. 900, 922 (1995). For instance, as to Section 2 of the VRA, a state must have had a "strong basis in evidence" to conclude that a majority-minority district was reasonably necessary to comply with § 2 "before it implements the classification." *Shaw II*, 517 U.S. at 908 n.4; *see also Bush*, 517 U.S. at 977.

An interest proffered by a defendant to justify race-based redistricting, moreover, must be one that actually motivated the Legislature in drawing district lines. "To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification." *Shaw II*, 517 U.S. at 908 n.4; *see also Miller*, 515 U.S. at 921 (examining state's "true interest" in drawing majority-minority district). Accordingly, *post hoc* rationalizations provide no basis for finding a compelling governmental interest. Nor is there a compelling interest to draw majority-minority districts wherever possible; the U.S. Supreme Court rejected that approach as unconstitutional. *See Miller*, 515 U.S. at 925; *Johnson v. DeGrandy*, 512 U.S. 997, 1016 (1994).

Even if the Legislature can establish a compelling interest for race-based redistricting, a district cannot be narrowly tailored where the Legislature did not "t[ake] any steps" to conduct a proper voting rights analysis, cannot establish the results of any such analysis, or ignored the results of any such analysis. *Moon v. Meadows*, 952 F. Supp. 1141, 1150 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997); *see also Growe v. Emison*, 507 U.S. 25, 42 (1993) ("A law review article on national voting patterns is no substitute for proof that bloc voting occurred in Minneapolis."); *Johnson*, 926 F. Supp. at 1487 (holding that prior map-drawing court's "failure to examine any evidence of vote dilution precludes a finding of Section 2 liability which necessitated creation of majority-minority districts such as District

Three"). A district is also not narrowly tailored where "the state could have accomplished its compelling purpose just as well by some alternative means that was either completely race-neutral or made less extensive use of racial classifications." *Id.* at 1484 (internal quotation marks and citation omitted). For that reason, this Court has recognized that " '[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.' " *Apportionment I*, 83 So. 3d at 627 (quoting *Shaw I*, 509 U.S. at 655); *see also Bush*, 517 U.S. at 983 (holding that state did not have compelling interest in "not maintenance, but substantial augmentation" of minority population through non-compact districts).

Thus, to the extent the Legislature invokes race as a justification for redistricting decisions, it must carry the burden of showing that its racial classifications survive strict scrutiny. Nothing in the Florida Constitution or the VRA gives the Legislature *carte blanche* to engage in outright partisan and racial gerrymandering under the guise of minority protection. Rather, race-based redistricting is only permissible in limited circumstances, where the Legislature has properly ensured compliance with federal and state minority voting laws.

2. Tier-Two Requirements of Compactness and Respecting Political and Geographic Boundaries[12]

Compactness. The compactness requirement "limit[s] partisan redistricting and racial gerrymanders." *Apportionment I*, 83 So. 3d at 632. Thus, "if a district can be drawn more compactly while utilizing political and geographical boundaries and without intentionally favoring a political party or incumbent, compactness must be a yardstick by which to evaluate those other factors." *Id.* at 636.

The compactness review "begins by looking at the shape of a district." *Id.* at 634 (internal quotation marks and citation omitted). A district "should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement." *Id.*; *see also id*. at 636 (emphasizing that "non-compact and 'bizarrely shaped districts' require close examination"). Districts "containing … finger-like extensions, narrow and bizarrely shaped tentacles, and hook-like shapes … are constitutionally suspect and often indicative of racial and partisan gerrymandering." *Id.* at 638 (internal quotation marks and alteration omitted). Compactness should also be assessed from "quantitative geometric measures" derived from "commonly used redistricting software." *Id.* at 635. This

[12] The first tier-two criterion, incorporating the "one-person, one-vote" principle from the case law interpreting the Fourteenth Amendment to the federal Constitution, *Apportionment I*, 83 So. 3d at 628, is not at issue in this case.

Court used, for instance, Reock and Area/Convex Hull metrics to assess compactness of voting districts in *Apportionment I*. *See id.* at 635.[13]

Pre-Existing Boundaries. Tier-two also requires the Legislature to draw districts based on pre-existing boundaries when feasible. Political boundaries include "cities and counties," *id*. at 637, while geographical boundaries include "rivers, railways, interstates and state roads," *id.* at 638. This requirement is more flexible than the compactness requirement, as it includes the restriction "where feasible." *Id.* at 636. But "the choice of boundaries" is not "left entirely to the discretion of the Legislature," *id*. at 637, and the Legislature may not use any boundary (e.g., a "creek or a minor road") that suits its purposes, *id*. at 638.

3. How the Tiers Interact

Absent a conflict between the tiers, the Legislature must draw districts that "comport with all of the requirements enumerated in Florida's constitution." *Apportionment I*, 83 So. 3d at 615. While tier-two requirements "are subordinate and shall give way where compliance" would conflict with tier one or federal law, the Legislature may deviate from tier-two criteria "only to the extent necessary" to avoid a conflict. *Id.* at 639, 640; *see also id*. at 667 (holding that "the Legislature is

[13] Reock "measures the ratio between the area of the district and the area of the smallest circle that can fit around the district." *Id*. Area/Convex Hull "measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district." *Id*.

permitted to violate compactness only when necessary to avoid conflict with tier-one standards"); *id*. at 669 (striking down Senate District 6 because it could have been "drawn much more compactly and remain a minority-opportunity district").

If the Legislature departs from tier-two requirements in drawing a district and cannot identify a "valid justification" for doing so, then the Legislature's departure is "indicative of intent to favor incumbents and a political party." *Id*. at 669. Tier-two violations, however, certainly are not needed to find improper partisan intent. Violations of tier-two criteria appropriately trigger skepticism about the Legislature's partisan intent. *See id.* at 640 ("[A] disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms."). But because "the decisionmaking process itself is the case" in challenges under Article III, Section 20, *Apportionment IV*, 132 So. 3d at 150 (emphasis, alteration, internal quotation marks, and citation omitted), the words and deeds of legislators, staffers, and their collaborators may establish improper intent, regardless of any tier-two violation.

4. Relevance of Alternative Maps

Romo Plaintiffs submitted two alternative maps during the merits phase of the case (SR24:3541-48) and one alternative remedial map (App. at 73-74; SR16:2284-85), and Coalition Plaintiffs submitted two alternative remedial maps for the Court's consideration. (App. at 1-72; SR16:2212-47, 2248-83.) The func-

tion of such alternative maps is to illustrate how the Legislature ignored or subordinated the constitutional standards in Article III, Section 20 without any valid justification. If an alternative plan "achieves all of Florida's constitutional criteria without subordinating one standard to another," then the alternative plan "demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan." *Apportionment I*, 83 So. 3d at 641. The availability of such an alternative plan "will provide circumstantial evidence of improper intent." *Id.* Accordingly, alternative plans are a permissible, but not necessary, method of establishing a constitutional violation.

II. THE LEGISLATURE'S 2012 CONGRESSIONAL PLAN AND THE REVISED PLANS ARE UNCONSTITUTIONAL.

The constitutional prohibition on intent to favor a political party or incumbent extends to both "the apportionment plan" as a whole and to each "district." Art. III, § 20(a), Fla. Const.; *see also Apportionment I*, 83 So. 3d at 617 ("[B]y its express terms, Florida's constitutional provision . . . applies both to the apportionment plan as a whole and to each district individually"). Accordingly, in *Apportionment I*, this Court considered "general" challenges to the Initial Senate Plan separately from individual district challenges. *See id.* at 644-47, 653-57.

The trial court correctly found that the 2012 Congressional Plan was infected with partisan intent and, therefore, invalid in its entirety. (R86:11,310, 11,328-29.) The trial court, however, failed to give proper effect to that finding. The trial court

should have required the entire plan to be redrawn or, at the very least, shifted the burden to the Legislature to establish the constitutionality of individual district configurations notwithstanding the partisan intent in the plan generally.

A. The Plan as a Whole Is Unconstitutional.

The trial court found that the entire 2012 Congressional Plan was motivated by unlawful partisan intent based on extensive evidence, including:

1. Extensive "cooperation and collaboration" between the Legislature and Republican operatives (illustrated by, among other things legislators' early meetings and ongoing communications with the operatives; the Legislature's reliance on the Consultant Drawn Maps submitted by the operatives' shills; and secret transmissions of draft maps to Reichelderfer by a legislative staffer);

2. The Legislature's spoliation of relevant redistricting records, likely including additional communications with partisan political operatives, even though the Legislature considered it a "moral certainty" that litigation would follow; and

3. This Court's finding of improper intent as to the Initial Senate Plan, which was drawn by the same legislators and staffers who oversaw the drawing of the congressional districts and influenced by the same partisan political operatives. (R86:11,310-19.)

In short, the trial court's finding of overall improper intent was based in large part on the existence of a "different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or incumbent" that this Court held "would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate." *Apportionment IV*, 132 So. 3d at 135.

Objective measures further illustrate the partisan motives behind the plan. By selecting maps that increasingly benefitted Republicans, the Legislature arrived at a redistricting plan that carved up Florida's population to give Republicans 17 congressional seats—63% of Florida's delegation—even though a majority of registered voters are Democrats. That partisan advantage exists partly because in drawing the 2012 plan, the Legislature borrowed from district configurations in the 2002 plan, which it brazenly admitted was drawn to "maximize the number of districts likely to perform for Republicans." *Martinez*, 234 F. Supp. 2d at 1300-01. The 2012 plan, on average, gave incumbents roughly 69.8% of their benchmark districts—more than the 64.2% retained in the initial Senate plan this Court invalidated. (Ex. CP-1147 at 18); *see Apportionment I*, 83 So. 3d at 654.

The common recipe the Legislature used in both 2002 and 2012 was to pack Democratic voters into as few districts as possible, where their votes far exceeded the threshold needed to elect candidates. This strategy neutralizes the excess Democratic votes packed into those districts, allowing Republican candidates to win the greater number of remaining districts. (T11:1343-44.) Specifically, the Legislature packed Democratic voters into the following seven districts, setting up Republican victories in the vast majority of the remaining districts:

District (H000C9047)	Sink (D) (2010 Gub.)	Obama (D) (2008 Pres.)	% Retained from 2002 Congressional Plan[14]

[14] (Ex. CP-1147 at 18.)

5	67.2%	71.0%	80.66%
9	55.1%	60.6%	New district
14	63.0%	65.7%	84.85%
20	79.6%	80.8%	73.44%
21	63.0%	63.9%	76.23%
23	61.5%	62.2%	65.58%
24	86.1%	86.5%	79.79%
Average	67.9%	70.1%	76.76%

Expert testimony confirmed that, absent improper intent, the same partisan breakdown would virtually never occur based on "natural packing" or other apolitical factors. For example, Professor Jonathan Katz offered unrebutted testimony that the 2012 congressional plan reflected the largest partisan bias he had ever seen in fifteen years of studying redistricting plans across states with no constitutional restrictions on political gerrymandering. (T11:1367-68.)[15] Professor Katz opined that so extreme a partisan bias cannot be explained by minority-protection considerations or the geographic dispersion of voters. (T11:1367.)

Similarly, Professor Jonathan Rodden's testimony demonstrated that the 2012 Congressional Plan was a statistical outlier that is virtually impossible to ex-

[15] According to Professor Katz, the 2012 Congressional Plan had a partisan bias of 12.2 percentage points based on the 2008 presidential election and 15.9 percentage points based on the 2010 gubernatorial election. (T11:1358.) A partisan bias of 15.9 percentage points means that if both Democrats and Republicans were to receive 50% of the congressional votes statewide, Republicans would likely receive nearly 58% of the congressional seats and Democrats would likely receive approximately 42% of the seats. (T11:1358-59.) A partisan bias of 12.2 percentage points means that if both Democrats and Republicans were to receive 50% of the congressional votes statewide, Republicans would likely receive over 56% of the congressional seats and Democrats would likely receive less than 44% of the seats. (T11:1359.)

plain as anything other than a partisan gerrymander. (T12:1434.) Professor Rodden and his colleague, Professor Jowei Chen, developed an algorithm that creates thousands of redistricting plan simulations. (T12:1419-20, 1424-26.) The Rodden/Chen simulations demonstrated that Democratic-performing districts in the 2012 congressional plan had significantly larger Democratic majorities than Democratic-leaning districts in the simulated plans. (T12:1496-97.) At the same time, all of the 2012 plan's marginal Republican districts were more Republican than the simulations predicted. (T12:1496-97.) Professors Rodden and Chen's analysis also ruled out "natural packing" or other apolitical factors to explain a 17 Republican-seat map. (T12:1434-37.) In other words, the clear evidence in this case disproved this Court's hypothesis with regard to the imbalance in House and Senate plans that "[e]xplanations other than intent to favor or disfavor a political party could account for his imbalance." *Apportionment I*, 83 So. 3d at 642-43.

All of the foregoing evidence and analysis establish beyond reasonable debate that the entire 2012 plan was the result of prohibited partisan gerrymandering. Although the trial court clearly agreed and properly found overall partisan intent, it misunderstood the legal effect of that finding. The trial court collapsed the concepts of whole map challenges and individual district challenges into a single analysis, considering the two categories "to be a false dichotomy, a distinction without

difference." (R86:11,296-97.)[16] But as this Court has recognized, intent to favor a political party or incumbents in a redistricting plan *as a whole* is a constitutional violation separate and apart from individual district infirmities. *See Apportionment I*, 83 So. 3d at 617. Thus, in concluding that Plaintiffs' whole map challenge lacked independent legal significance, the trial court overlooked the plain language of Article III, Section 20 and departed from this Court's previous rulings. *See id.* ("[B]y its express terms, Florida's constitutional provision … applies both to the apportionment plan as a whole and to each district individually.").

Despite its finding of partisan intent in the plan generally, the trial court invalidated only Districts 5 and 10 and adopted a revised plan making only minor changes to those districts.[17] That was error. There is simply no justifiable way to limit the finding of partisan intent to Districts 5 and 10 alone. The objective evidence overwhelmingly demonstrates the Legislature's unmistakable intent to craft

[16] No party advanced this position in the trial court. The Legislature conceded that Article III, Section 20 authorizes challenges to improper intent in regard to the entire map or individual districts. (R12:1489-90.)

[17] Notably, the trial court adopted the revised plan after a half-day hearing based on a limited public record and no discovery. Such proceedings are hardly a substitute for trial, particularly when the Legislature has shown its willingness to manipulate and sanitize the public record. Fact-based challenges to remedial plans can thus be brought notwithstanding their adoption by the trial court. *See Apportionment III*, 118 So. 3d at 200 (allowing fact-based challenges to state legislative plan after facial review); *Johnson v. Mortham*, No. TCA-94-40025-MMP, 1996 WL 297280, at *1 (N.D. Fla. May 31, 1996) (permitting constitutional challenges to remedial plan by separate proceedings).

a state-wide plan that ensures Republican domination of a state with an evenly divided electorate. Having found overall partisan intent, the trial court should have required the Legislature to redraw the *entire* plan, including each individual district, to provide the voters with the non-partisan plan that they demanded when they overwhelmingly approved Article III, Section 20. See *Apportionment I*, 83 So. 3d at 617 (emphasizing that "there is no acceptable level of improper intent").

At the very least, the conclusion that the entire 2012 plan was motivated by unlawful partisan intent should have played a central role in the trial court's district-by-district review.

To hold that the entire 2012 plan was motivated by improper intent is, as a matter of logic, to hold that each individual district was tainted too. But instead of assessing the constitutionality of individual districts in light of its prior holding that the entire plan was infected with improper intent, the trial court conducted an analysis similar to this Court's facial review in *Apportionment I*, focusing heavily on tier-two compliance as if it was premature or impossible to directly assess tier-one compliance. (R86:11304-06, 11319-28.) On top of that, relying on the default principle that the judiciary has a "limited role" in redistricting and should not simply select the "best plan," the trial court forgave or ignored redistricting decisions that benefited the Republican Party at the expense of tier-two criteria. (R86:11296.)

The trial court clearly believed that it owed deference to the Legislature's redistricting decisions, both in evaluating the 2012 plan and the revised plan. But as this Court has made clear, review of apportionment plans subject to the strict "instructions" that the electorate gave for establishing the very foundation of our democratic government demands close review, and not the kind of judicial deference due other legislative decisions. *Apportionment I*, 83. So. 3d at 608; *see also Apportionment III*, 118 So. 3d at 205 (noting that "the framers and voters desired more judicial scrutiny" of the Legislature's redistricting decisions, "not less"). To be sure, in the absence of proof of partisan intent, the Legislature is due deference in its "decision to draw a district in a certain way" as long as it complies with the objective criteria of the FairDistricts Amendments. *Apportionment I*, 83 So. 3d at 608. But that is not this case. Instead, after two years of hard-fought litigation and a lengthy bench trial, the trial court found partisan intent. Under these circumstances, the Legislature lost any arguable entitlement to deference, and the burden should have shifted to the Legislature to prove that individual districts so clearly complied with the requirements of the FairDistricts Amendments that the same result would have obtained absent the Legislature's improper intent.

Accordingly, based on the trial court's finding of partisan intent, this Court should invalidate the entire plan, even as revised, and require each district to be redrawn. Alternatively, at the very least, this Court should give the Legislature no

deference in reviewing Plaintiffs' individual district challenges, and should place the burden on the Legislature to establish that particular districts remain constitutional even though the redistricting process as whole was marred with partisan intent.

B. Several Specific Districts Are Independently Unconstitutional

1. District 5 and Surrounding Districts

No district is more central to the Legislature's attempts to rig Florida's elections than District 5. And no district more brazenly flouts the will of the voters who enacted the FairDistricts Amendments.

The few differences between the enacted and the revised district are cosmetic at best. Revised District 5 retains the initial version's bizarre shape—one of the nation's most infamous "crimes against geography." Christopher Ingram, *America's most gerrymandered congressional districts*, Wash. Post (May 15, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/ 05/15/americas-most-gerrymandered-congressional-districts/. And the Revised Plan continues to pack Democratic minorities into District 5 without any conceivable justification, thereby diluting the influence of those minorities in neighboring districts and favoring the Republican Party. This minority-marginalizing strategy is a vestige of an era in which partisan considerations drove the redistricting process, and it is entirely inconsistent with the FairDistricts Amendments. The trial court, therefore, erred

when it held that the Revised Plan cured the constitutional deficiencies of District 5. Revised District 5 remains infected with partisan intent, and both Revised District 5 and the districts it impacts should be struck down.

District 5 has long been a bulwark of partisan gerrymandering. In 2002, benchmark District 3, the predecessor to District 5, was challenged as an unlawful racial gerrymander. The Legislature denied that charge, but unabashedly proclaimed that the district was drawn to benefit Republicans. *See Martinez*, 234 F. Supp. 2d at 1340.

Later iterations have deviated little from 2002's partisan blueprint. The 2012, enacted version of District 5 retained more than 80% of the 2002 benchmark district. Similarly, the 2014, revised version of District 5—the version at issue in this appeal—retains roughly 80% of the 2002 benchmark district. (*See* SR16:2186.) That consistency is remarkable, but not surprising. Republican legislators and their allies have long understood that a gerrymandered District 5 is essential to retaining Republican dominance in Florida's congressional delegation. The durability of District 5's basic configuration is a testament to its effectiveness.

Here, the trial court held that Article III, Section 20 put an end to the long, sorry tradition of political gerrymandering in Florida, including in District 5, and correctly struck down District 5. The trial court erred, however, when it subse-

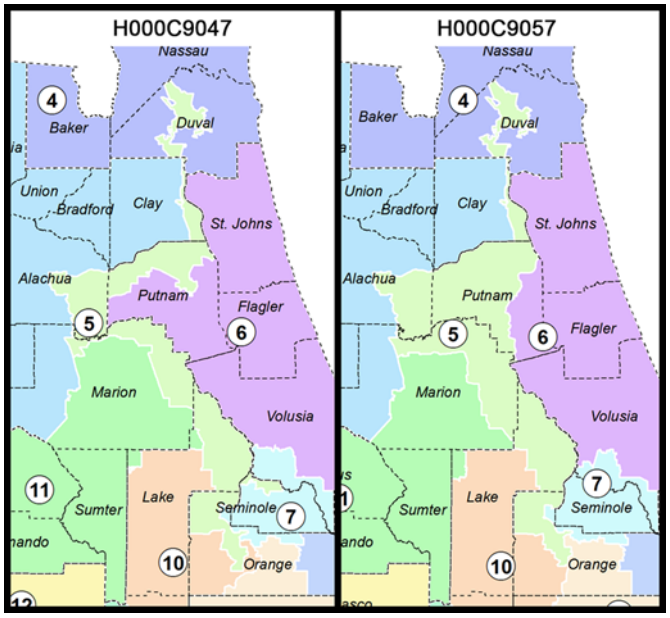
quently approved the "revised" version of District 5 in the Revised Plan—a version that is little changed from its unconstitutional predecessor.

The trial court erred on two grounds, each sufficient to justify reversal. First, the trial court did not undertake the constitutionally required "close examination" of the revised District 5, *Apportionment I*, 83 So. 3d at 636, and as a result, approved the revised version even though it is riddled with unjustifiable tier-two violations. Second, the trial court approved the revised version even though the undisputed history of the district and evidence introduced at trial showed that it was drawn to favor Republicans, in violation of tier one. In short, the trial court sanctioned a version of District 5 that propagates all the evils Article III, Section 20 was designed to prevent. That was error, and the trial court should be reversed.

In its merits judgment entered after the trial, the trial court correctly held that the version of District 5 enacted in the 2012 Congressional Plan was a tour de force of gerrymandering: it was "visually not compact," "bizarrely shaped," and ignored "traditional political boundaries as it [wound] from Jacksonville to Orlando," at one point "narrow[ing] to the width of Highway 17." (R86:11,306.) And the Legislature's lone attempt to justify District 5's bizarre shape—that is, as a necessary evil compelled by the VRA—was "not supported by the evidence." (R86:11,306.) The trial court therefore held that the 2012 Enacted District 5 impermissibly violated tier-two criteria, and that the parade of tier-two violations supported an infer-

ence of tier-one violations as well. (*See* R86:11,306-08.)

In response, the Legislature enacted a Revised Plan with a slightly modified version of District 5. The new district remains "visually not compact" just like its predecessor. (R86:11,306.) It still features the "bizarrely shaped," serpentine configuration of the old district, which "connects two far flung urban populations in a winding district which picks up rural black population centers along the way." (R86:11,306-07.) And it continues to run roughshod over "traditional political boundaries as it winds from Jacksonville to Orlando," at one point "narrow[ing] to the width of Highway 17." (R86:11,306.)



These blatant tier-two violations might be acceptable if they were required by tier-one considerations. But they are not. Neither the trial court nor the Legislature identified any tier-one considerations compelling the contortions of Revised District 5. At trial and in the remedial proceedings, Plaintiffs offered expert testi-

mony from Dr. Stephen Ansolabehere showing that District 5 could have been drawn in an East-West configuration that would have rendered it far more compact and preserved minority voters' ability to elect their preferred candidates. (T14:1743-47; SR16:2188.) That testimony was unrebutted. In fact, the House's chief map drawer, Kelly, conceded that he considered a similar East-West configuration of District 5 during the redistricting process and concluded that it would not result in retrogression. (T8:932-35.)[18] Nevertheless, the trial court erroneously approved Revised District 5, reasoning that it "sufficiently addresses the concerns I identified in the Final Judgment." (SR16:2308.)

As this Court has explained, "bizarrely shaped districts" require "close examination" because they raise a host of constitutional concerns, *Apportionment I*, 83 So. 3d at 636, and race-based district configurations likewise demand strict scrutiny, *id.* at 627. The need for close examination and strict scrutiny was particularly acute in this context: the first enacted version of District 5 had already been declared unconstitutional; the revised version was essentially identical to the enacted version; the Legislature had admitted that the substantially identical 2002 district was drawn for partisan purposes; and some of the same people who drew

[18] The Senate did not conduct a functional analysis of District 5 or any other district in the 2012 Congressional Plan. Instead, it simply followed the core configurations of the minority districts in the gerrymandered 2002 Plan. (T5:558-59, 563; T6:45-46.)

the enacted version were involved in drawing the revised version. *See id.* at 619 (noting that "the drawing of a new district so as to retain a large percentage of the incumbent's former district" may serve as an "[o]bjective indicator[]" of unlawful intent); R86:11,319 (declaring the 2012 Congressional Plan unconstitutional in part because this Court had previously declared the Florida Senate map unconstitutional, and the "same process and the same people were involved in drafting the congressional map"). But the trial court did not examine Revised District 5 closely. To the contrary, instead of scrutinizing the district's many deformities—virtually all imported from the prior version—the trial court all but ignored them. This Court should reverse the trial court for that reason alone.

Moreover, to the extent that the trial court did analyze Revised District 5, it misconstrued the requirements of the Florida Constitution. Under Article III, Section 20, "the Legislature is permitted to violate compactness *only when necessary to avoid conflict with tier-one standards*." *Apportionment I*, 83 So. 3d at 667 (emphasis added); *see also id*. at 669 (striking down state Senate district because it could have been "drawn much more compactly and remain a minority-opportunity district"). Here, however, the trial court did not ask whether the new district's tier-two violations could be justified by reference to tier one. Instead, the trial court relied on three rationales for approving the revised district, none of which has any basis in the Florida Constitution.

First, the trial court highlighted two minor changes in the new district: (1) a slight "widening" of the middle portion, and (2) the removal of a small appendage into Seminole County, which had been used to pack additional African-Americans into District 5. (SR16:2308.)

It is true that those token modifications improved District 5 by some measures. But that misses the point. The Legislature was required to do more than *improve* District 5; the Legislature was required to make District 5 fully compliant with Article III, Section 20. Notwithstanding the Legislature's tinkering, Revised District 5 retains virtually all of its predecessor's non-compact and "bizarrely shaped" features. (R86:11,306-07.) Just as before, there are no tier-one justifications for those extreme tier-two violations. In other words, Revised District 5 is identical to its invalid predecessor in every material way. It is therefore unconstitutional for the same reasons.

Second, the trial court faulted Plaintiffs for not offering "convincing evidence that an East-West configuration [of District 5] is necessary" to comply with Article III, Section 20. (SR16:2308.) Of course, the challengers disagree. But again, the point is immaterial. In this context, where strict scrutiny governs and Plaintiffs established that the 2012 Congressional Plan was tainted with partisan intent, the burden was on **the Legislature** to establish the constitutionality of District 5. But, even if the burden had been on Plaintiffs, they would not have been not

required to show that a different version of District 5 was "necessary." Rather, they would only have been required to show only that the version enacted by the Legislature is not constitutionally compliant. Regardless of which burden applied, the trial court erred.

Third, the trial court suggested that it was constrained to accept Revised District 5 because the Legislature "is not required . . . to produce a map that the Plaintiffs, or I, or anyone else might prefer." (SR16:2308.) That argument is no more compelling. By insisting that District 5 be drawn compactly and follow political boundaries where feasible, Plaintiffs are not expressing mere policy preferences. The *Florida Constitution requires* the Legislature to comply with tier-two criteria absent a valid tier-one justification. And time and again, this Court has made clear that Florida courts are required to enforce that requirement, even if it means rejecting the Legislature's policy preferences. *See*, *e.g.*, *Apportionment IV*, 132 So. 3d at 154 ("While the Florida Constitution authorizes the Legislature to adopt redistricting plans, it places significant limitations on how the redistricting plans are drawn and therefore the power is vested in the courts to determine the constitutionality of those plans.").

In short, the trial court erred by failing to examine the blatant tier-two violations of Revised District 5, and erred further by approving the new district—notwithstanding those violations—on grounds foreign to the Florida Constitution.

This Court should therefore reverse the trial court.

The trial court also erred by failing to hold that Revised District 5, like the initially enacted District 5, is infused with unlawful partisan intent and therefore violates tier one of Article III, Section 20. It offered a litany of reasons to conclude that the 2012 Congressional Plan, especially District 5, was drawn with an unlawful intent to favor the Republican Party. Apart from the evidence of overall improper intent described in Part II.A.1, *supra*, the trial court emphasized that District 5 contained egregious tier-two violations and was a particular focus of the partisan operatives in their subversion of the 2012 redistricting process. (R86:11,308-19.) The trial court therefore rightly concluded that the Legislature and its allies had "made a mockery" of the redistricting process, and that the 2012 Congressional Plan violated tier one of Article III, Section 20. (R86:11,309.) In evaluating Revised District 5, however, the trial court failed to scrutinize closely the Legislature's intent and instead simply declared that unspecified "legitimate non-partisan policy reasons" existed "for preferring a North-South configuration." (SR16:2308.)

That was error. Under the Florida Constitution, "there is no acceptable level of improper intent." *Apportionment I*, 83 So. 3d at 617. That uncompromising requirement insists that trial courts will scrutinize the Legislature's claims of nonpartisanship. *See Apportionment IV*, 132 So. 3d at 148 ("[I]n enacting these constraints on the Legislature's reapportionment of congressional and state legislative

districts, the framers and voters clearly desired more judicial scrutiny of the apportionment plans, not less.") (internal quotation marks and citation omitted).

If the trial court had inquired into legislative intent, it would have been compelled to conclude that Revised District 5, like the enacted District 5, was meant to serve partisan purposes above all else.

First, as explained above, Revised District 5 violates tier-two criteria to almost the same extent as its invalidated predecessor. *See* Part II.B.1.a, *supra*. The same inference of improper intent therefore arises with respect to the new district.

Second, the evidence shows that the Legislature conspired with partisan operatives before and during the 2012 redistricting process, then sought to conceal that misconduct by destroying documents and other means. *See* Part II.A.1, *supra*. That evidence of unlawful intent was not washed away by the five-day special session in which the Legislature enacted the Revised Plan. After all, many of the same people involved in the drawing of the 2012 Congressional Plan, such as Weatherford and Gaetz, were involved in the drawing of the 2014 Revised Plan. (R86:11,319 ("The Florida Supreme Court found improper partisan intent present in the State Senate Map. The same process and the same people were involved in drafting the [2012] congressional map. It seems unlikely that the same taint would not affect that map as well.").)

Third, Revised District 5 is substantially identical, both in terms of overall

configuration and political performance, to the 2012 version (which was declared a partisan gerrymander) and is based largely on the 2002 benchmark version (which Republicans admitted was a partisan gerrymander). The only logical explanation for that close kinship is that the newest version, like its predecessors, was intended to favor the Republican Party. *See Apportionment I*, 83 So. 3d at 619 ("When analyzing whether the challengers have established an unconstitutional intent to favor an incumbent, we must ensure that this Court does not disregard obvious conclusions from the undisputed facts."); *see also Davis v. Bandemer*, 478 U.S. 109, 129 (1986) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.").

Fourth, in enacting the Revised Plan and Revised District 5, the Legislature once again followed a partisan playbook. Before holding the first public meeting in the special legislative session, Republican leaders held private meetings to decide the features of the Revised Plan. To avoid scrutiny under Article III, Section 4(e), which requires public access to meetings between three or more legislators, the Legislature carefully included no more than two legislators at those private meetings. (SR9:1058, 1069-70, 1141-42, 1146; SR10:1217, 1231-32, 1347-48.) Conspicuously absent were members of the minority party. In fact, the Republican leadership barred Democrats from those meetings. (SR16:2302-05.) As a result,

Democratic legislators repeatedly expressed dismay during the special session about being excluded. (SR1:1432, 1439, 1440, 1445, 1451, 1453.) But their pleas fell on deaf ears. The map drawn in the private meetings sailed through both chambers without a single modification, and ultimately became the law of the land. If any doubt remains about the Legislature's intent in enacting the Revised Plan, it should be put to rest by that carefully orchestrated and overtly partisan exercise.

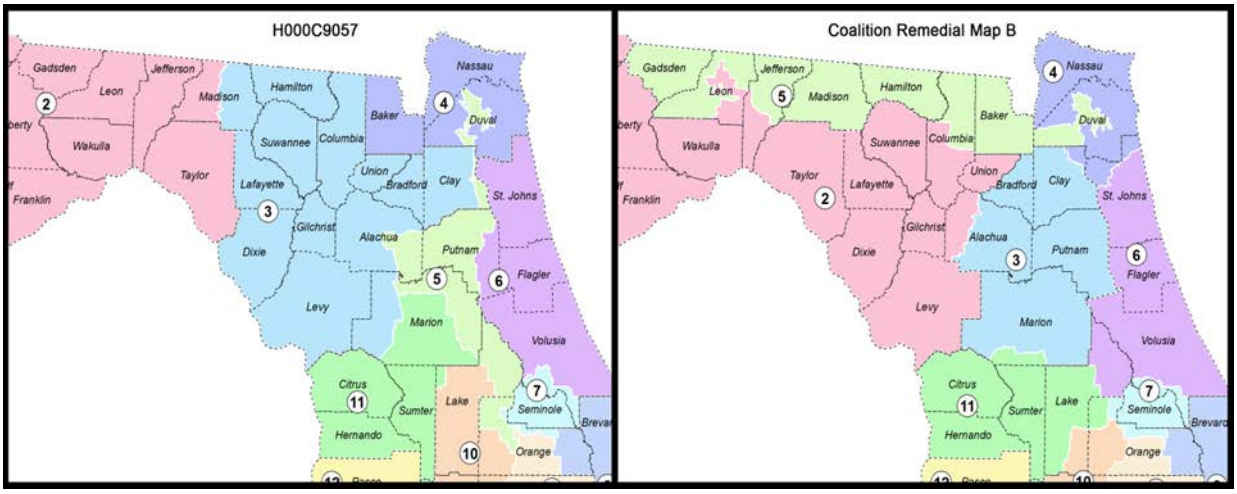
In short, there is overwhelming evidence that Revised District 5, like its forebears, was drawn with unlawful partisan intent. The trial court erred by failing to consider that evidence and failing to strike down the revised district.

The unconstitutionality of Revised District 5 has larger implications for Florida's voting map and hence for Florida's voters. Plaintiffs' proposed maps submitted during the remedial proceedings, show why: by insisting on a snake-like, North-South configuration for District 5, the Legislature unnecessarily limited minority voting strength in surrounding districts; deprived minority voters of an additional opportunity district; and undermined compactness and respect for political boundaries throughout the region. Not coincidentally, they also vastly improve political performance for the Republican Party.

Coalition Plaintiffs' Remedial Maps ("CP-A" and "CP-B", and collectively "Coalition Remedial Maps") and Romo Plaintiffs' Remedial Map (the "Romo Remedial Map") all include an East-West configuration of District 5 that maintains

African Americans' ability to elect their chosen candidates. As noted above, Plaintiffs' expert Dr. Ansolabehere testified at trial and in the remedial proceedings that the East-West configuration would not diminish minorities' ability to elect, and the House's chief map drawer, Kelly, did not dispute that testimony. (T8:932-35; T14:1743-47.)

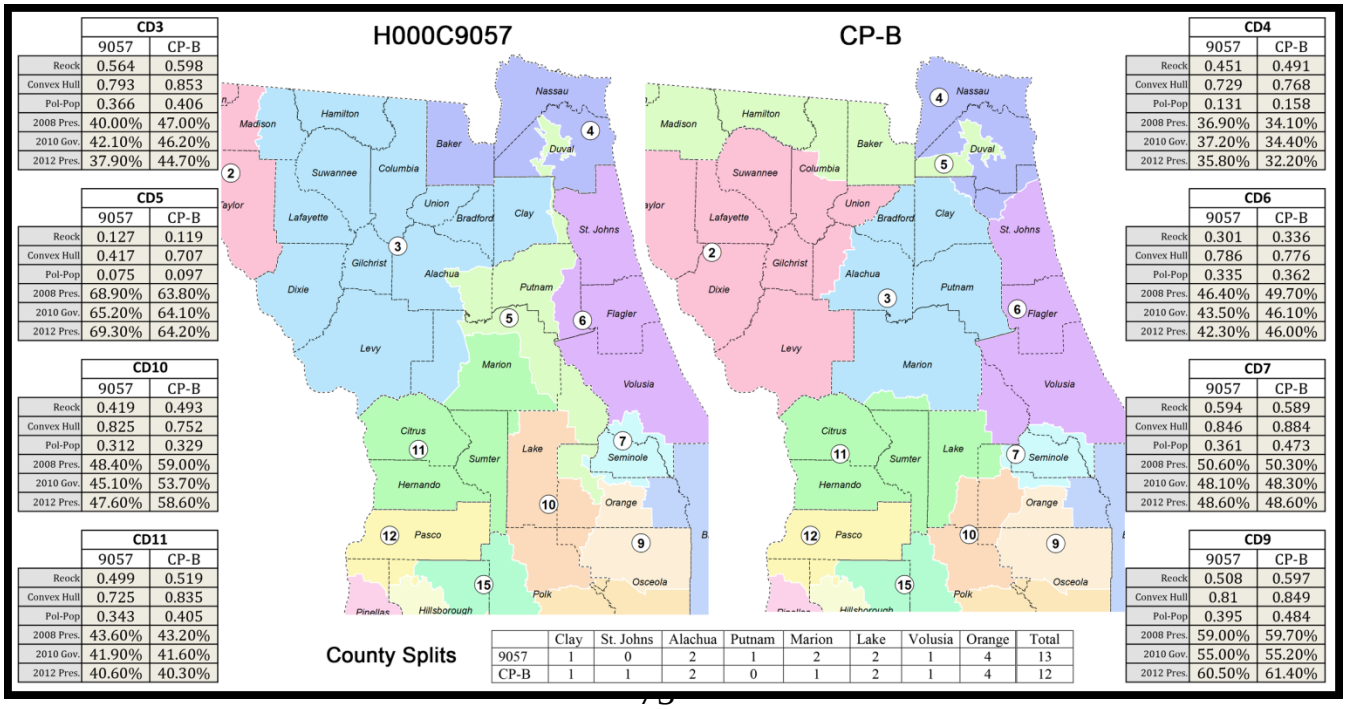
The Legislature never seriously considered that alternative configuration. Had it done so, it would have discovered that an East-West configuration of District 5 would greatly reduce tier-two deviations both within District 5 and throughout surrounding districts. Instead, the Legislature returned to its admittedly skewed 2002 Plan as its model, once again needlessly creating tier-two deviations with no justification. Therein lies an impermissible partisan choice.



As shown in the figure above, when configured East-West, Proposed District 5 touches only three districts, whereas in the Revised Plan it impacts seven. If District 5 does not wind South to Orlando, it can be drawn more compactly, both visu-

ally and by two of three accepted compactness metrics (SR16:2191), while keeping four counties (Baker, Hamilton, Madison, and Gadsden) whole within its borders and avoiding extra splits in at least Putnam and Marion Counties. At the same time, four districts (Proposed Districts 3, 4, 9, 11) can be drawn more compactly, both visually and by all accepted metrics (SR16:2192, 2195); and three districts (Proposed Districts 6, 7, 10) can be drawn more compactly, both visually and by two of three accepted metrics. (SR16:2193-95.)

Moreover, as reflected in the figure below, without interference from District 5, the vote share in Proposed Districts 3, 6, and 7 would be more equally divided, and Proposed District 10's Democratic performance would not be diminished to favor incumbent Republican Daniel Webster (as the trial court found was an intent behind the districts it invalidated in the original plan) (R86:11,322-23):



An East-West configuration would also enhance minority voting strength by creating a new minority opportunity district in Central Florida. At trial, the Legislature went to great lengths to claim concern for minorities as grounds to increase the BVAP of District 5. But by raiding African-American voting strength from two far-flung urban cores of Jacksonville and Orlando, the Legislature's District 5 actually *deprives* minorities of an additional opportunity to elect a (Democratic) candidate of choice in Orlando.

After being presented with the option of having two minority-performing districts in the Jacksonville and Orlando regions, the Legislature chose to have only one – its North-South Revised District 5 – resulting in added tier-two deviations and Republican performance gains. If the Legislature had chosen Plaintiffs' configuration, Proposed District 5 and Proposed District 10 in the Orlando area would both elect minority-preferred candidates, according to Dr. Ansolabehere's unrebutted testimony. (T14:1746, 1749-50.) The table below confirms this.

	Minority Population		Democratic Performance			2010 Dem. Primary Turnout		2010 Registered Dem.		2012 Registered Dem.		2010 to 2012 % Difference in Registered Dem.	
	%Blk VAP	%His. VAP	2008 Pres.	2010 Gov.	2012 Pres.	% Blk.	% His.	% Blk.	% His.	% Blk.	% His.	Blk.	His.
CD5													
H/C9047	50.1%	11.1%	71.0%	67.2%	71.6%	67.3	1.9	67.5	5.3	70.0	5.8	+4%	+9%
H/C9057	48.1%	10.3%	68.9%	65.2%	69.3%	63.7	1.6	65.3	4.8	68.0	5.4	+4%	+13%
CP-B	45.1%	6.1%	63.8%	64.1%	64.2%	57.1	.6	63.0	2.0	66.1	22.0	+5%	+10%
CD10													
H/C9047	11.1%	14.2%	47.6%	45.6%	46.1%	18.1	4.7	9.5	9.2	9.7	10.1	+2%	+10%
H/C9057	12.2%	16.9%	48.4%	45.1%	47.6%	21.0	4.7	22.9	13.6	24.0	15.7	+5%	+15%
CP-B	27.4%	18.5%	59.0%	53.7%	58.6%	44.2	5.2	43.1	13.0	44.3	14.7	+3%	+13%

In the East-West Proposed District 5, African Americans would have controlled over 57% of the 2010 Democratic primary vote in a strong Democratic-performing district. (SR16:2279, 2287.) In Proposed District 10, African Americans would have controlled 44.2% and Hispanics 5.2% of the 2010 Democratic primary vote in a strong Democratic-performing district that actually selected an African American, Val Demings, as the Democratic nominee in 2012. (SR16:2279.) Because Enacted District 5 leached African Americans out of District 10, however, Demings lost to incumbent Republican Daniel Webster by 3.4%[19] because, as purposefully drawn by the Legislature, District 10 had only 46.1% Democratic performance in 2012. The Legislature's gerrymandered District 5 destroyed a minority opportunity in Central Florida, and its Revised Plan, if allowed to stand, may well deprive minorities of such opportunities to elect candidates of choice in Orlando for years, if not decades, to come.

The Romo Remedial Map re-orients District 5 in the same manner as the Coalition Remedial Maps, such that it has fewer county and city splits than the Revised Plan's version of District 5. (SR16:2197.) The Revised Plan's District 5 splits six incorporated towns and cities, while the Romo version splits only three

[19]*See* http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/2004&DATAMODE= (reflecting Webster with 51.7% of the vote and Demings with 48.3%) (last viewed Nov. 14, 2014). The trial court took judicial notice of election results as reported by the Florida Secretary of State (T4:509-11.)

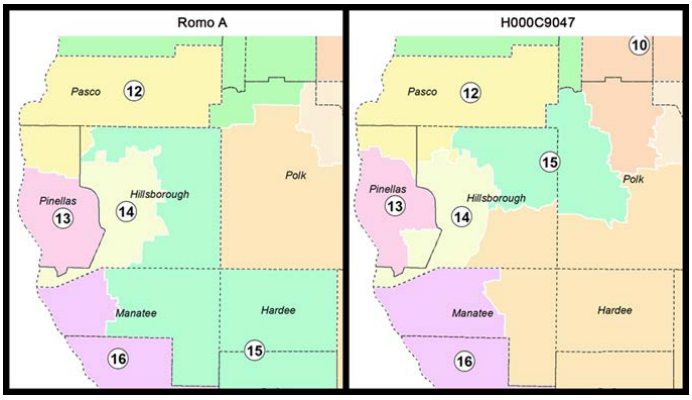
incorporated towns and cities. (SR16:2197.) The Romo version also preserves the opportunity for African-Americans to elect their preferred candidates in District 5 by including a total African-American population of 48.5% and an African-American VAP of 45.1%. (SR16:2248, 2287.)

Importantly, the Romo Remedial Map makes these improvements while also improving the map's overall compliance with tier-two criteria. The Romo Remedial Map splits only 19 counties, as compared to the 21 county splits in the Revised Plan. (SR16:2198.) Similarly, the Romo Remedial Map out-performs the Revised Plan on the number of times counties are split, with the Romo map splitting counties 54 times as compared to 61 in the Revised Plan. (SR16:2198.) The Romo Remedial Map also contains fewer splits of incorporated areas: incorporated areas are split 59 times as compared to 66 in the Revised Plan. (SR16:2198.) And the Romo map splits fewer incorporated areas than the Revised Plan (23 vs. 28). (SR16:2198.)

In sum, the Romo Remedial Map, like the Coalition Remedial Maps, increases compliance with tier-two criteria, preserves the ability of African-Americans to elect candidates of their choice in District 5, and enhances minority voting strength in surrounding districts. It too makes clear that the Legislature could have complied with their constitutional obligations, but simply chose not to.

2. **Districts 13 and 14**

District 14 crosses Tampa Bay and splits Pinellas County and St. Petersburg to move African-American population from District 13 into District 14. Plaintiffs offered alternative maps at trial (the "Romo Trial Maps") demonstrating that Districts 13 and 14 can be drawn without crossing Tampa Bay or the Pinellas County line and without causing retrogression. (SR24:3541-58.)



By crossing Tampa Bay and dividing Pinellas County, the Legislature turned District 13 from a safe Democratic district into a district that Republicans could win. The following table illustrates the political effect of this maneuver:

	Democratic Performance				Democratic Registration	
	2006 Gov.	2008 Pres.	2010 Gov.	2012 Pres.	2010	2012
CD 13						
Romo A	48.0%	56.4%	55.0%	55.5%	40.4%	39.5%
H/C9047-9057	45.3%	51.9%	51.0%	50.7%	36.2%	35.2%
CD 14						
Romo A	53.1%	62.2%	59.2%	62.4%	48.0%	47.2%
H/C9047-9057	56.5%	65.7%	63.0%	65.8%	51.0%	50.2%

Crossing Tampa Bay to reduce the Democratic performance of District 13 has been a frequent tool of political gerrymanders in this state. Although the analog districts in the 1996 congressional plan did not divide Tampa Bay or Hillsborough

County, *see* Ex. LD-44,[20] the Legislature adopted this maneuver in its admittedly partisan 2002 Plan. Districts 13 and 14 in the 2012 Congressional Plan and the Revised Plan follow the 2002 gerrymander, maintaining an overwhelming 83.5% and 84.9% of the respective benchmark districts. (Ex. CP-1147 at 18.)

Substantial additional evidence regarding the gerrymandering of Districts 13 and 14 was derived from discovery obtained from Bainter and appears in Part III of the supplement to this brief.

Despite the foregoing evidence, the trial court found that it could not infer unlawful intent because Districts 13 and 14 did not contain a "flagrant" tier-two violation. (R86:11,324.) The trial court did *not*, however, find that the division of Tampa Bay and Pinellas County was needed to avoid retrogression, as the Legislature had claimed. Instead, the trial court remarked that the Romo Trial Maps contained surrounding districts with lower compactness than the enacted versions. (R86:11,324.) Because the trial court did not believe that the Legislature was required to make a "tradeoff in compactness to avoid splitting Pinellas County," it declined to invalidate Districts 13 and 14. (R86:11,324-25.) By applying an incorrect standard to the tier-two violations and disregarding evidence of tier-one violations, the trial court erred.

[20] *See also* http://archive.flsenate.gov/data/redistricting_data/current_maps/current_congressional/PUBC0000_fl.PDF.

First, a deviation from compactness or a split of a geographical or political boundary that is not necessitated by a tier-one mandate is a constitutional violation, regardless of whether it is flagrant. The plain language of Article III, Section 20 does not require "flagrancy" before a tier-two violation can be found, and the Court cannot write such a limitation into the constitutional language. *See Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011); *Butterworth v. Caggiano*, 605 So. 2d 56, 60 (Fla. 1992). As the trial court correctly observed, the redistricting process is a "zero-sum game" in which "[s]ubtle shifts" in district lines can result in keeping or losing power. (R86:11,290-91.) Disregarding tier-two violations that are not sufficiently "flagrant" would invite abuse, create a limitation absent from the plain language of the FairDistricts Amendments, and undermine the will of the voters.[21]

Second, the trial court disregarded the overall evidence of partisan intent in the 2012 redistricting process and evidence of partisan intent with regard to Districts 13 and 14 in particular. The Legislature expressly relied on a Consultant Drawn Map for its configuration of District 13, and the configuration closely followed the admittedly partisan benchmark districts. These facts, coupled with de-

[21] Although the trial court downplayed the tier-two deviation at issue in Districts 13 and 14, decisions to cross bodies of waters are particularly suspicious. *See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 187 n.1, 188 (Fla. 2009) (stating that one purpose of Article III, Section 20 is to avoid "bizarrely shaped districts," such as a district that stretched "across the waters of Lake Okeechobee without any connecting territory on either the northern or southern shores of the lake").

viations from compactness, unjustified breaks in county and geographical boundaries, and partisan effects of the Legislature's decision to cross Tampa Bay, established a tier-one violation with respect to Districts 13 and 14.

Third, the trial court afforded the Legislature undue deference in reviewing Districts 13 and 14. During the redistricting process, the Legislature justified the decision to cross Tampa Bay based solely on purported minority protection concerns, claiming that it needed to draw African-American population from St. Petersburg into District 14 to avoid retrogression. (T9:1075; T23:2908-09; *see also* Ex. CP-1141 at 252-53.) At trial, however, Dr. Ansolabehere offered unrebutted testimony that keeping Pinellas County and Tampa Bay whole would not result in retrogression. (T14:1756.) Presumably for that reason, the trial court did *not* find that the Legislature's decision to cross Tampa Bay was necessary for minority protection reasons.

Because the Legislature justified the division of Tampa Bay and Pinellas County on racial grounds, and because of the finding of partisan intent in the 2012 Congressional Plan as a whole, the trial court should have applied strict scrutiny and placed the burden on the Legislature to establish that Districts 13 and 14 were constitutional and narrowly tailored to the stated goal of non-retrogression. Instead, the trial court relied on a *post hoc* argument – never made during the redistricting process itself – that keeping District 14 whole within Pinellas County **could** lead to

tier-two issues elsewhere in the map. As the figure on page 79, *supra*, illustrates, the compactness of surrounding districts in the Romo Trial Maps is lower mainly because the Romo Trial Maps better follow county boundaries, splitting Hillsborough, Pinellas, and Polk Counties fewer times than the enacted plan. If the Romo Trial Maps had elected to allow additional county splits, they could have increased overall compactness. But that is beside the point.

By accepting the Legislature's "tradeoff" argument, the trial court allowed the Legislature to engage in an impermissible dance. When it actually drew the district lines, the Legislature used minority protection, the classic pretext for political gerrymandering, to justify the configuration of Districts 13 and 14. After it became apparent that this claim was baseless, the Legislature suddenly argued in litigation that preserving the boundaries of Tampa Bay and Pinellas County *might* harm tier-two compliance elsewhere in the map. To allow this maneuver gives too much leeway to a Legislature proven to have acted with partisan intent. It also imposes too great a burden on Plaintiffs. Because improving compactness may result in additional boundary splits and vice versa, Plaintiffs would have to present an array of alternative maps foreclosing any possible *post hoc* attack on an alternative configuration that the Legislature or its counsel might muster.

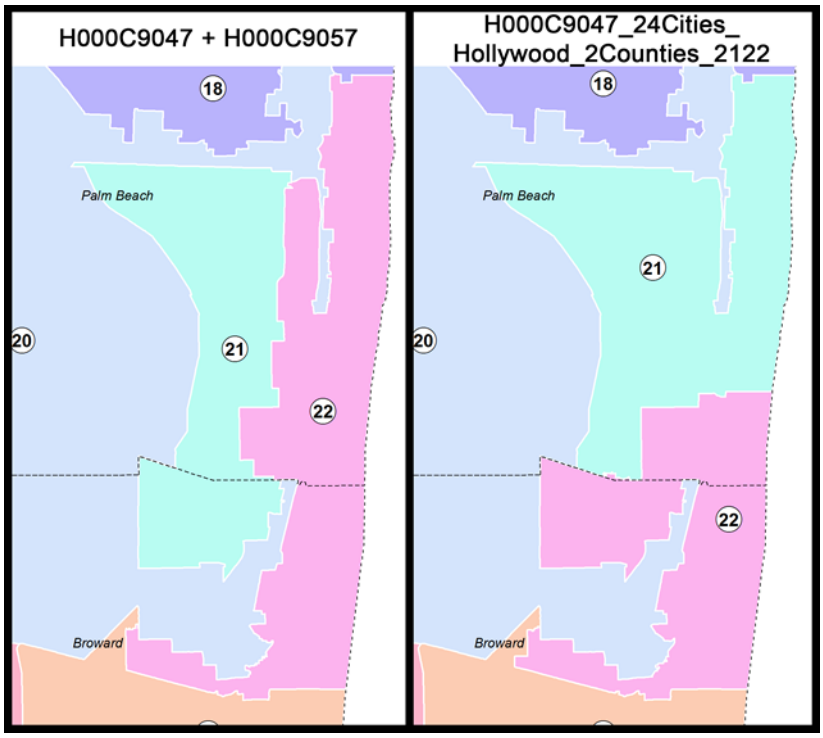
Even if there was not a finding of overall partisan intent and Districts 13 and 14 were not drawn based on race, Plaintiffs would not have needed to present an

alternative map that improves upon the enacted map by every metric or that addresses every possible criticism, whether or not a basis for the Legislature's decisionmaking. Plaintiffs' unrebutted expert testimony and the alternative configuration in the Romo Trial Maps established that non-retrogression – the Legislature's stated goal – could be achieved without crossing Tampa Bay and dividing Hillsborough County. That would have been enough to establish a violation of tier two and to create an inference of improper intent even if the burden of proof remained with Plaintiffs.

For the foregoing reasons, the trial court applied the incorrect standard in evaluating Districts 13 and 14 and erred in rejecting Plaintiffs' tier-one and tier-two challenges. Accordingly, the trial court's ruling should be reversed.

3. **Districts 21 and 22**

The Legislature knew of, but inexplicably rejected, a version of Districts 21 and 22 that no party disputes is more tier-two compliant. In the closed-door meetings to negotiate the final districts, the House presented a modified version of H000C9043 with Districts 21 and 22 in a "stacked" East-West orientation, rather than the North-South configuration in the 2012 Congressional Plan.



Kelly provided undisputed testimony that the alternate configuration of Districts 21 and 22 was more compact and broke fewer political boundaries than the North-South orientation, without causing any minority protection concerns. (T8:951-53.) Gaetz summarily rejected the stacked configuration without any explanation; it did not make its way into the 2012 Congressional Plan. (T8: 954.)

Despite an admittedly superior alternate configuration, the trial court expressed a general concern that a stacked orientation **might** cause neighboring District 20 to cease being majority-minority. The trial court also noted that the "stacked" configuration in several draft maps led to undesirable features – *i.e.*, a more irregular boundary with Hendry Country, an incursion into District 21 by District 20, and a less visually compact District 23. (R86:11,325-26.) Believing

that the Legislature made "tradeoffs" for the sake of "compact districts in the region as a whole," the trial court declined to invalidate Districts 21 and 22. (R86:11,326.)

The trial court again held Plaintiffs to an excessive burden, requiring them not only to show a constitutional violation, but to exclude any conceivable justification – whether or not the Legislature actually relied on it. No party ever claimed that Districts 21 and 22 had to be in an East-West configuration to avoid vote dilution in District 20, and the trial court even recognized that Plaintiffs offered variants of Districts 21 and 22 in a stacked configuration that left District 20 as a majority-minority district. (R86:11,326 & n.16.) Yet the trial court still required Plaintiffs to rebut a minority protection argument that the Legislature never made and that the undisputed evidence at trial demonstrated was not present.

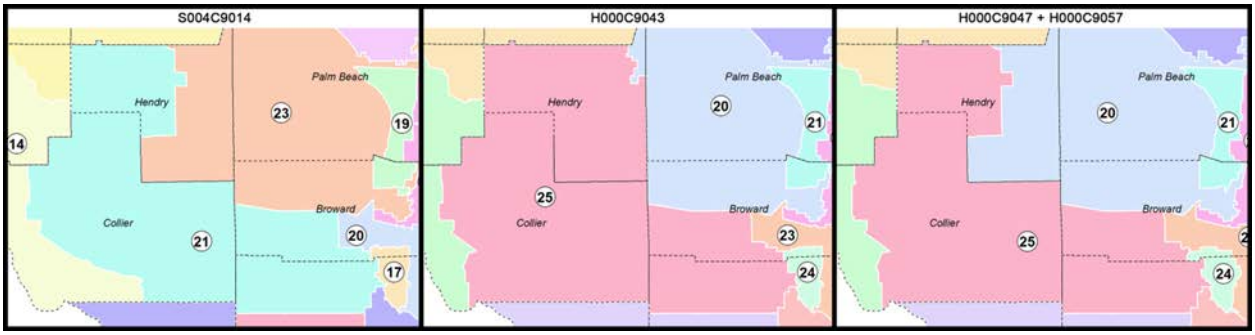
Nor did the Legislature ever claim that it rejected the stacked configuration for the sake of tier-two "tradeoffs." The House believed a stacked configuration to be more compliant, and Gaetz rejected it without any explanation during a closed-door exchange that was replete with partisan choices. (T8:950-54.) The staffers whom the trial court found did not participate in the partisan conspiracy were thus summarily overridden by one of the legislators at the very center of it.

By showing tier-two violations in Districts 21 and 22 that lack any tier-one justification, Plaintiffs met their burden. They need not go further and exclude any

conceivable *post hoc* rationalization the Legislature might offer. Therefore, the trial court's decision to uphold Districts 21 and 22 should be reversed.

4. District 25

For most of the redistricting process, the House's proposed version of District 25 included nearly all of Hendry County. The Senate version, meanwhile, shifted a significant portion of Hendry County from District 25 to District 20 based on unspecified Section 5 concerns. (T7:782-85.) During the non-public meetings in late January 2012, the House agreed to adopt the Senate version, reducing the compactness of both District 25 and surrounding District 20.

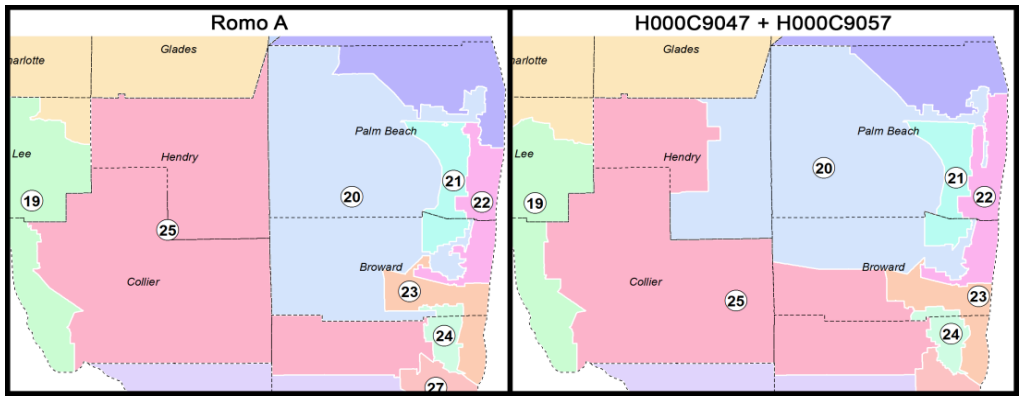


	CD 25			CD 20		
	Reock	Convex Hull	Polsby Popper	Reock	Convex Hull	Polsby Popper
S/C9014	.38	.73	.32	.48	.74	.19
H/C9043	.47	.82	.42	.49	.74	.22
H/C9047-9057	.40	.73	.32	.48	.74	.22

The Senate had not performed a functional analysis to determine whether a greater portion of Hendry County was needed in District 20 to avoid retrogression. (T6:738-46.) The House, for its part, had already determined that its versions of District 20 that did not further invade Hendry County were lawful and compliant. (T9:1095.) The Legislature, therefore, had no evidence before it that the constitu-

tional prohibition on retrogression required tier-two requirements to be sacrificed. By deciding to render Districts 20 and 25 less compact without any tier-one justification, the Legislature violated Article III, Section 20.

The Romo Trial Maps provide further evidence of the Legislature's needless deviation from tier-two requirements by demonstrating that it is possible to keep Hendry County whole within Proposed District 25. Dr. Ansolabehere testified, and the Legislature's expert agreed, that Proposed District 25 would not result in retrogression. (T14:759-60.)[22] As shown in the figure below, by breaking the Hendry County line without any tier-one justification, the Legislature violated Article III, Section 20.



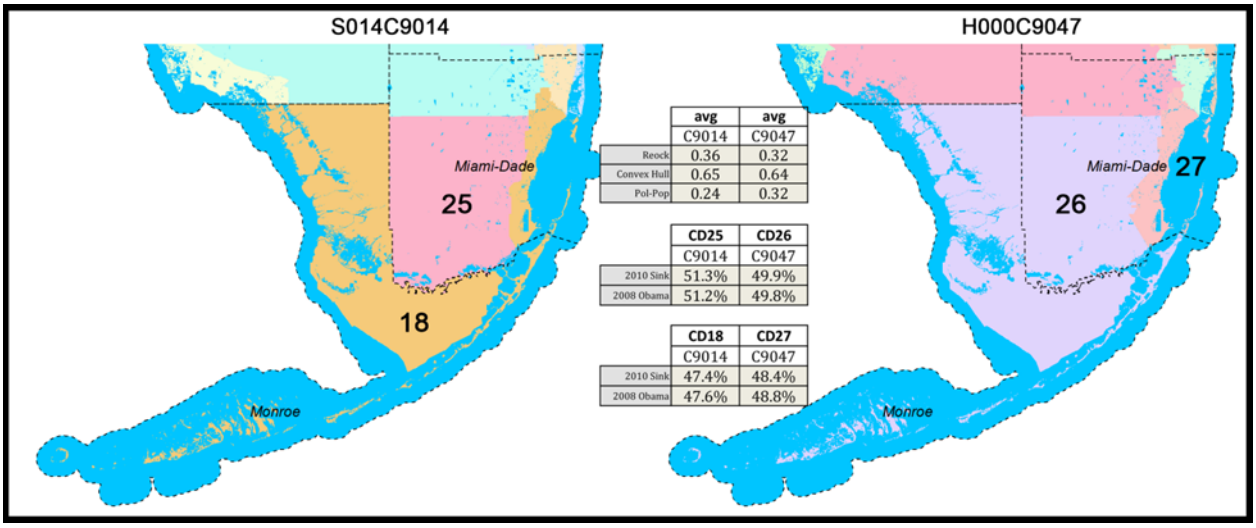
The trial court rejected Plaintiffs' challenges because it believed that any tier-two deviation in District 25 was *de minimis*. (R86:11,327.) No constitutional vi-

[22] The trial court "credit[ed] the testimony of Professor Moreno that [the Romo Trial Maps] could have a retrogressive effect on the Hispanic majority districts in South Florida." (R86:11,327.) Professor Moreno, however, reached this conclusion only as to District 26. He conceded that Proposed Districts 25 and 27 in the Romo Trial Maps would *not* result in retrogression. (T18:2357-61.)

olation, however, can properly be disregarded as too small in the "zero sum game" of redistricting where "subtle shifts" make all the difference – particularly when it has been proven that the process was marred with partisan intent. Accordingly, the trial court should have invalidated District 25.

5. **Districts 26 and 27**

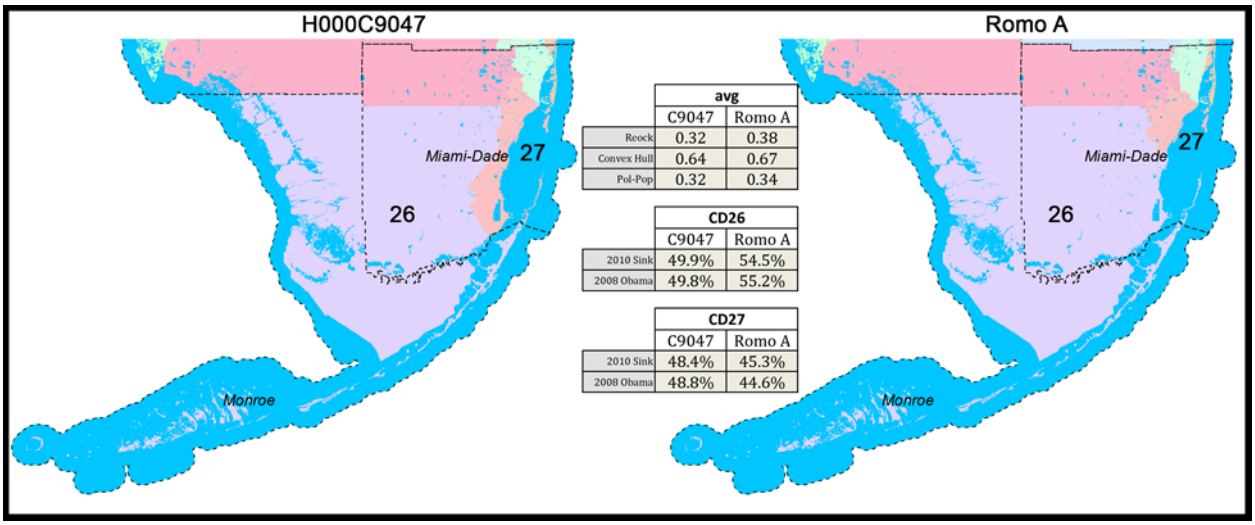
The Legislature adopted the House's configuration of Districts 26 and 27, which needlessly divides Homestead. As the figures below illustrate, the division of Homestead turned what would otherwise have been one Republican district and one Democratic district into two Republican-leaning districts. The Senate's proposed maps and the Romo Trial Maps both demonstrate that it is possible to keep Homestead whole while improving compactness and avoiding retrogression.

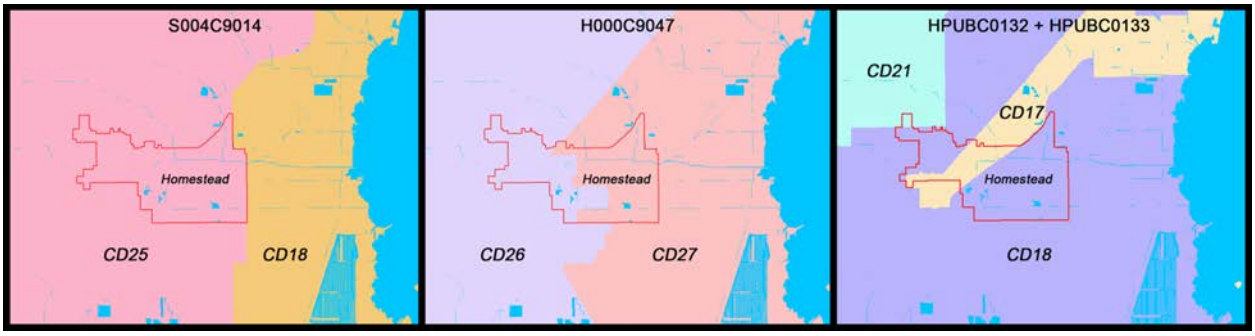


	avg C9014	avg C9047
Reock	0.36	0.32
Convex Hull	0.65	0.64
Pol-Pop	0.24	0.32

	CD25 C9014	CD26 C9047
2010 Sink	51.3%	49.9%
2008 Obama	51.2%	49.8%

	CD18 C9014	CD27 C9047
2010 Sink	47.4%	48.4%
2008 Obama	47.6%	48.8%





The partisan implications of dividing Homestead were well known to the operatives. From his earliest known draft map in July 2011, Terraferma included analogs of Districts 26 and 27 that split Homestead to improve the Republican performance of District 26. (Ex. CP-1445 at 4; SR26:4113.) The operatives included the same feature in the maps fraudulently submitted in Posada's name. (Ex. CP-586, CP-587; SR26:4115; T10:1200.) Later, when the Senate released its draft map without a split of Homestead, Terraferma remarked: "that CD 25 [Enacted District 26] is pretty weak :(" Heffley responded, "The House needs to fix a few of these." When Terraferma responded "Yes," he was sure to copy his colleague Reichelder-

fer, who had close ties to Cannon. (Ex. CP-387.) Ultimately, the Legislature "fixed" the performance issues in Districts 26 and 27 by enacting the House configuration that split Homestead.

Although the Legislature offered purported non-retrogression concerns as its justification for dividing Homestead, Hispanics are a supermajority of the VAP in Districts 26 and 27. Based on these demographics and a racial polarized voting analysis, Dr. Ansolabehere testified that there is no minority protection justification for dividing predominantly African-American Homestead. Through the Romo Trial Maps, he demonstrated that this split of Homestead could be eliminated while still maintaining both districts as majority Hispanic districts and more faithfully complying with tier-two criteria. (T14:1729-30, 1760-61.)

The trial court rejected Plaintiffs' challenge to Districts 26 and 27 based on (1) its belief that any tier-two deviations are *de minimis*, and (2) Professor Moreno's testimony regarding minority protection issues in South Florida. (R86:11,327.) In so ruling, the trial court misconstrued the requirements for establishing a tier-two violation, allowed speculation and anecdote to take the place of legitimate expert opinion, and disregarded evidence of tier-one violations.

First, as with Plaintiffs' other challenges, the trial court erred in looking for "drastic" tier-two deviations and rejecting those considered *de minimis*. The trial court's attempt to categorize tier-two violations is unsupported by the language of

Article III, Section 20 and invites abuse – particularly if the Legislature is allowed such leeway even after being found to have acted with improper intent.

Second, for the trial court to rely on expert testimony, it cannot be "based on speculation and conjecture, not supported by the facts, or not arrived at by a recognized methodology." *Daniels v. State*, 4 So. 3d 745, 748 (Fla. 2d DCA 2009) (alteration, internal quotation marks, and citation omitted). Thus, "no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning." *Div. of Admin., State Dep't of Transp. v. Samter*, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981). Professor Moreno testified only that there is a "possibility" of a scenario under which a non-Hispanic white could be elected in Proposed District 26 in the Romo Trial Maps, primarily because he believes that it might be difficult to recruit Hispanic candidates if then incumbent Representative Joe Garcia retired or passed away. (T18:2334-35.) Anecdotal speculation that perceived weaknesses in the existing field of candidates might produce a "possibility" of electing a non-Hispanic candidate hardly establishes retrogression.[23]

[23] Professor Moreno also conceded that (1) in the 2002 redistricting cycle, he determined that Hispanic VAP and registration numbers lower than those in Proposed District 26 were sufficient for Hispanics to elect their preferred candidates; (2) he did not conduct a racially polarized voting analysis which would have shown cohesive voting between African Americans and Hispanics in the area; and (3) Proposed District 26 would have performed for the Hispanic-preferred candidate in the 2012 presidential election. (T. 2352-53, 2360-63, 2371.)

But, even accepting Professor Moreno's testimony, there was no need to divide Homestead. The Legislature's own alternative, analog District 25 in S004C9014, is far more compact, keeps Homestead whole, and has **higher** Hispanic VAP and **higher** Democratic performance than Enacted District 26, further assuring that a Hispanic-preferred candidate would prevail.

	Democratic Performance			Hispanic VAP & Voter Registration			2010 Dem. Primary Turnout		2010 Dem. Registered		2012 Dem. Registered	
	2008 Pres.	2010 Gov.	2012 Pres.	% VAP	% RV 2010	% RV 2012	% Blk.	% His.	% Blk.	% His.	% Blk.	% His.
CD26												
C9014*	51.2%	51.3%	56.0%	74.1	61.5	62.9	35.0	26.8	26.5	46.3	26.6	48.4
C9057	49.8%	49.9%	53.4%	68.9	55.5	57.3	25.2	22.7	21.2	42.6	21.2	45.3
Romo A&B	55.2%	54.5%	58.6%	65.0	50.6	52.7	33.4	19.3	28.1	38.9	27.9	41.5
CD27												
C9014*	47.6%	47.4%	50.9%	70.0	53.2	54.8	10.0	25.2	10.8	41.4	10.0	44.8
C9057	48.8%	48.4%	53.3%	75.0	59.2	60.5	15.6	29.2	21.4	42.6	15.8	48.3
Romo A&B	44.6%	45.3%	49.4%	77.6	63.7	64.4	7.5	32.9	7.4	50.2	7.2	53.4

Third, the trial court disregarded evidence of improper partisan intent in Districts 26 and 27. The division of Homestead benefited Republicans, was not justified by legitimate minority protection considerations, was a feature of the Posada maps and the operatives' communications, and was among the highly partisan decisions made in the late January 2012 non-public meetings between the House and Senate. These factors, along with the evidence of overall partisan intent, established a tier-one violation.

III. BECAUSE THE LEGISLATURE HAS TWICE FAILED TO DRAW CONSTITUTIONAL DISTRICTS, THE COURT SHOULD CRAFT A MEANINGFUL REMEDY.

It remains for this Court to decide how it should address the Legislature's ongoing refusal to comply with the Florida Constitution. The Legislature will no doubt argue—as it has on other occasions—that if the Court strikes down its revised plan, then the only available remedy is to allow the Legislature to try, yet again, to enact a valid redistricting plan. But neither common sense nor the law requires that result. Instead, this Court should formulate its own plan to ensure that the voters of Florida are not deprived of their right to vote in constitutional districts. If this Court elects not to remedy this constitutional violation itself, it should at least give the Legislature clear instructions so that this process does not continually repeat until it becomes moot with the 2020 census.

A. The Court Has the Authority—and Obligation—to Formulate and Adopt a Constitutionally Valid Redistricting Plan.

In earlier briefing, the Legislature argued that Florida courts have no authority to draw congressional redistricting maps. (R85:11130, 11,142 n.9.) But that is simply wrong. In fact, both the United States Supreme Court and this Court have held that state courts are not only **authorized** but **obligated** to devise lawful voting plans where, as here, legislative bodies cannot or will not do so. *See Growe v. Emison*, 507 U.S. 25, 37 (1993) (holding that state courts are appropriate agents of apportionment, and that the "District Court erred in not deferring to the state

court's timely consideration of congressional reapportionment"); *Apportionment I*, 83 So. 3d at 608 ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the U.S. Supreme Court] but appropriate action by the States in such cases has been specifically encouraged.").

Other courts have reached the same conclusion. *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003) (explaining that "courts are constitutionally required to draw constitutional congressional districts when the legislature fails to do so"); *In re 2003 Apportionment of State Senate & U.S. Congressional Dists.*, 827 A.2d 844, 845 (Me. 2003) (adopting congressional map in face of legislative inaction); *Alexander v. Taylor*, 51 P.3d 1204, 1209 (Okla. 2002) ("[B]oth state and federal courts have jurisdiction to craft both legislative reapportionment and congressional redistricting plans when, as here, the legislature has failed to act.").

Accordingly, this Court has the authority to formulate a valid redistricting plan to remedy the Legislature's repeated attempts to undermine Article III, Section 20. And a judicially drawn map is particularly appropriate where, as here, the unlawful intent of the Legislature has already been proven. Nothing in the record suggests that these legislators and their allies—many of whom have opposed the FairDistricts Amendments from the beginning—will suddenly embrace the lan-

guage and intent of the Amendments. To the contrary, the evidence strongly suggests that they will, yet again, seek to evade the will of the voters if given a third bite at the proverbial apple.

Enough is enough. After more than two years of litigation, two elections held under unlawful voting maps, and two failed legislative attempts to enact a valid map, it is time to enforce the fundamental rights guaranteed by Article III, Section 20. *See Desena v. Maine*, 793 F. Supp. 2d 456, 462 (D. Me. 2011) ("Constitutional violations, once apparent, should not be permitted to fester; they should be cured at the earliest practicable date."). The only way to ensure that long-deferred outcome is to adopt a redistricting plan formulated by this Court. *See DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1083 (N.D. Fla. 1992) ("[W]hen the legislature is unable to adopt a redistricting plan, the obligation of devising a redistricting scheme falls upon the courts."). [24]

This Court could formulate its own redistricting plan independently, adopt one of Plaintiffs' alternative maps (or a combination of Plaintiffs' alternative maps), or rely on a redistricting expert to prepare a constitutional redistricting plan. *See In re Petition of Reapportionment Comm'n*, No. SC 18907, Order Directing Special Master (Conn. Jan. 3, 2012) (ordering special master to propose congres-

[24] Notably, the Florida Constitution expressly contemplates judicial apportionment when the Legislature fails to produce a constitutional state House or Senate plan. *See* Art. III, § 16(b), (c), Fla. Const.

sional plan for court's adoption); Fla. R. Civ. P. 1.570(c)(3). If this Court chooses to utilize an expert, Plaintiffs will provide a list of proposed experts within one business day of this Court's request.

B. Alternatively, the Court Should Assist the Legislature So That It Can Adopt a Constitutional Apportionment Plan.

If this Court elects not to adopt its own plan, then it should at least adopt a remedial approach beyond simply giving the Legislature another mulligan and hoping for the best.

Ideally, the Court should still either craft its own map or pick one or more of Plaintiffs' proposed plans and advise the Legislature that this plan or plans would pass constitutional muster. That, at least, would give the Legislature the option of adopting a plan that is indisputably lawful. If the Legislature were to adopt such a map, this litigation would end. Even if it were to use that map as a starting point and make any tweaks that it believes are appropriate to meet the FairDistricts' criteria, the likelihood of a further challenge would be much reduced or at least its scope would be narrowed.

Regardless, this Court should make clear that any new plan must actually remedy the clear result of the Legislature's prior constitutional violations, and that any substantial partisan or racial imbalance in the new plan will result in further strict scrutiny. Beyond that, it should provide additional guidance on the tier-one and tier-two violations in the revised plan to avert further partisan gamesmanship.

Cf. Apportionment I, 83 So. 3d at 667-69 (providing clear and specific guidance as to how a particular Florida Senate district would have to be redrawn to comply with the Florida Constitution).

For example, the Court should clarify that the Legislature cannot cure District 5's fundamental tier-two defects—namely, that District 5 is "visually not compact, bizarrely shaped, and does not follow traditional political boundaries as it winds from Jacksonville to Orlando"—without abandoning District 5's serpentine, North-South configuration. And because District 5 was drawn with partisan intent, the Legislature should also be prohibited from drawing a new district that needlessly leaches minority or Democratic voters from surrounding areas to accomplish the same partisan result. *See Benavidez v. Irving Indep. Sch. Dist.*, No. 3:13-CV-0087-D, slip op. at 55 (N.D. Tex. Aug. 15, 2014) ("[I]n light of the court's finding that District 6 is inadequate as presently configured, the court will not approve a proposed remedy that only adjusts immaterially the boundaries of District 6.").

Similarly, Plaintiffs have shown that the Legislature intentionally manipulated Districts 13 and 14 to benefit the Republican Party. By needlessly crossing Tampa Bay and dividing Pinellas County to claw Democratic voters out of District 13, the Legislature turned two solidly Democratic districts into one very solid Democratic district and one district that Republicans could win. If these districts are invalidated, the Legislature should not be permitted to restore partisan imbal-

ance through other means—by, for example, merely shifting Republican and Democratic population from surrounding areas to meet the same performance goal. Demanding that improper partisan outcomes be removed from the remedial map is the only effective means of remedying the harm done by a partisan redistricting process and fulfilling the constitutional mandate to eradicate improper intent, regardless of degree, from reapportionment.

Finally, in light of the history of this case and the trial court's finding of partisan intent, this Court should impose procedural safeguards. For example, this Court should order the Legislature to (1) conduct in public all meetings and communications between legislators, staffers, and others regarding a revised plan, (2) conduct the map-drawing process itself in a public forum and require that all changes to any map be made in public view, and (3) refrain from deleting any documents relating to a revised plan. Absent such guidance and ground rules, the will of the voters will almost certainly be thwarted once again, and Floridians will come to see their Constitution as a dead letter.

IV. THE TRIAL COURT SHOULD HAVE ALLOWED ROMO PLAINTIFFS TO REOPEN THEIR CASE TO INTRODUCE THE EMAIL PRODUCED BY THE NRCC AND RNC.

On June 4, 2014, the last day of trial, the NRCC and RNC produced an email exchange between Heffley and Hofeller in response to a June 3, 2014 order issued by the Superior Court for the District of Columbia. (R83:10,883-10,917.) In

the email, Hofeller thanked Heffley for "guiding the Senate through the thicket" after this Court approved the Revised 2012 Senate Plan, and Heffley responded by noting that the outcome was a "[b]ig win," with the "[w]ors[t] case" being a "26-14" map favoring Republicans. (R83:10,885.)

The trial court may allow a party to present additional evidence after the close of evidence based on "(1) the timeliness of the request, (2) the character of the evidence sought to be introduced, (3) the effect of allowing the evidence to be admitted, and (4) the reasonableness of the excuse justifying the request to reopen." *Grider-Garcia v. State Farm Mut. Auto.*, 73 So. 3d 847, 849 (Fla. 5th DCA 2011). Although perhaps cumulative, the Heffley email provides evidence of collaboration, as it characterized Heffley as "guiding" the Legislature through the redistricting process. Plaintiffs could not have introduced the evidence in their case because it had not yet been produced, and they moved promptly for admission once it was obtained. Because all relevant factors favor Plaintiffs, the trial court abused its discretion in denying Plaintiffs' request to reopen the evidence.

CONCLUSION

For the foregoing reasons, the Court should reverse and either impose a constitutionally compliant redistricting plan itself or allow the Legislature to adopt another new plan with the specific directions and guidance set forth above.

Respectfully submitted,

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