IN THE SUPREME COURT OF FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA et al.,
Appellants/Cross-Appellees,
v.

KEN DETZNER, et al.,
Appellees/Cross-Appellants.

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

APPELLANTS' CORRECTED REPLY BRIEF/ ANSWER BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT TO ASSIST THE READER

This brief will use the same abbreviations and citation conventions listed in the Preliminary Statement of the initial brief, with the following additions:

- (I.B. __) indicates citations to the Corrected Initial Brief;
- (S.I.B. __) indicates citations to the Supplemental Initial Brief;
- (A.B. __) indicates citations to the Answer Brief/Initial Brief on Cross-Appeal filed by the Legislature;
- (NAACP B. __) indicates citations to the Answer Brief filed by the NAACP;
- (Am. B. ___) indicates citations to the Amici Curiae Brief filed by LatinoJustice PRLDEF, Florida New Majority, and Mi Familia Vota;
- (SR28:___) indicates citations to the supplemental record attached to Appellants' motion to supplement the record, filed on January 9, 2015;
- (S.A. __) indicates citations to the Supplemental Appendix to the Legislative Parties' Answer Brief and Initial Brief on Cross-Appeal.

REPLY ARGUMENT ON MAIN APPEAL

The answer briefs join the issues on appeal in an unusual posture. Though part of the Legislature's answer brief purports to be a "cross-appeal," it does not seek reversal of any trial court ruling. The relief sought by every appellee is an affirmance of the judgment below. But because the trial court's findings of fact so clearly required a broader finding of unconstitutionality and a more meaningful remedy, the appellees argue for affirmance not only by trying to water down the critically important constitutional principles set forth in the initial brief, but also by challenging the trial court's findings of fact. But this trial judge was no "tipsy coachman." His findings of fact were lucid and well supported, though his ultimate legal conclusions did not get him to the destination our constitution requires.

I. THE LEGISLATURE'S REDISTRICTING PLAN IS SUBJECT TO STRICT SCRUTINY.

The Legislature claims that there is no need for strict scrutiny because, although it admittedly relied on race, it purportedly did so only "to **effectuate** and **implement**" the constitutional minority protection requirements. (A.B. 24.) Courts do not take such assurances at face value. Racial classifications are subject to "strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign … or whether they misuse race … without a compelling justification." *Bush v. Vera*, 517 U.S. 952, 984 (1996); *see also City of Richmond v. J.A.*

Croson Co., 488 U.S. 469, 493 (1989) (explaining that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race").

Exacting scrutiny is particularly warranted in redistricting cases under the Florida Constitution because minority protection has been a classic pretext for gerrymandering. *See, e.g.*, *Johnson v. Mortham*, 926 F. Supp. 1460, 1490 (N.D. Fla. 1996) (holding that "the record belie[d]" minority protection claim because "Republicans in the State Senate were more interested in aggregating Democrats in a single district in northeastern Florida than in creating an African-American majority-minority district"). Indeed, in this very case, the trial court found that the Legislature tried to use minority protection as cover for impermissible partisanship. (R86:11,308.)

Although the Legislature argues that strict scrutiny is limited to substantive claims based on the Equal Protection Clause, it is regularly applied outside Equal Protection cases, as when a statute implicates fundamental rights. *See Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001); *Turner v. State*, 937 So. 2d 1184, 1185 (Fla. 5th DCA 2006). Regardless of the cause of action asserted, race-based decisionmaking or impairment of fundamental rights triggers strict scrutiny.

The Legislature cites a single inapposite case to support its position. In *Harris v. Arizona Independent Redistricting Commission*, the court declined to apply strict scrutiny in a "one person, one vote" challenge, which does not depend on ra-

cial classifications. 993 F. Supp. 2d 1042, 1073 (D. Ariz. 2014). Article III, Section 20, in contrast, specifically requires protection of minorities and permits the Legislature to deviate from tier-two principles "only to the extent necessary" to avoid retrogression or vote dilution. *See Apportionment I*, 83 So. 3d 597, 626, 640 (Fla. 2012). Because racial considerations are central to the analysis and the Legislature repeatedly invoked minority protection to justify its decisions, strict scrutiny is required.

The Legislature claims that *Apportionment I* implicitly rejected strict scrutiny for race-based decisions or the plan generally, even after a finding of improper intent. Glossing over the express discussion of strict scrutiny in the opinion, *Apportionment I*, 83 So. 3d at 627, the Legislature notes that this Court sometimes referred to **Plaintiffs'** burden. Although strict scrutiny requires the Legislature to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest," Plaintiffs "bear the burden of rebutting the evidence put forward by" the Legislature and "persuading the Court that [it has] not made a sufficient showing to satisfy strict scrutiny review." *Johnson*, 926 F. Supp. at 1467 (citations and internal quotation marks omitted). This Court's references to Plaintiffs' burden merely reflect the shifting of burdens under a strict scrutiny analysis.

This Court should reject the Legislature's invitation to endorse a more lenient standard than ordinarily governs cases implicating racial classifications and

fundamental rights. After all, "the framers and voters clearly desired more judicial scrutiny of … apportionment plan[s], not less." *Apportionment III*, 118 So. 3d 198, 205 (Fla. 2013). Accordingly, this Court should strictly scrutinize the entire plan or, at the very least, districts drawn for purported minority protection reasons.

II. CIRCUMSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING OF COLLUSION WITH OPERATIVES.

The Legislature would impose upon Plaintiffs the burden of proving each aspect of the conspiracy with partisan operatives by direct evidence. It insists, for example, on proof that a particular operative and legislator "sat together" in a room to draw districts, and it challenges Plaintiffs to "name the legislator or staff member who devised the public-submission scheme." (A.B. 27-28.) For the Legislature, only an admission or other direct evidence proves partisan intent, and any circumstantial evidence is mere speculation and innuendo. This Court has, however, already recognized that partisan intent may be proved by "both direct and circumstantial evidence," *Apportionment I*, 83 So. 3d at 617, and has long held that conspiracies may be proved by circumstantial evidence, *see, e.g.*, *Resnick v. State*, 287 So. 2d 24, 26 (Fla. 1973). In conspiracy cases, "direct evidence is ordinarily in the possession and control of the alleged conspirators and can seldom be obtained," such that "a conspiracy usually is susceptible of no other proof than that of circumstantial evidence." *Anheuser-Busch, Inc. v. Campbell*, 306 So. 2d 198, 199 (Fla. 1st DCA 1975) (citation and internal quotation marks omitted). If direct evidence were

required, then "any group of co-conspirators could prevail in a lawsuit involving that conspiracy merely by agreeing among themselves to testify that no conspiracy existed and to coordinate their testimony to accomplish that end." *Id.* at 200.

Proving a conspiracy by direct evidence was particularly difficult in this case because the Legislature destroyed most of the relevant emails, communicated through non-traceable or difficult-to-trace methods, and conducted key meetings in secret. (I.B. 15-16, 20, 25-26.) In addition, when Plaintiffs sought telephone records evidencing communications with operatives, the Legislature raised meritless objections and then flatly ignored a court order to produce the records, leaving Plaintiffs unable to use them in trial questioning.[1]

The same pattern continued at trial. Key players often claimed not to remember what had been said or done, or simply offered transparently false testimony about their activities. (I.B. 9, 17.) The operatives misrepresented their map-

[1] In March 2014, Romo Plaintiffs served third-party subpoenas on Pepper, Cannon, Reichelderfer, and AT&T seeking records of telephone conversations to further support Plaintiffs' allegations of collaboration among legislators and operatives. (SR28:4645-66.) The Legislature objected (SR28:4668-74), but the trial court found the records to be "perfectly discoverable," and ordered that they be produced with certain redactions. (SR28:4836-44.) "Obviously," the trial court stated at the time, Plaintiffs "need [the records] very quickly," and counsel for the House responded, "Sure." (SR28:4844.) But despite repeated requests from Plaintiffs' counsel during and after trial, the records were never produced. (T24:3065-66.) The Legislature has never explained its concealment of these records (or its failure to comply with the trial court's order), and is apparently satisfied that it has "run out the clock" on the issue.

drawing efforts as a mere pastime (SR21:2895-2900), and legislative insiders gave "unusual" and "illogical" explanations for emails reflecting operative feedback on draft legislative maps (R86:11,317-18). The trial court was not persuaded.

The Legislature offers a lengthy, skewed presentation of the circumstantial evidence putting the case in a light most favorable to it. The apparent goal of this effort is to invite this Court to reweigh the evidence and reach a different conclusion, even though the Legislature seeks affirmance of the judgment below and does not purport to seek reversal of any order by the trial court, even on cross-appeal. Ultimately, the Legislature acknowledges that factual findings "supported by competent, substantial evidence" must be upheld (A.B. 16), and does not come close to meeting the high standard necessary to discount a finding of fact. Despite the Legislature's prolonged efforts to recast the evidence in a more favorable light, this Court cannot substitute its judgment for that of the trial judge, who was able to fully evaluate the credibility of the witnesses on questions of fact. *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 676 (Fla. 2004); *City of Williston v. Cribbs*, 82 So. 2d 150, 152 (Fla. 1955).

In any event, the Legislature takes great liberties with the record in criticizing the trial court's finding of collusion. For example, the Legislature claims that there is no evidence that the operatives "provided a map to a legislator or staff member" (A.B. 27), but it is undisputed that they did so using intermediaries and

false names. (S.I.B. 1.) The emails and meetings unearthed in discovery were not merely "among the operatives" (A.B. 27), but involved legislators and staffers. (I.B. 8-12.) These communications, in fact, reflected feedback on "how districts should be drawn" (A.B. 27), as well as clandestine efforts to keep the operatives involved in the process. (I.B. 15-20.)

The Legislature casts Pepper as a misguided yet well-intentioned staffer who merely gave previews of draft maps to an operative who happened to be "his personal friend," and it argues that the Pepper/Reichelderfer backchannel had no impact on the redistricting process. (A.B. 33.) In its role as fact-finder, the trial court reasonably rejected this version of events because (1) Reichelderfer gave feedback to Pepper and Cannon after securing the maps, (2) distinctive features of the operatives' maps appeared in the enacted plan, and (3) all parties involved in the Reichelderfer affair lacked credibility. (R86:11,317-19.)

In arguing that it did not actually rely on the operatives' work product, the Legislature claims that a staff-prepared "casebook" referring to a Posada map and other publicly-submitted maps was merely meant to show "similarities" with (rather than "reliance" on) public maps. (A.B. 29-30.) Gaetz, however, said on the Senate floor that the Committee on Reapportionment "**relied upon**"—and did not merely note similarities with—"the publicly submitted map by Alex Posada" in the redistricting process. (Ex. CP-1141 at 248 (emphasis added).) Ironically, the Legis-

lature's "defense," if believed, would be an apparent concession that the committee did not actually rely on public input, but merely pointed to similar districts after the fact. Promising an open and transparent process, drawing districts independently of it, and then littering the record with false indications of public participation equally qualifies as a "different, separate process … undertaken contrary to the transparent effort." *Apportionment IV*, 132 So. 3d 135, 149 (Fla. 2013).

In attempting to explain away parallels with the operatives' activities, the Legislature wryly suggests that Plaintiffs must also have "collaborated with the operatives" because the HVAP of District 9 is over 40% in both the Romo Trial Maps and the Posada maps. (A.B. 30.) Plaintiffs have, of course, never argued that a single common feature between two maps shows collusion. A combination of factors established collusion, including the Legislature's repeated contact with operatives, secret transmission of maps to Reichelderfer, disproportionate reliance on those same operatives' work product, adoption of multiple districts with key similarities to operative districts, and destroying or failing to produce relevant records.

Although the Legislature argues that increasing the BVAP of District 5 over 50% was "too obvious to evidence a secret collaboration with the operatives" (A.B. 31), it forgets that no map released by the Legislature included a majority-minority District 5 before the meetings in late January 2012. (SR24:3473-3540.) If drawing a majority-minority district was "obvious," then surely a legislator, staffer,

or legislative attorney would have raised the issue earlier in the process, perhaps even publicly. The trial court rightly found the Section 2 claim to be pretextual (R86:11,319-20), and was not required to ignore the fact that a strategy consistently advocated by operatives in contact with legislative leadership suddenly surfaced in closed-door meetings.[2]

The Legislature summarily dismisses evidence of collusion in the Senate map as "hav[ing] no relevance to this appeal." (A.B. 29.) Given its prior assurances to this Court that the Senate plan was the product of an apolitical, transparent, public process, it is understandable that the Legislature now sidesteps the issue altogether. In the midst of the operatives' mapdrawing efforts, one of Bainter's collaborators stated that he was "[h]eaded up" to "TLH" and "[t]elling folks to look at" a Consultant Drawn Map. (SR21:2886-87; Ex. CP-697.) "Folks" in the Legislature evidently listened to this and similar hints, deriving at least **twelve** Senate districts partially or entirely from Consultant Drawn Maps. (S.I.B. 8-9.) Political operatives

[2] The Legislature incorrectly claims that the analog district in "the first proposal ever released by professional staff," S000C9002, which had a BVAP of 49.96%, was essentially the same as the enacted majority-minority District 5. (A.B. 31.) As the Legislature knows, a majority-minority district, *i.e.*, a district **in excess of** 50% minority VAP, has special significance in Section 2 jurisprudence. *See Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (rejecting argument that anything less than an actual majority-minority district can meet criteria for vote dilution claim). For that reason, the operatives considered a majority-minority district to be a convenient justification for tier-two deviations benefitting Republicans. (Ex. CP-386.)

later congratulated themselves on "guiding" the Legislature through the Senate redistricting process. (R83:10,885.)[3] Although the Legislature imagines an impenetrable wall between the congressional and Senate processes, the trial court correctly found it likely that "the same taint" equally affected the two plans, considering that the same decisionmakers, the same operatives, and the same partisan strategies were involved. (R86:11,319.)[4]

The Legislature casts any claim of selective deletion of documents as an "outright falsehood" that somehow "contradicts the trial court's findings." (A.B. 34.) For the Legislature, it is simply a happy coincidence that legislators and staffers deleted **virtually every** inculpatory communication with operatives, but preserved scores of documents allegedly showing an open, public process. No one

[3] Of similar vein, shortly after this Court approved the second Senate redistricting plan (having found the first to be facially invalid), Mr. Heffley, the operative praised for guiding the Senate, emailed Mr. Clark, the chief legislative aide to Senate President Don Gaetz, a cartoon of two men walking into a senate room for the "redistricting do-over special session" where one brags to the other, "In life, you don't always get a second chance to put one over on the public." (Ex. CP-1364.)

[4] For the same reason, the Court should reject the Legislature's single-sentence reply to Plaintiffs' fourth point on appeal, which is that the trial court erred by not allowing the Romo Plaintiffs to reopen their case to put the Heffley email into evidence. (A.B. 138 n.49.) Unless this Court concludes that evidence of partisan operative manipulation of the Senate process has no relevance to congressional redistricting, the trial court's ruling has no defense. The very fact that the email came from a Washington, D.C.-based national operative should suffice to show its relevance to the only redistricting plan with national implications.

admitted selective deletion, but the only reasonable inference is that it occurred—whether by specifically deleting incriminating emails or funneling them through private accounts that were routinely purged. The fact is that incriminating emails between operatives and the Legislature were ultimately obtained in discovery from the operatives, not the Legislature, which had destroyed its copies.

The Legislature contends that the purge of redistricting records is unremarkable because its leadership and staff delete public records all the time. But the testimony cited by the Legislature to support that claim raises obvious inconsistencies. Although the Legislature insists that Kelly deleted only emails not "relevant to the redistricting process" (A.B. 35), Kelly admittedly destroyed emails to Pepper transmitting the draft maps that Pepper ultimately passed to Reichelderfer (T10:1151-52). And, if Cannon did automatically delete his emails after six months (as he claimed), then his November 2011 exchanges with Pepper and Reichelderfer were not deleted **until May 2012**—months after the filing of a lawsuit in which Cannon was a named party. (*See, e.g.*, T13:1663.) This is fatal to the Legislature's claim that "once this litigation commenced, [it] acted in good faith to identify and preserve potentially responsive documents." (R74:9779.) Pepper's and Cannon's alleged deletion of **all** emails regardless of subject matter likewise contradicts the Legislature's statement under oath that it acted "[i]n strict compliance with [its] written record-retention policies" requiring a document-by-document determina-

tion whether there is "sufficient administrative, legal, o[r] fiscal significance to warrant … retention." (SR28:4511-12.)

The Legislature argues that it could not "have anticipated this Court's decision in [*Apportionment IV*]" on legislative privilege (A.B. 35), but it had determined as early as January 2011 that no privilege applied to its communications with operatives (T1:29-35, 46). In fact, the Legislature claims to have convened an in-person meeting specifically "to make sure that [the operatives] understood very clearly that there was no privilege." (T4:396.) Thus, the Legislature cannot seriously assert a good-faith belief that it could withhold or delete communications with operatives on legislative privilege grounds.

Ultimately, this Court need not sort out how or why the Legislature came to delete virtually every document undermining its claim of an open and transparent redistricting process. The trial court determined that it could draw an adverse inference based on the Legislature's spoliation of evidence, and the Legislature has not cross-appealed the spoliation order. (R76:9986-87.) The trial court was, in any event, justified in drawing an adverse inference even if the Legislature's assurances of pure motives are accepted. Sanctions may be imposed whether a spoliator destroys evidence "inadvertently or intentionally." *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). While intentional spoliation justifies the harshest of sanctions, including the striking of pleadings, Florida courts

may impose rebuttable presumptions of liability or adverse inferences against parties who destroy evidence even unintentionally. *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005). In redistricting cases, courts must be particularly vigilant to guard against and penalize spoliation because "[i]f the Legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery, the purpose behind the voters' enactment of the article III, section 20(a), standards will be undermined." *Apportionment IV*, 132 So. 3d at 149.

Although the Legislature argues that there was no duty to preserve (A.B. 35-36), an adverse inference, unlike harsher sanctions, "is not based on a strict legal 'duty' to preserve evidence," but "arise[s] in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence." *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003), *approved*, 908 So. 2d 342; *see also Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006) (legal duty to preserve only required to compel an adverse presumption, but not to support an adverse inference). Regardless, the Legislature did have a duty to preserve here because litigation was not only foreseeable, but **actually foreseen**, throughout the redistricting process. *See, e.g., Am. Hospitality Mgmt. Co. of Minn. v. Hettiger*, 904 So. 2d 547, 549

(Fla. 4th DCA 2005) (finding duty to preserve where defendant "could reasonably have foreseen the claim").[5]

Although spoliation principles justify an adverse inference, the same result follows from this Court's instruction that "an entirely different, separate process" at odds with the Legislature's proclamation of openness and transparency "would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate." *Apportionment IV*, 132 So. 3d at 149. Here, the Legislature **said** one thing, promising the citizens an "open, transparent and publicly participatory reapportionment process." (Ex. CP-619 at 8.) The Legislature, however, **did** the opposite, secretly communicating with partisan operatives, making major decisions in non-public meetings, and purging incriminating documents from the record. If, as the Legislature argues, conducting an open public process weighs in favor of finding proper intent, then promising and failing to conduct such a process surely must weigh against it.

The Legislature similarly misses the point when it argues that non-public meetings are the "standard method of reconciling" bills. (A.B. 36.) According to

[5] The cases cited by the Legislature are inapposite because they address independent causes of action for spoliation, rather than discovery sanctions. *Gayer v. Fine Line Constr. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007); *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004). For independent causes of action, some Florida courts have required a contract, statute, or discovery request before imposing a duty to preserve.

the Legislature, any suggestion of impropriety regarding such meetings reflects "a glaring unfamiliarity with the legislative process" that, if indulged, would "break down" and "hobble the separation of powers." (A.B. 37-38.)

That argument is irrelevant to this appeal, as the trial court did not base its finding of improper intent on the non-public meetings. Nevertheless, the Legislature's rhetoric cannot mask the fact that redistricting challenges are "completely unlike … a traditional lawsuit challenging a statutory enactment." *Apportionment IV*, 132 So. 3d at 149-50. Although backroom deals may be grudgingly accepted for ordinary legislation, the judiciary has an "explicit constitutional mandate to outlaw partisan political gerrymandering and improper discriminatory intent" in redistricting. *Id.* at 137. To enforce the constitutional mandate, courts must closely scrutinize both public and non-public dealings. And in weighing the evidence, making credibility determinations, and drawing inferences, courts may account for the structuring of decisionmaking to avoid public disclosure. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The specific sequence of events leading up to the challenged decision … may shed some light on the decisionmaker's purposes.").

To date, the Legislature has never explained why it did not conduct in public view the critical final discussions affecting virtually every district. Nor has it explained why the four leaders involved in those discussions did not simply sit down

in the same room rather than transmit instructions to one another through intermediaries.[6] The only reasonable conclusion is that the participants conducted seriatim meetings involving only two legislators at a time to avoid public scrutiny. Even if the Legislature's conduct was not a substantive violation of its internal rules or the sunshine laws, the trial court was justified in accounting for the Legislature's deviation from its promise of an open and transparent process when it made credibility determinations and drew inferences from the evidence.

III. THE ENACTED PLAN IS INVALID IN ITS ENTIRETY.

The Legislature argues that the trial court never found improper intent in the plan as a whole, but merely addressed improper intent as to District 5. (A.B. 39-40.) To advance this claim, the Legislature takes a heading out of context, emphasizing that the trial court placed its general discussion of improper intent in a section titled "Specifically Challenged Districts." (A.B. 39.) Yet the trial court arranged its findings in this manner only because it erroneously rejected whole-plan challenges as a distinct concept. (R86:11,296-97.) Despite this misapprehension, the trial court included a discrete subsection discussing "evidence of improper intent in the redistricting process **generally**" (R86:11,308 (emphasis added)), fol-

[6] Cannon, for instance, directed Kelly and Weatherford to accede to an anticipated request by the Senate to raise the BVAP of District 5 over 50%. (T8:942-43, 947-48.) The Legislature misstates the record by suggesting that Weatherford and Gaetz merely "report[ed] their progress" to Cannon and Haridopolis. (A.B. 37.)

lowed by a second subsection addressing "Evidence of Partisan Intent Specifically Related to District 5" (R86:11,319). The discussion in each subsection reveals that the trial court found improper intent both in the overall plan and individual districts.

The Legislature continues to rely on distortions of the record and cherry-picked data to argue that it acted with proper intent. Characterizing any claim of partisan imbalance as "baseless bombast," the Legislature suggests that the Revised Plan and Plaintiffs' remedial maps have the same number of Republican-performing districts. (A.B. 15.) To make this claim, the Legislature must conceal individual election results in carefully selected averages and ignore district competitiveness. The "comparison" quickly falls apart once that sophistry is accounted for. The Revised Plan, for example, produced only 11 Democratic-performing districts in 2008 and 2012 (S.A. 2), whereas Plaintiffs' remedial maps produced 12 Democratic-performing districts in those years (S.A. 6, 10, 14). Even though the maps produced a similar partisan split in 2010 (10 Democrat and 17 Republican seats), the Revised Plan produced fewer (4 versus 5) competitive districts in the 48%-52% performance range than the Romo Remedial Map. (S.A. 14.) It is, in any event, hardly surprising that there is some performance similarity, as Plaintiffs'

remedial maps address only the two districts invalidated by the trial court, leaving the vast majority of the initial map intact.[7]

The Legislature similarly inflates the number of past Republican victories by including non-competitive races and elections dating back to 2000 (when there was a greater proportion of registered Republicans) (A.B. 43), and reduces continuity with the benchmark districts by including only "the actual rate of district continuity for Republican incumbents who sought reelection" (A.B. 45).[8] By the latter maneuver, the Legislature eliminates Democratic districts with extremely high rates of continuity. Yet over-packed Democratic districts are often the key to Republican dominance, and it is hardly unknown for Republicans and Democrats to join forces out of common interest. *See Johnson*, 926 F. Supp. at 1490 (observing "how politics made strange bedfellows in the 1992 redistricting process, as Republicans joined with African-American Democrats in an attempt by each group to enhance

[7] The Legislature cites Coalition Plaintiffs' withdrawn proposed map when it suits its purposes (*e.g.*, A.B. 105 n.36, 107-08, 116, 125-31), but conveniently omits the withdrawn map from this particular "comparison." No doubt that it is because the withdrawn map would have produced 13 Democratic-performing districts in both 2008 and 2010. (Ex. LD-29, file: "spubc0170_MyDistrictBuilder_datagrid.csv").

[8] Although the Legislature questions Plaintiffs' claim of 69.8% average population carryover from the 2002 Plan, the figure is derived from a staff report calculating retention of benchmark districts under the column "%TPOP Dist." (Ex. CP-1147 at 18.) Averaging the Legislature's figures yields 69.8%.

their own political power"); *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271 (11th Cir. 2012) (rejecting challenge to Amendment 6 brought jointly by Democratic incumbent, Republican incumbent, and Republican House).

The Legislature goes to great lengths to mischaracterize the expert testimony offered by Plaintiffs, even though the trial court had no reason to discuss that testimony in light of the other evidence of partisan intent. For example, the Legislature argues that Dr. Katz failed to accurately predict certain election results. But Dr. Katz made clear that the function of a partisan bias estimate is not to forecast election outcomes but rather to analyze the baseline partisan characteristics of the map itself to determine if and to what extent it tilts the playing field in favor of a political party. (T11:1353-54.)[9] Ultimately, Dr. Katz's conclusion was left unrefuted: the Legislature ably followed a "simple recipe" for partisan gerrymandering, packing Democrats into as few districts as possible and spreading Republicans across the rest of the districts so as to maximize the odds of Republicans winning as many districts as possible. (T11:1365.)

The Legislature also fervently attacks the testimony provided by Dr. Rodden, forgetting that it relied heavily on a 2009 draft paper co-authored by Dr. Rod-

[9] Nevertheless, when assessed against three years of election results, rather than a single year's results as the Legislature suggests, Dr. Katz's probability assessments were well in line with real-world results. (T12:1405-07.)

den before this Court. In *Apportionment I*, the Legislature argued that Dr. Rodden's work demonstrated that the severe pro-Republican bias in those maps was the result of natural, geography-driven factors. (*See* Ex. RP-162 at 45-46.) The Legislature's current criticisms are more applicable to the draft paper they previously endorsed than the significantly-refined approach in Dr. Rodden's analysis of the 2012 Congressional Plan. (*See, e.g.*, T12:1428; T13:1601 (same methodology with some improvements was used for analysis in this case as in the 2009 article); T12:1429-30, 1454-56, 1582 (earlier work relied on data from single presidential election); T12:1460-62 (earlier work used 5% population deviation); T12:1462-63 (earlier work controlled for compactness using same method).)

Moreover, Dr. Rodden addressed at trial the Legislature's critiques of the very methods upon which it earlier relied. For instance, as in the enacted plan, the simulations sometimes sacrificed visual compactness for VRA, equal population, and municipal boundary considerations, but all of the simulations are more compact than the enacted plan. (T12:1463-64, T13:1602-03.) When the simulations are specifically controlled for compactness, a 17 Republican-seat map never naturally occurs. (T13:1604.)

The Legislature incorrectly asserts that Dr. Rodden either did not consider his simulations in light of Florida's existing majority-minority districts or conceded that their preservation would invalidate his results. Dr. Rodden considered the

simulations holding fixed all African-American districts that the Legislature claimed to have BVAPs of over 50%, and the simulations always produced at least three majority Hispanic districts without artificially maintaining them. (T12:1469-75.) Even assuming Hispanic-majority districts require a supermajority, that would not change his ultimate conclusion. (T12:1490-91.)[10]

The Legislature's reliance on the testimony of Nolan McCarty is surprising given that Dr. McCarty determined that the 2012 Congressional Plan favors Republicans in a whopping 19 districts. Dr. McCarty admitted that Democrats are packed so heavily into the paltry eight seats remaining that, in the most competitive of those, Republicans have only a 10% chance of winning. (T22:2844, 2846-48.) Consistent with the testimony of **Plaintiffs'** experts, Dr. McCarty agreed that an effective gerrymander would require precisely what he found here—a small number of incredibly safe Democratic seats. (T22:2845-46.)

Finally, the Legislature claims that the 2012 Congressional Plan improved over time. (A.B. 48-49.) The Legislature relies primarily on city and county splits, glossing over the fact that nearly every district in H000C9047 is less compact than in H000C9043. (*Id.*) Moreover, the trial court rightly rejected the notion that "con-

[10] By comparison, Dr. Rodden's earlier work, which the Legislature advocated before this Court, did not control in any way for the VRA or laws protecting minority voting rights. (T12:1464.)

stant improvement" showed proper intent, noting that the "constant improvement" theme was a discussion point in the memorandum compiled by Reichelderfer after the December 2010 meeting between operatives, legislative staff, and legislative counsel. (R86:11,312, 11,314.)

Turning to the consequences of a finding of improper intent in the plan generally, the Legislature does not expressly confess error, but makes little attempt to defend the trial court's characterization of whole plan challenges as "a false dichotomy, a distinction without difference." (R86:11,296.) Instead, it argues that the finding of overall improper intent should not require every district to be redrawn. (A.B. 40-42.) According to the Legislature, the only remedy for a whole plan violation should be to redraw those districts invalidated as part of Plaintiffs' individual district challenges. (A.B. 42.) Yet the Legislature fails to explain how its proposed "remedy" differs materially from what would occur if the trial court had not found improper intent in the plan as whole.

The Legislature misconstrues *Apportionment I* as endorsing an approach that renders the whole-plan violation in this case superfluous. The finding of overall improper intent in the state Senate plan involved a scheme to benefit incumbents by manipulating district numbers. *Apportionment I*, 83 So. 3d at 657-62. A targeted remedy, *i.e.*, "an incumbent-neutral" numbering system, existed for that very specific violation, *id.* at 686, and this Court was "constrained" by the "limited nature

of the [facial] review," *Apportionment III*, 118 So. 3d at 212. Here, once the trial court heard extensive evidence of intent and found a partisan scheme not focused on a narrow issue such as district numbering, a more significant remedy, such as redrawing the entire plan, became essential. At the very least, the trial court should have granted no deference and required the Legislature to establish that individual districts were constitutional notwithstanding the partisan intent infusing the entire process.

To its credit, the Legislature seems to agree that it should be afforded no deference once a whole plan violation is found. Still, it contends that the trial court never actually " 'forgave' violations or granted the Legislature any 'deference.' " (A.B. 42.) A review of the Invalidity Judgment reveals otherwise. (*See, e.g.*, R86:11,296 (discussing deference granted to Legislature), 11,324 (requiring "flagrant" tier-two violation before inferring improper intent), 11,327 (allowing tier-two deviations to stand because they were perceived to be "*de minimis*").) Thus, the trial court should have imposed an independent remedy for the whole-plan violation.

IV. THE CHALLENGED DISTRICTS ARE UNCONSTITUTIONAL.

A. Revised District 5

While Plaintiffs and the Legislature disagree on many things, one rule of law is beyond dispute: the Legislature may deviate from tier-two requirements "only to

the extent necessary" to comply with tier-one requirements. *Apportionment I*, 83 So. 3d at 626, 640. Thus, this Court must answer two questions about Revised District 5. First, does Revised District 5 comply with tier-two requirements? Second, if it does not, are its tier-two deviations attributable entirely and exclusively to the Legislature's efforts to avoid tier-one violations? If the answer to both questions is "no," then Revised District 5 violates the Florida Constitution and the trial court erred in upholding it. *See, e.g.*, *id.* at 669 (striking down state Senate district because it could have been "drawn much more compactly and remain a minority-opportunity district").

The first question is easy to answer. Like the 2012 configuration struck down by the trial court, Revised District 5 "connects two far flung urban populations in a winding district which picks up rural black population centers along the way" (R86:11,307); ignores "traditional political boundaries as it winds from Jacksonville to Orlando," at one point "narrow[ing] to the width of Highway 17" (R86:11,306); and includes a variety of "finger-like extensions, narrow and bizarrely shaped tentacles, and hook-like shapes [that are] constitutionally suspect and often indicative of racial and partisan gerrymandering," *Apportionment I*, 83 So. 3d at 638 (internal quotation marks and citation omitted). For those reasons, the trial court easily concluded that Revised District 5 is "not a model of compactness." (SR13:1722; SR16:2308.)

The answer to the second question—whether Revised District 5 violates tier-two only to the extent necessary to avoid a tier-one violation—is also "no." The Legislature does not argue that Revised District 5 is drawn to avoid vote dilution under the Florida Constitution. The trial court rejected that claim as to the 2012 version of District 5 (R86:11,306-08), and the Legislature does not renew it here.[11] Instead, the Legislature argues that the serpentine shape and bizarre borders of Revised District 5 are compelled by "the tier-one imperative to avoid diminishment in the ability of black voters in a historically performing minority district to elect the candidates of their choice." (A.B. 49-50.)[12] That claim does not withstand the slightest scrutiny, let alone the "close examination" required here. *Apportionment I*, 83 So. 3d at 636.

[11] Although Revised District 5 is not a majority-minority district and therefore could not give rise to a vote-dilution claim, *Bartlett*, 556 U.S. at 26, the NAACP argues that Revised District 5 is a necessary "prophylactic remedy" because "[a]ll of the factors that lead to vote dilution are still prevalent in North-Central Florida." (NAACP B. 10.) Even if such prophylactic remedies are permissible (and the NAACP cites no cases suggesting that they are), the trial court held that the 2012 version of District 5 was not justified by vote dilution considerations, and the NAACP has not cross-appealed that ruling. Nor does the Legislature invoke vote-dilution concerns to justify Revised District 5.

[12] The NAACP's retrogression argument is substantially the same as that of the Legislature. Although Plaintiffs' discussion of retrogression refers to the Legislature's arguments, it applies equally to the NAACP's arguments.

The Legislature tries to rewrite District 5's history as a bulwark of partisan gerrymandering, but the facts are to the contrary: District 5's predecessor district, District 3, was first adopted by a federal court in 1992. That version of District 3 was held unconstitutional in 1996. *See Johnson*, 926 F. Supp. at 1493. In striking it down, the *Johnson* court noted that District 3 was based on a plan originating in the Florida Senate and that the authors of that plan "were more interested in aggregating Democrats in a single district in northeastern Florida [to increase the Republican performance of surrounding districts] than in creating an African-American majority-minority district." *Id.* at 1490 & n.60. The constitution forbids—and Appellants seek to eradicate—partisan gerrymandering period, regardless of what politician or political party it may benefit.

The Legislature enacted a new version of District 3 in the wake of *Johnson*. Although the Legislature makes much of the fact that Democrats supported the 1996 configuration (A.B. 53-54), that is neither surprising nor relevant. Redistricting "made strange bedfellows in the 1992 redistricting process" as well. *Johnson*, 926 F. Supp. at 1490. And it will continue to make strange bedfellows because, as the trial court rightly observed, "political gerrymandering [allows] the representatives to choose their voters instead of vice versa." (R86:11,291.)

In 2002, the Legislature adopted yet another version of District 3. That version was less compact than its predecessor; for example, it introduced a new ap-

pendage into Alachua County to draw in additional African-American population. (*Compare* Ex. LD-44, *with* SR24:3467-71.) The FairDistricts Amendments had not been enacted in 2002. Thus, when the 2002 map was challenged in court, the Legislature freely declared that it drew the 2002 map for partisan purposes. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340 (S.D. Fla. 2002).[13]

Of course, the *Martinez* court was not the last to find that an iteration of District 5 was drawn with partisan intent. Here, the trial court found that the 2012 version of District 5 was similarly drawn to favor Republicans. In reaching that decision, the trial court pointed to substantial evidence of partisan intent, including:

- The bizarre shape of District 5;
- The Legislature's failure to identify a plausible tier-one justification for District 5's tier-two violations;
- The Legislature's collaboration with partisan operatives; and
- The Legislature's destruction of documents, including communications with the aforementioned operatives.

(R86:11,306-11.)

[13] The Legislature misconstrues a footnote in *Martinez* to argue that District 3 was somehow exempt from that admission, but the public record makes clear that the plaintiffs and intervenors in *Martinez* did, in fact, regard District 3 as an integral part of a state-wide partisan gerrymander. *See, e.g.*, *Martinez v. Bush*, No. 02-20244-CIV-JORDAN, Intervenors' Am. Compl. for Declaratory and Injunctive Relief at 9 (S.D. Fla. May 17, 2002) (identifying District 3 as one of the districts that "most clearly" illustrated the Legislature's partisan intent).

Revised District 5 was drawn by the same Legislature that conspired with operatives to draw the 2012 Congressional Plan, using the same methods to limit public scrutiny of the map-drawing process. Thus, not surprisingly, it departs little from history's partisan playbook. Most importantly, it still hews to the same bizarre, serpentine configuration that winds from Jacksonville to Orlando, reaching out to grab pockets of African-American voters along the way. *See Apportionment I*, 83 So. 3d 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). Indeed, the differences between the 2012 version and Revised District 5 are cosmetic at best.

The Legislature's minority-protection defense also fails on its own terms because it is not supported by the undisputed demographic data. Since its inception in 1992, voters in District 3/District 5 "elected an African-American to Congress" in every election. (R86:11,308.) The 2002 configuration of District 3 ("Benchmark District 3") had a BVAP of 46.84% when it was enacted. (SR24:3468.) Demographic shifts caused the BVAP to increase to 49.87% by the 2010 census. (*Id.*)[14] Nevertheless, in the 2012 version of District 5, the Legislature chose to **increase** the district's BVAP from its historical levels to 50.1%, thereby leaching additional

[14] During the same period, Benchmark District 3's growth lagged so that it had 37,290 fewer voters than the equal population level in 2010. (*Id.*)

African-American voters to improve the Republican performance of surrounding districts. (R86:11,308.) The trial court rightly viewed that as a partisan maneuver.

In Revised District 5, the Legislature carved off the appendage into Seminole County and made other minor modifications, bringing its BVAP to 48.11%. (S.A. 2.) But the Legislature has never explained why maintaining a minority concentration that high—that is, significantly higher than levels that have consistently elected minority-preferred candidates—is so critical that it justifies the tortured configuration of Revised District 5. As outlined below, Plaintiffs have presented a more compliant East-West Proposed District 5 that includes a percentage of minority voters consistent with historical levels (ranging from 42.7% to 46.9%), *see Martinez*, 234 F. Supp. 2d at 1307-08, and the Legislature has not come close to establishing that the East-West Proposed District 5 would result in retrogression. Thus, the Legislature's claim that it was compelled to adopt Revised District 5's bizarre borders to avoid retrogression is pure pretext.

According to the Legislature, it had no choice but to enact Revised District 5 because only that configuration avoids retrogression. But Plaintiffs' remedial maps show that the Legislature could have drawn an East-West District 5 that preserves minority voters' ability to elect their preferred candidates; creates an additional minority opportunity district; improves compactness scores for District 5 and its surrounding districts; and makes Districts 3, 6, and 7 more competitive. (I.B. 73-

78.) In short, Plaintiffs' remedial maps show that the Legislature could have drawn District 5 to be more constitutionally compliant in every relevant way. They therefore strongly suggest that Revised District 5 was drawn for partisan purposes. *Apportionment I*, 83 So. 3d at 641. Recognizing that fact, the Legislature spends 25 pages trying to discredit Plaintiffs' remedial maps. (A.B. 66-91.) But all of those attacks are incorrect, irrelevant, or both.

Invoking the very sort of "bombast" it claims to deplore (A.B. 15), the Legislature argues that an East-West configuration of District 5 "egregiously" violates tier two because, among other things, it "combines far-flung communities worlds apart culturally and geographically" and "carve[s] Tallahassee into pieces" (A.B. 66-68). The Legislature's primary criticism of Proposed District 5 is that it is too "long." (A.B. 67-69.) But length alone is not a recognized compactness metric, and relative increases in length are sometimes simply a function of sparse population and geography, as is the case in the panhandle. In any event, the Legislature's recitation of the data confirms that the East-West configuration of Proposed District 5 is more compact than Revised District 5. Plaintiffs' East-West configuration and Revised District 5 have similar Reock scores (0.12 and 0.13, respectively), and the East-West configuration has vastly superior Convex Hull and Polsby Popper scores. Although the Legislature argues that the Convex Hull disparity should be ignored (A.B. 69), this Court relied on Convex Hull scores in *Apportionment I*, 83

So. 3d at 613, 635, and the Legislature relies on Convex Hull scores just one page later to criticize Plaintiffs' maps (A.B. 70).

Relatedly, the Legislature argues that "[s]tatewide, the alternative maps produce no improvement in tier-two metrics." (A.B. 69.) A "statewide" comparison is highly misleading because 18 districts are identical as between the Revised Plan and Plaintiffs' remedial maps. By including identical districts in the count, the Legislature shrouds indisputable tier-two improvements in the affected districts to support its dubious claim of "no improvement."

Comparing the districts that differ from the Revised Plan shows demonstrable tier-two improvements. Coalition Remedial Map B, for instance, improves the compactness of five Central Florida districts (Proposed Districts 6, 7, 9, 10, and 11) from an average Reock score of 0.47 to 0.51 by using Proposed District 5's far less intrusive configuration. (*Compare* S.A. 10, *with* S.A. 2.) And two of the three districts that Proposed District 5 touches (Proposed Districts 3 and 4) in Coalition Remedial Map B are more compact than in the Remedial Map. (*Id.*) Proposed District 2 is the sole exception, but only because its sparsely populated area spans the narrowest part of the State save for the Florida Keys.[15] Proposed District 2 spans

[15] As Dr. Ansolabehere testified, Proposed District 2's Reock score of 0.31 is well above the red flag level of 0.2 and is a natural consequence of sparse population and location. (SR20:2637-38; *see also* T14:1765-66 (observing how coasts,

15 whole counties, only splits one county (Alachua) to meet the equal-population requirement, and takes the remainder of three counties (Leon, Jefferson, and Columbia) that Proposed District 5 must split to prevent retrogression. Using the East-West Proposed District 5, the Romo Remedial Map presents a similar configuration that improves visual compactness, has about the same metric compactness as the Revised Plan, and has only 19 county and 25 municipal splits compared to the Revised Plan, which splits 21 counties and 28 municipalities. (*Compare* S.A. 14, *with* S.A. 2.)

In short, Plaintiffs have presented alternative maps that depart from tier-two criteria in less intrusive ways and only to the extent necessary to prevent retrogression. In contrast, Revised District 5 needlessly wreaks havoc by slicing through seven counties and reducing the visual and metric compactness of all eight districts it touches—all to the benefit of Republican and incumbent interests.

The Legislature erroneously claims that an East-West configuration would diminish minorities' ability to elect their preferred candidates. (A.B. 74.) Plaintiffs presented unrebutted expert testimony during the remedial hearing that this configuration would **not** result in retrogression (SR20:2602-03, 2609-12), and the House's principal map drawer, Alex Kelly, conceded the point at trial (T8:932-35).

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bays, and island keys legitimately affect compactness, but there is no such justification for the North-South configuration of District 5).)

The only figures that the Legislature could muster in opposition to an East-West configuration as part of its special session likewise confirm lack of retrogression. (SR16:2287.) African-American voters decisively control the Democratic primary with 57.2% of the vote (S.A. 11), and African-American preferred candidates win by overwhelming majorities in the general election: 63.8% in 2008, 64.1% in 2010, and 64.2% in 2012. (S.A. 10.)

Faced with those inconvenient facts, the Legislature argues that any change that might reduce the expected margin of victory for minority-preferred candidates, no matter how slight, qualifies as unlawful retrogression. (A.B. 87.) For example, the Legislature argues that this Court must reject Proposed District 5 because, as compared to Benchmark District 3, it "reduces BVAP from 49.9 to 45.1%—a reduction of 4.8%" and therefore might weaken minority voting strength in District 5. (A.B. 74.)[16] The Legislature's argument misunderstands the law of retrogression. Voting strength is not reducible to a single statistical variable. Slight reductions in BVAP therefore do not necessarily equal retrogression, and this Court has "reject[ed] any argument that the minority population percentage in each district

[16] The BVAP in all three of Plaintiffs' remedial maps is 45.12%. (S.A. 6, 10, 14.) The BVAP of analog Benchmark District 3 was 46.84% in 2000, and 49.87% in 2010. (SR24:3468.)

as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision." *Apportionment I*, 83 So. 3d at 627.

Retrogression occurs only if a redrawn district "would **actually diminish** a minority group's ability to elect its preferred candidates." *Id*. at 625 (emphasis added). Here, the Legislature cannot argue that drawing District 5 with a BVAP of 45.1% would actually diminish—i.e., "cognizabl[y] effect"—the ability of minority-preferred candidates to be elected because African-American voters decisively control the Democratic primary and consistently see their preferred candidates win the general election by considerable margins. Indeed, in every election analyzed by the experts, the minority preferred candidate prevails by a comfortable margin in Plaintiffs' Proposed District 5. (S.A. 10.) The only meaningful difference between a district drawn to allow 16+% margin of victory for a minority-preferred Democratic candidate and one that affords a lower but still comfortable margin is the leaching of minority voters from the surrounding districts—the very aim the Legislature has long pursued and the constitution now forbids.

Lacking plausible evidence that Proposed District 5 would "cognizably effect" minority voting strength, the Legislature resorts to cherry picking. In one three-way Senate race in 2010, argues the Legislature, the minority candidate of choice would have won by 16.2% under Revised District 5 but "only" 4.5% under Plaintiffs' East-West version. (A.B. 77.) There are two responses to that argument.

First, even according to the Legislature, the minority-preferred candidate still would have won by a comfortable margin in Proposed District 5. Second, that race was highly unusual and hence not predictive of future elections.[17]

The Legislature also fabricates a scenario in which non-African Americans might somehow have overcome African Americans' decisive 57.2% vote share in the 2010 Democratic primary, **if** it had been an open primary (as when only Democrats run for election) and **if** a "candidate with name recognition … opposed another candidate that most minorities preferred." (A.B. 79.) For this hypothetical to play out, non-African Americans would have to turn out at levels unheard of for a primary. To exceed African Americans' voting strength in the Democratic primary would require **virtually every voter** who is not African American, including Whites, Hispanics, and voters of any other race or ethnicity, to turn out at their 2010 general election high of 58% (A.B. 76), and then vote over 6-to-1 for one particular non-African-American Democratic candidate, versus all other candidates. Nothing of the sort occurred in 2010, and it is difficult to conceive of such coordinated, hyper-polarized, and unprecedented primary voter turnout occurring in the real world. To the contrary, election data in both 2008 and 2012 reflect that

[17] This Court, for example, did not evaluate the 2010 U.S. Senate election in *Apportionment I* or *Apportionment II*. Indeed, the NAACP conceded during those proceedings that the 2010 U.S. Senate election is not "overwhelmingly probative of the extent of racially polarized voting." *Apportionment II*, 89 So. 3d at 883.

over 20% of other voters joined with African-American Democrats in electing an African American to be President by a landslide margin of 64%. (S.A. 10.)

No matter how highly concentrated minorities are in a district, it is always possible to invent a hypothetical in which the minority-preferred candidate could lose an election. In determining whether there is retrogression, however, courts must conduct a functional analysis of demonstrated historical "electoral behavior," not a fanciful analysis of outlandish scenarios, to determine if there is a "cognizable effect on a minority group's ability to elect its preferred candidate of choice." *Apportionment I*, 83 So. 3d at 625-26.

Finally, the Legislature continues its ad hominem assault on Plaintiffs, claiming that Proposed District 5 was "drawn in the vat of party politics" by "national Democratic Party interests." (A.B. 88.) That argument should not detain this Court long. Although the Legislature fails to inform this Court, the trial court repeatedly rejected this "tit for tat" strategy, making clear that the only maps on trial in this proceeding are the maps drawn by the Legislature and imposed on the voters of Florida. (R55:7242-44; R76:9988.)[18]

[18] The Legislature is evidently untroubled by the tension between this argument and its argument that Plaintiffs' remedial maps perform just as well for Republicans as does the Legislature's Revised Map. (A.B. 15.)

More fundamentally, it simply does not matter if some of the Plaintiffs are Democrats.[19] All of Florida's voters, be they Democrats, Republicans, or members of other political parties, are entitled to a redistricting process untainted by partisan gerrymandering. Whether Plaintiffs' politics are aligned with the Legislature has nothing to do with whether the Legislature complied with the Constitution, and it is completely irrelevant to whether this Court should vindicate the constitutional rights of all Florida voters in this case.

B. Districts 13 and 14

Districts 13 and 14 violate the Florida Constitution by crossing Tampa Bay and dividing Pinellas County to benefit the Republican Party. Attempting to distance itself from the partisan operatives, the Legislature proclaims that "[o]ver a dozen public submissions contained districts almost identical to District 13" (A.B. 96-97), but it achieves this figure only by including seven maps submitted **after** the release of the legislative proposals (Exs. CP-602-08). Because these maps plainly used those proposals as a starting point, it is hardly surprising that they contain districts "almost identical" to legislative versions. The Legislature further increases the count by counting duplicates and near duplicates by the same submitter

[19] The lead Coalition Plaintiffs (the League of Women Voters and Common Cause), of course, are well known non-partisan organizations with a strong history of battling both parties on issues such as these.

as multiple maps (Exs. CP-558, 560, 584, 585), and including a map that does not even reach into St. Petersburg (Ex. CP-546). After reducing the count from "over a dozen" to a handful, none of these submissions matches the Republican performance of Enacted District 13 almost exactly. But the Posada configuration does.[20] The Legislature cannot escape the fact that it expressly referenced one of the Posada maps as its basis for drawing District 13 and then adopted a configuration with nearly identical Republican performance to the Posada version. (S.I.B. 9-10.)

The Legislature also claims that Districts 13 and 14 do not violate tier-two requirements. Yet decisions to cross bodies of water are exactly the type of maneuver that the FairDistricts Amendments are meant to prevent, *Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 187-88 & n.1 (Fla. 2009), and Plaintiffs have shown that it is possible to draw Districts 13 and 14 without crossing Tampa Bay or dividing Pinellas County. Accordingly, the Legislature has deviated from tier-two requirements, and the remaining question is whether it has done so "only to the extent necessary" to avoid retrogression. *Apportionment I*, 83 So. 2d at 626, 640.

[20] The native files for all publicly submitted maps are included in Ex. LD-34-B4 (Publicity and Participation/Publicly Submitted Congressional Plans). Performance data can be viewed through MyDistrictBuilder.

In that regard, the Legislature argues that it feared a repeat of a 1992 preclearance denial of a state Senate district that did not combine minority populations in Pinellas and Hillsborough Counties. (S.A. 17-20.) The Legislature insists that "preclearance would have been denied" and "the stability of the election process that followed the redistricting plan's adoption would have been jeopardized" if it did not cross Tampa Bay. (A.B. 99.) Lost in that conjecture are several inconvenient facts. The 1992 letter objected to the Legislature's failure to create a majority-minority state Senate district based on a policy of maximizing majority-minority districts that the U.S. Supreme Court later found unconstitutional in *Miller v. Johnson*, 515 U.S. 900, 925 (1995). (S.A. 18.) But, even when the Department of Justice followed this unconstitutional policy, it never demanded a **congressional** district to be drawn across Tampa Bay. The analogs to District 14 in the 1992 and 1996 plans did not cross Tampa Bay to draw in African-American population from St. Petersburg, yet survived preclearance. (*E.g.*, Ex. LD-44.) It was only in the overtly partisan 2002 redistricting process that the Legislature adopted this maneuver.

At trial, Dr. Ansolabehere provided unrebutted testimony that Proposed Districts 13 and 14 in the Romo Trial Maps would not cause retrogression. (T14:1756.) Having failed to enlist an expert to support its claim of retrogression, the Legislature offers only select data points, suggesting, for example, that in 2006

Democrat Jim Davis would have received a "bare majority" of 53.1% of the vote, compared with 57.4% in Benchmark District 11. (A.B. 98.) The Legislature takes the 2006 gubernatorial election in isolation for the only time in its answer brief (and perhaps the entire case) because Democratic candidates overwhelmingly prevail by 62.2% in the 2008 presidential election, 59.2% in the 2010 gubernatorial election, and 62.4% in the 2012 presidential election. (SR24:3542.) The Legislature cites various other metric decreases, but does not establish that those reductions actually deprive African Americans and Hispanics of their ability to jointly elect their preferred candidates. Presumably for that reason, the trial court did **not** find that the division of Tampa Bay and Pinellas County was necessary to avoid retrogression.

Although the Legislature does not—and cannot—claim that it crossed Tampa Bay and divided Pinellas County to avoid tier-two issues elsewhere in the map, the trial court accepted the enacted configuration on that basis. (R86:11,323-25.) Despite the Legislature's arguments to the contrary, the trial court adopted an extremely deferential standard by searching for a hypothetical justification on which the Legislature never claims to have relied. Far more scrutiny is demanded when the actual justification was race-based, and Plaintiffs have already shown that the Legislature acted with improper intent.

C. Districts 21 and 22

To date, the Legislature has never explained its rejection of alternative configurations of Districts 21 and 22. The Legislature vaguely suggests that it had "little room to maneuver" because of surrounding minority districts (A.B. 102), but Kelly, the principal map drawer for the House, conceded that an alternative configuration did not impact minority protection. (T8:953.) The Legislature's purported tier-one justification for violating tier two, therefore, falls flat.

The Legislature accurately points out that the Romo Trial Maps included a vertical orientation, but the Legislature misses the point. Plaintiffs do not contend that Districts 21 and 22 must be reconfigured horizontally, and in fact believe a vertical configuration could pass constitutional muster. The point is that whatever their configuration, it must comply with tier two. Here, given its finding of overall partisan intent, the trial court should have closely scrutinized the Legislature's decision to reject the alternative configuration of Districts 21 and 22.

D. District 25

District 25 violates Article III, Section 20 by needlessly dividing Hendry County. The Legislature argues that "the Department of Justice would have denied preclearance" and "treated the new district as a sham" if it "had removed Hendry County African Americans from a performing district." (A.B. 105-06, 110.) Ac-

cording to the Legislature, Section 5 of the VRA imposed a bright-line prohibition against removing any individual minorities from covered counties.

This Court and the Department of Justice have made clear that Article III, Section 20 and Section 5 of the VRA only preclude the Legislature from "eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Apportionment I*, 83 So. 3d at 625. Both state and federal law focus not on maintaining fixed demographic characteristics or comparing "the census population of districts in the benchmark and proposed plans," but on determining whether there is in fact a diminishment in the ability to elect for the minority group. *Id.* at 625-26 (internal quotation marks and citation omitted). Indeed, the Legislature made no claim that the non-retrogression requirement barred it from shifting minority populations in Manatee and Volusia Counties from ability-to-elect benchmark districts to non-performing districts.[21]

The only "support" offered by the Legislature is a 2002 letter denying preclearance of a state House plan because the Department of Justice objected to the

[21] Any implication that Section 5 imposes more stringent requirements than Article III, Section 20 is incorrect. *See Apportionment I*, 83 So. 3d at 619-27. Even if the standard for covered counties were different, the issue no longer has any relevance. When the Legislature enacted the Revised Plan, Hendry County was not subject to preclearance because of the U.S. Supreme Court's invalidation of the coverage formula in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013).

elimination of a "majority Hispanic district, which existed in a portion of Collier County." (S.A. 22.) The proposed House plan cleaved a former majority-minority district in two, causing the HVAP and registered Hispanic voters in the district to decrease by 46.9 and 49.4 percentage points, respectively. (*Id.*) In declining pre-clearance, the Department of Justice focused not on the bare movement of population, as the Legislature suggests, but on whether there was "in fact a district in which Hispanic residents could elect a candidate of choice." (S.A. 23.)

The non-retrogression principle, then, does not contemplate freezing the demographics of the benchmark map regardless of retrogression, and the Legislature may not deviate from tier-two criteria on that basis. A contrary result would give the Legislature license to maintain the district configurations of the gerrymandered 2002 Plan by merely uttering the words "Section 5." Because the Legislature admittedly "included part of Hendry County not to increase the district's minority voting strength (which is what a functional analysis measures)," but to place a specific "minority community" in District 20 (A.B. 110), this Court should reverse the trial court's decision not to invalidate District 25.

E. Districts 26 and 27

Districts 26 and 27 violate Article III, Section 20 by dividing Homestead to benefit the Republican Party. At the outset, the Legislature misstates that Plaintiffs have not preserved arguments as to comparisons between Districts 26 and 27 and

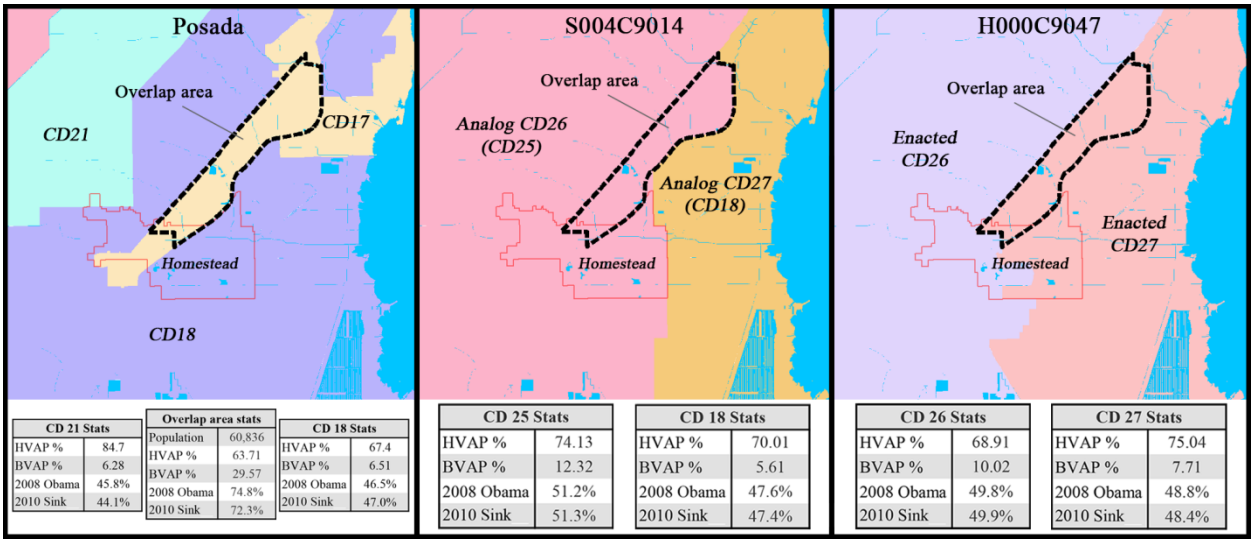
analogs in S004C9014, similarities in the operative maps, and the speculative and anecdotal foundations of Moreno's testimony. (A.B. 114-15, 117, 118.) Plaintiffs asserted all of these points in closing submissions. (SR26:4034, 4040, 4099-4101; SR28:4699.)

The Legislature insists that there is "[n]o evidence show[ing] that the operatives attached any significance to a split of Homestead." (A.B. 115.) Attempting to trivialize the operatives' split of Homestead as "completely unremarkable" and purportedly random, the Legislature notes that the Posada maps divide a host of other cities. (A.B. 116.) While other features changed throughout the operatives' mapdrawing efforts, the division of Homestead remained constant from Terraferma's July 2011 map to the Posada maps. (S.I.B. 6-7.) Indeed, Terraferma focused on the division of Homestead in his earliest draft maps as part of a configuration designed to produce two Republican-performing Hispanic majority districts centered in Miami-Dade County. (S.I.B. 3.)

The operatives again singled out this region when they discussed the first draft Senate map (S000C9002). Terraferma declared that the Senate configuration preserving Homestead was "pretty weak," and Heffley remarked that the House needed to "fix" it. (Ex. CP-387.) Although the Legislature dismisses as outlandish any notion that these concerns reached the House, Terraferma copied Reichelderfer, whom the trial court found provided feedback to Cannon and Pepper on the

exact same Senate proposed map just one day before the operatives' exchange regarding South Florida. (R86:11,317; Exs. CP-276, CP-285.)

The reason for, and consequences of the Homestead split, are anything but "unremarkable." The Legislature "fixed" the issue identified by the operatives by adopting the House's configurations in the enacted map which, like the operative-drawn Posada maps, splits Homestead to divert the same, specific, and concentrated Democratic-performing population for a distinct purpose and with obvious partisan implications to enhance overall Republican performance in the adjoining districts. Although the Legislature notes other visual differences between the Posada maps and Enacted Districts 26 and 27, the primary substantive goal, capturing a specific minority community for partisan gain, is the same and is achieved in both maps. Among the 86 maps that were publicly submitted before the first published Legislative maps, the Posada maps were the only ones to split Homestead and create two Republican-performing Hispanic districts in 2008 and 2010 (Posada CDs 21 and 18), as shown below. By splitting Homestead and capturing a portion of the same minority community, the Legislature likewise achieved two Republican-performing Hispanic districts (Enacted CDs 26 and 27).



In any event, the Legislature cannot reasonably dispute that the trial court upheld Districts 26 and 27 based on its perception that any tier-two issues were "*de minimis.*" (R86:11,327.) Instead of defending a "*de minimis*" exception to Article III, Section 20, the Legislature assumes that the trial court meant to say that there is "no" tier-two issue. (A.B. 118.) Yet the decision to divide Homestead by attaching jagged spikes to District 27 is plainly a tier-two deviation, and the question becomes whether the Legislature deviated "only to the extent necessary" to avoid retrogression. *Apportionment I*, 83 So. 3d at 626, 640.

Although the Legislature asserts that "House staff tried to unite Homestead in one district but found that the changes would affect the ability of Hispanics to elect their preferred candidates" (A.B. 114), the cited testimony merely reflects an

unsuccessful attempt to lead staff to admit retrogression.[22] The Legislature then turns to the testimony of Moreno, claiming that his opinion was "not founded primarily on concerns about candidate-recruitment," but on "minimal Hispanic influence over the Democratic primary in a Democratic district." (A.B. 119.) Testimony excised from the Legislature's citation shows that Moreno believed that lower registration in Proposed District 26 might lead to a "possibility" that "a non-Hispanic Democrat would be elected" **because of** anecdotal views about the relative merits of particular candidates who might run for election in the district if then-incumbent Joe Garcia "were to get hit by a bus." (T18:2334-36.)

More fundamentally, Moreno merely offers a targeted criticism of the Romo Trial Maps. Moreno has not shown that the Legislature's decision to divide Homestead was necessary to avoid retrogression, even if he disagrees with the particular alternative in the Romo Trial Maps. The analogs to Districts 26 and 27 in S004C9014, for example, address Moreno's concerns and do not divide Homestead. Proposed District 25 (analog to District 26) in S004C9014 keeps Homestead whole within its borders, but includes a percentage of Hispanics among registered Democrats (46.3% in 2010) that is almost 4% higher than Enacted District 26

[22] When counsel asked Poreda to agree that "keeping Homestead whole" would "adversely affect the ability to elect," he responded, "I haven't said that." (T23:2911.) Poreda said only that preserving Homestead "would slightly affect the ability to elect in the area" in an unspecified way. (T23:2912.)

(42.6% in 2010). (SR24:3468, 3483.) Accordingly, the trial court erred in excusing the division of Homestead as a "*de minimis*" issue and accepting the speculative testimony of Moreno when legislative staff did not agree that preserving Homestead would lead to retrogression.

V. THERE IS NO BASIS FOR EXCLUDING PLAINTIFFS' ALTERNATIVE REMEDIAL MAPS.

Consistent with its strategy throughout the trial court proceedings, the Legislature attempts to put Plaintiffs' alternative maps on trial. Striving to characterize Plaintiffs as somehow being equally culpable, the Legislature imagines that all of Plaintiffs' maps were drawn by "partisan operatives." Plaintiffs strongly deny the Legislature's assertions about their alternative maps, but will not be lured into offering explanations or contrary testimony that would allow the Legislature to succeed by default in its efforts to distract from the merits of this appeal.

The Legislature spends an astounding thirteen pages offering a flurry of deposition testimony and emails regarding the Romo Trial Maps and a map that Coalition Plaintiffs never presented at trial. (A.B. 119-32.) Despite repeated proclamations about "the integrity of this proceeding," respect for "our court system," and "gamesmanship" (A.B. 132), the Legislature is well aware that **none** of the deposition testimony or emails regarding Coalition Plaintiffs' withdrawn map are in evidence, nor are most of the deposition testimony and emails regarding the

Romo Trial Maps.[23] Yet the Legislature quotes as much deposition testimony as it can, regardless of context, in a transparent effort to smear Plaintiffs. This Court should not tolerate tactics of this sort and should summarily strike or disregard this portion of the answer brief. *See R. L. Bernardo & Sons, Inc. v. Duncan*, 145 So. 2d 476, 477-78 (Fla. 1962) (holding that appellate courts cannot properly consider deposition testimony that "was not introduced in evidence"); *Coca-Cola Bottling Co. v. Clark*, 299 So. 2d 78, 82 (Fla. 1st DCA 1974) ("Pretrial discovery, including depositions, … do not become a part of the evidence to be considered in resolving the trial issues unless properly offered and received into evidence.").

In any event, the Legislature cites no authority for its argument that challengers have an obligation to disclose various details about the drafters, history, and principles of alternative maps before such maps can even be considered. This Court imposed no such preconditions on the submission of alternative maps in *Apportionment I* and explained that **exemplar** maps submitted by a private plaintiff are not the same thing as the **enacted** congressional districts actually governing

[23] The Legislature's citations are not to the trial record, but to its unsuccessful motion for sanctions. That is because although the Legislature initially designated testimony and included proposed exhibits concerning Coalition Plaintiffs' alternative map for proposed admission at trial (SR25:3839-43, 3845, 3996-4002), it ultimately withdrew all of those designations and did not offer any of those exhibits into evidence. (R82:10,868.) The Legislature likewise withdrew most of its designated deposition testimony and did not seek admission of the vast majority of its proposed exhibits concerning the Romo Trial Maps. (*Id.*)

elections in the state. The FairDistricts Amendments are a "restraint on **legislative** discretion in drawing apportionment plans." *Apportionment I*, 83 So. 3d at 599 (emphasis added); *see also Brown*, 668 F.3d at 1279 (recognizing that Article III, Section 20, like the remainder of Article III of the Florida Constitution, "explicates the power of the **legislature** and sets forth the rules that govern how the **legislature** may act") (emphases added). Alternative maps merely show that districts can better comply with tier-two criteria without violating the mandates of tier one. *Apportionment I*, 83 So. 3d at 611. If such a plan is found to better comply with constitutional requirements, it does not automatically become law, but merely provides circumstantial evidence of improper legislative intent. *Id*. The focus remains on whether the Legislature—not the private party submitting the map—"consider[ed] impermissible factors, such as intentionally favoring a political party or an incumbent." *Id.* Consequently, there is no such thing as unconstitutional intent by the submitter of an exemplar map, nor is there any justification for a mini-trial on intent whenever a different district configuration is proposed.

In the redistricting process, the Legislature did not simply rely on otherwise constitutional maps that happened to have been submitted by persons with partisan motives. Instead, the Legislature repeatedly communicated with Republican operatives, received advice from at least one of them, disproportionately relied on maps **secretly** drawn by the same operatives to whom it provided special access, and de-

stroyed any evidence revealing what it had done. That collaboration with operatives, together with other circumstantial evidence, constitutes unconstitutional intent. The same considerations are not implicated when courts evaluate maps submitted by private plaintiffs to determine whether the enacted districts are justified. Thus, there is no barrier to this Court's consideration of Plaintiffs' remedial maps.

VI. AMICI'S DISTRICT 9 ARGUMENT IS INAPPLICABLE.

Plaintiffs agree with the Legislature that this Court should disregard amici curiae's minority protection argument with respect to District 9. (A.B. 133-34.) Not only do amici lack standing to argue issues not raised by the parties, but the trial court properly found that there is no tier-one justification for a 40% minority population floor in this district. (R86:11,321.) Moreover, amici's suggestion that Plaintiffs' remedial maps "drastically reduce" the HVAP of District 9 (Am. B. 5), is an overstatement. In fact, Proposed District 9 has a 39.7% HVAP in the Romo Remedial Map and a 39.3% HVAP in Coalition Remedial Map B. (S.A. 10, 14.) Amici's bare suggestion that Proposed District 9 in Plaintiffs' remedial maps "may result in unconstitutional vote dilution" (Am. B. 10), provides little direction for the parties or the Court.

Notably, in dismissing amici's argument, the Legislature fails to mention that the trial court originally struck down District 10 as a partisan gerrymander, despite the **Legislature's** insistence that the district was drawn in service of minority

protection goals in District 9. (R86:11,321-22; SR27:4152.) Contrary to the Legislature's assertion that amici's brief illustrates the "naïveté of Appellants' position" (A.B. 134), it in fact underscores the Legislature's persistent attempts to use minority protection as a guise for partisan aims. In the face of the trial court's opinion exposing the pretense, even the Legislature cannot proffer a tier-one justification for its initial redistricting decision.

VII. THIS COURT SHOULD CRAFT A MEANINGFUL REMEDY FOR THE LEGISLATURE'S CONSTITUTIONAL VIOLATIONS.

The Legislature continues to argue that state courts lack authority to adopt congressional redistricting plans. Rather than grappling with the precedent from this Court and the U.S. Supreme Court and several other cases on which Plaintiffs rely on pages 94-95 of the initial brief (citing, *inter alia*, *Growe v. Emison*, 507 U.S. 25, 37 (1993), and *Apportionment I*, 83 So. 3d at 601), the Legislature relies on the vacated holding from a lower federal court in *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002). The *Smith* court did hold, as an alternative basis for enjoining use of a plan adopted by a state court, that the U.S. Constitution barred state courts from drawing congressional districts. 189 F. Supp. 2d at 558. But the U.S. Supreme Court **vacated** that alternative holding and warned that it "is not to be regarded as supporting the injunction we have affirmed on the principal ground, or as binding upon state and federal officials should Mississippi seek in the future

to administer a redistricting plan adopted by the Chancery Court." *Branch v. Smith*, 538 U.S. 254, 265-66 (2003).

Here, the Legislature has **twice** failed to enact a lawful voting map, and Florida's voters have endured not one but two federal elections under illegal maps. Under those circumstances, the claims that the Legislature should be "afford[ed] … a reasonable opportunity to adopt a remedy" (A.B. 135) and that any other result would "encroach on the law-making power" (A.B. 137) are unpersuasive and unseemly. The Legislature has made clear that it cannot or will not respect the rights enshrined in Article III, Section 20. This Court should therefore adopt its own congressional plan to ensure those rights are realized. *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."); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003) (state courts "are constitutionally required to draw constitutional congressional districts when the legislature fails to do so"). As explained in Plaintiffs' initial brief, this Court could formulate its own redistricting plan independently, adopt one of those maps (or a combination of Plaintiffs' alternative maps), or rely on an expert to prepare a constitutional redistricting plan.

If this Court does not adopt a new plan, then it should at least articulate principles (including those identified in Plaintiffs' I.B. at 98-99) that the Legislature

must follow in enacting a new plan. It should also impose procedural safeguards (e.g., public-meeting requirements and preservation obligations) to protect the process from the same partisan influences that tainted the 2012 Congressional Plan. Otherwise, history is doomed to repeat itself.

The Legislature's only opposition to this form of relief is that it would interfere with the "internal workings of the Legislature." (A.B. 137.) But the Legislature cites no authority prohibiting this Court from ordering additional procedural safeguards to protect fundamental rights. To the contrary, one of the two cases cited by the Legislature makes clear that the Legislature's power to prescribe its procedures is not absolute; it instead must give way when it would conflict with the Florida Constitution. *Moffitt v. Willis*, 459 So. 2d 1018, 1021 (Fla. 1984).

And even if it were true that the proposed safeguards might minimally infringe the Legislature's discretion in establishing its internal procedures (although the Legislature never explains how), the fundamental rights of Florida's voters surely trump the Legislature's preferences with respect to how it sends emails, schedules meetings, and saves documents. *See Apportionment I*, 83 So. 3d at 615 ("[T]he voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process."). The Legislature's argument to the contrary illustrates, yet again, its inability or unwillingness to come to terms with the sea-change wrought by the FairDistricts Amendments.

SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

In the portion of its brief styled as a cross-appeal, the Legislature simply asks for "clarification" on various points or rulings inconsistent with its request for affirmance of the trial court's decision to uphold certain districts and the Revised Plan. (A.B. 150.) The purported "cross-appeal" should be dismissed as seeking improper advisory opinions, rather than reversal of an order of the trial court.

In any event, the arguments raised in the cross-appeal are meritless. The Invalidity Judgment does not penalize public participation, but simply reflects that the judiciary has a constitutional mandate to scrutinize the public process, along with all other aspects of the Legislature's redistricting efforts.

To argue that the intent of individual legislators and staffers cannot be considered, the Legislature ignores this Court's decision in *Apportionment IV*, the clear constitutional language, and basic principles of agency law. The redistricting process is unlike traditional legislation, and intent may be properly established through the words and actions of the individual legislators, staffers, and other agents of the Legislature involved in the drawing of the redistricting plan.

Finally, this Court should reject the Legislature's attempt to re-litigate its Elections Clause defense. The Eleventh Circuit's decision in *Brown* collaterally estops the Legislature from obtaining a "second bite at the apple."

ARGUMENT ON CROSS-APPEAL

The Cross-Appeal Should Be Dismissed for Failure to Challenge Any Ruling

As an initial matter, the cross-appeal should be dismissed because the Legislature has not identified any order or ruling by the trial court it asks this Court to reverse. *See Breakstone v. Baron's of Surfside, Inc.*, 528 So. 2d 437, 439 (Fla. 3d DCA 1988) (explaining that a cross-appeal must "identify with particularity the exact adverse trial court order or ruling which the appellee claims is error"). A cross-appeal is only appropriate when the judgment below "does not completely accord the relief to which the appellee believes itself entitled." *Id.* (quoting *Webb Gen. Contracting, Inc. v. PDM Hydrostorage, Inc.*, 397 So. 2d 1058, 1059-60 (Fla. 3d DCA 1981)). While the Legislature expresses disagreement about aspects of the trial court's reasoning leading to its ruling that the Enacted Plan was unconstitutional in Points VIII and IX, it not only fails to ask this Court to reverse that determination, it actually asks the Court to **affirm** the trial court's approval of the Remedial Plan. The Remedial Plan would only be appropriate, however, if the Enacted Plan were invalid.

Similarly, Point X argues that Amendment 6 is unenforceable under the U.S. Constitution. If that were a point properly preserved for review on cross-appeal, then the remedy would be to reverse the judgment below and reinstate the Enacted Plan, which is the opposite of the relief sought by the Legislature. The Legislature

asserts that the trial court properly approved the Remedial Plan because the Legislature fully complied with Amendment 6. Thus, whether the amendment is enforceable is simply not a justiciable issue in this appeal because resolution of that question can have no effect on the disposition of this appeal. At best, this point is a request for an advisory opinion that this Court has no jurisdiction to issue. At worst, it is an attempt to manufacture a basis for review in the Supreme Court of the United States by hoping this Court will opine on an issue of federal law that is unnecessary to the disposition of this appeal.

While the cross-appeal should be dismissed, Appellants respond on the merits in an abundance of caution.

VIII. THE LEGISLATURE MISCHARACTERIZES THE INVALIDITY JUDGMENT AS DISCOURAGING PUBLIC PARTICIPATION.

In the first portion of its purported cross-appeal, the Legislature makes self-serving statements about the importance of the public process and then asks for an advisory opinion "clarify[ing] that the Legislature will not be penalized if it continues to solicit the voices of the citizens it represents and encourage public participation in the redistricting process." (A.B. 143.) The Legislature falls flat in casting the Invalidity Judgment as a "penalty" for soliciting public participation. To advance its argument, the Legislature takes out of context what it admits are "observations" in dictum. (A.B. 140.) No ruling of the trial court outlawed or restricted legitimate efforts at public participation. In fact, the trial court **encouraged** a genu-

inely open process. (R86:11,316 ("Perhaps it would be best to have it out on the table for all to see and evaluate. … [A]n open process would assist in evaluating [whether partisan intent] was in play in a particular situation.").)

Plaintiffs, in any event, emphatically agree that true efforts at public participation are a hallmark of good governance that should be encouraged. Even partisan operatives are free to openly submit maps they hope will advance their partisan agenda, which allows both the public and reviewing courts to judge for themselves the role those partisan suggestions play in any ultimate redistricting plan. Merely stating that a process is open and transparent, however, is not a talisman capable of warding off judicial review. In scrutinizing the purported public process, the trial court understood 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. The judiciary cannot fulfill that duty by accepting legislative assurances of openness and transparency at face value and refusing to look behind the public process for evidence of abuse or partisan maneuvering. For that very reason, this Court authorized discovery "to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution." *Id.* at 149.

No one disputes that there would be evidence of unconstitutional intent if the partisan operatives sat in a room with legislators and handed them proposed districts favoring a political party or incumbent, which the Legislature ultimately adopted. And so the same prohibited conduct cannot be undertaken indirectly by creating the façade of an open process, communicating with operatives in secret, funneling operative-drawn maps into the public process with the authors' names obscured, and knowingly relying on the operative-submitted districts.

To be sure, Floridians have a long, proud history of demanding transparent government. Because transparency and public participation are so important, the judiciary must be vigilant in stamping out abuse or subversion of the public process to hide constitutional violations. Courts, then, must scrutinize ostensible efforts at public participation to determine whether the Legislature has contorted the public process into a shield for partisanship that would be indisputably prohibited if done overtly. The Legislature makes much of the trial court's comment that "relying upon publicly submitted maps may not be the best way to protect against partisan influence." (A.B. 140 (emphasis omitted); R86:11,315.) But here, the process undertaken was obviously "not … the best way to protect against partisan influence" in large part because operatives collaborating with the Legislature made it falsely appear to be a public process to hide their partisan maneuvering. Indeed, the purported public process was the very "means by which partisan maps, secretly

drawn and submitted by political operatives, could be incorporated into the enacted map with no one in the general public the wiser." (R86:11,314-15.)

The Legislature's rhetoric cannot obscure the practical result of the "clarification" it seeks. If this Court were to forbid or limit prospectively judicial review of actions in the public process, future Legislatures would have a simple roadmap to adopt gerrymandered districts: funnel interaction with partisan collaborators through the public process, keep those efforts secret and delete any incriminating documents, and adopt partisan districts with impunity. This faux public process would, perversely, become a shield for conduct that could not be taken in the open. This Court should reject the Legislature's invitation to endorse such an approach.

IX. LEGISLATIVE INTENT IS PROPERLY EVALUATED THROUGH THE ACTIONS OF THE INDIVIDUAL LEGISLATORS AND STAFFERS INVOLVED IN THE DRAWING OF THE PLAN.

The Legislature argues that the intent of individual legislators and staff members cannot be imputed to the Legislature and is irrelevant to the Legislature's intent as a whole. This argument draws a false dichotomy contrary to this Court's decision in *Apportionment IV*, and is at odds with the plain language of the Florida Constitution and basic principles of agency law and statutory interpretation.

First, this Court has already determined that the intent of individual legislators and legislative staff members is relevant to the assessment of legislative intent under Article III, Section 20. In *Apportionment IV*, this Court wrote:

> [T]he Legislature argues that intent in a statutory enactment is best revealed through the actual language used and any applicable legislative history, rather than through the testimony of individual legislators regarding their subjective intentions in proposing, amending, or voting for or against a particular piece of legislation. In this context, however, the "intent" standard in the specific constitutional mandate of article III, section 20(a), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.
>
> This Court has explained that the "intent" standard "applies to both the apportionment plan as a whole and to each district individually," and that "there is no acceptable level of improper intent." Thus, **the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, could directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent**.

Apportionment IV, 132 So. 3d at 150 (internal citation omitted) (emphasis added). This Court thus considered and rejected the argument that the Legislature now makes. *See also id.* at 138 ("We therefore reject the Legislature's argument that requiring the testimony of individual legislators and legislative staff members will have a 'chilling effect' among legislators in discussion and participation in the reapportionment process, as this type of 'chilling effect' was the precise purpose of the constitutional amendment outlawing partisan political gerrymandering and improper discriminatory intent.").

Despite the Legislature's best efforts to contort *Apportionment IV*, this Court did not distinguish the intent of individual legislators from that of the "Legislature as a whole." On the contrary, it recognized that "the communications of individual legislators or legislative staff members" could provide direct evidence of improper

legislative intent. *Id*. at 150; *see also id.* at 137 ("[T]he issue … is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues **directly** relevant to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory 'intent.' "). Because this Court has already rejected the argument the Legislature now raises, it should be summarily dismissed.

Second, the Legislature's argument that "[t]he intent of the Legislature—not the diverse and unique motivations of a few individuals—controls" (A.B. 144), ignores the plain constitutional language. To determine the standard for improper intent, this Court must look first to the language of Article III, Section 20, construing its language "consistent with the intent of the framers and the voters" and giving "[e]very word … its intended meaning and effect." *Apportionment I*, 83 So. 3d at 614, 630 (citation and internal quotation marks omitted). Article III, Section 20 provides that "[n]o apportionment plan or individual district shall be **drawn** with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const. (emphasis added). Thus, the Constitution does not refer to the intent with which a plan is enacted, adopted, or even voted on, but rather to the intent with which it is **drawn**. (*See* R86:11,303 ("[T]he question is what was the motive in **drawing** these lines." (emphasis added)).)

The Legislature does not dispute that the legislators and staff members who testified at trial were, in fact, the same individuals charged with drawing, or directing the drawing of the congressional plan. (I.B. 12-13.) The motivation of those "few individuals," therefore, is not only relevant to the constitutional validity of the map, it goes to the very heart of the constitutional prohibition on "drawing" maps with partisan intent.

The Legislature's suggestion otherwise would mean that the legislative map drawers could craft a plan intended to benefit Republicans as long as they hide their motives from other legislators voting on the redistricting bill. As long as the "Legislature as a whole"—which was not meaningfully involved in the drawing of the map[24]—lacks improper intent, the map would be sanitized. If the Legislature were allowed to cleanse partisan intent in this manner, the constitutional prohibition on partisanship would be no more than empty words on paper. This Court could hardly have envisioned such a result when it held that "there is no acceptable level of improper intent." *Apportionment I*, 83 So. 3d at 617. Divorcing the intent

[24] The map drawing process was controlled by a select group of legislative leaders, with most redistricting committee members having no meaningful involvement in or impact on the map-drawing process. (I.B. 12-13.) Indeed, Representative Precourt, Vice-Chair of the House Redistricting Committee, who introduced the amendment that led to the enactment of 9047, confirmed he had no role in the drawing of the maps and little knowledge of the actual changes that were being proposed in his amendment. (SR23:3194, 3196-98, 3216-17.)

of the map drawers and the select few legislators involved in deciding district configurations from the intent of the Legislature as a whole would both defy the plain language of Article III, Section 20, and encourage the very same backroom dealing and partisan gamesmanship that resulted in the plans now under review.

Third, the Legislature is a body comprised of individuals; its acts and intent cannot be wholly separated from the acts and intent of its members and staff who drew the maps any more than the acts and intent of a corporation can be wholly separated from the acts and intent of its employees. *See Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003) ("As a general rule, a principal may be held liable for the acts of its agent that are within the course and scope of the agency."); *Morgan Int'l Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 617 So. 2d 455, 459 (Fla. 3d DCA 1993) (holding that "it is well established 'that a corporation can only act through its officers and agents,' " and that such acts "are indistinguishable from the acts of the corporation itself" (citation and internal quotation marks omitted)); *cf. O'Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039, 1045 (Fla. 2d DCA 2007) ("Where a corporation is wholly dominated by persons engaged in wrongdoing, the corporation has itself become the instrument of wrongdoing."). Thus, if individual legislators or staff members drew or were part of the broader process of drawing all or part of the 2012 Congressional Plan with partisan intent, the Legislature, under principles of agency law, must be found to have acted with

improper intent. We are not talking about improper intent by random legislators and staffers with minimal to no role in drawing the maps; the legislators and staffers involved were the very folks the Legislature appointed to lead the redistricting effort and draw the maps.

Fourth, courts routinely look to evidence relating to staff members and individual legislators when the central question is the intent of a legislative body. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 254 (2001) (email sent from staff member responsible for drafting districting plans to two senators offered "some support" for district court's conclusion that racial considerations predominated); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977) (in determining whether discriminatory purpose motivated decision, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements **by members** of the decisionmaking body, minutes of its meetings, or reports" (emphasis added)); *Texas v. United States*, 887 F. Supp. 2d 133, 165 (D.D.C. 2012) (stating that court's "skepticism about the legislative process that created enacted SD 10 [wa]s further fueled by an email sent between staff members on the eve of the Senate Redistricting Committee's markup of the proposed map" that showed that "a plan was in place, at least at the staff level, such that no new proposals or amendments to the district map would be entertained at the markup"), *vacated on other grounds*, 133 S. Ct. 2885 (2013); *Smith v. Beasley*,

946 F. Supp. 1174, 1210 (D.S.C. 1996) (looking to the intent of two staff members to whom the Reapportionment Subcommittee delegated the responsibility of drawing the district lines at issue).

The cases cited by the Legislature are readily distinguishable for a variety of reasons. In particular, only one of these cases is a redistricting case. That case involved a California constitutional provision that, unlike Article III, Section 20, did not put intent directly at issue. *See Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 94 (Cal. Ct. App. 2006) (involving alleged violation of provision requiring "geographical integrity" of political subdivisions and geographical regions).

As for the non-redistricting decisions cited by the Legislature, this Court has squarely held that this case "is completely distinguishable from the various circuit court orders and cases outside the reapportionment context from other jurisdictions cited by the Legislature that have quashed subpoenas of legislators or legislative staff members where the testimony of an individual member of the Legislature was not directly relevant to any issue in the case." *Apportionment IV*, 132 So. 3d at 150. Many of the cases cited in the Answer Brief are, in fact, the exact same cases that this Court rejected for essentially the same proposition in *Apportionment IV*. (*Compare* A.B. 145 ("[C]ourts of this State have long doubted the probative value of the subjective views or motivations of an individual legislator in determining the Legislature's collective intent."), *with* Leg. Answer Brief in SC13-949, SC13-951,

at 40 ("Courts have long doubted the probative value of an individual legislator's testimony in determining the Legislature's collective intent.").)

The Legislature's litany of cases[25] primarily involve the interpretation of legislation. In redistricting litigation, unlike cases involving mere statutory construction, "the decision-making process itself is the case," making redistricting cases "entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction." *Apportionment IV*, 132 So. 3d at 150 (emphasis, alteration, and citation omitted); *see also id*. at 151 (emphasizing that "this case is wholly unlike the traditional lawsuit challenging a statutory enactment, where the testimony of an individual legislator is not relevant to intent in statutory construction").

The unpublished and therefore non-precedential decision in *Tinsley Media, LLC v. Pickens County, Georgia*, No. 05-12324, 203 Fed. App'x 268, 273 (11th

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[25] *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982); *Sec. Feed & Seed Co. v. Lee*, 189 So. 869, 870 (Fla. 1939); *State v. Patterson*, 694 So. 2d 55, 58 n.3 (Fla. 5th DCA 1997); *Fields v. Zinman*, 394 So. 2d 1133, 1135 (Fla. 4th DCA 1981); *McLellan v. State Farm Mut. Auto Ins. Co.*, 366 So. 2d 811, 813 (Fla. 4th DCA 1979), *overruled on other grounds by S.C. Ins. Co. v. Kokay*, 398 So. 2d 1355 (Fla. 1981); *In re Blair*, 408 S.W.3d 843, 859 (Tex. 2013); *State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431, 436 n.5 (Mo. 2007); *Cave City Nursing Home, Inc. v. Ark. Dep't of Human Servs.*, 89 S.W.3d 884, 890 (Ark. 2002); *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO Local 469, Yakima Firefighters Ass'n*, 818 P.2d 1076, 1087 (Wash. 1991); *Jackson v. Delk*, 361 S.E.2d 370, 372 (Ga. 1987); *Styers v. Phillips*, 178 S.E.2d 583, 590 (N.C. 1971).

Cir. Oct. 12, 2006) (per curiam), which assessed whether a restriction on commercial speech was motivated by a substantial government purpose, is further distinguishable because the court was primarily concerned with the *post hoc* nature of an affidavit submitted by a county commissioner. And, while the United States Supreme Court stated in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission* that "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it," 461 U.S. 190, 216 (1983), it does not follow that the motivations of individual legislators and staffers actually responsible for drafting districts provide an insufficient basis to determine legislative intent. In any event, the court in *Pacific Gas* explained that it "should not become embroiled in attempting to ascertain California's true motive." *Id*. Here, there is a **constitutional mandate** to evaluate legislative intent. That intent can be evaluated only by considering the words and conduct of the individual legislators, staffers, and their agents (or, as was revealed in this case, their operative co-conspirators, upon whom they relied for suggested district configurations and changes to benefit Republicans and incumbents) who participated in the drawing of the map. Accordingly, this Court should reject the Legislature's invitation to revisit its prior holdings on the issue of legislative intent.

X. THE LEGISLATURE'S RENEWED ATTEMPT TO INVALIDATE ARTICLE III, SECTION 20 BASED ON THE ELECTIONS CLAUSE OF THE U.S. CONSTITUTION FAILS.

Consistent with its other repeated attempts to evade the redistricting requirements imposed by the Florida Constitution, the Legislature contends that Amendment 6 violates Article I, Section 4 of the United States Constitution (the "Elections Clause"). That argument has consistently failed, and it should fail here, too: not only is it moot because the Legislature is seeking affirmance of the trial court's approval of the Remedial Plan, it is also barred by the doctrine of collateral estoppel and inconsistent with federal case law.

This issue has already been adjudicated. Immediately after Florida's voters approved Amendment 6, two members of Congress challenged its constitutionality in federal court in *Brown v. Secretary of State*, No. 1:10-cv-23968 (S.D. Fla. Sept. 9, 2011), *affirmed*, 668 F.3d 1271 (11th Cir. 2012). The House, one of the Cross-Appellants here, actively intervened as a party in that case and argued that the "precedential effect of an adverse ruling [w]ould impair the House's interests in future litigation, including litigation regarding the validity of any forthcoming redistricting plan." *See* Fla. House of Representatives' Unopp. Mot to Intervene as Plaintiffs, at 3, *Brown*, No. 1:10-cv-23968 (S.D. Fla. Jan. 14, 2011), ECF No. 33 (available on PACER).

After the district court granted an adverse summary judgment, the House joined in taking an appeal to the Eleventh Circuit. *Brown*, 668 F.3d at 1274. The Eleventh Circuit clearly stated the issue on appeal was "whether a state constitutional provision establishing standards for congressional redistricting that was approved by the people by initiative is contrary to the Elections Clause of the United States Constitution." *Id.* at 1272. Relying on the same cases cited by the Legislature, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932), the Eleventh Circuit directly held that "Amendment Six does not run afoul of the [Election Clause]." *Brown*, 668 F.3d at 1281. No further appeal was taken, rendering the decision a final binding judgment.

As a matter of federal preclusion law, the Legislature is bound by *Brown* and collaterally estopped from re-raising the Elections Clause here. "A fundamental precept of common-law adjudication … is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction … cannot be disputed in a subsequent suit between the same parties or their privies.' " *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48 (1897)).[26] Under collateral estoppel, even where the second

[26] Federal common law dictates the preclusive effect that this Court should afford the judgment in *Brown*. *E.g.*, *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Deposit Bank of Frankfort v. Bd. of Councilmen of Frankfort*, 191 U.S. 499 (1903); *see also* 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4468 (2d ed.

action is upon a different cause of action, "the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Collateral estoppel protects litigants from the burden of relitigating identical issues, conserves judicial resources, and "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54; *see also Parklane Hosiery*, 439 U.S. at 326.

The Legislature's Elections Clause argument is identical to the argument that was previously raised and rejected in *Brown*. And both the House and the Senate are bound by that decision, regardless of Plaintiffs' participation in the prior litigation, as collateral estoppel does not require mutuality of parties. *Parklane Hosiery*, 439 U.S. at 327-38. The House and Senate's interest in the constitutionality of Amendment 6 is identical; both chambers are equally responsible for congressional redistricting in Florida, and both chambers have uniformly litigated the issue below. The Eleventh Circuit squarely rejected the Elections Clause argument. The Legislature is therefore estopped from relitigating it here.

1987) (observing that the U.S. Supreme Court has "ruled that federal common law dictates the preclusion effect that state courts must give a federal judgment" that determined a substantive question of federal law).

The Legislature argues that this Court is not bound by *Brown*. As a procedural matter, that argument is irrelevant inasmuch as collateral estoppel addresses the binding effect of judgments on parties (not courts); whether *Brown* is binding as a precedential matter is of no moment.

But even if the Court were to disregard the procedural failings of the Legislature's Elections Clause argument, it should treat *Brown* as persuasive authority and agree with its substantive reasoning and conclusion. In the absence of a controlling U.S. Supreme Court decision regarding a federal question, Florida courts should "accord unusual weight to a decision … of the federal circuit in which the state is located" to ensure "that the issue will be uniformly decided by both federal and state courts in the geographic area," thereby "discouraging forum shopping." *Wylie v. Inv. Mgmt. & Research Inc.*, 629 So. 2d 898, 900 (Fla. 4th DCA 1993). From any angle, the Legislature's attempt to relitigate the constitutionality of Amendment 6 vis-à-vis the Elections Clause is a blatant and impermissible attempt at seeking another bite at the apple that should be rejected by this Court.

CONCLUSION

For the foregoing reasons, while the Court should reverse on the main appeal and grant the relief requested in the initial brief, it should dismiss or, alternatively, affirm on the cross-appeal.

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