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Common Cause v. Byrd

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Common Cause, et al.)
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v.) 4:22-cv-109
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TRANSCRIPT OF VIDEO-RECORDED
HEARING OF THE FLORIDA HOUSE CONGRESSIONAL
REDISTRICTING SUBCOMMITTEE
NOVEMBER 3, 2021

DIGITAL EVIDENCE GROUP
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1 REP. SIROIS: That's right. Good afternoon. The
2 congressional redistricting subcommittee will come to
3 order. Kyle, please call the roll.

4 CLERK: Chair Sirois?

5 REP. SIROIS: Here.

6 CLERK: Vice Chair Tuck?

7 REP. TUCK: Here.

8 CLERK: Ranking member Skidmore?

9 REP. SKIDMORE: Here.

10 CLERK: Representative Beltran?

11 REP. BELTRAN: Here.

12 CLERK: Benjamin?

13 REP. BENJAMIN: Here.

14 CLERK: Brown? Brown? Fabricio? Fabricio?
15 Fetterhoff?

16 REP. FETTERHOF: Here.

17 CLERK: Fisher?

18 REP. FISHER: Here.

19 REP. TUCK: Perfect timing.

20 CLERK: Giallombardo?

21 REP. GIALLAMBARDO: Here.

22 CLERK: Harding? Harding? Hunschofsky?

23 REP. HUNSCHOFSKY: Here.

24 CLERK: Joseph?

25 REP. JOSEPH: Here.

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1 CLERK: Massullo?

2 REP. MASSULLO: Here.

3 CLERK: Morales?

4 REP. MORALES: Present.

5 CLERK: Perez excused. Plakon excused. Silvers
6 excused. Toledo excused. Trabulsky?

7 REP. TRABULSKY: Here.

8 CLERK: Williamson?

9 REP. WILLIAMSON: Here.

10 CLERK: Core members present, Mr. Chair.

11 REP. SIROIS: Thank you, Kyle. Members, a few
12 reminders before we begin. Please silence all
13 electronic devices and if you wish to make public
14 comment, please fill out a speaker form and turn it in
15 to the sergeant's staff.

16 Also, a reminder for our members and presenters.
17 Please ensure that you turn your microphone on when
18 you are speaking and off when you are finished.

19 Members, welcome back to our interim committee
20 meetings. So far in this process, we have covered an
21 introduction to redistricting concepts, reviewed our
22 website and current public input opportunities,
23 discussed our map drawing applications' advanced
24 functionality and how those tools can assist us in
25 aligning our maps with our constitutional standards,

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1 as well as demonstrated some of the tangible examples
2 of our constitutional standards within our currently
3 enacted congressional maps.

4 I explained during our first committee meeting
5 how important a comprehensive, educational effort is
6 to understanding the full scope of redistricting. I
7 hope you're coming to appreciate that this is not an
8 easy task , nor will there be one clear cut answer.

9 One of the last pieces of educational information
10 we need to cover as a committee is the legal aspect of
11 redistricting, which includes applicable federal and
12 state law as well as case law related to this process,
13 especially the Florida Supreme Court precedent that
14 established -- that was established following the 2012
15 redistricting cycle. This will directly impact how we
16 view and apply our Tier-One and Tier-Two standards.

17 For this redistricting cycle, the house has
18 retained outside counsel to advise the chamber on
19 state and federal law as well -- as well as relevant
20 court precedent. Today -- uh, for today's
21 presentation, our committee will be hearing from Andy
22 Bardos.

23 Mr. Bardos has been with Gray-Robinson since 2005
24 and was involved in the 2012 redistricting cycle, as
25 well as having previously -- previously served as a

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1 special counsel in the Florida Senate. We're glad
2 you're with us today, sir. Thank you.

3 Members, I want to differentiate to -- I want to
4 differentiate that today's counsel presentation is for
5 our education -- is for our education on relevant
6 redistricting law. It is not -- it is not for
7 discussing hypothetical scenarios or specific policy
8 decisions that may become -- that may come before our
9 committee.

10 As I've mentioned before, there is no correct
11 map. When we begin reviewing district boundary lines,
12 decisions will be weighed among one another with the
13 goal of drawing a legally compliant map. As Mr. Bardos
14 goes through his presentation, I encourage you to take
15 notes of questions that you may have.

16 Once the presentation is concluded, we will take
17 questions from members on the content of the
18 presentation and then we'll move on to public comment.
19 And with that, Mr. Bardos, welcome to the House
20 Congressional Redistricting Committee and you're
21 recognized for your presentation.

22 MR. BARDOS: Thank you, Mr. Chairman. My name is
23 Andy Bardos. I'm an attorney with the Gray-Robinson
24 law firm. I'll be providing an overview today of the
25 legal standards that apply to state legislative and

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1 congressional districts, with an emphasis, of course,
2 on congressional districts, um, given that this is a
3 subcommittee for drawing congressional plans.

4 The standards that apply to the two -- in the two
5 contexts are very similar. I'll point out the
6 differences, which are -- which are few and -- and, uh
7 -- and -- but otherwise, um, the standards will be --
8 will be similar.

9 So the standards come from a number of different
10 sources. The United States constitution imposes legal
11 standards, as does the federal voting rights act and
12 now the state constitution, which in 2010 was amended
13 to add a number of substantive legal standards that
14 will guide our -- our, uh, thought process in drawing
15 new districts.

16 I'll begin with the federal Voting Rights Act,
17 which was enacted in 1995 by Congress to enforce the
18 15th amendment. Um, the 15th amendment guarantees that
19 the right of citizens to vote will not be denied or
20 abridging on account of race. And the Voting Rights
21 Act was enacted to govern a number of different
22 aspects of election law.

23 Two particular are relevant to redistricting and
24 those are section 2 and section 5. Section 2 of the
25 Voting Rights Act prohibits a state from imposing

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1 election laws that result in the denial or abridgement
2 of the right to vote on account of race, color, or
3 membership in language minority group.

4 That's very broad language, but the US Supreme
5 Court, in the context of redistricting, has refined
6 that in a case called Thornburg v. Gingles and given
7 definition to that legal standard.

8 Gingles was decided in 1986, and this slide shows
9 the criteria that the US Supreme Court announced in
10 the case and these are the criteria that must be
11 present for section 2 to apply. And section 2 applies
12 to a particular region of the state where it requires
13 -- it might require the drawing of a minority
14 opportunity district.

15 The Gingles standard sets forth three
16 preconditions. These three preconditions are
17 quantifiable and objective, more so than the ultimate
18 test, which is a totality of the circumstances
19 analysis, which we'll discuss in a moment.

20 Um, the first three criteria are here numbered on
21 this slide. And the general concept here is that if a
22 minority population is sufficiently large that it
23 could be the majority in a single member district and
24 it has voting preferences that are different from that
25 of the majority of the electorate so that the majority

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1 of the electorate would usually defeat the preferred
2 candidates of the minority population, then the
3 minority population might be entitled to a -- a
4 district that gives them a majority population status
5 and therefore the ability to control the outcome of
6 that election.

7 The three criteria encompass those ideas. Um, the
8 first one is that the minority population must be
9 sufficiently large and geographically compact to
10 constitute a majority in a single member district. So
11 this is the first standard that must be satisfied.

12 So in a congressional district, for example, with
13 an ideal population in excess of 700,000 people for
14 total population, um, this would require a minority
15 population that's relatively compact in excess of
16 300,000 people.

17 Of course, for section 2, we would use voting age
18 population only, not look at the total population, but
19 that gives some idea of how large the population must
20 be before section 2 could even apply.

21 Not only must a minority population be
22 sufficiently large that it would constitute a majority
23 of the voting age population, it must be
24 geographically compact. Section 2 will never require
25 the drawing of a district that is not compact. It

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1 doesn't require the combining of populations that are
2 remote from each other into a single district, um,
3 that doesn't have a geographically compact shape.

4 But where the minority population is large enough
5 to be the majority of the voting age population in the
6 district and it is relatively compact, then we look at
7 criteria 2 and 3, which encompass this idea of
8 racially polarized voting.

9 And racially polarized voting means that the
10 minority population has -- prefers different
11 candidates from the majority population and therefore,
12 because the majority -- minority population is
13 outnumbered, their preferred candidate will usually be
14 defeated.

15 And so, in that situation where there's racially
16 polarized voting and yet the minority population
17 could, depending on how the district is drawn, be a
18 majority in that district, section 2 might apply to
19 require the drawing of a district that gives minority
20 voters a majority in a district.

21 But only applies if this final criterion is
22 applied, which we see here on this slide. And this is
23 less objective. It's less quantifiable. Um, it's based
24 on the totality of the circumstances.

25 We must ask whether members of the minority group

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1 have less opportunity than other members of the
2 electorate to participate in the political process and
3 to elect representatives of their choice.

4 And in Gingles, the court enumerated various
5 considerations that inform that analysis. The courts
6 will consider whether there is discriminatory --
7 whether there are discriminatory election practices,
8 whether there is racially polarized voting, um,
9 whether there have been racial overtones in campaigns,
10 whether there has been discrimination in other areas
11 that affect the ability of a minority group to
12 participate in the political process.

13 And all of that is considered in totality to
14 determine whether minority voters have the same
15 opportunity to elect the candidates of their choice
16 and to participate in the political process as the --
17 as the majority of the electorate. If not, and if the
18 other criteria are satisfied, then the state is
19 required to draw a district that provides minority
20 voters with an opportunity to elect the candidate of
21 their choice by making them the majority of the voting
22 age population of that district.

23 That was section 2. The other provision of the
24 Voting Rights Act that can be relevant to
25 redistricting is section 5. Um, section 5 is no longer

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1 effective however, um, as of 2013, when the United
2 States Supreme Court decided the Shelby County v.
3 Holder decision.

4 We will cover it though, because the Florida
5 constitution has incorporated section 5's principles
6 into our state law and so it continues to apply to
7 Florida's redistricting plans through the Florida
8 constitution.

9 Um, when it was originally enacted, section 5 was
10 a temporary measure that was designed to cover select
11 jurisdictions. And those jurisdictions were
12 jurisdictions that, back in the 1960s and 1970s, had
13 in place what are called by the Voting Rights Act,
14 "tests or devices."

15 And the best example of that would be a literacy
16 test. And so, these jurisdictions that had a test or
17 device in place and also had relatively low rates of
18 turnout or registration among minority voters were
19 identified by Congress in the Voting Rights Act
20 through a formula as being subject to section 5.

21 And so, in Florida, five counties were identified
22 as being subject to section 5. But of course, if there
23 was a state law, such a redistricting plan, that would
24 apply to those five counties, then that state law was
25 also subject to section 5 of the Voting Rights Act.

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1 And what that meant was that a voting rights -- a
2 voting law that was -- that applied to those five
3 counties could not retrogress, um, and that means no
4 backsliding -- that minorities would not be in a worse
5 position than they were in before that law was
6 enacted.

7 And in order to ensure that there would be no
8 retrogression, the Voting Rights Act required election
9 law changes to be submitted either to the -- to the
10 United States Department of Justice or to the federal
11 district court for the District of Columbia to be pre-
12 approved before it could go into effect.

13 And this was considered by the US Supreme Court
14 to be a -- a very, um, stringent remedy for -- for a
15 harm, um, that was identified by Congress. And that's
16 why, in the Shelby County v. Holder case, the United
17 States Supreme Court viewed section 5, um, with some,
18 uh, analytical rigor and it determined that
19 ultimately, um, because facts had changed since the
20 1960s and 70s, this coverage formula that determined
21 which jurisdictions would be subject to section 5 was
22 outdated and could no longer be applied, um, because
23 it was based on data that was 40 or 50 years old.

24 And so, in Shelby County v. Holder, the United
25 States Supreme Court invalidated that coverage formula

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1 and now, because there's no coverage formula, section
2 5 doesn't apply anywhere.

3 Congress could enact a new coverage formula
4 that's based on current conditions, but it has not
5 done that. Um, we will see though that this anti-
6 retrogression principle continues to apply in Florida
7 through the Florida constitution.

8 Before we move into the Florida constitution,
9 we'll talk about two more concepts from federal law,
10 um, both of which arise from the United States
11 constitution. Um, the first is the -- um, racial
12 gerrymandering.

13 And this slide references Miller v. Johnson,
14 which is probably the leading case on racial
15 gerrymandering, although the court -- the United
16 States Supreme Court has considered a number of cases
17 in this area.

18 And this perfectly -- this, um -- this is an
19 interpretation of the equal protection clause of the
20 United States constitution and the court has held that
21 the equal protection clause prohibits the
22 consideration of race in redistricting as the
23 predominant factor.

24 In other words, race cannot be the predominant
25 factor in drawing district lines. It may be considered

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1 and it may a motive to enacted a district in - in a
2 particular way, but it may not predominant.

3 And the court has explained that what that means
4 is that traditional redistricting principles such as
5 compactness may not be subordinated or made secondary
6 to the consideration of race in redistricting.

7 There is an exception to that that the court has
8 recognized, um, and that is, if necessary to comply
9 with the Voting Rights Act, the legislature may
10 consider race and utilize race as the predominant
11 consideration.

12 The court has never explicitly decided this but
13 it has stated in a number of cases that it assumes as
14 much. It assumes that compliance with the Voting
15 Rights Act justifies the consideration of racial -- of
16 race as a predominant consideration of drawing a
17 district -- in drawing the district lines.

18 So to the extent that it's necessary in order to
19 comply with section 2 or section 5, the legislature
20 may consider race, even as the predominant factor.
21 Otherwise, race may be one of the considerations in
22 the mix but cannot predominate over other traditional
23 redistricting principles.

24 Um, the second concept and it's -- it's a related
25 one -- is -- is partisan gerrymandering. And partisan

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1 gerrymandering is -- is a -- is also a -- a -- an
2 interpretation of the equal protection clause and as
3 of 2019, in the Rucho v. Common Cause decision, um,
4 the United States Supreme Court has held that federal
5 courts will not get involved in deciding partisan
6 gerrymandering, uh, claims.

7 Um, this is relevant, however, to our state
8 constitutional standard where -- which we'll discuss
9 momentarily. Um, in federal -- in the federal courts -
10 - federal courts have interpreted the United States
11 constitution not to prohibit at least some partisan
12 gerrymandering.

13 Um, they have said that considering partisanship
14 is -- is permissible under the federal constitution.
15 The question was always whether it can go too far and
16 how the courts would go about determining how much
17 partisan consideration is too much in drawing a
18 redistricting map.

19 And in a number of decisions, the United States
20 Supreme Court has deferred on that decision and
21 finally, in 2019, it decided that it has not
22 identified a legal standard that it could consistently
23 and reliably apply to determine when a redistricting
24 plan goes too far in considering partisanship in -- in
25 drawing districts and therefore the court decided that

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1 partisan gerrymandering is not a claim that federal
2 courts will consider.

3 So we move now to the Florida constitution. Um,
4 article 3, section 16 sets out certain parameters, but
5 this is for state legislative districts rather than
6 congressional. Um, it is relevant in some ways to
7 congressional in the sense that, um, this dictates the
8 timeline by which state legislative redistricting --
9 districts must be adopted.

10 They must be adopted in the second year after
11 each decennial census and so that would be in 2022 in
12 the regular session. And although the congressional
13 redistricting plan is not bound by that same timeline,
14 typically they have been, uh, developed in the past
15 in tandem.

16 So here we see, um, the state constitutional
17 standards that were adopted in 2010. Um, they are
18 found in article 3, sections 23 and 21 of the Florida
19 constitution. One of those sections governs
20 legislative district -- redistricting and the other
21 governs congressional redistricting, but otherwise the
22 standards are the same. And they are -- they are
23 separated into two tiers, Tier-One and Tier-Two.

24 The Tier-One standards, uh, uh, prevail in case
25 of conflict. To the extent that Tier-One standards

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1 conflict with Tier-Two standards, Tier-One standards
2 have precedence. Um, within each tier, there is no
3 order of priority.

4 So within the tiers -- Tier-One standards, for
5 example, must be balanced with each other, and
6 likewise within Tier-Two, those standards must be
7 balanced with each other. The fact that they -- one is
8 stated before the other - the order that they are
9 stated in does not establish an order of priority.

10 And there are conflicts - there is tension
11 between these standards. For example, um, sometimes
12 avoiding diminishment in the ability of minority
13 voters to represent their candidates of choice might
14 require drawing a non-compact district. And so, in
15 those -- in that case, Tier-One would prevail and the
16 legislature would be free to draw a non-compact
17 district.

18 Likewise, within Tier-Two, there could be, um --
19 there could be tension between the compactness
20 standard and the requirement to utilize existing
21 political and geographic boundaries where feasible.

22 So for example, a city or county might not be
23 compact, and so if the legislature wants to preserve
24 that city or county or follow its boundaries, then it
25 might not draw a district that would be as compact if

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1 it could ignore political and geographical boundaries.
2 So those standards must be reconciled and balanced in
3 the drawing of the map.

4 Now we'll review some of the, um, Florida Supreme
5 Court's interpretation of these provisions. The first,
6 um, that we'll discuss is the Tier-One standard of
7 districts with an intent to favor or disfavor a
8 political party. Um, this was a -- a significant
9 addition to the Florida Supreme Court -- I'm sorry --
10 the Florida constitution in 2010.

11 And the focus of this provision is intent. What
12 matters here is whether the legislature is drawing
13 districts with a -- with an intent to favor or
14 disfavor a political party.

15 Um, the focus of this provision is not the effect
16 of the map. There could be non-partisan reasons why a
17 map may favor one political party or another. The
18 question is, what was the intent in drawing it?

19 If the intent was to favor a political party or
20 to disfavor a political party, then that map violates
21 the standard. If that was not the intent, if that was
22 simply an effect, if that was a political consequence,
23 then it doesn't violate the standard.

24 And every redistricting plan will have political
25 effects. Every redistricting plan will have political

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1 ramifications, and that's why the Florida Supreme
2 Court made clear that the focus of this provision is
3 intent, as the -- as the language of the provision
4 states.

5 Um, the court also made clear that there is no
6 acceptable level of improper intent. Um, it may not be
7 considered -- uh, partisan considerations may not be
8 considered and weighed in combination with other
9 redistricting criteria. It simply must be excluded
10 from the redistricting calculus altogether.

11 Um, the court made clear also that, um, the
12 legislature is not required to balance the map between
13 the two political parties. As -- as this slide states,
14 the Florida constitution does not require the
15 affirmative creation of a fair plan, but rather a
16 neutral one in which no improper intent was involved.

17 So again, intent is the focus of the standard. If
18 political intent has been set aside, then this
19 standard is -- has been complied with.

20 Um, likewise, with respect to incumbency, there
21 may be no intent to favor or disfavor an incumbent.
22 Um, that's why the -- the Florida Supreme Court said
23 here, um, that's why the inquiry for intent to favor
24 or disfavor an incumbent focuses on various
25 considerations. It -- it would involve the shape of

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1 the district.

2 The court will look at the shape of the district
3 in assessing whether there was an intent to favor or
4 disfavor an -- an incumbent and it will look at
5 incumbent addresses relative to those district lines
6 to determine whether a district appears to be
7 intentionally taking an -- an incumbent's residence or
8 excluding an incumbent from the district.

9 Those are things that the court would consider as
10 evidence in determining whether there was an improper
11 intent from the legislature's perspective, in the
12 process of passing that map.

13 Once again, this is, um, essentially a negative
14 standard. It tells you what you -- what -- what may
15 not be done, what may not be considered. And the
16 legislature may not consider, um, and draw maps with
17 an intent to favor or disfavor an incumbent.

18 Now we're moving into the provisions that are the
19 analogues to the Voting Rights Act provisions. Um, the
20 Tier-One, um, standards include, um, the, uh,
21 requirement that districts, uh, be drawn to provide
22 racial and language minorities with an equal
23 opportunity to participate in the political process.

24 This is the Florida constitution's equivalent to
25 section 2 of the Voting Rights Act and it has been

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1 interpreted in the same way. So the Gingles standard
2 that we discussed earlier with its three preconditions
3 and then ultimately the totality of the circumstances
4 analysis would apply under the Florida constitution as
5 well.

6 The second provision. This is the analogue -- um,
7 under the Florida constitution, which relates to, uh,
8 racial or language minorities is the diminishment
9 standard.

10 This is the equivalent of the section 5
11 prohibition on retrogression. Section 5, as we
12 discussed, no longer applies but under the -- under
13 the state constitution, legislature cannot draw
14 districts that diminish the ability of minority voters
15 to elect the candidate of their choice.

16 Again, the -- what this, um, is - is focused on
17 is the retrogression or -- or -- or worsening of the
18 position of -- of racial or language minorities to
19 elect the candidates of their choice. So the Florida
20 Supreme Court stated in -- in 2012 that the
21 legislature cannot eliminate minority/ majority
22 districts or weaken other historically performing
23 minority districts, where doing so would actually
24 diminish a minority group's ability to elect its
25 preferred candidates.

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1 Um, the -- in -- in assessing whether a district
2 -- a new district diminishes the ability to elect a --
3 a preferred candidate, we don't look simply to the
4 voting age population of the district because it might
5 not tell the full story as to whether minority voters
6 in that district would have the ability to elect the
7 candidates of their choice.

8 So we have to perform what the court has referred
9 to as a "functional analysis." This requires a deeper
10 dive into election data, including past election
11 results, um, registration data and turnout data within
12 the districts that are under consideration.

13 And that requires a comparison of the benchmark
14 district -- former district that was in place -- and
15 the new district to see whether the new district
16 affords minority voters with an undiminished ability
17 to elect the candidates of their choice.

18 And in this, uh, analysis, the courts will be
19 looking at whether the new map, uh, affords racial and
20 language minorities at least the same number of
21 districts in which, uh, they could elect the
22 candidates of their choice as the prior map did.

23 This slide sets forth the Tier-Two standards. Um,
24 the first is, uh, the districts must be as nearly
25 equal in population as is practicable. This is the one

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1 person, one vote standard. In the context of
2 congressional maps, this has been construed quite
3 strictly.

4 Um, the United States Supreme Court, in
5 interpreting, um, the federal constitution has said
6 that, um, this imposes a requirement of precise
7 mathematical equality.

8 And so, um, state legislatures, when they redraw
9 maps, typically will draw congressional districts to,
10 um -- to have a deviation of essentially one person so
11 that the district that is the largest district in
12 terms of population will have one person more than the
13 smaller -- smallest district.

14 In limited circumstances, the United States
15 Supreme Court has recognized some leeway but not much,
16 um, and -- and it requires a strong justification for
17 every deviation from the one person, one vote
18 standard. So precise, mathematical equality has in
19 practice been the standard that state legislatures
20 have adhered to.

21 Uh, the second Tier-Two requirement is that
22 districts be compact. And this a -- a -- basically a
23 commonsense measure. There's no bright line rule, but
24 it's -- it begins with a visual analysis -- analysis
25 of the district. Does it have a regular shape or is

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1 bizarre or unusual in its shape? Does it have
2 appendages?

3 Um, and so, the visual examination is the first
4 standard and that's something that, um, you know, most
5 people when they look at a map will easily see whether
6 that's a district that looks reasonable or not.

7 It's obviously -- the compactness of a district
8 is obviously affected by the geography of the state
9 and sometimes by the geography of Florida's counties,
10 which are less compact than some counties in other
11 states.

12 Um, so Florida's counties are -- are somewhat
13 irregular, and because of the third standard that
14 we'll talk about in a moment, which is adhering to
15 political boundaries, that might influence the
16 compactness of some districts as the geography of the
17 state might. For example, in the Keys, there's no --
18 you can't draw a circular or a rectangular district in
19 the Keys.

20 Um, so, Florida as a state is not rectangular or
21 square and neither are its counties, so, um, that will
22 influence the compactness analysis.

23 Um, in addition to visual compactness, we look at
24 mathematical measures and there are a couple of
25 mathematical, uh, measures of compactness that the

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1 Florida Supreme Court reviewed, um, 10 years ago.

2 Um, these are -- are aids to -- to determining
3 whether a district is compact, um, but visual
4 compactness is -- is the primary measure.

5 The third standard under Tier-Two is that
6 districts must, where feasible, utilize existing
7 political and geographical boundaries. Political are
8 city and county -- city and county -- county
9 boundaries.

10 Um, so, typically, the legislature will, um, try
11 to keep as many cities whole or -- and counties whole
12 as possible and follow city and county boundaries and
13 it will -- uh, the other requirement, geographical
14 boundaries also requires legislature, where feasible,
15 to utilize easily ascertainable and commonly
16 understood geographical boundaries.

17 And those could be rivers or railways or
18 interstates or state roads -- things that voters can
19 recognize and identify with so that the boundary isn't
20 simply running somewhere that voters can't ascertain
21 or identify.

22 So these are all of the standards that the
23 legislature must balance and -- and implement in
24 enacting any redistricting plan and they all, in the
25 context of the geography and the demography of the

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1 state, um, tend to come into some tension with each
2 other.

3 Um, it's important to bear in mind, as the
4 Florida Supreme Court recognized in 2012, that the
5 legislature is not required to pass the best possible
6 map or draw the most compact districts.

7 It's simply required to pass a map that meets
8 these constitutional thresholds and there are a number
9 of different configurations that could meet these, um,
10 minimum requirements. Um, so, the legislature doesn't
11 have to find that one perfect map.

12 And that covers the, um, standards that I -- I
13 wanted to, uh, review today. That's an overview of the
14 standard and Mr. Chairman, I'd welcome any questions.

15 REP. SIROIS: Thank you very much, Mr. Bardos,
16 for your informative presentation. Uh, members, there
17 are two specific items that I'd like to address on the
18 record before we take questions from committee
19 members.

20 The first issue is incumbencies. I want to state
21 very clearly that we are not, and we will not be using
22 any incumbent or candidate addresses to produce these
23 maps. The house took the same position last decade and
24 the Florida Supreme Court viewed that as a favorable -
25 - favorable step towards protecting against

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1 inadvertently favoring or disfavoring an incumbent,
2 one of our Tier-One standards.

3 Members, I'd also like to point out candidly, as
4 new district lines are workshopped and this process
5 proceeds, there is a chance that any member may be
6 paired with a fellow incumbent in a newly created
7 district in order to create legally complaint
8 boundaries.

9 I know that this may be an intimidating thought
10 for members, however, that is part of our process. And
11 as you bring comments to committee, please be mindful
12 that I will not entertain any discussion about placing
13 boundary lines in order to disfavor -- in order to
14 favor or disfavor an incumbent or potential
15 challengers.

16 The second item that I'd like to address is a
17 point that Mr. Bardos touched on regarding the
18 partisan makeup of the maps that will come before our
19 committee. While external, third-party groups
20 seemingly prioritize the Republican-Democrat split
21 over the legal compliance of our boundary lines, that
22 is not what we as legislators are charged to do.

23 Outside of using the functional analysis to
24 ensure our racial and minority groups can elect a
25 candidate of their choice -- a Tier-One standard -- I

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1 want to be clear that staff, nor this subcommittee,
2 will be reviewing the overall partisan split of a map
3 at any stage of this process to help ensure that we
4 are not intentionally favoring or disfavoring a
5 political party or incumbent.

6 Chair Leek was clear yesterday in the full
7 redistricting committee that they will also not be
8 looking at a partisan split.

9 Additionally, I would encourage you not to engage
10 in any planned or unplanned conversations regarding
11 such a topic, as it may lend itself toward a violation
12 of Tier-One standards as interpreted by the Florida
13 Supreme Court.

14 Now, I open up to questions, uh, Mr. Bardos, for
15 committee members. Uh, I'd like to remind you to
16 please address your questions to the chair.

17 I will ask for one question to be submitted at a
18 time and then I'll recognize Mr. Bardos, uh, to
19 provide an answer and then we'll deal with any follow-
20 up questions -- questions as they may arise. Uh,
21 Representative Benjamin, you're recognized for a
22 question.

23 REP. BENJAMIN: Thank you, Mr. Chair. My question
24 goes to, uh, intent. Uh, I noticed that the -- it was
25 some guidance in case law with regards to intent as it

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1 relates to the incumbent, as to what the court looks
2 to to determine what the intent was.

3 I didn't see that in the, uh -- what you provided
4 for intent to favor or disfavor a political party. So
5 is there anything that you've read or information that
6 you have as to what are some of the things that the
7 court looks for to determine what the intent was?

8 REP. SIROIS: Mr. Bardos, you're recognized.

9 MR. BARDOS: Thank you, Mr. Chairman. That's a
10 very good question. Um, so, when assessing the intent
11 to favor or disfavor a political party, the court will
12 review a number of considerations.

13 Obviously, if there are statements on the record
14 saying that we're favoring or disfavoring a political
15 party, that would be direct evidence and the most
16 informative evidence, but the court will also look at
17 objective factors in the map to determine -- to
18 attempt to determine whether there was an intent to
19 favor or disfavor a political party.

20 One of those is, how closely is a legislature
21 following the two-tier standards -- compactness and
22 political boundaries and geographical boundaries.

23 Those standards, among other things, are designed
24 to limit the ability to favor or disfavor a political
25 party or an incumbent and so the courts will look at

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1 that and if the -- if the districts are compact, if
2 they faithfully follow political and geographical
3 boundaries, then that weighs against the finding that
4 there was an improper intent.

5 Um, the court will look at the shape of the
6 district. It will look at whether the district, um --
7 it will look at the district population and the
8 demography of the district, relative, um, to the shape
9 of the district.

10 And it will look at, um -- it will look at
11 whether there have been interactions with outside, um,
12 actors who might have a political -- vested political
13 interest in the process. That was something that was
14 part of the redistricting litigation after the last
15 cycle.

16 It will look at, um, the demographics of the
17 district and the overall political composition of the
18 map.

19 Um, so, the overall political composition of the
20 map, I think, by itself, the court expressed, won't be
21 -- won't be enough because the court recognizes that
22 there might be factors such as drawing, um, districts
23 for -- uh, that protect the ability of minority voters
24 to elect the candidates of their choice or, um -- or
25 concentrations of certain, uh, voters of a -- of one

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1 political party in, say, urban areas at high rates
2 that will affect the political composition of the map.

3 So the court will look at everything in totality,
4 um, to determine whether there was an improper intent.
5 And so, those are some of the considerations that the
6 court will look at.

7 REP. SIROIS: Thank you. Uh, Representative
8 Beltran, you're recognized for a question.

9 REP. BELTRAN: Thank you, Chairman, and, uh,
10 thank you sir for your good -- uh, good presentation.

11 Um, I guess I'm the only legislator from
12 Hillsborough, so I'm going to ask this question, uh,
13 because my county's been listed on page seven of the
14 presentation. Uh, how -- how on earth did Hillsborough
15 County get singled out?

16 I've wondered this for a number of years because
17 I'm familiar with the VRA, but I wasn't able to
18 determine historically how did we get singled out.

19 And then, if you could just confirm for me that
20 Shelby County v. Holder held that Hillsborough
21 County's no longer singled out and -- and I guess if
22 there's -- hopefully there's no counties in Florida
23 that there's been a finding -- a congressional
24 finding. But if you could just assure me that we're in
25 good standing now and tell me how we got that -- there

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1 and -- in the first place, please.

2 REP. SIROIS: You're recognized.

3 MR. BARDOS: Thank you, Mr. Chairman. I assume
4 singled -- that by singled out, you're referring to
5 being one of the five counties that was identified for
6 coverage under section 5 of the Voting Rights Act.

7 So in 19 -- um, in the 1970s, Congress amended
8 the Voting Rights Act and it -- it -- it added a
9 provision to the Voting Rights Act that said that any
10 jurisdiction, any county in the United States that as
11 of 1972, um, had a certain -- a test or device in
12 place and there's a -- there's language in the Voting
13 Rights Act that defines that -- and that had certain
14 registration rates or turnout rates among minorities
15 that were considered to be low, then those
16 jurisdictions would be section 5 of the Voting Rights
17 Act.

18 So it goes back to 1972 and it's based on data
19 from 1972 and election practices from 1972. That was
20 never updated. That's why Shelby County v. Holder
21 invalidated the coverage formula. And yes. You're
22 correct.

23 At this point, because of Shelby County v.
24 Holder, Hillsborough -- neither Hillsborough County
25 nor the other five counties that were originally

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1 covered or any other county in Florida is covered, um,
2 and therefore section 5 is -- doesn't uniquely apply
3 to any of those counties but the diminishment standard
4 does, however, apply to all counties in Florida under
5 the state constitutional provision that we discussed.

6 REP. SIROIS: Thank you. Representative Massullo,
7 you're recognized for a question.

8 REP. MASSULLO: Thank you, Mr. Chair and thank
9 you for your presentation, sir. You know, in a -- in a
10 ideal world, we would have a blended population where
11 minorities don't exist. Obviously we deal with them
12 today.

13 Uh, it's unfortunate that we have to in -- in
14 certain ways. But how do you define a minority
15 population besides a consolidated area?

16 REP. SIROIS: You're recognized.

17 MR. BARDOS: Thank you Mr. Chairman. Um, so,
18 there's not a definition, but typically, a -- the
19 minority populations that, um, would typically be
20 large enough to constitute a -- a population -- a, uh,
21 majority in a district or, uh, a population that would
22 -- would have the ability to elect whether their --
23 whether or not they're a majority in a district --
24 would be African American voters and Hispanic voters.

25 And we determine -- use that data from the

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1 census, um -- from the census -- um, decennial census
2 that identified individuals by race and by ethnicity
3 and by the case of Hispanic voters. And so, we look at
4 populations according to African American and
5 Hispanic.

6 REP. SIROIS: Uh, one follow-up, Representative
7 Massullo.

8 REP. MASSULLO: Thank you. Thank you, uh, Mr.
9 Chairman. In the last census, have you found that
10 there's been less indication of race on the actual
11 questionnaire as there had been in the past?

12 REP. SIROIS: I'm going to -- I'm going to
13 interject there. I don't know that our -- our speaker
14 would be in the position to -- to be able to, uh,
15 provide an answer or any insight on that question.

16 REP. MASSULLO: All right. Thank you.

17 REP. SIROIS: Thank you. Any other -- any other
18 questions? Representative Beltran?

19 REP. BELTRAN: Um, thank -- thank you, Chairman.
20 Uh, and thank you for -- for your previous answer,
21 sir.

22 I'm just going to want -- one more question,
23 which is from page 12 of your presentation and this is
24 the Tier-Two standards. It says districts shall, where
25 feasible, utilize existing political and geographical

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1 boundaries.

2 Does that essentially create a presumption
3 subject to the other Tier-One and Tier-Two standards -
4 - that you don't cross county lines unless you have
5 to? Is that a fair statement of the law, in your
6 opinion?

7 MR. BARDOS: Thank you, Mr. Chairman. So uh, it
8 can be viewed as -- as -- as a requirement both to
9 preserve intact a county but also to follow the county
10 boundary with the district boundary.

11 So it can be viewed in different ways. Um, during
12 the last round of litigation, the courts would
13 frequently look at how many counties have been split
14 and how many times a county has been split.

15 Those are considerations that -- that go into
16 that. But it can also be, um, the use of a -- a
17 existing county boundary as the district boundary.
18 Following the county line, um, itself can be a
19 justification for putting a district boundary in a
20 particular place.

21 REP. SIROIS: Thank you. Representative Fisher,
22 you're recognized.

23 REP. FISHER: Thank you, Mr. Chairman. Uh, this
24 question really came up in part, uh, because of your
25 answer to Representative Massullo's question, um,

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1 about minorities. My - my wife is originally from
2 Singapore and my kids are Asian.

3 Uh, you mentioned that only two minority groups
4 there are considered, uh, and I think last night we
5 saw the first Asian American mayor elected in Boston
6 and Cincinnati and I know that we have, um, a growing
7 AP - AAPI population in Florida. Why are only two
8 subgroups considered?

9 MR. BARDOS: Other groups could be considered.
10 I'm simply saying that as of --

11 REP. SIROIS: I'm going to -- I'm going to --

12 MR. BARDOS: I'm sorry. I'm sorry.

13 REP. SIROIS: Excuse me. I'm going to - I think
14 again that would be -- that would require our
15 presenter to offer speculation on the way that the,
16 uh, process is conducted in terms of the census and
17 the data that's collected and I don't know that he's
18 able to address that for us.

19 But if you'd like to take a stab at it, you're
20 more than welcome.

21 MR. BARDOS: I was -- I was just commenting on --
22 on the numbers in Florida. It's -- the -- the
23 populations that are large enough -- say, 300,000
24 people -- to be a -- close ---even close to a majority
25 in a congressional district in concentrations to draw

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1 a district will typically be African American and
2 Hispanic populations.

3 REP. SIROIS: Follow up.

4 REP. FISHER: So does there -- there's nothing in
5 law or in court precedence that require it to just be
6 two. That's just -- you're just stating that that's
7 kind of historically what's been considered and that
8 others can be considered.

9 REP. SIROIS: You're recognized.

10 MR. BARDOS: Thank you, Mr. Chairman. That's
11 correct. It's -- I was commenting on -- on simply the
12 -- the numbers in Florida and the concentrations of
13 population in geographical areas.

14 REP. SIROIS: Thank you very much. Representative
15 Joseph recognized for a question.

16 REP. JOSEPH: Thank you, Mr. Chair. I actually
17 have three questions.

18 REP. SIROIS: Let's take them one at a time,
19 please.

20 REP. JOSEPH: All right. Perfect. So just
21 piggybacking on -- off of the questions that were
22 raised, um, about other ethnic groups, when we're
23 looking at minority populations, um, you mentioned in
24 your presentation, reference to language minorities,
25 et cetera.

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1 Within Florida, the two largest immigrant
2 populations are Cubans and then Haitians. So Haitians
3 are usually classified under the African American
4 whatever. How are they considered in this process as
5 we're evaluating the redistricting?

6 REP. SIROIS: You're recognized.

7 MR. BARDOS: Thank you, Mr. Chairman. So the
8 Florida Supreme Court didn't say very much about
9 language minorities during the last process, so we
10 don't have an interpretation of that.

11 Um, the federal Voting Rights Act provides a
12 definition of language minorities, but it's unclear
13 whether the Florida constitution will follow that same
14 definition. Um, to the extent that there is overlap
15 with, um, racial, um, groups as for example, African
16 American groups, that data is in - is available and is
17 being used for, um, drawing districts.

18 Um -- so, again, also the requirement -- simply
19 as a matter of numbers, you would have to, um, have a
20 population that's sufficiently large to be able to
21 control the result of an election.

22 Um, so, all of those are factors, um, but beyond
23 that the Florida Supreme Court hasn't elaborated on
24 that standard in that way that it has on some of the
25 others.

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1 REP. SIROIS: Recognized.

2 REP. JOSEPH: Thank you, Mr. Chair. The next
3 question is -- you made reference to one of the
4 lessons learned from, uh, the prior litigation --
5 litigation from our most recent census attempt.

6 Uh, what other top line points would you want to
7 make sure that this committee is aware of with
8 respects to lessons learned from last time, um, with
9 redistricting post-litigation that we should avoid
10 going forward this time?

11 REP. SIROIS: I'm going to interject there. That
12 -- I think that would ask for speculation on the part
13 of our, uh, speaker and I think that question is out
14 of order.

15 REP. JOSEPH: Well, if I may, I'm not actually
16 asking for speculation. I'm not asking -- so, to the
17 extent that I would be -- here's one way that you
18 could look at as speculation. So I'm not asking you to
19 identify -- let's say there are a list of five to tell
20 me which two you think.

21 But legally, what are some lessons that we need
22 to know, um, with respect to what came out of the last
23 litigation. I don't know if you still consider that
24 speculation. I don't think it is but you let me know.
25 To the extent it wasn't already included in your

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1 presentation.

2 REP. SIROIS: I think if -- if -- if the speaker
3 would like to cover -- Mr. Bardos, if you would like
4 to cover the mechanics of -- of the, uh, decisions or
5 opinions that the court offered, uh, I think that
6 would be fine, but, uh, I would caution against, uh,
7 any speculation.

8 REP. JOSEPH: Yeah. I -- I'm explicitly in my
9 question not asking for speculation. I'm asking for
10 actual law that the committee should be aware of.

11 MR. BARDOS: Yeah. That's a very big question. We
12 had about six years of litigation coming out of the
13 last, um, cycle.

14 Um, so, I think -- I think the presentation has
15 covered the high points and I think those are -- are
16 the legal standards. There's a lot of nuance in
17 redistricting, um, for each one of those standards.

18 Um, so, I'm not sure where I would start with
19 that. I think -- I think the high points are covered
20 in the -- in the presentation though.

21 REP. JOSEPH: Thank you. And --

22 REP. SIROIS: Your third question?

23 REP. JOSEPH: -- and the third question is -- so,
24 our chair sometimes makes reference to an eyeball test
25 and I'm wondering if that is the equivalent to I think

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1 what you called the visual test as being the primary
2 test for geographic compactness? Is that the same?

3 REP. SIROIS: You're recognized.

4 MR. BARDOS: Thank you. Yes. It's been called the
5 eyeball test. It's been called the interocular test.
6 They're all visual examinations though. You know it
7 when you see it. That's -- that's the long and short
8 of it.

9 REP. JOSEPH: That was awesome. Thank you.

10 REP. SIROIS: I'm going to stick with eyeball.
11 I'm going to stick with eyeball test.

12 UNKNOWN SPEAKER: Yeah.

13 REP. SIROIS: Um, did you have any further
14 questions, uh, Representative?

15 REP. JOSEPH: Just one more, Andy. Um, so, and --
16 and you don't need to answer it now, but to the extent
17 that there was anything that you think would be, um,
18 particularly pertinent in terms of lessons learned
19 from the prior litigation that was not covered in your
20 presentation and -- and -- and we don't need to do
21 this for the committee, but if there are any specific
22 cases that you think we need to be aware of, I would
23 love to -- to see those. That was it.

24 MR. BARDOS: Thank you.

25 REP. SIROIS: Representative Skidmore for

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1 question.

2 REP. SKIDMORE: Thank you, Mr. Chair. The
3 question, um, is not for the presenter -- presenter
4 but for you, if that -- if -- if now is the
5 appropriate time.

6 REP. SIROIS: Certainly.

7 REP. SKIDMORE: Certainly. Thank you so much. Um,
8 so, we are speaking specifically on just the legal
9 issues of the redistricting process. Um, so, my
10 question is, at what point do we begin talking about
11 the policies that we will apply as a committee toward
12 the map making process?

13 REP. SIROIS: Um, thank you very much for that
14 question. You know, I -- I think that we have -- uh,
15 as a committee, we have approached this -- this
16 project in several stages.

17 Uh, as we have talked about, repeatedly, it's
18 necessary for this committee to have the foundational
19 knowledge for us to be able to move forward, to
20 understand the constitutional framework, to understand
21 the applicable federal state and law.

22 Uh, today's presentation is a continuation of
23 that process, uh, and I think moving forward -- uh,
24 now that we've been able to complete that -- a near
25 completion of that educational process, you know,

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1 we're going to start turning our attention toward the
2 task at hand.

3 Uh, I cannot offer anything specific today
4 related to, uh, what our schedule looks like moving
5 forward, given - given special session, uh, but as the
6 committee members are aware, uh, the constitution
7 requires that we complete this process, uh, during our
8 legislative session, which begins on January 11th.

9 Um, so, that is, I hope, a sufficient answer to
10 your question. Members, thank you very much. Um, I'm
11 sorry. Are there any other questions from committee
12 members?

13 I want to thank you all, uh, for your questions
14 and now we will open it up to public comments. Uh, do
15 we have any public comment cards?

16 Seeing no comment cards filed, once again, I want
17 to thank you all for your time this afternoon. Mr.
18 Bardos, I want to thank you for your presentation, uh,
19 and for being here today.

20 Members, if you have any follow up questions for
21 Mr. Bardos, please feel free to submit those to
22 committee staff and we'll work to get your questions
23 answered.

24 At our next meeting, we -- uh, as to our next
25 meeting, we will keep the committee update on our

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1 authorized dates and times as we find out more details
2 about special session and any impacts that it may have
3 to our schedule moving forward.

4 Uh, thank you, members, that concludes our
5 committee meeting for today. Vice Chair Tuck moves
6 that we adjourn, hearing no objection. We are
7 adjourned.

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11 March 13, 2023

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