

**House Redistricting Committee
November 2, 2021**

Transcript of video recording available at:
<https://thefloridachannel.org/videos/11-2-21-house-redistricting-committee/>

EXHIBIT

J65

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1 Tom Leek: The redistricting committee will come to order. DJ, please call the roll.

2 DJ Ellerkamp: Chair Leek.

3 Tom Leek: Here.

4 DJ Ellerkamp: Vice-Chair Fine.

5 Randy Fine: Here.

6 DJ Ellerkamp: Ranking Member Geller.

7 Joseph Geller: Here.

8 DJ Ellerkamp: Representatives Andrade.

9 Robert Andrade: Here

10 DJ Ellerkamp: Avila. Avila? Bush.

11 James Bush: Here.

12 DJ Ellerkamp: Byrd.

13 Cord Byrd: Here.

14 DJ Ellerkamp: Clemons.

15 Charles Clemons: Here.

16 DJ Ellerkamp: Drake.

17 Brad Drake: Here.

18 DJ Ellerkamp: Driskell.

19 Fentrice Driskell: Here.

20 DJ Ellerkamp: Goff-Marcil.

21 Joy Goff-Marcil: Here.

22 DJ Ellerkamp: Grall. Grant has been excused. Jenne.

23 Evan Jenne: Here.

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DJ Ellerkamp: Latvala.

Chris Latvala: Here.

DJ Ellerkamp: Mariano.

Amber Mariano: Here.

DJ Ellerkamp: Omphroy.

Anika Omphroy: Here.

DJ Ellerkamp: Payne.

Bobby Payne: Here.

DJ Ellerkamp: Robinson.

Will Robinson: Here.

DJ Ellerkamp: Rommel.

Bob Rommel: Here.

DJ Ellerkamp: Sirois.

Tyler Sirois: Here.

DJ Ellerkamp: Slosberg.

Emily Slosberg: Here.

DJ Ellerkamp: Thompson.

Geraldine Thompson: Here.

DJ Ellerkamp: Tuck.

Kaylee Tuck: Here.

DJ Ellerkamp: Quorum is present, Mr. Chair.

Chair Leek: Thank you, DJ. Members, a few reminders before we begin. Please silence all electronic devices and if you wish to make a public comment, please fill out a form and turn it

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1 in to the sergeant's staff. Also, as a reminder for our members and presenters, please ensure that
2 you turn your microphone on when you are speaking and off when you are finished.

3 Welcome back to our interim committee meetings. So far in this process, we have
4 covered an introduction to redistricting concepts, reviewed our website and current public input
5 opportunities, as well as discussed our map drawing application's advanced functionality and
6 how those tools can assist us in aligning our maps with our constitutional standards. I explained
7 during our first committee meeting how important a comprehensive educational effort is to
8 understanding the full scope of redistricting. I hope you're coming to appreciate that it is not an
9 easy task, nor one with clear-cut answers.

10 One of the last pieces of educational information we need to cover as a committee is the
11 legal aspect of redistricting, which includes applicable federal and state law as well as caselaw
12 related to this process, especially Florida Supreme Court precedent that was established
13 following the 2012 redistricting cycle. This will directly impact how we view and apply our Tier
14 One and Tier Two standards. For this redistricting cycle, the House has retained outside counsel
15 to advise the chamber on state and federal law as well as relevant court precedent. For today's
16 presentation, our committee will be hearing from Andy Bardos. Andy has been with Gray
17 Robinson for close to a decade, was involved in the 2012 redistricting cycle, as well as having
18 previously served as special counsel in the Florida Senate prior to joining the private sector.

19 Members, I want to differentiate that today's counsel presentation is for our education on
20 relevant redistricting law. It is not for discussing hypothetical scenarios, or specific policy
21 decisions that may come before our committee, because as I've mentioned before, there is no
22 single correct map. When we begin reviewing district boundary lines, decisions must be weighed
23 among one another with a goal of drawing a legally compliant map. As Andy goes through his

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1 presentation, I encourage you to take notes of questions you may have. Once the presentation is
2 concluded, we will take questions from members on the contents of the presentation, then move
3 on to public comment. With that, Mr. Bardos, welcome to the House Redistricting Committee.
4 You are recognized to present.

5 Andy Bardos: Thank you, Mr. Chairman, and members of the committee. My name is
6 Andy Bardos. I'm an attorney with the Gray Robinson law firm. I'll be providing an overview
7 today of the legal standards that govern redistricting plans at both the state legislative and
8 congressional redistricting. As the Chairman suggested, the standards are complex. They
9 overlap. There is a hierarchy among those standards. We'll try to sort that out today as well as
10 we can.

11 I'll begin with a federal Voting Rights Act. As you can see on this slide, there are both
12 federal redistricting standards and state redistricting standards. We have federal redistricting
13 standards in the United States Constitution and in the federal Voting Rights Act and state
14 standards in the Florida Constitution, most of which were added to the Constitution in 2010
15 when the voters adopted Article III, Sections 21 and 22. The federal Voting Rights Act was
16 adopted by Congress in 1965. It was adopted to enforce the 15th Amendment, which protects the
17 right of citizens to vote and protects that from denial on the basis of race, color, or previous
18 condition of servitude. The federal Voting Rights Act implements that guarantee and it does it in
19 the context of redistricting through two provisions, Section 2 and Section 5. Section 5 is no
20 longer in effect, but we will cover it anyway because the state constitution incorporates a Section
21 5 principle. So although the Federal Voting Rights Act, Section 5 no longer applies, there's an
22 analog in the Florida state constitution that does continue to apply.

23 We will start with Section 2, however. Section 2 of the Voting Rights Act prohibits

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1 election procedures that have the result of denying or abridging the right of any citizen to vote on
2 account of race, color, or membership in a language minority group. At its most basic level,
3 Section 2 requires the creation of a minority opportunity district when certain criteria are
4 satisfied. Those criteria apply where the minority population in a particular region or locality is
5 large enough to form a majority in a single-member district where the minority population's
6 voting preference differs from that of the majority. In the absence of a minority opportunity
7 district, the majority population would outvote and usually defeat the preferred candidate of the
8 minority population. These criteria were announced by the United States Supreme Court in a
9 case called *Thornburg versus Gingles*. *Gingles* is a term that's commonly used in redistricting
10 law to refer to Section 2 and the criteria that govern Section 2.

11 The criteria are stated on this slide. There are three prerequisites as *Gingles* calls them, or
12 preconditions, to the application of Section 2. Then ultimately, if those three preconditions are
13 satisfied, there must be an assessment based on a totality of circumstances to determine whether
14 members of the minority group have less opportunity than the other members of the electorate to
15 participate in the political process and elect representatives of their choice. That totality of the
16 circumstances analysis can take into consideration election procedures, if they're discriminatory.
17 It can take into consideration racially polarized voting, meaning that members of the minority
18 group have different voting preferences from members of the majority group. It can take into
19 consideration any other circumstances that speak to the ability of minority voters to elect the
20 candidates of their choice and participate in a political process.

21 Before we even get to that analysis, the three preconditions must be satisfied. Those
22 preconditions are more quantifiable, more objective than the ultimate totality of the
23 circumstances analysis. The first condition is that the minority population must be numerous

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1 enough to form a majority in a single-member district. There's a requirement that minority
2 population have the potential to control the outcome in the election. In a case of a congressional
3 district, for example, that minority population must be quite significant, over 300,000 people, if
4 we're considering total population, in order to form a majority of the population of a
5 congressional district. Right off the bat, we see the first precondition that the Section 2 analysis
6 will rarely apply, especially in districts as large as congressional districts. That's the first
7 requirement.

8 The second is, and it's built into the first, is that that minority population must be
9 geographically compact. Section 2 never requires the creation of a district that is non-compact
10 that combines minority populations that don't live in a relatively compact geographical area. If
11 we move beyond the first precondition, if we assume that that's satisfied and that the minority
12 population is large enough to be a majority in a single-member district, and is sufficiently
13 compact, that a compact district could be drawn for that minority population, then we move to 2
14 and 3.

15 Criteria 2 and 3 relate to this concept of racially polarized voting. Number 2 is the
16 minority population must be politically cohesive. In other words, a minority population has a
17 strong preference for one particular candidate over another. They're not split between two
18 candidates in a relatively even way. If a minority population is cohesive, if it backs a single
19 candidate consistently, and then number 3, the majority population usually votes as a bloc to
20 defeat the minority population's preferred candidate, then we have racially polarized voting.
21 Where the minority population's preferred candidate is defeated in most elections by the
22 preference of the majority of the electorate, in that case Section 2 might apply to require that the
23 Legislature to create a district in which minority voters constitute a majority and are therefore

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1 able to elect the candidates of their choice.

2 The other provision of the Voting Rights Act that has applied to redistricting is Section 5.
3 Section 5 is the anti-retrogression principle of the Voting Rights Act. Retrogression is a legal
4 term for backsliding. Section 5 assures that when a redistricting plan is amended, minority voters
5 don't find themselves in a worse position than they were in in the benchmark plan, which is the
6 term we use for the existing plan or the prior plan. Section 5 required that minority voters' ability
7 to elect the candidates of their choice not be diminished when a new plan is adopted.

8 Section 5 also had a procedural component that required the state to submit a new
9 redistricting map to either the United States Department of Justice or to a federal district court
10 for preapproval before it could go into effect. That procedure, of course, is no longer in effect, as
11 we'll discuss when we talk about the *Shelby County versus Holder* decision.

12 The other aspect of Section 5 that's notable is Section 5 was limited to certain
13 jurisdictions. They were identified through a formula in the Voting Rights Act. Congress
14 identified certain jurisdictions in the 1960s and 1970s that had what are called tests or devices in
15 place. The best example of that would be a literacy test. In these jurisdictions that had a test or
16 device in place in the '60s and '70s, if those same jurisdictions have low rates of registration or
17 turnout among minority voters, they were then subjected to Section 5 of the Voting Rights Act,
18 which then required redistricting plans and other election law changes to be preapproved by the
19 federal government before they could take effect.

20 However, in *Shelby County versus Holder* in 2013, the United States Supreme Court held
21 that this formula by which Congress determined which jurisdictions would be subject to the
22 Section 5 of the Voting Rights Act was outdated and it no longer reflected current conditions
23 because it was based on data from the 1960s and '70s. The court noted that much had changed,

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1 that Congress was free to amend the formula to establish a new formula based on current
2 conditions. Congress has not amended the formula and therefore the formula remains
3 unconstitutional in Section 5. Therefore, without a coverage formula is not enforceable. But as
4 we will see when we address the state constitutional standards, this anti-retrogression principle
5 now appears in Florida's state constitution.

6 The United States Constitution imposes a couple of restrictions as well. One is a
7 restriction on racial gerrymandering, and we have on this slide a reference to *Miller versus*
8 *Johnson*, which is the leading case, but there are a number of cases in which the United States
9 Supreme Court has addressed racial gerrymandering. Racial gerrymandering is the use of race as
10 a predominant consideration in redistricting. The Equal Protection Clause prohibits the
11 predominant use of race in redistricting. Another way that the court has expressed that is that if
12 traditional redistricting principles such as compactness are subordinated to race, made secondary
13 to race, then race has become the predominant principle and that violates the Equal Protection
14 Clause.

15 The exception to that is if the Voting Rights Act requires race to be considered as the
16 predominant consideration in drawing districts. Obviously, as we just noted, when Section 2
17 applies or when Section 5 applied, the states were required by federal law to consider race and
18 draw districts on account of race. In those situations, the U.S. Supreme Court, while it hasn't
19 expressly decided the issue, has always assumed that the use of race in order to implement the
20 Voting Rights Act is appropriate, even if race then for that limited purpose becomes the
21 predominant consideration in drawing district boundaries.

22 Another related issue is the issue of partisan gerrymandering. There's been a debate for a
23 long time over whether the Equal Protection Clause similarly prohibits drawing districts on the

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1 basis of partisanship for political purposes. In 2019, in *Rucho versus Common Cause*, this is a
2 very recent decision of the United States Supreme Court, the court determined that partisan
3 gerrymandering is not an issue that the federal courts will adjudicate because the court held that
4 there is no, as the courts refer to it, judicially discoverable and manageable standard for
5 determining when a redistricting plan goes too far in considering partisanship. This is a little bit
6 different from the state constitutional standard, which we will address in a moment. The United
7 States Supreme Court has held that some amount of partisan gerrymandering is acceptable under
8 the United States Supreme Court. So the question then becomes how do federal courts determine
9 when it goes too far. So the Supreme Court decided that there's really no clear-cut objective way
10 for federal courts to determine when partisan gerrymandering goes too far. Therefore, it
11 determined the federal courts will not involve themselves in partisan gerrymandering cases. As
12 we will see, the Florida Constitution does place significant restrictions on the consideration of
13 partisanship, in fact prohibits the consideration of partisanship and political party advantage in
14 drawing redistricting plans in Florida.

15 Article III, Section 16 has been a part of the Florida Constitution for a long time. This is
16 the provision that establishes the procedure or the mechanics of passing a state legislative
17 redistricting plan. It directs the Legislature at its regular session in the second year after the
18 census to adopt a redistricting plan for state legislative districts. That would be the regular
19 session which is now approaching in 2022. It requires that there be 30 to 40 Senate districts and
20 between 80 and 120 representative districts, and that the districts be contiguous.

21 Contiguous means that a district consists of a single land area that is in actual contact. It
22 can't consist of two or more separate pieces. Water areas are disregarded as a district clearly can
23 cross over lakes or rivers. That's not a violation of contiguity. A district cannot meet at a point.

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1 Those would be considered two separate pieces of the district if they simply meet at a point.
2 Otherwise, the contiguity requirement requires that the district be a single integrated land area.

3 Article III, Sections 20 and 21 were adopted in 2010 by the voters. These are our more
4 recent state constitutional standards. One of the sections applies to congressional redistricting.
5 The other applies to state legislative redistricting. They are substantively the same, even though
6 they are set forth in two separate sections. The standards are divided into two tiers, frequently
7 referred to them Tier One and Tier Two. The standards in Tier One prevail over those in Tier
8 Two if there's a conflict. One example of that might be in order to maintain a district in which
9 minority voters have the ability to elect, it might be a district that is non-compact, it might be in
10 the benchmark plan. Tier Two, on the other hand, requires districts to be compact. In order to
11 avoid diminishment, if it's necessary, that district can be redrawn, even if it's not compact in
12 order to avoid diminishing the ability of minority voters to elect candidates of their
13 choice. That's one example in which Tier One standards might conflict with Tier Two standards,
14 and the Tier One standards will prevail in that situation. Within each tier, the standards have no
15 priority. Tier One standards among themselves must be balanced. They are not stated in any sort
16 of order of priority and likewise, within Tier Two, the standards don't have a priority over each
17 other.

18 Districts must be compact. They must be as nearly in population as practicable, and
19 where feasible, they must utilize existing political and geographical boundaries. Those are the
20 Tier Two standards, and they must be harmonized by the Legislature in drawing the map.
21 Sometimes there can be tension between them. Sometimes preserving a municipality or a county
22 can render a district less compact. So those standards have to be harmonized and that's part of
23 the legislative task.

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1 Now we will address some of the Florida Supreme Court's interpretations of those
2 standards. The Florida Supreme Court had several opportunities during the last redistricting
3 cycle to review those standards and apply those standards. Those decisions give us guidance in
4 preparing the redistricting plan during this redistricting cycle. First, we'll discuss the standard
5 that prohibits drawing districts with an intent to favor or disfavor a political party. What the
6 Florida Supreme Court has said about this standard is that this standard prohibits intent and not
7 effect. That's there in the plain language of the provision. Obviously, every drawing of districts
8 will have some sort of political effect. It will have political consequences. So it's not possible to
9 draw a map that doesn't have political consequences, but the important thing is that the
10 Legislature not draw with that intent. So the Florida Supreme Court has made that distinction
11 very clear. It is also said that there is no acceptable level of improper intent. So even if the
12 district is drawn for multiple reasons, intent to favor a political party or an incumbent may not be
13 one of those reasons. It simply may not be considered.

14 The Florida Supreme Court has also rejected any suggestion that once the political results
15 of a plan are known, the Legislature must alter the plan to bring it more into balance with the
16 composition of voters statewide. Sometimes the Legislature, we'll discuss in a moment, will
17 have to review political data in order to assure compliance with minority voting protections.
18 Even if it knows the result of the plan politically, it has no obligation under Florida Supreme
19 Court precedent to then rebalance the map and make it more balanced politically. The important
20 thing is that intent to favor or disfavor not be considered. The Florida Supreme Court also went
21 on to say that the Florida Constitution does not require the affirmative creation of a fair plan, but
22 rather a neutral one in which no improper intent was involved. So Florida's Constitution doesn't
23 require competitive districts or doesn't require political balance. What it requires is that the

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1 Legislature set aside any intention of favoring or disfavoring any political party or an
2 incumbent.

3 This slide refers to the incumbent aspect of that same standard. The Legislature may not
4 draw districts with an intent to favor or disfavor an incumbent. This slide discusses some of the
5 considerations that the court will look at in determining whether a map was drawn with an intent
6 to favor or disfavor an incumbent. Obviously, if there's direct evidence of that, if members say
7 that they are drawing a map with an intent to favor or disfavor an incumbent, that would be very
8 strong evidence. The court will also look at circumstantial evidence, both as to political parties
9 and incumbents. It will look at the shape of the district. It will look at the demography of the
10 district. It will look at how closely the Legislature complies with Tier Two standards because
11 Tier Two standards, one of the purposes of Tier Two standards, such as compactness, is to limit
12 the Legislature's ability to draw districts for any purpose that's partisan or incumbent-based.
13 Here, this slide notes that the court will look at the incumbent's legal residence relative to the
14 district to determine whether there might have been an attempt to draw an incumbent into a
15 district or out of a district. These are some of the considerations that the court looked at during
16 the last cycle to determine whether the maps complied with this intent standard.

17 Then we have in Tier One the standard that is the analog to Section 2 of the Voting
18 Rights Act. The Florida Constitution has adopted the same *Gingles* standard that we discussed
19 before. This is known as vote dilution. It prohibits vote dilution and the standard that the Florida
20 Supreme Court has adopted mirrors this standard that the United States Supreme Court adopted
21 in the *Gingles* case in 1986. That is also a part of the Florida Constitution, in addition to the
22 Voting Rights Act.

23 The Florida Constitution also contains this retrogression principle that was found in

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1 Section 5 of the Voting Rights Act. The Constitution provides that districts shall not be drawn to
2 diminish the ability of racial or language minorities to elect representatives of their choice. So
3 even though this retrogression principle no longer exists in the federal Voting Rights Act, is no
4 longer enforceable, it does continue to exist in the Florida Constitution and it does apply
5 statewide, unlike Section 5 of the Voting Rights Act, which applied only to select
6 jurisdictions. So under the Florida Constitution, the Legislature must assure that the ability of
7 minority voters to elect candidates of their choice is not diminished when a new map is passed.
8 The primary focus of this inquiry is whether the new map has as many districts, at least as many
9 districts, as the prior map in which minority voters are able to elect the candidates of their
10 choice.

11 To determine whether minority voters are able to elect the candidates of their choice both
12 in the benchmark plan and in the new map that the Legislature will consider and pass, the
13 Legislature must consider elections data to determine whether the minority population in fact has
14 the ability to elect its preferred candidates. Simply looking at the voting-age population is not
15 enough. The Florida Supreme Courts has explained that the voting-age population is an
16 important starting point in that analysis. It does give some indication as to whether minority
17 voters will be able to elect their preferred candidates in a district. But it doesn't tell the full story,
18 because turnout rates, registration rates, whether high or low, can impact the ability of a minority
19 population to elect candidates of their choice. That's why, in the redistricting software that is
20 available to members and the public, elections data is available for use in determining whether
21 minority voters are able to elect the candidates of their choice in the districts that the Legislature
22 is considering.

23 Here's a slide that shows the Tier Two standards. Some of these have been covered in

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1 past committee meetings, but I will address these briefly as well. The first is that districts must
2 be drawn with a population as nearly equal as practicable. This applies a little bit differently in
3 congressional redistricting and in state legislative redistricting. The United States Supreme Court
4 has said that in congressional redistricting the standard is precise mathematical equality, which
5 means the districts must be as equal to the average or ideal population as possible. Usually the
6 difference between the most populous district and the least populous district will be a single
7 person. The courts have recognized some limited leeway where there is strong justification for it,
8 but typically, one person is the total deviation when it comes to congressional redistricting.

9 The federal courts in interpreting the U.S. Constitution has been more willing to
10 recognize leeway where states are drawing their own state legislative districts. So when drawing
11 state legislative districts, the states may follow traditional redistricting principles. Sometimes
12 those principles will result in a larger deviation than in congressional maps. The federal courts
13 will generally accept a deviation up to 10%, meaning that the most populous district and the least
14 populous district, the difference between those will be 10% of the ideal population of a
15 district. Beyond 10%, it can be permissible, but the state must justify it and the state has a heavy
16 burden at that point to justify that deviation.

17 The second Tier Two requirement is that districts be compact. This is a commonsense
18 assessment in the first place, a visual assessment of the district to determine whether the district
19 is regular in its shape. Or is it bizarre or does it have appendages? Is it unusual in the way that it
20 looks? Districts that are more regular in their shape, more circular, more square, more
21 understandable in terms of the geographical limitations of the state will be compact. The state's
22 geography does impact the compactness analysis. For example, in the Florida Keys, there's no
23 way to draw a circle or a square. So the geography very much impacts what is possible. So visual

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1 compactness is the first measure. The second measure is mathematical. The courts have two or
2 three different mathematical measures that they use in order to assess the compactness of
3 districts. Those measures come in aid of the visual examination. All of that is looked at in
4 totality. There isn't a single measure or single bright-line rule as to whether a district is compact.

5 Finally, the third Tier Two standard is the districts must, where feasible, utilize existing
6 political and geographical boundaries. The court has recognized county and city boundaries as
7 being political boundaries. It has recognized rivers, railways, interstates, and state roads as being
8 geographical boundaries. There might be others as well. The court has referred to easily
9 ascertainable and commonly understood geographical boundaries. The idea is that voters
10 recognize the boundaries as an immovable boundary like a state road or like an interstate. It
11 makes more sense to use that as a district boundary than to simply draw a line where there's no
12 ability for a voter to recognize it or refer to it as a geographical boundary does.

13 These are the Tier Two standards. The Florida Supreme Court has also emphasized in
14 applying these standards, the Legislature is not required to enact the best possible plan or the
15 most compact district or maximize the number of counties and cities that are kept whole. It is
16 allowed to balance these standards. The important thing is that it pass a constitutional map, not
17 necessarily the best map that's conceivable. So there are different degrees, but the important
18 thing is that the districts be as nearly equal in population as practicable and that districts be
19 compact, and that where feasible they follow political and geographical boundaries. That's an
20 overview of the legal standards that apply to redistricting, and Mr. Chairman, I'd welcome any
21 questions.

22 Tom Leek: Thank you, Mr. Bardos for your presentation. Members, there are two
23 specific items that I would like to address on the record before we take questions from committee

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1 members. The first being incumbencies. I want to state very clearly that we are not and will not
2 be using any incumbent or candidate addresses to produce these maps. The House took the same
3 position last decade and the Florida Supreme Court viewed that as a favorable step towards
4 protecting against inadvertently favoring or disfavoring an incumbent, one of the Tier One
5 standards. I think this is also a good point in time to very candidly say, members, as new district
6 lines are workshopped and as process proceeds, there's a chance any member may be paired with
7 a fellow incumbent in a newly created district in order to create legally compliant boundary lines.
8 I know that that may be an intimidating thought for all members. However, that is part of the
9 process. As you bring comments to committee, please be mindful that I will not entertain any
10 discussion about placing boundary lines in order to favor or disfavor a current House member or
11 potential challengers.

12 The second item I'd like to address is a point Mr. Bardos touched on regarding the
13 partisan makeup of the maps that would come before our committee. While external third-party
14 groups seemingly prioritize the Republican-Democrat split over the legal compliance of our
15 boundary lines, that is not what we as legislators are charged to do. Outside of using functional
16 analysis data to ensure our racial and language minority groups can elect a candidate of their
17 choice, as directed by the Florida Constitution, I want to be clear that staff nor this committee
18 nor our subcommittees will be reviewing the overall partisan split of a map at any stage in this
19 process. Additionally, I would encourage you to not engage in any planned or unplanned
20 conversations regarding such topic as it may lend itself towards a violation of the Tier One
21 standards as interpreted by the Florida Supreme Court. Now, members, I'll open it up to
22 questions from committee members. Please address your questions to the Chair. Ranking
23 Member Geller, you're recognized.

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1 Joseph Geller: Thank you, Mr. Chair, nice to see you and everyone thank you for your
2 presentation, very thorough. You were talking about voting-age populations. My question
3 specifically because it wasn't addressed, is how the law views and how this committee should
4 view prison population?

5 Tom Leek: Okay, I'm going to be clear here. I would like you, Mr., Bardos, to please
6 answer every question there possibly could be asked of you regarding the mechanics of how the
7 law works. If the question is policy or requires an opinion, then I'm going to say that that is our
8 job as the committee. I'm going to ask Mr. Bardos not to opine on that. But if you want to know
9 the mechanics of it, feel free to answer the question.

10 Joseph Geller: Well, let me ask this if I may, Mr. Chair, to clarify further, I don't suggest
11 that the gentleman is there to make our decisions for us. But if there are policy options permitted
12 by the law, I'd want to know the range of options that he thinks are available under the law
13 recognizing that if they're all legal options, the choice among them is for us?

14 Tom Leek: I appreciate your distinction. It's quite frankly probably trampling over the
15 line of a policy question, but I'm going to ask Mr. Bardos to answer the question of how the
16 mechanics of the law work as to Representative Geller's question.

17 Andy Bardos: Sure. I can say that the Florida statutes do require the use of U.S. census
18 data in drawing redistricting maps. So the Legislature in preparing its software applications take
19 in the U.S. census data as it was provided by the Census Bureau and that's what has been
20 followed because that's what the Florida statutes require us to follow.

21 Tom Leek: Representative Geller?

22 Joseph Geller: Recognizing that census data is the starting point, to what degree does the
23 law allow us to make policy choices as to how prison populations are treated in the lines we

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1 draw.

2 Tom Leek: Thank you. I want to make this clear because I think we've had this question
3 come up before. I'll defer to Mr. Bardos in a second here but the law requires us to use the
4 census data as presented to us. The census data that we are using is the one that is presented to
5 us. We're not permitted to manipulate it. Mr. Bardos, if you care to follow up on that?

6 Andy Bardos: That's the assumption I've proceeded on and so I would have to look at
7 that issue more closely under the assumption that the Florida statutes didn't require the census
8 data to be used, which they do. That would be a question that I would have to look at more
9 closely before I could give you an opinion on that.

10 Joseph Geller: Follow up, Mr. Chair?

11 Tom Leek: Yeah. I want to follow up on that, too. I think we can look further at the
12 statute, if you would like, at a different setting. If the statute clearly requires us to use the census
13 in the state of Florida, we are clearly required to use the census data as presented to us.

14 Joseph Geller: So the follow up would be the following, with your permission. My
15 understanding is that, as you say correctly, that we are required to use and the beginning of any
16 inquiry that we do is census data. The census treats prison populations in a certain way. It's
17 where people are currently at. But it's also my understanding that there is in the analysis of
18 minority districts and the ability to elect a candidate of a minority community's choice, that a
19 functional analysis is employed. I think you made some reference to that that has to do with
20 taking into account other factors like turnout and not necessarily registration but ability to
21 register. For instance, if there's a large population of noncitizens ineligible to register to vote so
22 at least in terms of that functional analysis as to the ability of minorities to elect candidates of
23 their choice, what are the policy options available to this committee to choose from in employing

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1 the functional analysis in regard to prison population?

2 Tom Leek: Sure sounds like a policy question in there. I want to follow up on the census
3 data because it's really very clear whatever the census tells us and counts them, where they count
4 them is the data that we are required to use. I heard the question start with something like that,
5 but ended up with functional analysis. You understand the question, Mr. Bardos. Can you answer
6 that?

7 Andy Bardos: I can address the functional analysis part of that.

8 Tom Leek: Okay.

9 Andy Bardos: It's a different issue from where people reside and different issue from the
10 population data. This functional analysis is an assessment of elections data to determine whether
11 minorities are likely to be able to elect the candidates of their choice in the districts that the
12 Legislature has drawn or the districts in the benchmark plan. It consists of election results. It
13 consists of turnout data. It consists of registration data. All of that is viewed in combination with
14 the voting-age population. All of that informs the primary analysis that the Florida Supreme
15 Court has required the Legislature to conduct in drawing minority districts and that is: One, will
16 minority voters be able to control the primary election and nominate the candidates from the
17 primary that they prefer? Two, will minority voters be able to elect the candidates of their choice
18 in the general elections? So primary election, general election. It requires us to look at the
19 elections data from past elections, registration data, and turnout data to determine whether
20 minority voters have sufficient numbers, sufficient turnouts, sufficient registration in order to
21 control the primary and then ultimately the general election.

22 It's a somewhat different analysis from the prison population issue, which is deciding
23 where people live and then how to count them for the purpose of determining whether districts

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1 have equal populations. So the equal population component is different from the minority district
2 requirements under Section 2 and Section 5 and the state law analogs to those.

3 Joseph Geller: One more follow up.

4 Tom Leek: One last follow up.

5 Joseph Geller: So on that, and I understand what you've said in terms of equalizing
6 populations and as the Chair says, that's based on census data. I understand that. That's a good
7 point. But when one looks at the functional analysis, which we are in some circumstances
8 required to utilize, how does the applicability and the existence of a prison population separate
9 and apart from the equality that is required affect the functional analysis as to the ability of
10 minorities to elect representatives of their choosing?

11 Tom Leek: We're focused on legal questions here so, I mean if that's a legal question,
12 feel free to answer that.

13 Andy Bardos: Thank you, Mr. Chairman. Some of that will be built into the data that we
14 look at in the functional analysis because if we have voters, for example, who are not eligible to
15 vote or who are not registered to vote, or who are not registered to vote where they currently
16 reside, that will be reflected in the elections data that we have. The elections data then will not
17 show them as being a registered voter there. I think that information for purposes of determining
18 whether minority districts would perform for minority voters is built into the data that reflects the
19 actual situation of elections and registration turnout in that locality.

20 Joseph Geller: Thank you, Mr. Chair.

21 Tom Leek: Thank you. Vice-Chair Fine, you're recognized for a question.

22 Randy Fine: Thank you, Mr. Chairman. This is a question, I think, might be helpful for
23 the committee to ask. If you follow the six standards that you laid out, would one come up with

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1 one map? Is there only one answer? Or is there an infinite number of possibilities that could be
2 devised that would meet all six standards?

3 Tom Leek: You're recognized.

4 Andy Bardos: Thank you, Mr. Chairman. A very good question, yes, there would be, if
5 not an infinite, a very, very large number of potential compliant configurations of districts. We
6 have thousands of census blocks across the state that can be combined in all sorts of different
7 combinations and the Florida Constitution establishes certain minimum requirements. Certainly,
8 there are different combinations of districts that can satisfy those minimum requirements.

9 Tom Leek: Vice-Chair Fine.

10 Randy Fine: Thank you, Mr. Chairman. So to be clear, the map that we propose could be
11 compliant if we follow all six of these standards. But other members of the committee, the
12 public, they could also have ideas for other compliant maps as well. There's not one answer to
13 the question.

14 Tom Leek: You're recognized.

15 Andy Bardos: That's correct.

16 Randy Fine: Thank you.

17 Tom Leek: Representative Driskell, you're recognized.

18 Fentrice Driskell: Thank you, Mr. Chair. Thanks for the presentation today. I had a
19 question about *In Re Senate Joint Resolution*, the case that you discussed, on page 13, one of the
20 quotes on page 13? If we could go there, alright. So it's the third quote down where it says, We
21 also reject the suggestion that once the political results of the plan are known, the legislature
22 must alter the plan to bring it more in balance with the composition of voters statewide. As I was
23 reading that, my question is, it says that it's not that the Legislature 'must', but doesn't that allow

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1 for 'may', if I'm reading that correctly?

2 Tom Leek: You're recognized.

3 Andy Bardos: This is what the Florida Supreme Court has told us. It has also recognized
4 that there can be circumstances in which a map will not necessarily reflect statewide vote
5 distributions between the two political parties for reasons totally unrelated to an intent to favor or
6 disfavor. For example, it has recognized that members of one political party might concentrate in
7 certain geographical areas at much higher rates and then drawing a district in that area will
8 encompass more members of that party than other districts. That changes the partisan balance of
9 the map. It has also recognized that in drawing districts for minority voters, that might place a
10 disproportionate number of voters of one political party in a single district, which then affects the
11 political composition of other districts. Those are the situations that the court was speaking to. It
12 recognized that given those factors, there might well be an imbalance in the map that's unrelated
13 to any sort of intent. The court was saying in light of that, there's no need to rebalance that map.
14 What we do know beyond that, and the Florida Supreme Court didn't speak beyond that, is that
15 the Florida Constitution does prohibit an intent to favor or disfavor a political party or an
16 incumbent. If there are neutral reasons that cause a map to be out of balance and then the
17 Legislature were to make changes to that map in order to rebalance it, then there would be a
18 potential for a violation of the intent to favor or disfavor standard. That's what the Legislature
19 will have to consider, whether in changing the political composition of a map using political data
20 in order to do that, it is intentionally favoring one political party, and that's a question the Florida
21 Supreme Court didn't answer. I want to be cautious in not rendering opinions that the courts
22 haven't directly addressed. Those are the considerations that I would suggest the Legislature
23 should consider.

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1 Tom Leek: I appreciate that and Representative Driskell, I'll get with you in just a
2 second. I think this is a good time to – I'm trying to figure out how to state this strongly enough.
3 We particularly as members of this committee should not suggest that we should rebalance the
4 maps based on the partisan split in the gubernatorial race. You will lead us down a path that is
5 disastrous and wrong and we have got to stop saying it. I don't want to hear it in this committee
6 because it is a clear violation of Tier One to the extent that anybody is suggesting that or saying
7 that outside of this committee, I recommend that you don't. We don't control that but what we
8 do in here is within my province and I'm going to keep us on the straight and narrow. Forgive
9 me for hijacking your question, there, Representative Driskell, but you're recognized.

10 Fentrice Driskell: Thank you, Mr. Chair. I appreciate that. I'm just trying to understand
11 what the courts said. I'll go back and read the opinion more fully because the way that I read
12 that, it's says that the Legislature doesn't have to, but it doesn't sound like it forecloses the
13 possibility of going back and looking at a map if we decided, it sounds to me, maybe I could put
14 it this way, Mr. Chair? It sounds like, you can tell me if I'm reading this wrong, but it looks to
15 me like the court made a legal decision that allows for the Legislature to make the policy
16 decision to go back and look if it wants to, that's the 'may' piece. But the decision is very clear
17 that the Legislature does not have to, that's the 'must' piece, go back and revisit that policy
18 decision. Am I reading that correctly or no?

19 Tom Leek: You're recognized.

20 Andy Bardos: Thank you, Mr. Chairman. I think it's important to bear in mind the court
21 only answered the questions that come before them. The court was addressing the arguments that
22 were being made in that case. So it was not addressing the question that you're raising now. I do
23 think that if, in the situation that the court was describing, where there are neutral considerations

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1 that make the map favor one political party or an incumbent, and then the Legislature were to
2 look at political data in order to shift more districts to the other political party, I think that
3 someone would have an extremely compelling case that that's being done with an intent to favor
4 a political party.

5 Tom Leek: Representative Driskell, you're recognized.

6 Fentrice Driskell: Thank you, Mr. Chair. So I think, as I understand, I think we're getting
7 to some same page in this, trying to understand that, you're saying that the court didn't address
8 necessarily whether there could be a 'may', which means there could be a 'may', or maybe not. I
9 feel like I'm using confusing language saying may, may, may. But it sounds to me like the court
10 did not foreclose the possibility that the Legislature could make a policy choice to revisit the
11 maps if we determine as a body that the maps look like they were favoring or disfavoring a
12 particular political party. But you are warning us that if we go down that road, it could be danger
13 with respect to Tier One. But the court did not address it, either way?

14 Tom Leek: You're recognized.

15 Andy Bardos: What the court said is what's printed here on the slide. That's what the
16 court said. But the court did also emphasize that a map cannot be drawn with the intent to favor a
17 political party and that any amount of intent is impermissible. So if there's any intent at all to
18 favor a political party, that map would be invalidated.

19 Fentrice Driskell: I understand that. I think we're kind of ships passing in the night on
20 this question, unfortunately.

21 Tom Leek: Let me see if I can address some of it too. One on the backend is whether we
22 go back and rebalance the maps. That's kind of on the backend of it after the maps have been
23 passed and proposed. What we do know, the one 'have to' that we have that 63% of the voters

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1 mandated to us in 2012 is that we cannot pass a map with the intent of favoring or disfavoring a
2 political party. So to the point that we would pass on it before it got to the courts, and we were to
3 try to rebalance the maps based on partisan split in the gubernatorial election, we would be
4 passing a map with the intent of favoring or disfavoring a political party. That's the one thing
5 that is clear to us that we cannot do. Representative Omphroy, you're recognized for a question.

6 Anika Omphroy: Thank you very much, Chair. It's not on the lines of the last couple of
7 questions. Mr. Bardos, my question is, I don't know if I should even ask this, so Chair, please
8 keep me in line if I go out of line.

9 Tom Leek: I'll work on it.

10 Anika Omphroy: Thank you. My county is the second largest population-wise in the state
11 of Florida. I have three or four Congresspeople, but I don't have a Congressperson that only
12 belongs within the political boundaries of Broward County. There's not one congressional
13 person that only belongs to Broward. Would that be considered an issue of political distortion or
14 distortion of voice of population? Considering that we don't have our own individual political
15 voice.

16 Tom Leek: Let me step in there for just a second. Where the lines are drawn for
17 congressional districts is a policy decision. So to the extent that your question asked about where
18 they would be drawn, it is a policy decision. I'm going to say leave that for us. To the extent you
19 can walk through the legal mechanics of maybe, maybe you can do that with that question. I
20 would encourage you to do so. Representative Omphroy.

21 Anika Omphroy: Thank you, Chair. That's why I asked it because I wasn't sure. My
22 concern is we talked about political boundaries. My population is 1.9 million. In the process of
23 drawing congressional seats, we're supposed to look at voices of political boundaries. Why or

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1 how can we address this concern? Please help me because I don't understand it.

2 Tom Leek: If you can, walk through the legal parameters on what we're allowed to
3 consider. Most of that, Representative Omphroy, and I appreciate what you're asking, will be a
4 policy decision for the committee. You're recognized.

5 Andy Bardos: Sure. Thank you, Mr. Chairman. I'm not familiar with the specifics of the
6 districts you're describing, but the entire state, all of the districts are basically a jigsaw puzzle.
7 So there are a lot of considerations that the Legislature has to weigh. For example, if a county is
8 at the south end of the state and the districts are being drawn, each district must have a certain
9 amount of population. So it could be that the district must begin and end in a way that that
10 particular county doesn't have its own district. It's simply a matter of trying to fit all of the
11 standards together and trying to balance them in the best possible way. Districts are required to
12 follow political and geographical boundaries but only where feasible. Where feasible provision
13 in the Constitution recognizes that for any number of reasons, including the geography of the
14 state, the population of the districts, the need to make districts compact, the attempt perhaps
15 preserve political boundaries as opposed to geographical boundaries or vice versa, it simply
16 might not work out that even every large county has a district wholly contained within it. So it's
17 all very much a localized analysis. It depends on a lot of circumstances in each particular area of
18 the state. Those sorts of decisions about where to draw lines will ultimately have to be made by
19 the Legislature in trying to balance all of those different standards.

20 Tom Leek: Members, any other questions? Representative Geller, hold on for just a
21 second. See if anybody else has a question. Representative Geller, you're recognized.

22 Joseph Geller: Thank you, Mr. Chair. I want my second bite, too. Everybody's had one.
23 Thank you, Mr. Chair, and thank you again, sir. Let me return to the questions that Rep. Driskell

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1 was asking. But I'm not going to get into the 'must' versus 'may,' although I find that very
2 interesting, frankly. We were talking about why it would be impermissible to rebalance by
3 looking at a partisan division and saying that it should be rebalanced. I understand, I think, the
4 answer as to why that in and of itself would be viewed as intent. But that also presupposes that
5 there is, I'll call it base map that has been arrived at and which someone is seeking to redraw
6 with an eye on partisan differences. Isn't that different then if we're confronted with could be
7 multiple but for the moment I'll say two for simplicity, two different proposed maps, both of
8 which as compliant as you indicate there could be not infinite but many possible choices. Isn't
9 the choosing of one above another when they're still both proposed, when we're not redrawing
10 something that if there are neutral reasons for it, the decision to look to one rather than another
11 proposed map, could itself be evidence of partisan intent?

12 Tom Leek: Give me a second. I'm still digesting that. I think the question is whether
13 something would be partisan intent if you choose one over the other. See how quickly I got
14 there?

15 Joseph Geller: Yeah, that's not exactly how I put it.

16 Tom Leek: See how quickly I got there? Okay. And that's really not about the legal
17 mechanics of how we do this. If you're comfortable answering that question without opining on
18 it, the question is whether it could be partisan intent.

19 Andy Bardos: Thank you, Mr. Chairman. It all goes back to intent. If there are two maps
20 before the Legislature and one has one political balance and the other has another one and the
21 intention of the Legislature is to choose one or the other because of its political impact, because
22 it favors one party or because it favors another, that would be a violation of the Constitution. If
23 there are two maps before the Legislature with different political impact and the Legislature is

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1 not motivated by that consideration, its intention is not to choose one or the other for political
2 reasons, but it chooses the one map or the other map for nonpolitical reasons. If it chooses one
3 because it believes that it's more compact or this one is more adherent to political or
4 geographical boundaries, then that would not violate an intent standard. It all comes back to
5 intent. Why is the Legislature drawing the districts that it's doing and why is it choosing the map
6 that it's choosing?

7 Joseph Geller: Brief follow up, Mr. Chair?

8 Tom Leek: Yeah. Very quickly. Let me say this. I think the problem with your question is
9 the premise, because your premise is that we will select a map. Remember that the legislative
10 maps, we will select and they will go on to the Supreme Court. Whatever we pass out of here is
11 the map that we select. I believe the premise of your question involves a rebalancing of the
12 districts based on the partisan split or the performance in the gubernatorial election last time
13 around. Because that is a premise, it is necessarily intent in my mind and would be unlawful.

14 Joseph Geller: Don't think I disagree necessarily with what you just said, Mr. Chair. My
15 question is not, specifically not about a rebalancing. It's before, because a rebalancing presumes
16 we've made a choice. So to go back, though, to the specific answer that Mr. Bardos gave, and
17 not to give any major practice tips here, either. But wouldn't it require in that circumstance
18 where a choice had not been made where it's not a rebalancing we're seeking for it to not be
19 intent, wouldn't it require at least some articulable basis, such as the two that you offered for
20 choosing one over the other to negate the inference that partisan intent was involved in their
21 choice?

22 Tom Leek: Yeah. I don't want to get into policy here. But let me suggest this having gone
23 back and listened to the entire twelve hours of questions and debate on the House floor the last

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1 time around, there will be an articulable reason for essentially every line in the map. There must
2 be. I'm confident that our minority caucus will ensure that whatever lines are drawn, there will
3 be an articulate basis for. To go back to Vice-Chair Fine's question, there's no single one right
4 answer. The key here is to make sure that we don't make decisions based on things that we
5 clearly cannot do, which in this instance would be making, drawing lines with the intent to favor
6 or disfavor a political party. You're welcome to answer his question if you can.

7 Andy Bardos: I think that's really an evidentiary question for the court. The court will
8 have to make that determination. I don't think that the courts expressed that there is a default
9 assumption, that just because the Legislature makes one choice over another, it must have been
10 politically motivated. During the last redistricting cycle of redistricting litigation, there was
11 evidence that the court considered to be sufficient to establish a violation. But I don't think that
12 that's necessarily the assumption that the court will have at the outset. So for example, in 2012
13 when the Florida Supreme Court reviewed the Legislature's maps at the outset, it did begin with
14 the assumption that the legislation is constitutional and there would be a measure of deference
15 accorded to the legislative will. So it really becomes an evidentiary question beyond that. What
16 can the parties prove about what the intent of the Legislature was, recognizing that every map is
17 going to have political impact and different political impacts from all other maps?

18 Tom Leek: Thank you, members, for those questions. We will now hear from the public.
19 I'll remind you to keep your comments on the presentation today and please address your
20 questions through the Chair. We have any members of the public wishing to speak? Seeing no
21 members of the public wishing to speak, thank you for those, members, with counsel's
22 presentation today, if you have any follow up questions, please direct them to the committee staff
23 and we will work to get your questions answered. As to our next meeting, we will keep the

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1 | committee updated on our next authorized date as we find out more details about special session
2 | and any impacts it may have on the upcoming schedule. Thank you, members. This concludes
3 | our committee agenda for today. Representative Rommel moves we rise.



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Date: 12th November 2024

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Van Online Services, Inc.
10711 Spotsylvania Ave., Suite A
Fredericksburg VA 22408
Office: (888) 535-5668
Email: support@vananservices.com
Website: www.vananservices.com