IN THE SUPREME COURT OF FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA et al.,

Appellants/Cross-Appellees,

v.

KEN DETZNER, et al.,

Appellees/Cross-Appellants.

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

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

COALITION PLAINTIFFS' SUPPLEMENTAL BRIEF ON REMEDY

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PRELIMINARY STATEMENT TO ASSIST THE READER

Citations to the Record on Appeal are as follows:

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

- (SR(1-24):___) indicate citations to the Supplemental Record on Appeal filed by the clerk of the lower tribunal, also pursuant to this Court's order dated October 31, 2014, of materials filed since the *Bainter* record was compiled. This supplemental record was transmitted to the Court on October 30, 2014 and November 6, 2014;

- (SR(25-73):___) indicates citations to the Supplemental Record on Appeal filed by the clerk of the lower tribunal, pursuant to this Court's order dated July 9, 2015. This supplemental record was transmitted to the Court on October 21, 2015.

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

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

- (R. Ex. CP-___) indicates citations to Coalition Plaintiffs' exhibits admitted during the relinquishment proceedings, which were filed by the clerk of the lower tribunal on a disc with the supplemental record transmitted to the Court on October 21, 2015;

- (R. Ex. H-__) indicates citations to the House's exhibits admitted during the relinquishment proceedings, which were filed by the clerk of the lower tribunal on a disc with the supplemental record transmitted to the Court on October 21, 2015;

- (Ex. Ex. S-___) indicates citations to the Senate's exhibits admitted during the relinquishment proceedings, which were filed by the clerk

of the lower tribunal on a disc with the supplemental record transmitted to the Court on October 21, 2015; and

- (J.A. ___) indicates citations to the parties' Joint Appendix, which was filed by the Senate on October 16, 2015.

Citations to the briefs are as follows:

- (H.S.B __) indicates citations to the House's Supplemental Brief filed on October 16, 2015;

- (S.S.B __) indicates citations to the Senate's Supplemental Brief filed on October 16, 2015; and

- (Leg. A.B. ___) indicates citations to the Legislature's Answer Brief and Initial Brief on Cross Appeal filed on December 19, 2014.

STATEMENT OF THE CASE AND FACTS

Because the Legislature failed to enact a remedial congressional plan in response to the decision in *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015) ("*Apportionment VII*"), this Court has been thrust into the unusual posture of adopting a remedial plan to ensure constitutional elections. The trial court thoroughly analyzed the seven maps proposed by the parties, recommended approval of 19 legislatively drawn districts, and found that eight South Florida districts in CP-1 best fulfill the requirements of the Florida Constitution while correcting the specific defects identified in *Apportionment VII*.

Attempting to salvage its less compliant proposals, the Legislature offers only distortion, speculation, and diatribes against Coalition Plaintiffs and the judiciary. In doing so, the Legislature falls far short of its burden under *Apportionment VII*. This Court should accept the trial court's recommendation and adopt CP-1 as the plan governing congressional elections in Florida.

The Special Session. On July 9, 2015, this Court issued its *Apportionment VII* opinion, which invalidated the Legislature's 2014 congressional plan and relinquished jurisdiction to the trial court for a period of 100 days for remedial proceedings. The trial court promptly entered a scheduling order that was dependent on the Legislature enacting a remedial plan by August 25, 2015. (J.A. 2.)

The Legislature announced that it would convene a special session to consider a remedial plan from August 10, 2015 to August 21, 2015. (R. Ex. H-190.) Before the special session commenced, the Legislature directed staff to draw a "base map" that would be used as a starting point for the remedial plan. (R. Ex. H-118 at 1; J.A. 32.) The base map was not drawn in public, and there is no written, audio, or video recording of the closed-door drawing sessions or of the conversations among staff during those sessions. (J.A. 273-75, 286-87, 341.)[1]

In redrawing Districts 26 and 27, staff considered only two options that made the smallest possible changes to versions of District 26 and 27 invalidated in *Apportionment VII*. (J.A. 873.) One version left Homestead whole within District 26, while the other left Homestead whole within District 27. (R. Ex. CP-32-35.) Staff opted for the version that placed Homestead in District 26 and replaced the lost population in District 27 with three predominantly African-American communities in Richmond Heights, Palmetto Estates, and West Perrine. (J.A. 32.)

By shifting predominantly Democratic African-American communities into District 27, the Legislature increased the Republican performance in District 26, thereby replicating – and, in fact, exacerbating – the partisan effect of the prior Homestead split. (*Compare* J.A. 29 *with* J.A. 37.) To justify this maneuver, staff

[1] In the ongoing Senate remedial process, the Legislature has elected to record the drawing sessions for the proposed base maps. (J.A. 677.)

did not claim that they shifted African-American population into District 27 to avoid retrogression. Indeed, the Legislature represents that staff had no knowledge of the performance or demographic information necessary to conduct a functional analysis when drawing Districts 26 and 27. (*See* S.S.B. 34.) Instead, staff stated that they were merely attempting to follow major roadways in equalizing population and drew in Richmond Heights, Palmetto Estates, and West Perrine when connecting Highway 1 with the Florida Turnpike. (R. Ex. CP-13 at 128-29.)

After publication of the base map, Coalition Plaintiffs sent a letter to the Legislature expressing concern that the base map "accomplished the same partisan result" as the Homestead split by shifting Richmond Heights, Palmetto Estates, and West Perrine into District 27. (R. Ex. CP-29 at 2.) Coalition Plaintiffs "submit[ted] that ... the population removed from CD 26 was chosen because that particular population, if left to remain in CD 26, would have made the district more Democratic and improved tier-two compliance in the region as a whole." (*Id.*) The letter urged the Legislature to "find a non-partisan way to draw CD's 26 and 27." (*Id.*) The Legislature did not attempt to redraw Districts 26 and 27 in a more compliant manner after receiving the letter or at any other time during the special session. Instead, the Legislature launched a misguided attack, accusing Coalition Plaintiffs of making a "blatant request to make District 26 'more Democratic' " and asking "the Legislature to engage in partisan gerrymandering." (R. Ex. CP-30 at 3.)

During the special session, the House passed a slightly modified version of the base map, designated Plan 9071. (J.A. 38.) The Senate passed Plan 9062, which made more significant changes to the base map in Central and Southwest Florida. (J.A. 44.) The House and Senate could not agree on which map to adopt, and the special session concluded without a legislatively adopted remedial plan. (J.A. 865.) Because the initial instructions on relinquishment assumed that the trial court and this Court would review a legislatively enacted remedial plan, this Court entered a further order directing the trial court to

> hold a hearing in which it shall consider "proposed remedial plans from the parties" ... especially focusing on the map passed during special session by the House, and any amendments offered thereto; the map passed during special session by the Senate, and any amendments offered thereto; and the areas of agreement between the legislative chambers.

(J.A. 7) Emphasizing that "the burden remains on the House and Senate to justify their chosen configurations," this Court instructed the trial court to "make a recommendation to the Court ... as to which map proposed by the parties—or which portions of each map—best fulfills the specific directions in [*Apportionment VII*] and all constitutional requirements." (J.A. 7-8.)

The Remedial Hearing. The trial court then entered a second scheduling order directing the parties to submit proposed plans and setting a three-day evidentiary hearing. (J.A. 15-18.) Before the hearing, the parties filed seven plans:

(1) Plan 9071 (House) – Plan 9071, adopted by the House in the special session, largely follows the base map, except that it keeps whole four additional cities: Groveland, Auburndale, Riviera Beach, and Sunrise. Plan 9071 includes (a) the same East-West version of District 5 as in the map designated Romo Plan A at trial, (b) a version of District 14 that does not cross Tampa Bay or divide Pinellas County, (c) a "stacked" configuration of Districts 21 and 22, (d) a version of District 25 that keeps Hendry County whole, and (e) a version of District 27 that does not include any portion of Homestead, but replaces the lost population with predominantly African-American communities in Richmond Heights, Palmetto Estates, and West Perrine. Plan 9071 includes 18 split counties and 20 split cities.

(2) Plan 9062 (Senate) – Plan 9062, adopted by the Senate in the special session, modifies Districts 9, 10, 11, 15, 16, and 17 from the staff-drawn configurations in the base map. Primarily, Plan 9062 keeps Sarasota County whole, whereas Plan 9071 divides it. In exchange, Plan 9062 divides Manatee County, whereas Plan 9071 keeps it whole, and does not include a district wholly within Orange County (as is District 10 in Plan 9071). Plan 9062 includes 18 split counties and 20 split cities.

(3) Plan 9066 (Senate) – At Senator Galvano's direction, Senate staff drew Plan 9066 after the special session. Plan 9066 differs from Plan 9071 only as to Districts 9, 15, 16, and 17. Plan 9066 keeps both Sarasota County and Manatee County whole, while Plan 9071 divides Sarasota County. In exchange, Plan 9066 divides Longboat Key, portions of which are located in both Sarasota County and Manatee County, and reduces the compactness of Districts 9, 15, 16, and 17 as compared with Plan 9071 by either two or all three of the accepted compactness metrics. Plan 9066 includes 17 split counties and 21 split cities.

(4) CP-1 (Coalition Plaintiffs) – Coalition Plaintiffs offered CP-1 as their principal remedial plan. CP-1 includes 19 identical districts to Plan 9071 in North and Central Florida, but differs substantially from Plan 9071 in South Florida. First, CP-1 configures Districts 26 and 27 in a way that eliminates the split of Homestead, is substantially more compact than the legislative proposals, and follows major roadways more closely than the

legislative proposals. Second, CP-1 reconfigures Districts 20 through 25 in a way that avoids at least seven city splits and improves compactness in four out of the five affected districts. CP-1 includes 18 split counties and 13 split cities.

(5) CP-2 and CP-3 (Coalition Plaintiffs) – CP-2 and CP-3 are exemplar plans submitted by Coalition Plaintiffs to demonstrate that Districts 26 and 27 can be drawn to more closely follow major roadways without adversely affecting compactness or drawing the three African-American communities into District 27. CP-2 and CP-3 follow the district configurations in Plan 9071 other than for Districts 26 and 27. CP-2 and CP-3 both include 18 split counties and 20 split cities.

(6) Romo Plan (Romo Plaintiffs) – The Romo Plan is modelled after Plan 9071 in North and Central Florida, modifying only the South Florida districts. There are two significant differences between the Romo Plan and Plan 9071. First, the Romo Plan retains the non-"stacked" configuration of Districts 21 and 22 in the 2012 and 2014 congressional plans. Second, the Romo Plan modifies the boundary between Districts 26 and 27 so that the African-American communities in Richmond Heights, Palmetto Estates, and West Perrine are in District 26, rather than District 27. The Romo Plan includes 18 split counties and 23 split cities.

(J.A. 38-79.)

The trial court then conducted a three-day evidentiary hearing during which it heard testimony from the map drawers and expert witnesses for each of the parties. On October 9, 2015, the trial court entered its order recommending approval of 19 legislatively drawn districts reflected in Plan 9071 and eight South Florida districts in CP-1. (J.A. 864-882.) The trial court first approved the North and Southwest Florida districts in Plan 9071 because they are more tier-two compliant than the competing configurations in Plans 9062 and 9066. (J.A. 868-70.) It then

turned to the South Florida districts and found that CP-1 is "hands down the best tier two performing map of the group." (J.A. 875.) After finding that the Legislature had failed to carry its burden of justifying its less compliant versions of Districts 20 through 27 on non-retrogression or other grounds, the trial court recommended CP-1 as the plan that "best complies with the directions in *Apportionment VII* and the requirements of Article III, section 20." (J.A. 882.)

SUMMARY OF THE ARGUMENT

This Court should accept the trial court's recommendation and adopt CP-1 as the remedial plan governing congressional elections in Florida. The trial court faithfully followed this Court's instructions, focused primarily on the legislative plans, and recommended the most constitutionally compliant districts.

The trial court properly recommended adoption of the Central and Southwest Florida districts in Plan 9071 (which are incorporated into CP-1) over the Senate proposals. Plans 9062 and 9066 give rise to potential incumbent favoritism concerns, and they contain tier-two defects not present in Plan 9071.

The trial court also properly recommended adoption of Districts 20 through 27 as drawn in CP-1 because the Legislature did not meet its burden of justifying its proposed versions of those districts. Districts 26 and 27 in CP-1 are more compact and better follow major roadways and municipal boundaries than the legislative proposals without retrogression. The Legislature's claim that CP-1's District

26 diminishes the ability of Hispanics to elect their preferred candidates is inconsistent with its prior positions and the demonstrated electoral history. The relevant metrics in CP-1 are substantially the same as in the 2012 and 2014 enacted plans, which elected both a Hispanic Democrat and a Hispanic Republican and which the Legislature and its expert endorsed as non-retrogressive.

By eliminating an appendage extending from District 20 into District 21 and making other changes to Districts 20 through 25, CP-1 avoids at least seven additional city splits and substantially improves compactness in the region. To dispute these significant tier-two benefits, the Legislature offers nonsensical distinctions that fail to satisfy its burden under *Apportionment VII*.

Finally, the Legislature's prolonged, but tired attacks on Coalition Plaintiffs' maps and motives are irrelevant and unsupported. The trial court conducted a transparent, thorough, and non-partisan analysis and ultimately recommended 19 legislative districts and what is objectively the most compliant configuration of the remaining eight districts. Although the trial court correctly found that CP-1 was not drawn with partisan intent, the alleged intent of Coalition Plaintiffs and the procedure by which they drew their proposed maps are ultimately irrelevant.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARDS.

A. Appellate Standard of Review

Coalition Plaintiffs agree that this Court reviews factual determinations for competent, substantial evidence and questions of law *de novo*. (H.S.B. 12 n.1; S.S.B. 11.) The Senate, however, incorrectly suggests that *de novo* review applies to all aspects of the "question of 'which map proposed by the parties—or which portions of each map—best fulfills the specific directions in [*Apportionment VII*] and all constitutional requirements.' " (*Id.* (quoting J.A. 7-8).) The trial court's recommendation incorporates both factual determinations, such as whether particular maps were drawn with partisan intent, and legal determinations. The factual portions of the trial court's recommendation must be upheld if supported by competent, substantial evidence, while legal determinations are subject to *de novo* review.

B. Legal Principles Governing Review of Remedial Plans

This Court is in the unusual posture of adopting a remedial redistricting plan when the Legislature had the opportunity to enact a plan, but failed to do so. Although the task of redistricting falls primarily to the Legislature, this Court has the authority to adopt a remedial plan to avoid elections in unconstitutional districts in the face of legislative inaction. *See Apportionment VII*, 172 So. 3d at 413 (acknowledging that "state courts are empowered to enact constitutional redistricting

plans for the United States Congress 'when the legislature fails to do so' ") (citing *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003)); *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1083 (N.D. Fla. 1992) (adopting judicially crafted congressional districts when Legislature failed to enact plan). The Legislature has conceded as much. It was, after all, the House that requested this Court to modify its relinquishment instructions to allow for judicial adoption of a remedial plan before the 2016 congressional elections, and neither chamber objected to the authority of the judiciary to adopt a plan during the relinquishment proceedings.[2]

Now that the trial court has declined to recommend a portion of the legislative proposals, the House complains that remedial districts are being "impos[ed]" in violation of "separation of powers" (H.S.B. 33), and proclaims that "judicial imposition" of the challengers' proposed districts would "violate ... democratic values" and "justify the Legislative Parties' opposition to Amendment Six as a device intended to strip the Legislature of its constitutional authority" (H.S.B. 44). These inflammatory claims fall flat for at least two reasons. First, the House itself asked this Court to modify its relinquishment of jurisdiction and to instruct the trial court to "solicit proposed remedial plans from **the parties**" – not simply the two legisla-

[2] The Legislature previously argued that courts do not have authority to impose a plan for misconduct alone, but conceded that the judiciary has the "unwelcome obligation" to adopt a redistricting plan if the Legislature "has had a reasonable opportunity to enact a remedial plan," but "fails to respond." (SR3:130-31.)

tive chambers – and then "recommend to this Court the adoption of one of the proposed remedial plans." (House Mot. for Further Relinquishment at 4 (emphasis added); *see also* J.A. 6-8.) Second, it is neither a violation of separation of powers nor a judicial power grab to adopt districts proposed by parties other than the Legislature when the Legislature has failed to respond to its constitutional obligation to enact a remedial redistricting plan. If courts were strictly limited to picking a deficient map proposed by one legislative chamber or the other when alternative proposals satisfy all constitutional requirements, the Legislature would be afforded the very deference that this Court rejected in *Apportionment VII*.

This Court has properly determined that the *Apportionment VII* framework continues to govern the legislative proposals despite the lack of an enacted plan. (J.A. 7.) If the rule were otherwise, the Legislature could reduce its burden in remedial proceedings simply by refusing to act or manufacturing an "impasse" over inconsequential issues. Because the Legislature drew the 2012 congressional plan with unconstitutional intent, the burden is on the Legislature to justify its proposed remedial district configurations, and this Court affords no deference to the Legislature in reviewing its proposed districts. *See Apportionment VII*, 172 So. 3d at 396-97. This Court described the effect of the burden shift as follows:

> Because there are many ways in which to draw a district that complies with, for example, the constitutional requirement of compactness, which party bears the burden of establishing why a decision was made to accept or reject a particular configuration can ultimately be deter-

> minative. ... Since the trial court found that the Legislature's intent was to draw a plan that benefitted the Republican Party, the burden should have been placed on the Legislature to demonstrate that its decision to choose one compact district over another compact district, or one tier-two compliant map over another tier-two compliant map, was not motivated by this improper intent. This is particularly true where the challengers presented evidence that the Legislature's choices ultimately benefitted the Republican Party and also showed alternative maps that performed more fairly.

Id. at 400-01.

The Legislature maintains that the trial court's analysis should have been strictly limited to deciding whether the legislative proposals corrected the specific constitutional defects identified in *Apportionment VII*. (H.S.B. 38-41; S.S.B. 43.) If the Legislature's position were accepted, the trial court would be required to recommend a legislative proposal for approval as long as it corrects the identified defects and meets some minimum threshold of tier-two compliance. That result would be inconsistent with the unique posture of this case, in which this Court is tasked with adopting a plan in the absence of a legislatively enacted plan, as well as the instructions on relinquishment and the *Apportionment VII* decision.

This Court directed the trial court to identify "which map proposed by the parties—or which portions of each map—**best** fulfills" not only "the specific directions of [*Apportionment VII*]," but also "all constitutional requirements." (J.A. 7-8) (emphasis added).) As the parties' competing proposals show, there are multiple ways to address the defects identified in *Apportionment VII* with differing levels of

tier-two compliance. There is no principled justification for casting aside obvious tier-two benefits simply because they are reflected in a map proposed by challengers, rather than the Legislature. To do so would afford the Legislature unwarranted deference and eviscerate the *Apportionment VII* burden shift. After a finding of improper intent, the Legislature is required not only to meet some bare threshold of tier-two compliance, but must affirmatively justify its decision "to choose one compact district over another compact district, or one tier-two compliant map over another tier-two compliant map." *Apportionment VII*, 172 So. 3d at 401.

In the absence of legislative action, this Court has the constitutional authority and obligation to adopt the remedial plan that most faithfully complies with Article III, section 20. It should not decline to do so simply because a challenger, rather than a legislative chamber, has offered the most compliant map.

II. THE TRIAL COURT APPLIED THE PROPER STANDARD OF REVIEW IN RECOMMENDING CP-1 FOR APPROVAL.

The Legislature claims that, in recommending CP-1, the trial court violated this Court's instruction to "especially focus[]" on the maps proposed by the chambers. (J.A. 7.) The House, for example, argues that the trial court "gave no effect to this Court's direction to 'focus' especially on the House's and Senate's maps" because it did not give "meaningful precedence" to choices made during the legislative process. (H.S.B. 38-39.) The Legislature appears to have conflated "focus" with "deference." This Court reasonably instructed the trial court to primarily scru-

tinize the legislative proposals and the justifications offered by each chamber. It did not suggest that legislative choices should be afforded deference, but quite clearly explained that no deference is due under *Apportionment VII*.

In making its recommendation, the trial court began with the three maps submitted by the House and Senate. It recommended that this Court approve the legislatively drawn districts in North and Central Florida as to which there was no disagreement and evaluated the districts that differed between the House and Senate proposals. (J.A. 868-70.) After careful consideration of each chamber's justifications for its choices, the trial court recommended approval of the House districts over their Senate counterparts. (*Id*.) The trial court then turned to the South Florida districts that the challengers contested. Again, the trial court focused on the legislatively proposed South Florida districts, considered the justifications offered by the Legislature, and found those justifications lacking in the face of more tier-two compliant alternatives that did not result in retrogression. (J.A. 871-81.)

The trial court faithfully complied with this Court's instructions by focusing on the legislative proposals, recommending 19 legislatively drawn districts for approval, and rejecting districts when the Legislature failed to meet its burden of justifying them. Having determined that the legislative proposal for Districts 20 through 27 was not the configuration that best fulfilled the directions of *Apportionment VII* and all constitutional requirements, the trial court recommended the

most compliant version in the proposed plans submitted by the parties – exactly as it was instructed to do. If the trial court had accepted the Legislature's invitation to afford deference to the legislative proposals and disregard more compliant configurations in the challengers' submissions, it would have violated the instructions on relinquishment. Accordingly, the trial court applied the proper analysis and standard of review during the relinquishment proceedings.

III. THIS COURT SHOULD ACCEPT THE TRIAL COURT'S RECOMMENDATION TO APPROVE THE CONFIGURATION OF CENTRAL AND SOUTHWEST FLORIDA IN PLAN 9071.

The trial court properly determined that the House's proposed configuration of Central and Southwestern Florida in Plan 9071 is preferable to the Senate's proposed configurations in Plans 9062 and 9066.[3] Initially, the Senate proposals raise potential tier-one concerns. As the House pointed out in its submissions, Plan 9062 places the residence of incumbent Congressman Dennis Ross slightly outside of proposed District 15 and puts the city of Brandon in the geographical center of proposed District 15. (SR42:5911-12.) Senator Tom Lee, who proposed the amendment resulting in Plan 9062, resides in Brandon. (*Id.*) As to Plan 9066, the House points out that the Senate placed Congressman Ross in proposed District 15 and incumbent Congressman Buchanan in proposed District 15, while creating a

[3] Plan 9062 and Plan 9071 differ as to Districts 9, 10, 11, 15, 16, and 17. Plan 9066 and Plan 9071 differ as to Districts 9, 15, 16, and 17.

new, open seat consisting of Manatee and southeast Hillsborough County that would also be favorable for Senator Lee. (SR42:5912-13.)

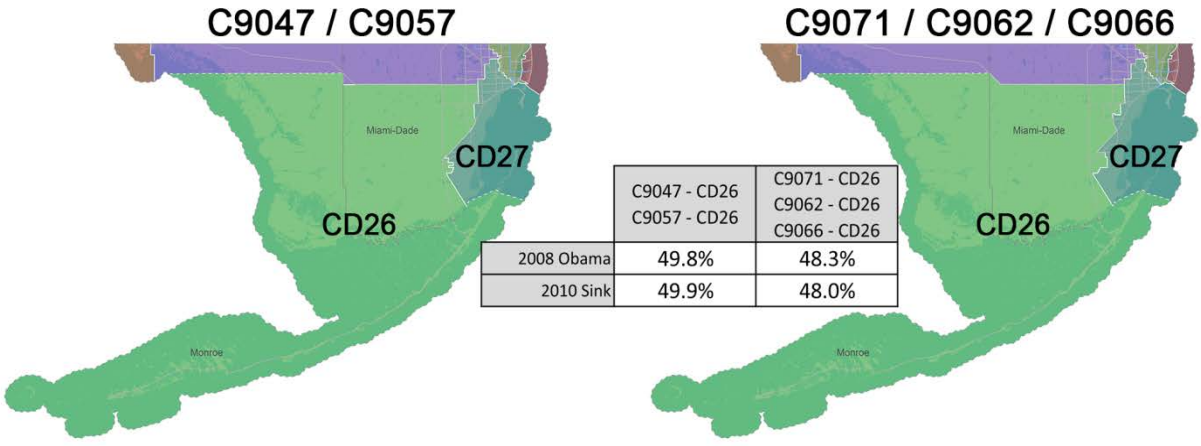
Ultimately, this Court need not base its decision on tier-one considerations because the Senate proposals contain tier-two defects not present in Plan 9071. Plan 9062 is slightly less compact than Plan 9071 and causes District 10 to protrude from Orange County into Lake County, while Plan 9071 leaves District 10 entirely within Orange County. (J.A. 869.) Plan 9062 also reflects an inconsistent methodology, as it "was purportedly designed to address the perceived 'donor' status of Hillsborough County, but ... it exacerbated the 'donor' status of Orange County." (*Id*.) Plan 9066 places District 10 entirely within Orange County and keeps an additional county whole, but causes an additional city split and leaves several districts less compact in the process. (J.A. 869-70.) Therefore, this Court should accept the trial court's recommendation to approve the Central and Southwest Florida districts in Plan 9071, rather than the Senate proposals.[4]

[4] The South Florida districts in CP-1 are not impacted by the selection of the differing proposals for Central and Southwest Florida in Plans 9071, 9062, and 9066. As the Senate notes in its brief, CP-1 can be "seamlessly merged" with the Senate's proposed district configurations. (S.S.B. 26 n.2.) Accordingly, this Court should separately approve the South Florida districts in CP-1 even if it adopts the Central and Southwest Florida districts in Plan 9062 or Plan 9066.

IV. THE TRIAL COURT PROPERLY FOUND THAT DISTRICTS 26 AND 27 IN CP-1 BEST FULFILL THE CONSTITUTIONAL REQUIREMENTS.

In *Apportionment VII*, this Court found that the Legislature failed to meet its burden of "demonstrat[ing] that the decision to split Homestead" in Districts 26 and 27 "was not done to benefit the Republican Party." *Apportionment VII*, 172 So. 3d at 410. It held that "the Legislature's asserted justification for its configuration of [Districts 26 and 27]—to protect minority voting rights—simply cannot be justified" and ordered Districts 26 and 27 to be "redrawn to avoid splitting Homestead." *Id.* The Legislature purported to "correct" these tier-one and tier-two violations by drawing a version of District 27 that replaced the predominantly Democratic African-American population in Homestead by reaching out from District 27's border along Highway 1 to draw in predominantly Democratic African-American population in Richmond Heights, Palmetto Estates, and West Perrine.

As the figure below demonstrates, the result of this "fix" was to make District 26 even better performing for Republicans than in the invalidated plan:

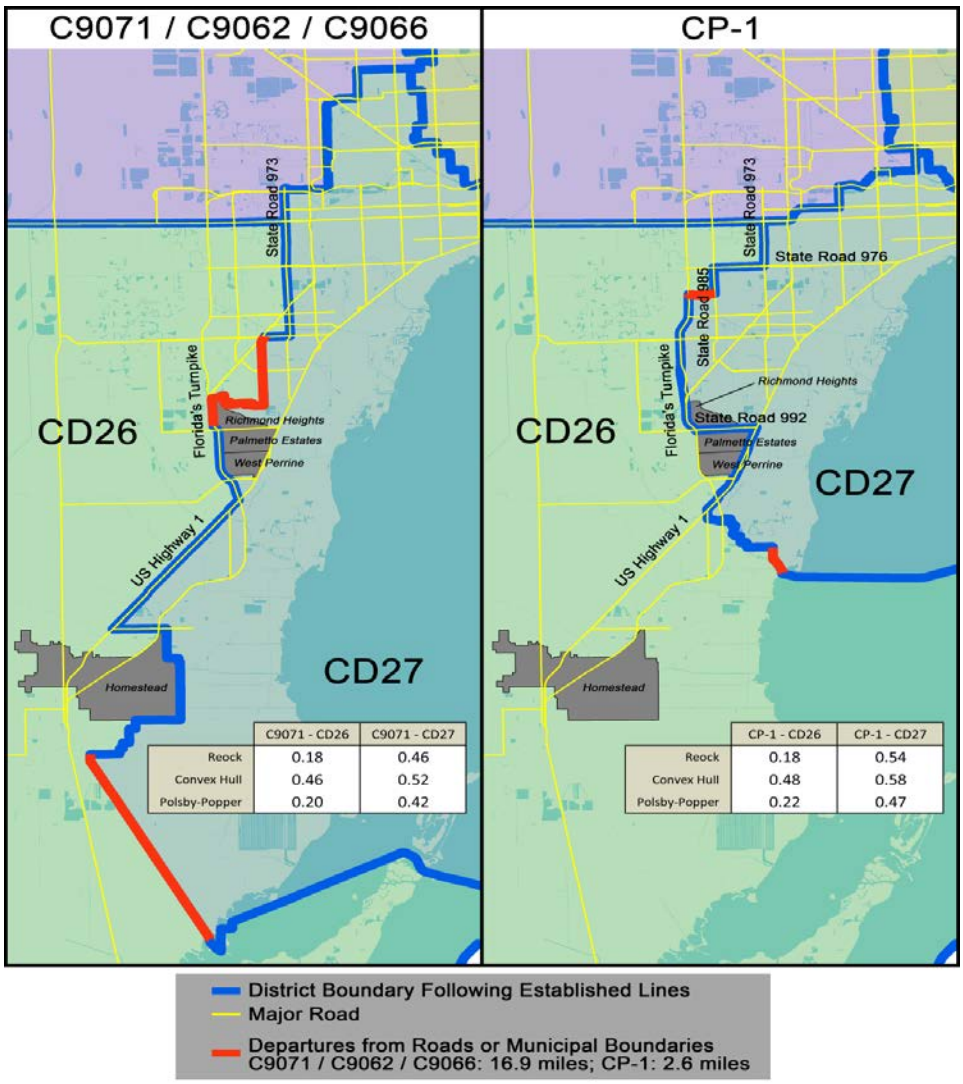


	C9047 - CD26 C9057 - CD26	C9071 - CD26 C9062 - CD26 C9066 - CD26
2008 Obama	49.8%	48.3%
2010 Sink	49.9%	48.0%

(J.A. 25, 29, 43, 49, 55.)

During the special session itself, staff claimed that mere happenstance caused them to shift into District 27 the only available population that would replace the partisan gains achieved by the Homestead split. According to staff, they simply followed major roadways and drew in the three African-American communities as they extended the border of District 27 to the Florida Turnpike. (R. Ex. CP-13 at 128-29.) Staff represented that they were not seeking out African-American or Democratic population to achieve any particular non-retrogression goal. In fact, they testified that they did not consider demographic or political data until **after** redrawing Districts 26 and 27. (S.S.B. 33-34.) Even then, staff conducted only a cursory review of that data and deferred to the Legislature's expert, Professor Moreno, for a functional analysis. (J.A. 873; *see* J.A. 342-43 349, 357.)

CP-1 demonstrates that Districts 26 and 27 can be drawn more compactly, avoid splitting Hialeah, better follow major roadways, and fit into an overall configuration of South Florida that is more tier-two compliant:



(R. Ex. CP-D4.) CP-2 and CP-3 further undermine the Legislature's stated justification for its proposed configuration of Districts 26 and 27 by showing that major roads can be better followed without placing Richmond Heights, Palmetto Estates, and West Perrine in District 27. (J.A. 62, 68; R. Exs. CP-D21, CP-D22.)

Recognizing that its stated justification – adherence to major roadways – cannot withstand scrutiny in light of Coalition Plaintiffs' alternatives, the Legislature now relies entirely on trumped up retrogression concerns to argue that the trial

court erred in recommending the versions of Districts 26 and 27 in CP-1. Specifically, the Legislature insists that District 26 in CP-1 would lead to retrogression because Hispanics do not "control" the Democratic primary. (H.S.B. 12-24; S.S.B 36-43.) The problem with the Legislature's argument is that it is inconsistent with its prior positions in this case and with the demonstrated electoral history in South Florida. Under these circumstances, the Legislature has the burden of establishing that Districts 26 and 27 must deviate from the superior tier-two configurations in CP-1 to avoid retrogression. It has fallen well short of that burden.

Not long ago, the Legislature represented that the invalidated version of District 26 – which had substantially the same demographic, registration, and primary turnout metrics for Democrats as CP-1 – did not diminish the ability of Hispanics to elect candidates of either party. (Leg. A.B. 114.) The following is a comparison of the metrics between District 26 in the 2012 and 2014 plans and in CP-1:

I. HVAP		
9057 – 68.9%	CP-1 – 68.3%	
II. Hispanic Voter Registration		
	9047/9057	**CP-1**
2010	55.5%	54.7%
2012	57.3%	56.5%
III. Hispanic Turnout – 2010		
Primary		
	9047/9057	**CP-1**
Democrats-Hispanic	22.7%	22.8%
Republicans-Hispanic	63.6%	62.4%
General Election		
	9047/9057	**CP-1**
Democrats-Hispanic	32.8%	32.6%
Republicans-Hispanic	64.2%	63.0%

IV. % of Republicans Who are Hispanic	
9047/9057 – 66.2%	CP-1 – 64.7%
V. % of Democrats Who are Hispanic	
9047/9057 – 42.6%	CP-1 – 42.5%

(J.A. 25-26, 29-30, 59-60.) Based on these metrics, the Legislature represented to the DOJ that Hispanics "continue to possess the ability to elect their preferred candidates of choice," and the DOJ precleared the 2012 version of District 26. (Ex. LD-34B (folder: Request for Preclearance, file: Submission Memorandum – Congress.pdf at 10); (folder: fromDOJ, file: 2012.04.30_DOJApprovalHSC.pdf)).

In a sharp about-face, the Legislature now insists that it is "likely and logical" that a Hispanic Democrat will not prevail under essentially the same metrics that it previously argued would preserve the ability to elect. (H.S.B 13.) To reach this conclusion, the Legislature claims that District 26 in the 2012 and 2014 plans was a "Republican-leaning" district in which Democratic metrics are not "relevant" because the Democratic candidate is supposedly not "likely" to win the general election. (H.S.B 22.) Stated another way, the Legislature argues that District 26 in the 2012 and 2014 plans performed for Hispanics because it was a "Republican" district, but District 26 in CP-1 does not perform for Hispanics because it is a "Democratic" district – despite having roughly the same metrics. Built into this argument are assumptions that the invalidated version of District 26 would never elect a Democrat (in which case the Democratic primary would be irrelevant) and

District 26 in CP-1 would never elect a Republican (in which case the Republican primary would be irrelevant). Both assumptions rapidly fall apart.

The Legislature has never before asserted that District 26 in the 2012 and 2014 plans was a Republican stronghold in which Democratic primary data simply did not matter. To the contrary, it made the following representation to this Court: "Enacted District 26 [in the 2012 and 2014 plans] is a competitive district that enables Hispanic voters to coalesce around a Hispanic candidate of either political party. No party contends that it diminishes the ability to elect." (Leg. A.B. 114 (citation omitted).) The Legislature characterized District 26 as "extremely competitive" and noted that "[t]he competitiveness of District 26 is punctuated by its recent history," in which "a Democrat defeated a Republican incumbent" in 2012, while "a Republican defeated the Democratic incumbent" in 2014. (Leg. A.B. 118 & n.44.) Even at the remedial hearing, the House called prior District 26 "a competitive district . . that elected a Hispanic Democrat once and a Hispanic Republican." (J.A. 796.) [5]

During the merits trial, the Legislature's expert, Professor Moreno, certainly believed that electoral data for both parties were relevant and had no trouble opin-

[5] The House points out that this Court described District 26 as a "Republican-leaning district" (H.S.B. 22), but ignores its further explanation that District 26 was "Republican under the 2008 presidential and 2010 gubernatorial elections but Democratic under the 2012 presidential election." *Apportionment VII*, 172 So. 3d at 409 & n.19.

ing that District 26 in the 2012 and 2014 plans preserved Hispanics' ability to elect. Professor Moreno did not "see a compelling case for fiddling with District 26" because "you can elect three Hispanics and even a Hispanic Democrat with [Districts 25, 26, and 27] as they're drawn" in the 2012 and 2014 plans. (TT18:2337-38.) He opined that prior District 26 "may even lean a little bit more Democrat than Republicans [sic]" and pointed out that "the enacted plan elected a Hispanic Democrat, Joe Garcia." (TT18:2339; *see also* J.A. 447-48.)

The Legislature and Professor Moreno had it right the first time around in characterizing District 26 as a district that Hispanics of either party could win. The invalidated version of District 26 was Democratic-performing in the 2012 presidential election and Republican-performing by only the narrowest of margins – 50.1% and 50.2% – in the 2010 gubernatorial election and the 2008 presidential election. (J.A. 25, 29.) It in fact elected a Democratic congressman in 2012, and he was the Hispanic candidate of choice. Likewise, the benchmark, whether considered to be District 18 or District 25 in the 2002 plan,[6] vacillated between Republican and Democratic performance. (J.A. 20.) In that regard, the partisan objective achieved by the Homestead split was to draw a district that Republicans could

[6] District 26 in CP-1 includes portions of Districts 18, 21, and 25 in the 2002 plan. The trial court used District 18 as the benchmark district "because it was most democratic of the three predecessor districts." (J.A. 879.) District 25 from the 2002 plan is another candidate for the benchmark, as the greatest amount of the population of District 26 in CP-1 comes from former District 25.

more easily win despite changing demographics that rendered the region more Democratic – not to create an impregnable Republican district.

In CP-1, District 26 remains a competitive district in which either party can prevail. Of the thirteen statewide elections that the Legislature deems worthy of consideration, District 26 in CP-1 performed more often for Republicans than for Democrats. (J.A. 61.) And, while CP-1's District 26 is no longer Republican-leaning in the 2010 gubernatorial and 2008 presidential elections, it becomes only narrowly Democratic-leaning at 50.7% and 51.8% performance. (*Id.*) Thus, the Legislature falls flat in its attempt to explain away the inconsistencies with its prior positions by casting the invalidated version of District 26 as "Republican" and CP-1's version of District 26 as "Democratic" in some talismanic sense.

The Legislature does not seriously dispute that coalitions or crossover voting provide Hispanic Democrats with the ability to nominate candidates of their choice in the primary in District 26. As with the 2012 and 2014 version of District 26, the Legislature describes its current proposal as a "toss-up" district (J.A. 290, 491), that "would result in a Hispanic candidate" of either party prevailing in the general election (J.A. 291). To plausibly claim non-retrogression under its own test, the Legislature must believe that Hispanic Democrats can have "control" of the primary in District 26 despite representing only 25.5% of the electorate. (J.A. 42). The Legislature has offered no logical, fact-based explanation why Hispanic Democrats

"control" the primary at 25.5%, but somehow have no "path to nomination and election" at 22.8% in CP-1 (H.S.B. 24) – particularly when it previously endorsed a version of District 26 with metrics that are very similar to CP-1's District 26. Indeed, the Legislature's newfound certainty on this subject is even at odds with its own expert. Professor Moreno would not opine that CP-1 actually "lock[s] Hispanics out" of the Democratic primary. (J.A. 443-44.) Instead, he merely speculated that "we could be there," although he was "not saying we're there." (*Id.*)

In truth, Hispanic Democrats have historically seen candidates of their choice reach the general election in the South Florida districts despite comprising far less than a majority of the primary electorate.[7] As Professor Moreno himself opined: "If a district is competitive, the Democrats have every incentive in the world to nominate an Hispanic Democrat, because that will be the best chance of prevailing against an Hispanic Republican." (J.A. 435.) The 2010 U.S. Senate race offers a good example of how CP-1 maintains that competitive impetus. In CP-1's Hispanic districts, as shown below, Rubio beat his nearest non-Hispanic competi-

[7] In recent elections, the Democratic nominee has almost always been Hispanic in Districts 25, 26, and 27 and their benchmark districts. (*See, e.g.*, R. Ex. CP-D2.) *See generally* http://results.elections.myflorida.com/.

tor by over 22 percentage points and garnered more votes than the combined total for Crist (a white independent) and Meek (an African-American Democrat)[8]:

District (CP-1)	Rubio (HR)	Meek (BD)	Crist (WI)	Rubio Margin Over Nearest Competitor
25	65.9%	12.9%	21.2%	**44.7 Percentage Points**
26	50.1%	22.9%	27.0%	**23.1 Percentage Points**
27	52.3%	17.7%	30.0%	**22.3 Percentage Points**

(J.A. 61.) Accordingly, regardless of the Legislature's effort to characterize District 26 in CP-1 as a solidly "Democratic" district, a Hispanic Republican candidate is likely to handily win that district against non-Hispanic challengers.

Moreover, the pattern of Hispanic Democrats emerging from primaries is all the more likely to continue, as Hispanic registration – and particularly Hispanic Democratic registration – is increasing in South Florida. (*See* R. Ex. CP-31 at 15 n.8 (undisputed testimony from Professor Lichtman that, "[a]mong Hispanic registered voters between 2006 and 2014, the number of Democrats increased 66%

[8] As the House points out, Coalition Plaintiffs have argued that the 2010 U.S. Senate election is unhelpful in analyzing racially polarized voting between African-American and white voters in District 5. (H.S.B. 22.) It does not automatically follow that the election is similarly unhelpful in evaluating the voter behavior of Hispanics in South Florida. As discussed below, Coalition Plaintiffs' expert demonstrated that Hispanic performance in the 2010 U.S. Senate election is consistent with Hispanic performance in a spate of two-candidate races in Miami-Dade County based districts. Regardless, it is particularly ironic that the House would raise a charge of inconsistency. The House previously used Congressman Garcia's victory to argue that District 26 in the 2012 and 2014 plans performed for Hispanic candidates of both parties. (*See, e.g.*, Leg. A.B. 118 & n.44; TT18:2339; J.A. 447-48.) Now, the House insists that Garcia's victory in 2012 is entirely irrelevant and an outlier. (H.S.B. 20.) Unlike Coalition Plaintiffs, the House has claimed that the same election is both relevant and irrelevant for the same purpose.

while the number of Republican registered voters was nearly flat"); *see also* J.A. 493.) Hispanics comprised 54.7% of registered voters and 42.5% of registered Democrats in CP-1's District 26 in 2010, and those figures increased to 56.5% of registered voters and 45.0% of registered Democrats in 2012. (J.A. 59-60.)

At the remedial hearing, Coalition Plaintiffs offered the opinion of Professor Lichtman to establish that Districts 25, 26, and 27 in CP-1 preserve Hispanics' ability to elect candidates of their choice.[9] Professor Lichtman compared Districts 25, 26, and 27 in CP-1 to the analog districts in the 2002, 2012, and 2014 plans. Professor Lichtman noted that Hispanic candidates of choice from both parties won 29 out of 29 elections that took place between 2006 and 2014 in comparable Miami-Dade County districts that had similar HVAP to the proposed Hispanic districts in CP-1. (R. Ex. CP-31 at 5-12; J.A. 877.) Professor Lichtman also analyzed the 2010 U.S. Senate Election and demonstrated that Marco Rubio, a Hispanic Republican, carried the proposed Hispanic districts in CP-1 by landslide margins. (R. Ex. CP-31 at 13-14.) Through ecological regression,[10] Professor Lichtman showed

[9] The parties agreed to submit Professor Lichtman's report into evidence in lieu of direct testimony. Because the Legislature elected not to cross-examine Professor Lichtman, he did not offer live testimony. (J.A. 368-69, 569.)

[10] Ecological regression is "the standard technique used to infer voting behavior among distinct population groups" and allows for "reasonably accurate estimates of majority and minority voting behavior from demographic data and, depending on whether voting in a specific election or party affiliation is being estimated, election returns and party registration data, respectively." *Reed v. Town of*

that in CP-1's District 26, for instance, Rubio received 71% of the Hispanic vote (including support from non-Republican Hispanics) and substantial crossover votes from non-Hispanic voters, even though the district performed for Sink in the 2010 gubernatorial election. (*Id.* at 14-15.) Professor Lichtman concluded that, "according to the range of most pertinent factors, [District 26] in CP-1 is a Hispanic opportunity district beyond any reasonable doubt," and that Districts 25, 26, and 27 in CP-1 function as performing Hispanic districts. (*Id.* at 14-17.)

If the Legislature questions whether Professor Lichtman should have put greater emphasis on particular data – such as primary turnout – it had every opportunity to raise that issue on cross-examination, but elected not to do so. It was up to the Legislature to elicit and challenge the "facts and data" underlying Professor Lichtman's opinion that Districts 25, 26, and 27 in CP-1 preserve Hispanics' ability to elect. § 90.705(1), Fla. Stat. (2015); *see also Myron v. S. Broward Hosp. Dist.*, 703 So. 2d 527, 530 (Fla. 4th DCA 1997) (holding that "the party against whom [an] opinion is offered may conduct an examination of the witness directed to the underlying facts upon which the opinion is predicated," and "the burden of challenging the sufficiency of [an expert] opinion is placed on the party against whom it is offered"). The Legislature cannot correct its failure to cross-examine

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Babylon, 914 F. Supp. 843, 851 (E.D.N.Y. 1996). Ecological regression is "a standard procedure for analyzing minority and white voting in voting-rights litigation." (R. Ex. CP-31 at 2-3.) No party contested its use or reliability.

Professor Lichtman by recasting consideration of primary data as an independent opinion not disclosed in pretrial submissions. (H.S.B. 19; S.S.B 38-39.)

The Legislature attempts to establish retrogression based on the testimony of Professors Moreno and Liu. Professor Moreno compared CP-1 to Plan 9071, rather than the benchmark. (J.A. 484-85, 494-95.) As the Legislature previously acknowledged: "Under the diminishment standard, the appropriate benchmark for comparison is the 'last legally enforceable redistricting plan in force or effect,' " which in this case "is the plan enacted in 2002." (Leg. A.B. 74 n.19 (citing Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011); *Abrams v. Johnson*, 521 U.S. 74, 96 (1997); and 28 C.F.R. § 51.54(b)). Professor Moreno only purported to show that the Legislature's proposed District 26 contains higher metrics for Hispanic Democrats than CP-1, but that is not the relevant question. If it were, the most overpacked minority district would always prevail regardless of tier-two compliance. Because Professor Moreno's analysis does not comport with the legal requirements for a functional analysis, his testimony cannot show retrogression and does not "assist [this Court] in understanding the evidence or in determining a fact in issue." § 90.702, Fla. Stat. (2015); *see also Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999) (finding that "[p]roffered expert testimony must meet the legal as well as the substantive issues of the case" to be admissible under *Daubert*).

Professor Moreno also speculated that the "the Democratic establishment" may not recruit and back Hispanic candidates with as much vigor if District 26 becomes more Democratic, discussed the results of isolated local elections, expressed concern about the merits of the field of candidates in District 26, and discounted "the Democratic Hispanic bench in Dade County" as "very weak." (J.A. 432-41, 445-46.) In the end, Professor Moreno could only state that there was a "possibility" that a Hispanic Democrat might not make it through the primary under CP-1. (J.A. 436, 439-40.) But speculative, anecdotal comments about electoral "possibilities" cannot form the basis for expert testimony. *See Daniels v. State*, 4 So. 3d 745, 748 (Fla. 2d DCA 2009) (holding that expert testimony cannot be "based on speculation and conjecture, not supported by the facts, or not arrived at by a recognized methodology") (alteration omitted); *Div. of Admin., State Dep't of Transp. v. Samter*, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981) ("[N]o weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning.").

Professor Moreno did not offer a reliable methodology for predicting what "the Democratic establishment" will do in the future, for broadly characterizing the "Democratic Hispanic bench" in the region as "very weak," or for his other *ipse dixit* statements. *See United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (holding that "[t]he trial court's gatekeeping function" under *Daubert* stand-

ard "requires more than simply 'taking the expert's word for it' " or accepting "the *ipse dixit* of an admitted qualified expert") (citation omitted). Notably, during the merits appeal, the Legislature attempted to rely on similarly speculative testimony from Professor Moreno to claim retrogression in an alternative version of District 26 that included lower Hispanic metrics than CP-1. (*See* TT18:2332-39 (testimony from Moreno that there was a "possibility" that non-Hispanic Democrat might get elected under Romo Trial Plans because of concerns about recruitment, existing field of candidates, reduction of percentage of Hispanics among registered Democrats to 38.9%, and outcome of county commission election.)) This Court found that the Legislature's prior non-retrogression argument based on this testimony from Professor Moreno "simply cannot be justified." *Apportionment VII*, 172 So. 3d at 410. Professor Moreno's current testimony fares no better.

In the final analysis, Professor Moreno offered no reasonable explanation for the discrepancy between his prior opinion that the 2012 and 2014 enacted versions of District 26 did not retrogress and his current claim that the version of District 26 in CP-1 (which has very similar demographics) would retrogress. Accordingly, the trial court was more than justified in finding that Professor Moreno's testimony did not establish retrogression because it was "speculative," "had little probative value," and "was long on pure opinion based on experience and short on systematic, scientific analysis of accepted statistical data." (J.A. 879.)

The Legislature offered the testimony of Professor Liu to argue that African Americans and Hispanics do not vote as a coalition in South Florida. Professor Liu, however, analyzed ten elections, only six of which involved Hispanic candidates and three of which were non-partisan judicial races. (R. Ex. S-2-1 at 4-5; R. Ex. CP- D8, CP-D9.) Professor Liu could not identify a single election in which African Americans and non-Hispanic whites effectively defeated the Hispanic candidate of choice, except for a non-partisan judicial race involving a young lawyer's challenge to a sitting county judge. (J.A. 411-12, 417-18.) For that reason, the trial court understandably found that Professor Liu's testimony was not "particularly helpful" because "the data he used to draw his conclusions from was suspect." (J.A. 878-79.) But even if the trial court had accepted Professor Liu's opinion that African Americans and Hispanics do not vote as a coalition in South Florida, it would have done nothing to advance the Legislature's claim of retrogression. Professor Liu himself conceded that Hispanic candidates of choice can prevail in Dade County with or without the support of African-American voters. (J.A. 418.) Thus, the presence or absence of a coalition is irrelevant.

Under *Apportionment VII*, the Legislature bears the burden of establishing that its less tier-two compliant proposal for Districts 26 and 27 is necessary to avoid retrogression. The Legislature cannot meet its burden by rewriting history to describe the invalidated version of District 26 as a Republican stronghold or by of-

fering unreliable and speculative expert testimony. Having contended that the 2012 and 2014 version of District 26 provided Hispanics of either party with the ability to elect candidates of choice, the Legislature is hard-pressed to argue that District 26 in CP-1, which has essentially the same demographic and registration metrics, is somehow non-performing. Because the Legislature's own positions and demonstrated electoral history show that District 26 in CP-1 is not retrogressive, the Legislature has failed to meet its burden of justifying a configuration of Districts 26 and 27 that is less compact, adheres less closely to political and geographic boundaries than CP-1, and enhances the partisan favoritism that caused this Court to invalidate the predecessor districts. Accordingly, this Court should accept the trial court's recommendation to approve Districts 26 and 27 in CP-1.

V. THE TRIAL COURT PROPERLY FOUND THAT DISTRICTS 20 THROUGH 25 IN CP-1 BEST FULFILL THE CONSTITUTIONAL REQUIREMENTS.

The Legislature raised no objection to Districts 20 through 25 in CP-1 in its written submission before the remedial hearing, despite being ordered to do so. (SR42:5894-5909.) Nevertheless, the Legislature now attempts to contest District 20 in CP-1 on two grounds: (1) District 20 was purportedly "not challenged" in the underlying case, and several of Coalition Plaintiffs' changes to surrounding districts were not specifically required by *Apportionment VII* (S.S.B. 43-44; *see also*

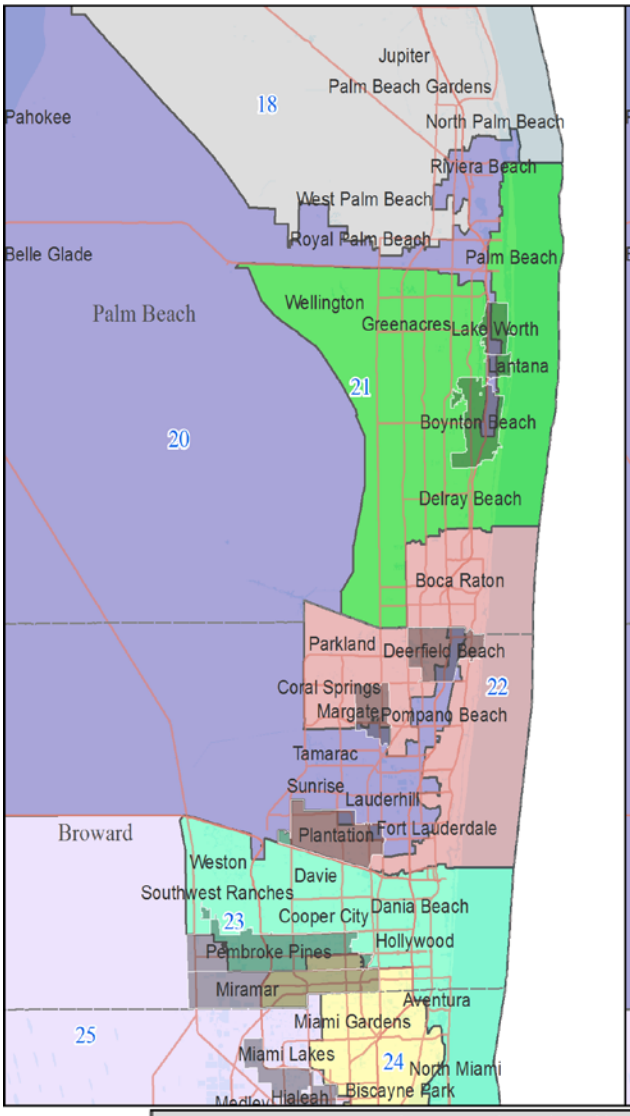
H.S.B. 37-38); and (2) District 20 in CP-1 supposedly adds a "third appendage" not present in the legislative proposals (S.S.B. 44-45; H.S.B. 28-32).

This Court invalidated five out of the eight South Florida districts modified in CP-1: Districts 21, 22, 25, 26, and 27. The remaining three districts, Districts 20, 23, and 24, directly border the five invalidated districts. Indeed, this Court found District 25 unconstitutional not because of a defect isolated to that district alone, but because of the interplay between Districts 20 and 25 – namely, the placement of a substantial portion of Hendry County within District 20 when it could have been placed entirely within District 25. *See Apportionment VII*, 172 So. 3d at 410. This Court likewise directed the Legislature to improve tier-two compliance in Districts 21 and 22, which also neighbor District 20. *See id.* at 412-13.

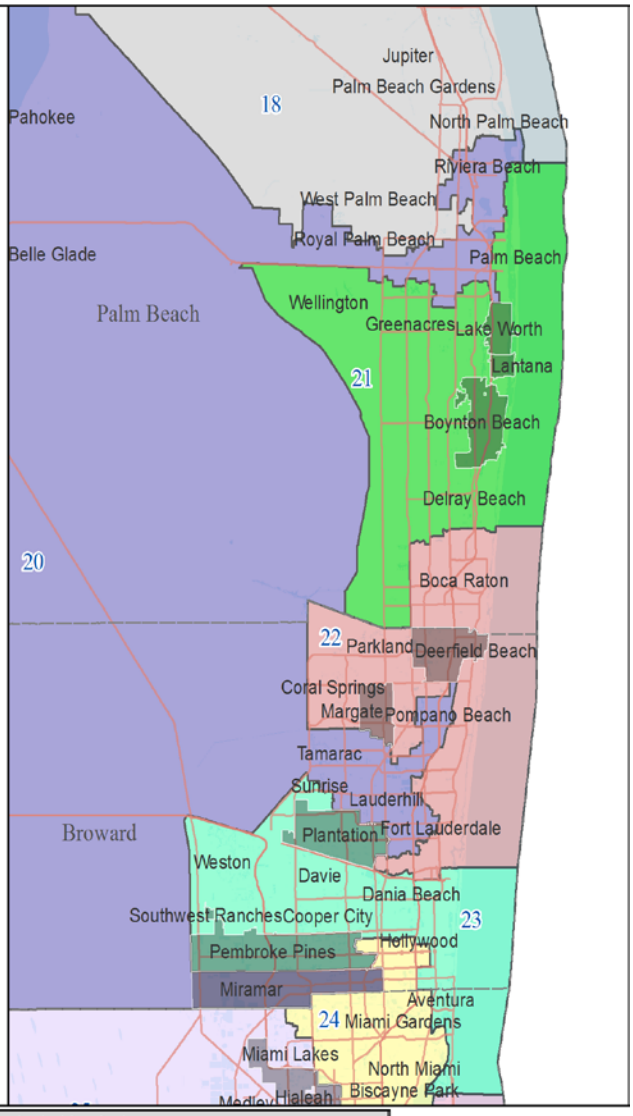
Improved tier-two compliance in District 20 and the other surrounding districts is hardly an improper or unforeseen consequence of redrawing Districts 21, 22, 25, 26, and 27. To the contrary, one of the principal benefits of correcting a constitutional defect in one district is often to enhance the tier-two compliance of neighboring districts, as is shown most clearly in the Central Florida districts that formerly bordered District 5. Accordingly, the Legislature's overblown claims that CP-1's modifications to the South Florida districts constitute an "uninvited" effort to "outdo the maps passed by the House and Senate," a "game of leapfrog," and a violation of "fundamental fairness" are devoid of merit. (H.S.B. 37-38.)

The Legislature's second objection – that CP-1 adds a "third" appendage to District 20 –defies common sense. District 20 in CP-1 does extend between Districts 23 and 24 to pick up the whole city of Miramar, but it eliminates altogether the jagged finger-like appendage cutting into District 21 in the legislative proposals and makes an appendage into District 22 less pronounced. In doing so, District 20 in CP-1 keeps **seven** additional cities whole, maintains the same level of metric compactness as the legislative proposals, and allows for surrounding districts to be redrawn more compactly. Accordingly, to preserve Districts 20's majority-minority status and achieve significant tier-two benefits, CP-1 merely trades one appendage (extending under District 23) for another (dipping into District 21). And the area in CP-1 that extends between Districts 23 and 24 follows the municipal boundary of Miramar, whereas the finger-like appendage in the legislative proposals adhere to no political boundary and divides a host of cities:

C9062 / C9066 / C9071



CP-1



Compactness Comparison of South Florida Districts						
	Reock Score		Convex-Hull Score		Polsby-Popper Score	
	c9062 c9066 c9071	CP-1	c9062 c9066 c9071	CP-1	c9062 c9066 c9071	CP-1
CD20	0.48	0.48	0.75	0.75	0.20	0.20
CD21	0.37	0.37	0.64	0.64	0.24	0.30
CD22	0.41	0.48	0.70	0.74	0.15	0.23
CD23	0.27	0.35	0.63	0.65	0.25	0.26
CD24	0.38	0.47	0.73	0.77	0.28	0.30
CD25	0.47	0.41	0.73	0.67	0.38	0.35
CD26	0.18	0.18	0.46	0.48	0.20	0.22
CD27	0.46	0.54	0.82	0.85	0.42	0.47
Avg.	0.38	**0.41**	0.68	**0.70**	0.27	**0.29**

Split Cities	
c9071	20
c9062	20
c9066	21
CP-1	**13**

(R. Ex. CP-D20, CP-D24.)[11]

[11] Gray shaded areas reflect municipal boundaries.

The Legislature's tortured response is that the long finger reaching south into District 21 does not count as an appendage because it is joined to another appendage that juts west from the main body of District 20 towards the coast. In other words, the Legislature contends that attaching an appendage to another appendage really only counts as one appendage. (*See* J.A. 270-71 (testimony from Poreda that he "would consider [appendage into District 21] as part of the northern appendage that is still there").) Proceeding from this dubious premise, the Legislature proclaims that its configuration is more visually compact because it only contains two appendages. (H.S.B. 32-33.) The trial court correctly rejected this "unified appendage" theory as a spurious distinction that did not meet the Legislature's burden under *Apportionment VII* or justify an increase in city splits by more than 50% (from 13 in CP-1 to 20 in Plans 9071 and 9062 or 21 in Plan 9066) or loss of the other tier-two benefits in CP-1. This Court should do the same.[12]

VI. THE LEGISLATURE'S ACCUSATIONS OF PARTISANSHIP ARE IRRELEVANT AND UNFOUNDED.

Undeterred by its own history of unconstitutional behavior, the House concludes with a lengthy diatribe casting Coalition Plaintiffs as partisans who are not committed to transparency. (H.S.B. 33-46.) The Senate is somewhat more re-

[12] In recommending CP-1 for adoption, the trial court also rejected Romo Plaintiffs' proposed configuration of Districts 21 and 22. (J.A. 876.) This Court should do likewise because CP-1's configuration of those two districts is more compact and avoids more city splits than the alternatives in the Romo Plan.

strained in its tone, but likewise insinuates that Coalition Plaintiffs drew CP-1 with partisan intent. (S.S.B. 28-31, 34-35, 45.) The Legislature repeatedly accuses Coalition Plaintiffs of writing a letter requesting that it make District 26 "more Democratic" by increasing its "Democratic performance index." (*See, e.g.*, H.S.B. 6, 43, 45; S.S.B. 13, 31, 34-35, 45.) The claim is entirely fabricated. What Coalition Plaintiffs actually wrote to the Legislature belies the baseless accusation:

> [T]he Base Map's configurations of CD 26 and CD 27 perpetuate the same violation of tier-one principles that caused the Court in Apportionment VII to order that the districts be redrawn. That is, in both the enacted map, H000C9057, and the Base Map, there appears to have been a targeted effort to shift Democratic, African American population into CD 27 in order to maintain a lower Democratic performance index in CD 26. ... We submit that, in fact, the population removed from CD 26 was chosen because that particular population, if left to remain in CD 26, would have made the district more Democratic and improved tier-two compliance in the region as a whole. ... We hope you, your staff or other members of the legislature will find a non-partisan way to draw CD's 26 and 27 and will offer amendments to the base map to accomplish this goal.

(R. Ex. CP-29 at 1-2.) Coalition Plaintiffs thus urged the Legislature to **avoid** partisanship and improve tier-two compliance. Rather than attempt to redraw Districts 26 and 27 in a more compliant manner, the Legislature used the letter solely as a weapon to cast Coalition Plaintiffs as partisans, repeating dozens of times the unfounded claim that they simply requested a "more Democratic" district.

The Legislature then criticizes Coalition Plaintiffs at length for not drawing their maps in public or on the record. It suggests that the work product of Coalition

Plaintiffs' map drawer, John O'Neill, is untrustworthy in some vague sense because he is an independent contractor for Strategic Telemetry, a company that has Democrats among its clients. (*See, e.g.*, H.S.B. 6-7.) Absurdly, the Legislature complains that he drew CP-1 in an "apartment in Los Angeles." (*Id.*) O'Neill, however, testified at the remedial hearing that he strove to draw the most tier-two compliant configuration of South Florida, did not consider political or incumbent data in drawing his maps, and was not given any other direction but to comply with Article III, section 20 and *Apportionment VII* and to improve compactness and adherence to major roadways where possible. (J.A. 705-06, 737, 763-65, 773.)[13]

Unable to challenge CP-1 on the merits, the Legislature offers unfounded accusations that Coalition Plaintiffs are the "true partisans" (H.S.B. 44), and lobs an *ad hominem* charge that O'Neill's testimony was "carefully choreographed." (H.S.B. 41.) Name-calling aside, the Legislature had an opportunity to cross-examine O'Neill, and did so. After considering O'Neill's testimony and observing his demeanor, the trial court "found him to be straightforward in his testimony, logical in his approach to drawing the districts and persuasive in his conclusions" and found "no evidence to suggest that CP-1 was drawn with improper partisan in-

[13] The Legislature insinuates that O'Neill did not retain his work product or emails. (H.S.B. 7.) O'Neill, however, actually testified that he did, in fact, "retain ... all of [his] emails and draft [maps]." (J.A. 737.)

tent." (J.A. 877.) The Legislature does not even attempt to argue that the trial court lacked competent, substantial evidence for that factual finding.

Nor does the Legislature gain any ground by complaining that CP-1 was not drawn in public. Throughout this litigation, the Legislature has steadfastly refused to accept that it and private challengers are held to different standards. It has instead made every effort to deter Plaintiffs and drive up their costs by attempting to put their maps and motives on trial. It sought extensive discovery into Plaintiffs' maps and supposed intent (R57:7273-R61:7967; R71:95520-R72:9763); attempted to excuse its own constitutional violations by claiming Plaintiffs had unclean hands and engaged in fraud on the court (R55:7242-44; R76:9988); and argued that more compliant alternative maps should be ignored because they were allegedly drawn with persons "aligned with the Democratic Party" or are "of unknown origin," *Apportionment VII*, 172 So. 3d at 401 n.11. This Court rejected those efforts, holding that "alternative maps are not on trial themselves, as is the Legislature's map," but merely provide "relevant proof that the Legislature's apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent." *Id.*

For good reason, this Court offered guidelines for the Legislature to follow, but did not impose preconditions on the submission of alternative maps – such as

that they be drawn on the record, by any particular person, or in any particular location – or authorize discovery into Coalition Plaintiffs' maps or alleged motives. It is now the decisionmaking process of the judiciary – not of Coalition Plaintiffs – that is relevant, and that process has occurred transparently and on the record. After a three-day evidentiary hearing in which all parties were given an opportunity to present evidence and argument, the trial court offered sound, non-partisan reasons for recommending approval of 19 legislatively drawn districts and rejection of the remaining eight districts in favor of more compliant versions in CP-1.

If this Court were to countenance the Legislature's strategy, it would multiply discovery and trial proceedings by creating a "mini-trial" for each alternative map and compel private challengers to bear the expense of fashioning a quasi-legislative process to draw alternative plans. The result would be to deter challenges to redistricting plans and exclude entire categories of potential plaintiffs based on cost and burden alone. The FairDistricts Amendments are meant to provide constitutional grounds for challenging gerrymandered redistricting plans – not to erect obstacles to such challenges. *See id.* at 398 ("[T]he framers and voters of the Fair Districts Amendment clearly desired more judicial scrutiny of the Legislature's decisions in redistricting."). Thus, Coalition Plaintiffs' supposed motives and the process by which they drew their plan are entirely irrelevant.

The Legislature also draws a false comparison between its conspiracy with partisan operatives and the trial court's observation that "evidence that a map drawer might be a partisan or have a bias" is not a reason to "automatically reject" a proposed map. (H.S.B. 4l-42; *see* J.A. 876.) The trial court, however, specifically found that O'Neill did not draw CP-1 with partisan intent and never stated or implied that Coalition Plaintiffs or their map drawer are "partisans." (J.A. 877.) More to the point, this Court did not invalidate the enacted plan solely because the Legislature received "input and advice from partisans" (H.S.B. 41), but because the Legislature repeatedly and elaborately schemed with partisan operatives to develop a partisan map, went to great lengths to hide its unconstitutional behavior from the public, destroyed the evidence of what it had done, and then drew districts with numerous tier-two defects that benefited the Republican Party. Efforts to rewrite the history of this case do not advance the Legislature's cause.

In the end, there can be no reasonable dispute that CP-1 contains what the trial court characterized as "hands down" the most tier-two compliant version of the South Florida districts or that the trial court offered logical, non-partisan justifications for its recommendation. (J.A. 875-82.) It is perhaps for that reason that the Legislature's briefs are long on inflammatory rhetoric and vague accusations of partisanship and short on legitimate criticisms of CP-1's merits. This Court, like the trial court, should reject the Legislature's unfounded attacks on Coalition Plain-

tiffs and once more clarify that it is the intent **of the Legislature**, not the challengers, that is at issue in redistricting cases.

VII. THE COURT SHOULD RETAIN JURISDICTION OVER THIS MATTER.

As this Court has recognized, congressional redistricting proceedings are "time sensitive" because elections and pre-election deadlines are fast approaching. *Apportionment VII*, 172 So. 3d at 372. Two congressional elections have already been conducted under unconstitutional redistricting plans due to the delay that accompanies litigation in the ordinary course. Because rights that form "the very bedrock of our democracy" are at stake, *In re Senate Joint Resolution of Apportionment 1176*, 83 So. 3d 597, 600 (Fla. 2012) ("*Apportionment I*"), this Court should retain jurisdiction to ensure that prompt remedial action can be taken if the Legislature attempts to adopt an unconstitutional successor plan.[14]

CONCLUSION

For the foregoing reasons, this Court should accept the trial court's recommendation, adopt CP-1 as the apportionment plan that shall govern congressional elections in this state, and retain jurisdiction over this matter.

[14] The prospect that the Legislature may attempt to enact a successor plan is hardly speculative. In requesting a further relinquishment of jurisdiction, the House asked this Court to prospectively declare the remedial plan to "be an interim or provisional plan that will remain in place only until superseded by subsequent legislation." (House Mot. for Further Relinquishment at 3.)

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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