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IN THE SUPREME COURT OF FLORIDA

LEAGUE OF WOMEN VOTERS
OF FLORIDA, *et al.*,

Appellants,

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

v.

KEN DETZNER, *et al.*,

Appellees.

ANSWER BRIEF OF THE FLORIDA STATE CONFERENCE OF NAACP BRANCHES

Allison J. Riggs
Anita S. Earls
George Eppsteiner
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707

Nancy Abudu
AMERICAN CIVIL LIBERTIES UNION OF FLORIDA FOUNDATION
4500 Biscayne Blvd., Suite 340
Miami, FL 33137

Jerry Wilson
P.O. Box 971
Redan, Georgia 30074

Victor L. Goode
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297

Counsel for the Florida State Conference of NAACP Branches

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INTRODUCTION

The approval of Amendments 5 and 6 in 2010 by a substantial majority of Florida voters represented a seminal point in the arc of voting rights struggles in the state. The state constitution now provides independent and more expansive protections for voters of color than federal law. However, Appellants' interpretation of Amendment 6 essentially renders irrelevant all input from citizens, even those whom the Amendment is explicitly designed to protect. That interpretation cannot be right, nor was it the will of the voters who passed the Amendment. If this Court truly intends to "ascertain the will of the people in passing the amendment" and to "fulfill the intent of the people, never to defeat it," *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 599 (Fla. 2012) ("*Apportionment I"*), then the voice of one of the strongest proponents of the Amendment must be heard now. And the gains in minority representation attained by decades of struggle and bloodshed should not be sacrificed at the altar of political gamesmanship. Those precious gains are fully protected by the Florida Constitution.

STATEMENT OF THE CASE AND FACTS

The Florida NAACP's involvement in the instant litigation was triggered by an attack on a district—Congressional District 5—that was the result of its advocacy to remedy the decades of political exclusion that black voters in North-

Central Florida faced. The district is necessary still today to ensure that its members in the region are afforded representation of their choice.

Because Appellants have painted an inaccurate historical picture of Congressional District 5—which, according to them, has "long been a bulwark of partisan gerrymandering"—it is necessary to examine briefly the history of Congressional District 5. In reality, the creation of this district was the direct result of years of NAACP litigation to remedy decades of vote dilution experienced by African Americans that denied them the opportunity to elect representatives of their choice.

After the 1990 decennial census, Florida was apportioned four additional Congressional seats, for a total of 23 members of Congress. *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1078 (N.D. Fla. 1992). No African American Congressperson had been elected from Florida since Reconstruction. *Id*. at 1079. When the state legislature reached an impasse on drawing a new congressional plan, the Florida NAACP filed a Voting Rights Act lawsuit, asking a federal court to draw a majority-black district in North-Central Florida to remedy the vote dilution present in the state for decades. *Id*. at 1086. The congressional district at stake in this litigation was the result of that lawsuit. *Id*. at 1088.

After the 2000 census, Florida was again apportioned additional congressional seats, and the Florida NAACP again pushed the legislature to keep

an African-American district in North-Central Florida. *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1278 (S.D. Fla. 2002). Publicly stating that "Florida has done a better job than many states" in complying with Section 2 of the Voting Rights Act, the Florida NAACP was satisfied with the legislature's efforts to protect minority voting gains. *Id*. at 1293. In a racial gerrymandering challenge to that 2002 drawing of what was, in this redistricting round, the benchmark for Congressional District 5, a federal court found that the district was a reasonably compact district that ensured black voting strength in the region was not diluted. *Id*. at 1307-09.

The need to defend African American congressional districts did not end there. In 2010, Florida voters approved two new constitutional provisions governing redistricting in the state. Amendment 5, now codified as Article III, Section 20, of the Florida Constitution, established criteria for drawing congressional districts and Amendment 6, now codified as Article III, Section 21, established criteria for state legislative redistricting. The Florida NAACP publicly endorsed the Amendments, and was involved in litigation to ensure that the measures were actually presented to voters. *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662 (Fla. 2010); *see also*, Florida NAACP's Endorsement of the Fair Districts Amendments, April 13, 2010, available at: www.flsenate.gov/usercontent/committees/2010-2012/reapportionment/exhibit%20Q--naacp%20letter.pdf.

After the decennial census data was received, the Florida NAACP worked to develop redistricting maps that would fully comply with the new amendments. With regard to Congressional District 5 (then numbered Congressional District 3), the Florida NAACP, informed by its members who live and struggle every day with conditions on the ground in North-Central Florida, drew the district in a way it believed necessary to avoid vote dilution and retrogression. That map was submitted to the legislature on November 1, 2011. (Ex. CP-598).

The legislature conducted numerous hearings across the state, at which many Florida NAACP members spoke. (Ex. LD-34A; Ex. LD-34C). Those members urged the legislature to protect the ability of black voters to elect the candidates of their choosing. *Id*. In late January, the legislature introduced plan H000C9047, the final proposed plan for Florida's congressional districts. Congressional District 5 in the legislatively-proposed plan followed the advice for the district presented through the NAACP's submission. (T20:2616). Communities within the district that were accustomed to the benefits of having representation of their choice were not stranded in districts where they would not be able to elect candidates of choice. The ability of black voters in the region to elect their candidates of choice was not lessened.

Following the enactment of the congressional redistricting plan in early 2012, the Coalition Plaintiffs (the League of Women Voters of Florida, Common

Cause and several individual voters) and the Romo Plaintiffs (individual voters associated with the Democratic Party) filed lawsuits challenging that congressional plan as violating the new state constitutional redistricting criteria. Specifically, both groups of plaintiffs alleged that Congressional District 5 unnecessarily packed black voters into the district and, as such, compliance with minority voting protections in the constitution did not justify the district's non-compact shape. The benchmark district for Congressional District 5 was 49.9% in black voting age population (BVAP). In the enacted plan, Congressional District 5 had a BVAP of 50.1%.

In May of 2012, the Florida NAACP's motion to intervene as defendants in the litigation was granted, with the intervention being primarily focused on interpretation of the amendments and defense of Congressional District 5. On April 30, 2012, the trial court denied Plaintiffs' motion for a preliminary injunction, and allowed the enacted congressional plan to be in place for the 2012 elections. (R15:2083).

After extensive discovery, the instant case went to trial on May 19, 2014, lasting for two and a half weeks. During that trial, the Florida NAACP was the only party to call affected voters—voters of color—as witnesses. Absent those voices, the decision as to whether the minority voting provisions of Art. III,

Section 20, were satisfied would have been informed solely by the testimony of white politicians, expert witness, legislative staff, and political operatives.

On July 10, 2014, the trial court ruled Congressional Districts 5 and 10 violated Art. III, Section 20, of the state constitution, and that those two districts would need to be redrawn. (R84: 11128). The Court declined to give the legislature any specific directions on how compliance should be achieved.

The trial court based its conclusion that those two districts were unconstitutional on evidence that a more tier-two compliant district could have been drawn that would not have been retrogressive. (R84: 11105). Specifically, the court referred to the plans proposed by the House of Representatives prior to plan H000C9047, the compromise plan negotiated by both chambers, being adopted as proving that point. (R84: 11105). Those earlier House versions of the congressional plan had Congressional District 5 at BVAPs between 47 and 48%, and the court noted that when Alex Kelly (one of the lead House mapdrawers) testified, he said that he performed a functional analysis on these iterations and they would not have been retrogressive. (R84: 11106).

Importantly, the trial court did not in any way suggest that Plaintiffs' demonstrative plans, which took Congressional District 5 out west to Tallahassee rather than south toward Orange County, were non-retrogressive. Nor did the trial

court hold that the Plaintiffs' proposed plans were the only acceptable remedy—or even an acceptable remedy at all—for the violations it found.

Rather, the trial court identified two appendages, one in Congressional District 5 and one in Congressional District 10, which it concluded were motivated by partisan reasons. (R84: 11107, 1119-22) The appendage in Congressional District 5 incorporated the city of Sanford into the district. (R84: 11107). Sanford had been part of the district in the benchmark version and in the NAACP's publicly submitted version. (Ex. CP-598).

The trial court, in concluding that the preconditions established in *Gingles v. Thornburg*, 478 U.S. 30, 50-51 (1986), were not present in North-Central Florida on the record before it, did not enumerate specific factual findings in support of that legal conclusion. In fact, the Court explicitly stated that all parties were in agreement that racially polarized voting was present in the region. The Court seemed to dismiss the presence of the third prong of *Gingles* solely because one candidate, Congresswoman Corrine Brown, had been successful in the district since it was drawn in 1992 to be an African American opportunity district.

After the trial court's instructions to the legislature to swiftly draw a remedial map, the legislature called a special session on August 7, 2014. The Florida NAACP participated actively in that session. It sent letters to all members of both the House and Senate redistricting committees outlining its position, and its

opposition to maps submitted by Appellants to the trial court as potential remedial maps. (SR7: 783-792). Numerous NAACP leaders testified in front of the committees. (SR7: 777-781). Dale Landry, one of the state conference's vice-presidents, testified on behalf of the state conference, noting that taking the district out west instead of south was simply not an option. He detailed how Congressional District 5 still served as a much needed voting rights remedy in North-Central Florida. (SR7:780-781). He also offered the unique perspective of an African American resident of Tallahassee—one who personally understood that an East-West configuration of the district could not adequately replace a North-South configuration. *Id*. Additionally, Evelyn Foxx, Whitfield Jenkins, and Beverlye Neal, leaders of the Alachua, Marion and Orange County branches of the NAACP respectively, also testified to the shared history of their communities, and the increased responsiveness of elected officials when their communities were included in a district in which black voters have the opportunity to elect their candidate of choice. (SR7: 777-779).

The passage of the remedial plan was not strictly along party lines. In the Senate, Democrats Audrey Gibson, an African-American member from Duval County, and Bill Montford, who represents Tallahassee and the surrounding region, voted for the remedial map. In the House, two African-American

Democratic members from Duval County, Representatives Reggie Fullwood and Mia Jones, also voted for the remedial map.

After the special session, Plaintiffs challenged the remedial map, arguing that the changes made to Congressional Districts 5 and 10, and the surrounding districts, were too minor to correct the constitutional problems identified by the trial court. The trial court disagreed, finding that "the remedial plan adequately addresses the constitutional deficiencies [] found in the Final Judgment." (SR8: 1721). Recognizing that what Plaintiffs were asking the court to do was to find that a North-South configuration of the district was unconstitutional, the court declined to do so. Instead, the court found that there were "legitimate, non-partisan policy reasons for preferring a North-South configuration for this district over an East-West configuration, and the Plaintiffs have not offered convincing evidence that an East-West configuration is necessary in order to comply with tier-one and tier-two requirements of Article III, Section 20." (SR8: 1722).

SUMMARY OF ARGUMENT

The significance of this Court's ruling in this case cannot be understated—at stake is whether Florida's new constitutional protections for voters of color are enforced with any vigor, and whether those protections do, in fact, offer even more protection for voters than does current federal law. Congressional District 5 in the 2014 remedial plan complies with Article III, Section 20, of the Florida

Constitution. All of the factors that lead to vote dilution are still prevalent in North-Central Florida, and a prophylactic remedy is necessary to ensure that African American voters continue to have the opportunity to elect the candidate of their choosing. Congressional District 5 in the remedial plan is also necessary to maintain the ability of black voters to elect their preferred candidate—the alternative versions of the district all lessen that ability.

ARGUMENT

I. Legal Standards

a. Standard on Appeal

In the Florida Supreme Court, questions of law, such as constitutional violations, are reviewed de novo, without deference to the decision below. *See Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004) ("[C]onstitutional interpretation . . . is performed de novo."); *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) (stating that in a de novo review, "no deference is given to the judgment of the lower courts"). If a trial court's ruling consists of a mixed question of fact and law addressing certain constitutional issues, the ultimate ruling must be subjected to de novo review and the court's factual findings must be sustained if supported by competent substantial evidence. *See Stephens v. State*, 748 So. 2d 1028, 1031-32 (Fla. 1999).

b. Review of Redistricting Plans

Appellants' suggestion that strict scrutiny is the appropriate standard of review whenever the legislature seeks to protect minority voting rights is completely unsupported in law and would run afoul of decades of federal voting rights jurisprudence. This Court has been clear that strict scrutiny review "is almost always fatal in its application." *In re Estate of Greenberg*, 390 So. 2d 40, 43 (Fla. 1980). It cannot have been the will of the voters to create minority voting protections in the constitution, only to have any legislative action under those protections "almost always" struck down.

Appellants' approach is also not consistent with federal Voting Rights Act precedent. No court has held that any time a jurisdiction acknowledges that it drew a district to comply with minority voting protections, they are subject to strict scrutiny. *See, e.g.*, *DeWitt* v. *Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily aff'd, 515 U.S. 1170 (1995). Appellants attempt to rely on *Bush v. Vera*, 517 U.S. 952 (1996) for the proposition that strict scrutiny is applicable in the instant case, but Justice O'Connor, writing for the plurality and the controlling, most narrow opinion explicitly stated "States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." *Id*. at 993. Only in Justice Thomas' dissent in part was Appellants' argument articulated. *Id*. at 999-1003 ("In my view, however, when a

legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered.")

The conclusion that strict scrutiny does not apply merely because race was one motivating factor behind the drawing of a majority-minority district has been reaffirmed even more recently. *LULAC v. Perry*, 548 U.S. 399, 475 (2006) (Stevens, J., concurring in part); *see also Easley* v. *Cromartie,* 532 U.S. 234, 241 (2001).

II. Minority Voting Protections under Art. III, Section 20

Article III, Section 20(a), now states in relevant part, that: "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." In approving this language, the voters of Florida enshrined in the state constitution a commitment to protecting minority voting rights and preserving minority voting strength. The Florida NAACP publicly endorsed the Amendments. Florida NAACP's Endorsement of the Fair Districts Amendments, April 13, 2010, available at: www.flsenate.gov/usercontent/committees/2010-2012/reapportionment/exhibit%20Q--naacp%20letter.pdf. The Florida NAACP also took the position that the Amendments would "give Florida's minority voters

even more protection than they presently have under the federal Voting Rights Act." *Id.*

All parties to this litigation seem to be in agreement that Article III, Section 20 of the Florida constitution creates new and expansive protection for voters of color, but the devil is in the details. The position of the Florida NAACP has always been that the first tier of both Amendments 5 and 6 (governing state legislative and congressional redistricting) are more protective than their federal counterpart, and that the federal protections only constituted the floor, not the ceiling for minority voting protections.

When interpreting in 2012 the constitutional provision governing legislative redistricting, this Court essentially agreed with the Florida NAACP's position. In Apportionment I, interpreting the identical provision governing legislative redistricting, this Court stated that Florida's constitutional provision, "now embraces the principles enumerated in Sections 2 and 5 of the Voting Rights Act" and that its interpretation of that provision "is guided by prevailing United States Supreme Court precedent." *Apportionment I*, 83 So. 3d at 620. Despite federal precedent being the starting point, this Court acknowledged that it had an "independent constitutional obligation to interpret our own state constitutional provisions." *Id*. at 621. This Court further implied that federal Section 2

principles may just set a floor for interpreting Florida's constitution, not a ceiling. *Id*.

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, is a permanent provision and applies countrywide. Section 2 prohibits any electoral practice or procedure that "results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color [or membership in a language minority]." 42 U.S.C. § 1973(a). In the redistricting context, this is a prohibition against what is known as "minority vote dilution," and Section 2 is violated where:

> Based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choices.

Id. §1973(b).

In the landmark *Thornburg v. Gingles* case in 1986, the United States Supreme Court articulated the elements of a minority vote dilution claim, starting with the three threshold conditions that begin the inquiry. 478 U.S. at 50. The conditions are: (1) that the minority group be "sufficiently large and geographically compact to constitute a majority" in a single-member district; (2) that the minority group be "politically cohesive"; and (3) that the white majority vote "sufficiently

as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority's preferred candidate." *Id.* at 50-51.

After establishing the three *Gingles* pre-conditions, plaintiffs alleging vote dilution under Section 2 must then demonstrate that, under the totality of the circumstances, minority voters have had less opportunity to elect candidates of their choice. *Id.* at 46. When determining whether vote dilution has occurred under the totality of the circumstances, courts generally are guided by the so-called "Senate Factors" or "Senate Report Factors" identified in a United States Senate report accompanying the reauthorization of the Voting Rights Act in 1982. These factors include: the extent of any history of official discrimination that touched the minority group members' rights to register, to vote, or otherwise to participate in the democratic process; the extent to which voting is racially polarized; the extent to which potentially discriminatory practices or procedures have been used; if there is a candidate slating process, whether minority candidates have been denied access to it; the extent of any discrimination against minorities in education, employment and health, which might hinder their ability to participate effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; the extent to which minority group members have been elected to public office (proportionality); whether there is a lack of responsiveness on the part of elected officials to the minority group's

particularized needs; and whether the policy supporting the use of the voting policy or practice is tenuous. *Id*. at 36-37 (citing S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177).

The first *Gingles* pre-condition examines both the potential for creating an additional majority-minority district and the reasonable compactness of the minority community involved. *Gingles*, 478 U.S. at 50. The Supreme Court has been unequivocal: "[t]o be sure, § 2 does not forbid the creation of a noncompact majority-minority district." *LULAC v. Perry*, 548 U.S. 399, 430 (2006) (quoting *Bush* v. *Vera,* 517 U.S. 952, 999 (1996) (Kennedy, J., concurring)). Under the *Gingles* geographical compactness analysis, "[t]he degree of geographical symmetry or attractiveness is . . . a desirable consideration for districting, but only to the extent it aids or facilitates the political process." *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988).

The characteristics of the minority community itself—the shared interests and needs—rather than just the shape of the district are more determinative in establishing whether the minority group is geographically compact than are untethered mathematical measures. *DeGrandy v. Wetherell*, 794 F. Supp. at 1085. Indeed, the benchmark version of Congressional District 5 was substantially less compact than it is now, and a federal court found that district to be "reasonably

compact" and complying "to a reasonable extent with traditional redistricting criteria." *Martinez*, 234 F. Supp. 2d at 1301.

The second and third prongs of the *Gingles* analysis examine racially polarized voting—whether minority voters are cohesive as a bloc and whether white majority voters, as a bloc, usually oppose the candidate of choice of minority voters. No party to this case contests the proposition that the second prong of *Gingles* is satisfied—all the experts who examined racially polarized voting have concluded that black voters are politically cohesive. (T19: 2464; T14: 1820). With regard to the third prong, though, there is some dispute about what types of elections are most probative of voting patterns by race. Numerous courts in the Eleventh Circuit and beyond have held that elections in which voters have a choice between an African-American and non-African-American candidate are the most probative in assessing the presence and extent of racially polarized voting. *See Davis v. Chiles*, 139 F.3d 1414, 1417 n. 5 (11th Cir. 1998) (noting that elections involving black candidates are more probative of racially polarized voting), *cert denied sub nom Davis v. Bush*, 526 U.S. 1003 (1999); *see also Rural W. Tenn. African-Am. Affairs Council v. Sundquist*, 209 F.3d 835, 840-41 (6th Cir. 2000) (approving a lower court decision to consider more probative black-versus-white elections); *Jenkins v. Manning*, 116 F.3d 685, 692, 694-95 (3rd Cir. 1997) (affirming a decision to discount elections that were not racially-contested);

Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989) ("[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates.").

Moreover, in a Section 2 analysis, where there are limited racially-contested endogenous elections to examine, examining county-wide or local races may give a better understanding of the extent of racially polarized voting in the region. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 94 (D.D.C. 2002). Candidates in congressional district races do not have the finances that candidates in national or state-wide races have, meaning that they have less opportunity to make their case publicly or to get voters to look beyond their race. (T19: 2468-69). Thus, while the 2008 and 2012 Presidential elections were racially contested ones, those two races do not adequately represent what a black candidate for a North-Central Florida congressional district would face in a race against a white candidate, where black voters did not constitute a majority of the electorate and racially polarized voting is present. Even county-wide elections, though exogenous, may be highly indicative of the electoral atmosphere facing black voters. *Georgia v. Ashcroft*, 195 F. Supp. 2d at 94.

Section 2 jurisprudence also confronts situations in which "special circumstances" might explain the existence of legally significant white bloc voting even where black candidates have won some elections. *Gingles*, 478 U.S. at 51.

The United States Supreme Court has determined that in some instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, can account for these candidates' success. *Id.* at 57.

Finally, under Section 2 jurisprudence, a Section 2 remedial district must be located where the evidence shows a violation occurs. That is:

> If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State.

Shaw v. Hunt, 517 U.S. 899, 917 (1996) (internal citations omitted). Since the framework for vote dilution analysis was first articulated in *Gingles*, the United States Supreme Court has been clear that the vote dilution inquiry requires an "intensely local appraisal" of the challenged district. *Gingles*, 478 U.S. at 78 (quoting *White v. Register*, 412 U.S. 755, 769 (1973)). "A local appraisal is necessary because the right to an undiluted vote does not belong to the minority as a group, but rather to its individual members. And a state may not trade off the rights of some members of a racial group against the rights of other members of that group." *LULAC*, 548 U.S. at 437.

Finally, Federal courts have widely recognized that lay testimony is relevant and probative evidence of racial polarization and of the totality of the circumstances of the local political landscape. *Gingles*, 478 U.S. at 41; *NAACP v. Fordice*, 252 F.3d 361, 365 (5th Cir. 2001); *Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987), *cert. denied,* 485 U.S. 936 (1988). In *Monroe v. Woodville,* 897 F.2d 763 (5th Cir. 1990), the Fifth Circuit noted that "lay testimony from members of the community on political cohesion might be sufficient" to establish the second prong of the *Gingles* inquiry. *Id.* at 764. Finally, in *NAACP v. Fordice*, 252 F.3d 361, 368 (5th Cir. 2001), the court found that the lack of "testimony from lay witnesses whose personal experiences mirrored the contentions urged by [the plaintiff]" was a weakness in the plaintiffs' Section 2 case.

Section 5 of the Voting Rights Act of 1965, in contrast to Section 2, only applied to 16 states, in whole or part, and was a provision that had to be reauthorized from time to time. Section 5 required that covered jurisdictions must show that any new voting "qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, or color, or [membership in a language minority group]." 42 U.S.C. 1973c(a). In 1976, the United States Supreme Court explained that the "effect" standard means that preclearance should be denied for

voting changes "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S.125, 141 (1976).

The retrogression standard is quite different from the vote dilution standard. Courts analyze retrogression by comparing the proposed plan to the benchmark plan, looking at the historical ability to elect under the benchmark plan and comparing that to the predicted ability to elect under the newly enacted plan. *Reno v. Bossier Parish School Board*, 520 U.S. 471, 487 (1997) ("Bossier I") (reviewing prior Supreme Court retrogression analyses). The proper standard for determining whether retrogression exists employs a functional analysis, as opposed to a simple brightline test based on one variable, like minority voting age population percentage or voter registration percentage. A functional analysis looks to all the relevant electoral circumstances affecting elections in a particular district when assessing a minority group's "ability to elect." Dep't of Justice Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("2011 Guidance"). The multitude of factors that may be considered under a functional analysis include: a district's minority voting age population (taking into account citizenship and registration rates); the extent of racially polarized voting; whether minority groups form voting coalitions; the effect of incumbency in past elections; and other factors that may affect turnout

rates by race. *Id.*; *see also Georgia v. Ashcroft*, 195 F. Supp. 2d at 76, 78-79; *LULAC*, 548 U.S. at 439-40; *Georgia v. Ashcroft*, 539 U.S. at 485. A brightline test is not a sufficient measure because there might be a district in which a minority group makes up a bare majority of voting age population, but which, because of registration and turnout rates, is not a district in which minority voters have the ability to elect a candidate of their choice.

Additionally, in some situations, compactness and other traditional redistricting criteria must be compromised in order to avoid retrogression. The Department of Justice has noted that "compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria that . . . require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression." 2011 Guidance, 76 Fed. Reg. 470 at 7472. The second tier of Art. III, § 20, specifically contemplates this.

Performing a functional analysis on a statewide plan does not mean that minority opportunity or majority-minority districts that allow minority voters to elect their candidates of choice may be traded for a larger number of "influence" districts. This scenario is precisely what the 2006 VRA Amendments were intended to address. The Amendments overruled the part of *Georgia v. Ashcroft*,

539 U.S. 461 (2003), which held that majority-minority districts could be traded for influence districts without violating Section 5.

Looking to what happened in Georgia after the Supreme Court's decision in *Georgia v. Ashcroft* explains why Congress needed to amend Section 5 to prohibit trading majority-minority districts for influence districts. In *Georgia v. Ashcroft*, Justice O'Connor described influence districts as districts that should result in "representatives sympathetic to the interests of minority voters." *Georgia v. Ashcroft*, 539 U.S. at 483. She defined these districts as those in which the black voting age population was less than 50% but above 25% or 30%. *Id.* at 470, 471, 487. The first State Senate plan under which elections were held where influence districts were identified included 17 influence districts. In four of the elections in which Democrats were elected, the senators-elect switched their party affiliation to Republican after the election and prior to the convening of the legislature. In two of those elections, the African-American vote was decisive in guaranteeing the candidate's election. *See* Richard L. Engstrom, *Influence Districts—A Note of Caution and a Better Measure*, Research Brief, The Chief Justice Earl Warren Institute on Law and Social Policy (May 2011), available at http://www.law.berkeley.edu/files/Influence_Districts.pdf. The position of the Florida NAACP, in line with what Congress clarified in the 2006 Reauthorization of the VRA, is that the trading of effective minority districts for ill-defined

"influence" districts is a setback for minority voting rights, and retrogressive where racially polarized voting at legally significant levels still occurs.

While the *Ashcroft* District Court decision was overruled, the subsequent Congressional amendment to the Voting Rights Act revives the relevance of the district court's analysis, which appropriately took into consideration the effects of racially polarized voting on a smaller minority electorate in a proposed district. The District Court in *Ashcroft* made several findings relevant to this Court's current inquiry. First, the *Ashcroft* court noted "an analysis of local and regional elections demonstrate[d] the presence of racially polarized voting in the benchmark Senate districts." 195 F. Supp. 2d at 94. Second, the *Ashcroft* court found reconstituted statewide election results to be inadequate to demonstrate a lack of retrogression because "African American candidates of choice running for State Senate seats are unlikely to receive the same levels of white crossover voting as may occur in statewide elections." *Id.*

The Congressional "*Ashcroft* fix" was intended to redirect the focus of the Section 5 analysis to whether "the electoral power of a community [was] **more, less, or just as able** to elect a preferred candidate of choice." H.R. Rep. No. 109-478, at 44 (2006) (emphasis added). Congress decided that if a change rendered that community **less able** to elect a candidate of choice, then that change was retrogressive and would not be precleared. *Id.* at 46. While the *Ashcroft* District

Court decision was overruled, the subsequent Congressional enactment revives the relevance of the district court's analysis, which appropriately took into consideration the effects of racially polarized voting on a smaller minority electorate in a proposed district.

Additionally, the trading off of majority-minority districts for districts in which black voters may not be able to elect their candidate of choice can have a negative effect on African American participation. "Social scientists call the political impact of believing that one's racial or ethnic group has little hope to elect the candidate of its choice the 'chilling effect'." *See Colleton County v. McConnell*, 201 F. Supp. 2d 618, 642-43 (D.S.C. 2002), Supplemental report of Prof. James W. Loewen at 2. Participation rates in a majority or near-majority African American district with established political infrastructure may not reflect participation rates in districts in which the black voting age population is significantly altered or is in a different region of the state.

Last year, the United States Supreme Court decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), striking down the coverage formula for Section 5 resulted in an effective gutting of Section 5, with its federal preclearance requirement being applicable nowhere in the country. Previously, in Florida, only five counties were ever covered by Section 5: Hillsborough, Hendry, Hardee, Monroe, and Collier. *Apportionment I*, 83 So. 3d at 597. Importantly,

however, the Supreme Court did not call into question the standards by which retrogression under Section 5 had been analyzed by the Department of Justice and the courts—only the congressional decision on which jurisdictions should be covered by Section 5. *Shelby County*, 133 S. Ct. at 2631.

III. Congressional District 5 is Compliant with Art. III, Sec. 20

Congressional District 5 in the 2014 remedial plan complies with Art. III, Section 20 of the Florida Constitution. It is numerically more compact than the benchmark district and the 2012 version of the district. (SR7: 746-53). It is visually more compact than Appellants' proposed remedial district, which stretches out over 200 miles along the northern border of the state. (SR7: 746-53). To the extent it is not the most perfectly compact district imaginable, that departure from compactness is necessary to avoid vote dilution in the area and to avoid any diminishment in the ability of black voters to elect their candidate of choice.

a. Alternative Maps

Before delving into the merits of why Congressional District 5 in the 2014 remedial plan satisfies the minority voting protections of Art. III, Section 2, the relevance of Appellants' alternative maps must be addressed. As this Court recognized in *Apportionment I*, it is not the place of the judiciary to select the "best plan" and impose it. 83 So. 3d at 608. Illustrative plans can, however, be used to determine whether the legislature complied with the new state constitutional

requirements. *Id*. at 641. Additionally, the retrogression analysis is, of necessity, a comparative one. Determining whether minority voters' ability to elect candidates of their choice is lessened requires the examination of more than one plan.

The trial court considered during trial two Romo districts, Romo A and Romo B. During the remedial phase, all remedial plans proffered by Plaintiffs made only small changes to Romo A, none of which affected Congressional District 5. The Plaintiff-proposed remedial Congressional District 5 spanned 206 miles, from Jacksonville to Chattahoochee, 62 miles longer than the remedial district drawn by the legislature. More significantly, Congressional District 5 in Romo A and the proposed remedial plan is a district where, in non-presidential years, and likely even presidential years where Barack Obama is not on the ballot, white voters will control the outcome by a substantial margin.

Finally, with regard to alternative plans, "this Court will defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements." *Apportionment I*, 83 So. 3d at 608. Appellants have not identified, nor can they, the constitutional violation created by drawing Congressional District 5 in a North-South configuration. As this Court has acknowledged, the United States Supreme Court has "explained that a federal district court may not wholly disregard policy choices made by a state's legislature, where those policy choices are not inconsistent with the United States

Constitution or the Voting Rights Act." *Id.* (citing *Perry v. Perez*, 132 S. Ct. 934, 943 (2012)).

The legislature made the policy decision, informed by the vigorous advocacy of the Florida NAACP, to situate Congressional District 5 in a North-South configuration. As discussed above, numerous NAACP leaders testified about the necessity of maintaining that configuration. (SR7: 777-792). Neither Appellants nor this Court may "wholly disregard" that policy decision absent a finding that orienting the district that way in and of itself creates a constitutional violation.

b. Vote Dilution

Congressional District 5 is a necessary remedy to avoid vote dilution in North-Central Florida. To the extent that the trial court concluded that the conditions that establish vote dilution do not exist in the area, that was an incorrect legal conclusion, supported by almost no factual findings. (R84: 1106-07).

To the extent that the trial court found that the first *Gingles* precondition—that the minority population in the district be geographically compact—was not satisfied with the 2012-enacted version of the district, that concern has been addressed in the remedial version of the district. First, very similar earlier iterations of the district have been determined by two different federal courts to be compact enough to satisfy the first *Gingles* precondition. *Johnson v. Mortham*,

1996 U.S. Dist. LEXIS 7792 at *3 (N.D. Fla. 1996); *Martinez*, 234 F. Supp. 2d at 1301.

Second, the district is now much more compact, visually and numerically, when compared to the 2012 plan. Whereas the 2012 version of Congressional District 5 had a Reock score of 0.09 and a Convex Hull score of 0.29, the remedial version of the district has a Reock score of 0.13 and a Convex Hull score of 0.42. (SR6: 735). The perimeter around the district was reduced from 707 miles to 583 miles. (SR6: 729). The remedial district follows the St. Johns River along its eastern border from Duval County down to Seminole County—that river basin area represents an African American community with important historical and social bindings. (T17: 2213-14; T17: 2259-2262).

The second and third prong of *Gingles* are also satisfied, meaning the potential for vote dilution exists. Florida NAACP expert Dr. Richard Engstrom demonstrated in his report and at trial that voting in the prior Congressional District 3 and current Congressional District 5 is racially polarized. The Florida NAACP submitted his report to the legislature during the remedial special session. (SR7: 785, 790). In conducting this analysis, Dr. Engstrom used the most highly regarded and statistically sound methodology—ecological inference—to detect

voting patterns by race. (T19: 2458-2461). Unlike Plaintiffs' expert,[1] who used exit polls (notoriously inaccurate), Dr. Engstrom used voter turnout in his analysis. (T19: 2459; 2524-25). Studying racially contested elections,[2] which are widely considered to be the most probative elections for analyzing racial polarization, *Davis,* 139 F.3d at 1417 n. 5, *Rural W. Tenn.,* 209 F.3d at 840-41, *Jenkins,* 116 F.3d at 694-95, *Westwego,* 872 F.2d at 1208 n.7, Dr. Engstrom found as follows: in what is now Congressional District 5, in 2008, then Senator Obama received 99.3% of the African American vote, but only 29.2% of the white vote. (Ex. NAACP-3). Likewise, in enacted Congressional District 5, in 2012, President Obama received 99.7% of the African-American vote, but only 25.5% of the white vote. (Ex. NAACP-4). Dr. Engstrom concluded that Obama's ability to "reach across racial lines" applied to Hispanic voters and other voters, but not to white voters. (T19: 2464). When examining the racially contested U.S. Senate race in

[1] Additionally, Romo expert Dr. Ansolabehere used ecological regression, instead of ecological inference, to ascertain racially polarized voting patterns. The ecological inference method used by Dr. Engstrom is far superior. Courts have recognized this. *See Ashcroft*, 195 F. Supp. 2d at 70 n.36 (relying on ecological inference, which "was generally considered to be the most accurate method of calculation")

[2] Dr. Ansolabehere credited much too strongly the probative value of white versus white elections. Such elections are widely considered less probative of racially polarized voting patterns than racially contested elections because "the choice presented to minority voters in an election contested by two white candidates is somewhat akin to offering ice cream to the public in any flavor, as long as it is pistachio." *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 304 (D.C. Mass. 2004).

2010, Dr. Engstrom also concluded that one cannot generalize from President Obama's support. In the 2010 Senate race, the African American candidate, Kendrick Meek, received 90.7% of the African American vote, but only 10.4% of the white vote. (Ex. NAACP-5). Dr. Engstrom also examined patterns of racially polarized voting in local elections in counties that are part of the benchmark congressional district. In eight of the nine elections in Duval, Bradford and Alachua Counties, the African American support for the African-American candidate exceeds 80%, while the highest white support for the black candidate in any of these nine elections is 29.2%. (Ex. NAACP-6). Thus, this analysis provides additional support for Dr. Engstrom's conclusion that voting is racially polarized between African Americans and whites. (T19: 2464-71).

Another unavoidable conclusion based on Dr. Engstrom's examination is that white voters in North-Central Florida do generally tend to vote as a block to defeat the minority candidate of choice. The trial court made a legal error in concluding to the contrary, and that conclusion is owed no deference. In 8 of the 9 county elections in the region that Dr. Engstrom examined, the black candidate—the candidate of choice of African American voters was defeated. (T19: 2470-71; Ex. NAACP-6). Lay witness testimony during trial and the remedial session confirm Dr. Engstrom's conclusion that black candidates still struggle to be elected from non-majority black districts in many of the counties that comprise the

congressional district. For example, in Marion County, no African American has ever been elected to the county commission. (T19: 2433-34). And in Ocala, the only African American elected to city council is elected from a majority black residency district. (T19: 2428-2444). In Alachua County, no African American has ever been elected to constitutional office. (T19: 2422-23). Despite African Americans repeatedly running, no African American has ever been elected Sheriff in Alachua County, an office that is elected county-wide. (T19: 2422-23). In fact, in many of the counties in Congressional District 5, black candidates do not receive support from the Democratic Party and often struggle to make it out of the Democratic primaries. (T19: 2381-97; 2428-44).

The success of incumbent Congresswoman Corrine Brown does not negate the potential for vote dilution. She is the only African American candidate to have ever won a Congressional seat in the area. Her success, though laudable, is due to the "special effects" of incumbency rather than an end to racial voting patterns in the region. Dr. Engstrom's study and the extensive lay witness testimony confirm this. (T19: 2462-70; 2428-44). Indeed, minority voting protections such as those in the Florida constitution do not exist only to create districts in which a certain minority-preferred candidate can win. They exist so that minority voters will have the opportunity to elect the candidate of their choosing, whoever that may be.

Beyond the evidence described above showing that the three *Gingles* preconditions are satisfied in the present situation, Florida NAACP's expert Dr. Daryl Paulson's unrebutted report, and his testimony at trial, as well as the testimony of numerous fact witnesses during the trial and during the remedial legislative session, demonstrated that under the totality of circumstances, Congressional District 5 was drawn and oriented as a North-South district in order to avoid vote dilution. Dr. Paulson has testified in other voting rights cases in Florida, and he is a well-regarded civil rights historian. (T17: 2191-92).

Florida has a long, sad history of racial discrimination in voting. (T17: 2193-2209; *DeGrandy v. Wetherell*, 794 F. Supp. at 1079. Florida quite successfully evaded the intent of the Fifteenth Amendment for decades by enacting facially neutral laws, such as white primary laws, poll taxes, literacy tests, and other tactics to bleach the voter rolls, ensuring that black voters could not participate in the political process. (T17: 2196-2200). Florida took other actions to exclude black voters, giving the governor the authority to appoint members of county commissions so that white Democrats would retain control even in majority-minority "Black Belt" counties. (T17: 2199-2200). Likewise, the legislature provided for the appointment of school board members by the State Board of Public Instruction so as to avoid the possibility of electing African Americans. *Id*. The state employed other methods to ensure that black children

received substandard educations, and the ramifications of this are still felt today. (T17: 2194).

In North-Central Florida, this history was especially vicious. When the white primary was found to be unconstitutional in the 1940s, the city of Jacksonville switched to at-large elections to prevent the election of black candidates from predominantly black wards. (T17: 2200). African-Americans were faced with physical violence when trying to register or to vote, from Reconstruction up through the 1900s. The Ku Klux Klan is particularly strong in the region encompassed by Congressional District 5. (T17: 2206-08).

After the passage of the Voting Rights Act in 1965, the effective enfranchisement of black voters was slow in coming. Florida did not send its first African American member to Congress until 1992. (T17: 2208-2210). During that redistricting cycle, Democrats were in control of the House and Senate, but could not agree on a congressional plan. While the NAACP urged that majority-black districts needed to be created to remedy the harms from over a century of absolutely no representation in Congress, Democratic leadership complained that drawing majority black districts would leave the surrounding districts more white and Republican. (T17: 2209-2210). In the hands of a federal court, Democratic "concern" for African American interests did not rule the day. Two majority-black districts (Congressional District 3 in North-Central Florida and Congressional

District 17 in South Florida) and one near-majority black district (Congressional District 23 in South Florida) were drawn, and Florida sent three African-American Congresspersons to Washington, D.C. (T17: 2210).

The state continues to erect electoral impediments for black voters even today. In Duval County, a post-2000 election study found that as many as one out of five ballots cast by black voters did not count in that election, compared to one out of fourteen white ballots. (T17:2214-16). Prior to the 2000 election, the state contracted with a private company to purge felons from the voter rolls, and black voters felt the disproportionate impact from these poorly-conducted purges, leading to additional litigation by the Florida NAACP designed to remedy the problem. (T17:2214-16). In 2011, the state of Florida moved to dramatically cut the early voting period, despite the fact that black voters were twice as likely to vote early when compared with white voters. (T17: 2217-18). A federal district court determined that Florida had not demonstrated that the cut to early voting would not cause retrogression in Florida's five covered counties. (T17: 2217-18). Thus, the court found that Section 5 of the Voting Rights Act had not been satisfied. Finally, the state of Florida implements the country's most stringent and racially discriminatory felony disenfranchisement laws. In 2010, nearly one in four African Americans was disqualified from voting due to a felony conviction—

more people are disenfranchised in Florida on these grounds than in any other state. (T17:2218-20).

African-American voters still encounter numerous obstacles in the region encompassed by Congressional District 5 that detrimentally affect their ability to participate in the political process. African Americans disproportionately face challenges in education, housing, and access to public services. (T17: 2171-2189; T19: 2381-97, 2407-20; 2420-28; 2428-44). Economic disparities, including trouble finding jobs, disproportionately plague black voters in Congressional District 5. (T17: 2171-2189; T19: 2381-97, 2407-20; 2420-28; 2428-44). This evidence was presented both during the trial and during the remedial legislative process. (T17: 2171-2189; T19: 2381-97, 2407-20; 2420-28; 2428-44; SR7: 777-81).

To the extent that the trial court afforded any legal significance to the House's non-testifying consultant Dr. Brunell's determination that there would be a 50/50 chance of electing a minority candidate of choice with a BVAP as low as 43.6%, that was in error. (R84: 11107). Potential vote dilution has never been determined by the point at which an African-American candidate would have a 50/50 chance of winning. In fact, the Supreme Court in *Bartlett v. Strickland* rejected that approach because trying to ascertain with any certainty at what point

under 50% a district might still perform for minority voters was too complicated and uncertain a task to impose on legislatures. 556 U.S. 1, 17 (2009).

Under federal voting rights jurisprudence, a jurisdiction may not remedy vote dilution in one part of the state by placing a remedial district in an entirely different part of the state. *Shaw v. Hunt*, 517 U.S. at 917. And Appellants' alternative plan does just that—places an alleged African American opportunity district in another part of the state. That alternative Congressional District 5 now spans eight counties across the northern border of the state. That cannot be a remedy for the evidence in this record that the potential for vote dilution exists in North-Central Florida.

Finally, Appellants' complain that the remedial map "marginalizes minorities by denying them an additional opportunity district in Central Florida." Appellants' Br. at 34. In fact, Hispanic voters in Central Florida were denied an additional opportunity to elect their candidate of choice, as illustrated in the amicus brief of LatinoJustice, but that is a direct consequence of remedying Appellants' challenge to Congressional District 10. Congressional District 9 was drawn to have a 41.4% Hispanic voting age population in the 2012 map. But because the trial court determined that District 9 was not entitled to Tier-One protection, it concluded that the Legislature's desire to draw that district as a Hispanic-influence district did not excuse Congressional District 10's deviation from compactness.

(R84: 11120-21). The white voters in the appendage in Congressional District 10 had to be redistributed to Congressional District 9. It was the Plaintiffs' position that marginalized minority voters. Their efforts to maximize Democratic performance in Congressional District 10 make clear that Appellants are more interested in creating additional opportunities for Democrats than for voters of color.

c. Diminishment

The alternative plans offered by Plaintiffs would diminish the ability of black voters to elect the candidates of their choice when compared to the benchmark plan and the 2014 remedial plan. In a long district stretched out across the northern Florida border—an area with substantial prison populations—African American voters would be less able to elect their preferred candidate. As such, that district is prohibited by Art. III, Section 20, from being a replacement district for existing Congressional District 5.

As an initial matter, Appellants' claims that the Legislature failed to "conduct a proper voting rights analysis," Appellants' Br. at 49, are belied by findings of the trial court and of this Court. In *Apportionment I*, this Court noted that "[t]he record reveals that the House undertook a functional analysis when drawing its plan in order to guard against retrogression." 83 So. 3d at 645. The trial court likewise recognized that in the 2012 redistricting process, the House's

chief map drawer, Alex Kelly, performed a functional analysis of an earlier version of Congressional District 5. (R84: 11106). Clearly the House was performing functional analyses, and during the remedial session because the NAACP presented the legislature with a functional analysis of the version of Congressional District 5 being proposed by Appellants.

A prohibition on retrogression does not allow the legislature to trade minority opportunity or majority-minority districts for a larger number of influence districts. Such a scenario is precisely what the 2006 Voting Right Act Amendments were intended to address. But that is exactly what Appellants seek from this Court—an order to draw a significantly weakened Congressional District 5 so that another Democratic district can be eked out.

In addition to his racially polarized voting studies, Dr. Engstrom also performed a retrogression analysis. Based on his analysis, he concluded that all of Plaintiffs' proposed iterations of Congressional District 5—including the iterations offered as constitutional alternatives during the summary judgment proceedings—lessened the ability of black voters to elect their candidates of choice. (T19: 2478-79). Even in the Romo A map, which purports to keep the voting age population statistics of Congressional District 5 to comparable levels with the enacted plan, Dr. Engstrom's analysis revealed a marked lessening of the ability of black voters to elect their candidates of choice, which constituted retrogression under the state

constitution. (T19: 2476). As discussed in the Section 5 standards discussion above, knowing the voting age population of a district is not the end of the retrogression inquiry. Turnout is highly probative in determining whether a minority group's ability to elect will be diminished in a proposed district. As Dr. Engstrom's data below indicates, the version of Congressional District 5 in Romo A (and Appellants' remedial map) will lessen that ability.

	Benchmark CD 5	Romo A CD 5
2010 General Election black % turnout	**46.7%**	**42.0%**
2010 General Election white % turnout	**45.6%**	**52.7%**

(Ex. NAACP-9). Critically, as highlighted above, Congressional District 5 in Romo A is a district where, in a recent non-presidential election year, white voter turnout outnumbered black turnout by over ten percentage points. This is such a dramatic lessening of political strength that concerns of a "chilling effect" are raised. (SR7: 780-81). The mapdrawers for Appellants' alternative version of the district were out-of-state residents who drew the district without any consideration

whatsoever of the needs and interests of the black residents in North-Central Florida. They listened to no public testimony, consulted no Florida resident, and examined no local elections. (T14: 1890-91).

Furthermore, a number of objections interposed by the Department of Justice in recent years in other jurisdictions (but prior to the *Shelby County* decision) reinforce Dr. Engstrom's conclusion that Plaintiffs' alternative versions of Congressional District 5 would be retrogressive. For example, in 2012, the Department of Justice objected to a redistricting plan for the county commissioners of Galveston County, Texas, in part because the jurisdiction did not demonstrate that the reduction of the total minority voting age population from 60.9 to 58.6 percent (reducing the black voting age population from 35.2 to 30.8 percent) in Precinct 3 would not have a retrogressive effect on black voters. *See* Objection Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to James E. Trainor II, Beirne, Maynard & Parsons (March 5, 2012).

In 2003, the Department objected to a redistricting plan for the City of Plaquemine, Louisiana, that would have reduced the black voting age population in one of the districts from 51.1 percent to 48.5 percent, noting "analysis of elections shows that the level of racial polarization in voting for the city's board of selectmen, as well as other elections within the city, is such that this level of

reduction, although relatively small, calls into question the ability of black voters to elect their candidate of choice." *See* Objection Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Nancy P. Jensen, Capital Region Planning Commission (December 12, 2003). In 2002, the Department objected to an annexation that would have decreased the percentage of black voters in a minority district from 59.3 percent to 50.3 percent. *See* Objection Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to C. Samuel Bennett II, Clinton City Manager (December 9, 2002). These are all objections where relatively small changes in district demographics were determined to be retrogressive following an intensely local examination of probative elections and racially polarized voting trends.

Additionally, an enormous number of African American voters would be stranded in districts in which they would not have the ability to elect their candidate of choice if the remedy in this case involved an East-West configuration of the district. In his partial dissent in *Apportionment II*, Justice Perry, who was in the majority in *Apportionment I*, noted that he would have invalidated one of the districts challenged by the Florida NAACP because it was, as redrawn, "detrimental to black voters in Daytona Beach and that that community accustomed to being represented by the candidate of its choice, would be stranded

in a district in which it most certainly will not be able to elect its candidate of choice or one responsive to its interests and needs." *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 899 (Fla. 2012) (Perry, J., concurring in part and dissenting in part) ("*Apportionment II*"). The evidence in the record in this case, and presented to the legislature during the remedial session, was that black voters in the region, after decades of exclusion from the political process, were finally "accustomed to being represented by the candidate of its choice," and were benefiting from that representation. (T17: 2171-2189; T19: 2381-97, 2407-20; 2420-28; 2428-44). Losing that now would be incredibly harmful.

Contrary to Appellants' arguments, this Court's decisions in *Apportionment I* and *Apportionment II* do not condemn the remedial version of Congressional District 5. First, in *Apportionment I*, the Court rejected a challenge to House District 70, even though it stretched across four counties and appeared "strikingly similar to its predecessor district." 83 So. 3d at 647-48. This Court acknowledged the legislature's intent to comply with the Voting Rights Act and the minority voting protections the state constitution, and approved of the yielding of compactness to protect against retrogression. *Id*. at 48. And this Court's ruling on Senate District 6 in *Apportionment I* is not analogous here. The illustrative district offered by challengers with regard to Senate District 6 did not locate the district in

an entirely different part of the state, as seen with the alternative Congressional District 5. It redrew the district within a single county (Senate District 6), not over 206 miles (Congressional District 5). And there was no evidence that the alternative Senate District 6 was one in which white voters outnumbered black voters by over ten percentage points. Whereas the Florida NAACP's challenge to redrawn Senate District 6 (then renumbered Senate District 9) failed because there was "insufficient evidence from which to conclude that Redrawn District 9…will meet constitutional requirements," that evidence is not lacking in this case. *Apportionment II*, 89 So. 3d at 883.

Finally, the retrogressive realities of an East-West Congressional District 5 hit home when examining the Congressional election results from 2014. In Congressional District 2, Democratic candidate Gwenn Graham, the daughter of well-known former U.S. Senator and former Florida Governor Bob Graham, defeated the longtime Republican incumbent Steve Sutherland. National Democratic groups spent heavily to elect Representative-elect Graham, and former President Bill Clinton joined her on the campaign trail. Karl Etters, *Gwen Graham Defeats Steve Southerland*, TALLAHASSEE DEMOCRAT, Nov. 5, 2014, http://www.tallahassee.com/story/news/local/state/2014/11/04/thirty-percent-of-congressional-district-voters-have-cast-ballots/18452597/. If Congressional District 5 were redrawn as Appellants ask, it would mean that Congressional

District 2 would become a safe Republican District and that there would be a white Democratic incumbent (Graham) living in Congressional District 5. Moreover, the Florida Constitution says that when a primary will have the effect of electing the officeholder because there is "no opposition in the general election," all registered voters can take part in the party primary. FLA. CONST. Art. VI, Sec. 5(b). Thus, if no Republican vied for the East-West Congressional District 5 seat, the electorate deciding on a potential black versus white contest would not be limited to registered Democrats.

CONCLUSION

Article III, Section 20 of the Florida Constitution creates protections for minority voters and for voters of the political minority party. The latter should be recognized, but not at the cost of the voters who have suffered the most. African-American voters who loudly supported Amendment 6 also loudly urged the legislature and the courts to avoid making black voters the rope in a tug-of-war between the political parties. That can be avoided only by fully complying with the minority voting protections in the constitution, and not lessening the ability of minority voters to elect their candidates of choice. Remedial Congressional District 5 achieves that.

Thus, the Florida NAACP respectfully urges this Court to approve the 2014 remedial plan with respect to Congressional District 5.

DATED this 13th day of November, 2014.

Respectfully submitted,

_/s/ Allison J. Riggs_____

Allison J. Riggs
N.C. Bar No. 40028
*admitted *pro hac vice*
Anita S. Earls
N.C. Bar No. 15597
George Eppsteiner
Florida Bar No. 84146
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
(919)-323-3380 ext. 117
(919)-323-3942 (fax)
allison@southerncoalition.org

Nancy Abudu
Fla. Bar No. 111881
AMERICAN CIVIL LIBERTIES UNION OF FLORIDA FOUNDATION
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
Tel: 786-363-2707
Fax: 786-363-1108
nabudu@aclufl.org

Jerry Wilson
P.O. Box 971
Redan, Georgia 30074
(404) 431-6262

(888) 868-7331 Fax
lawoffice1998@gmail.com

Victor L. Goode
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
Telephone: (410) 580-5673
Facsimile: (410) 358-9350
vgoode@naacpnet.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was served by electronic transmission on December 19, 2014, to the persons listed on the attached Service List.

/s/ Allison J. Riggs

Allison J. Riggs

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

/s/ Allison J. Riggs_____

Allison J. Riggs

SERVICE LIST

Gerald E. Greenberg Adam M. Schachter GELBER SCHACHTER & GREENBERG, P.A. 1441 Brickell Avenue, Suite 1420 Miami, Florida 33131 ggreenberg@gsgpa.com aschachter@gsgpa.com dgonzalez@gsgpa.com *Counsel for Coalition Plaintiffs*	J. Gerald Hebert 191 Somervelle Street, #415 Alexandria, VA 22304 hebert@voterlaw.com *Counsel for Coalition Plaintiffs*
David B. King Thomas A. Zehnder Frederick S. Wermuth KING, BLACKWELL, ZEHNDER & WERMUTH, P.A. P.O. Box 1631 Orlando, FL 32802-1631 dking@kbzslaw.com tzehnder@kbzwlaw.com fwermuth@kbzwlaw.com courtfilings@kbzwlaw.com *Counsel for Coalition Plaintiffs*	Michael B. DeSanctis Jessica Ring Amunson Paul Smith Kristen Rogers JENNER & BLOCK, LLP 1099 New York Ave NW, Suite 900 Washington, DC 20001 mdesanctis@jenner.com jamunson@jenner.com PSmith@jenner.com KRogers@jenner.com *Counsel for Coalition Plaintiffs*
Ronald G. Meyer Lynn Hearn MEYER, BROOKS, DEMMA and BLOHM, P.A. 131 North Gadsden Street Post Office Box 1547 Tallahassee, FL 32302 rmeyer@meyerbrookslaw.com lhearn@meyerbrookslaw.com *Counsel for Coalition Plaintiffs*	Michael A. Carvin Louis K. Fisher JONES DAY 51 Louisiana Avenue N.W. Washington, D.C. 20001 macarvin@jonesday.com lkfisher@jonesday.com *Counsel for the Florida Senate*
Raoul Cantero Jason N. Zakia Jesse L. Green White & Case LLP Southeast Financial Center 200 South Biscayne Boulevard, Suite 4900 Miami, FL 33131-2352 rcantero@whitecase.com jzakia@whitecase.com jgreen@whitecase.com Lillian.dominguez@whitecase.com mgaulding@whitecase.com *Counsel for the Florida Senate*	Charles T. Wells George N. Meros, Jr. Jason L. Unger Andy Bardos GRAY ROBINSON, P.A. Post Office Box 11189 Tallahassee, FL 32302 charles.wells@gray-robinson.com george.meros@gray-robinson.com Croberts@gray-robinson.com mwilkinson@gray-robinson.com jason.unger@gray-robinson.com andy.bardos@gray-robinson.com tbarreiro@gray-robinson.com *Counsel for the Florida House of*

	Representatives
George T. Levesque, General Counsel The Florida Senate 404 South Monroe Street Tallahassee, FL 32399-1100 levesque.george@flsenate.gov glevesque4@comcast.net carter.velma@flsenate.gov *Counsel for the Florida Senate*	Matthew J. Carson General Counsel Florida House of Representatives 422 The Capitol Tallahassee, FL 32399-1300 matthew.carson@myfloridahouse.gov *Counsel for the Florida House of Representatives*
Ashley Davis Assistant General Counsel Florida Department of State R.A. Gray Building 500 S. Bronough Street Tallahassee, FL 32399 Ashley.davis@dos.myflorida.com Jandrew.atkinson@dos.myflorida.com Diane.wint@dos.myflorida.com *Counsel for Florida Secretary of State*	Blaine Winship, General Counsel Allen Winsor, Solicitor General Office of the Attorney General The Capitol, PL-01 Tallahassee, FL 32399 Blaine.winship@myfloridalegal.com Allen.winsor@myfloridalegal.com *Counsel for Florida Attorney General*
Mark Herron Robert Telfer Messer Caparello & Self, P.A. Tallahassee, FL 32302-1876 mherron@lawfla.com rtelfer@lawfla.com clowell@lawfla.com bmorton@lawfla.com statecourtpleadings@lawfla.com *Counsel for Romo Plaintiffs*	John M. Devaney Mark E. Elias Elisabeth Frost Perkins Coie, LLP 700 Thirteenth Street, NW, Ste. 700 Washington, D.C. 20005 jdevaney@perkinscoie.com melias@perkinscoie.com efrost@perkinscoie.com *Counsel for Romo Plaintiffs*
John S. Mills Andrew D. Manko Courtney Brewer The Mills Firm, P.A. 203 North Gadsden Street, Suite 1A Tallahassee FL 32301 *Counsel for Coalition Plaintiffs*	Abha Khanna Kevin Hamilton Ryan Spear Perkins Coie, LLP 1201 Third Avenue, Ste. 4800 Seattle, WA 98101-3099 akhanna@perkinscoie.com khamilton@perkinscoie.com rspear@perkinscoie.com jstarr@perkinscoie.com *Counsel for Romo Plaintiffs*