IN THE SUPREME COURT OF FLORIDA

IN RE: 2002 JOINT RESOLUTION OF APPORTIONMENT

CASE NO. SC02-194

_____/

BRIEF OF ATTORNEY GENERAL ROBERT A. BUTTERWORTH

ROBERT A. BUTTERWORTH
Attorney General

Paul F. Hancock
Deputy Attorney General

The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 487-1963

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FLORIDA CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

The Attorney General submits this Brief pursuant to the direction of the Court in its order of January 31, 2002, to describe his views as to the validity of the reapportionment plans which have been presented to the Court by the Petition for Declaratory Judgment. The Brief is filed simultaneously with the Petition so as to allow the maximum time possible for the House, Senate and other interested parties to analyze and respond to the views presented herein.

The designed purpose of this Court's role in the reapportionment process is to preclude, to the extent possible, future successful challenges to the reapportionments, particularly in federal court. During the past decade, the United States Supreme Court articulated new standards for evaluating reapportionment plans, and also articulated clearly how such challenges can be defended successfully by states. The primary lesson learned is the importance of objective standards that can be used to evaluate the underpinnings of the plan redrawing the district boundaries.

This is particularly true due to technology that allows the instant drawing of plans designed to achieve any objective. **The reapportionment process--if objectively implemented--should result in a fair plan by which voters may select their legislators, rather than legislators selecting their voters.**

We describe the process followed by the Legislature in devising the plans under review, and we note in particular that the Legislature determined not to adopt or utilize objective standards to guide the reapportionments, other than population equality and the explicit requirement of the Florida Constitution requiring contiguity.

The United States Supreme Court has noted that "reapportionment is one area in which appearances do matter," and non-compact, unusual, contorted shapes of districts - in and of themselves - raise questions as to the underpinnings of the plan. Many districts of the proposed plans have facially inexplicable shapes.

The maps included in the Appendix depict examples of the many unusually shaped districts of the plans that do not facially appear to be justified by traditional reapportionment criteria. We suggest that this Court have the maps available in examining our written position.

It is difficult to reconcile the maps with the public testimony. At public hearings throughout Florida, local communities-- such as Naples and Gainesville--expressed a desire for the respect of "communities of interest" which do not appear to have been recognized by the Legislature. Similarly the proposed plans fragment many of the boundaries of cities and counties in Florida.

Population equality, which is satisfied in the plans presented, is the only specific reapportionment criteria mandated by the United States Constitution. The Florida Constitution's only explicit additional requirement is that districts be contiguous and consecutively numbered. As we will demonstrate, however, the judicial standards announced since this Court's last review of reapportionment - as well as our own Constitution - demand other considerations. Plans satisfying the explicit standards can continue to raise issues under State and federal constitutional standards, as well as federal statutory standards.

The types of federal challenges that might be raised include claims that the contorted districts reveal that the plans discriminate against Blacks or Hispanics, or - under the newer case law - are simply gerrymanders designed to divide people according to race. The balance is difficult to ascertain, but, in either case, rests on the State's ability to demonstrate the factors which determine the boundaries of the districts. In addition to racial and national origin claims, other basic standards of equal protection are at issue.

In the absence of standards underpinning these plans, we suggest that it is simply impossible for the Court to determine validity. If the issues raised herein are not successfully rebutted by other interested parties, we suggest that the Court deny the petition for declaratory judgment, allow the Legislature

to determine the objective standards to guide reapportionment, make plan adjustments necessary to implement the standards, and return the plans to this Court for further review.

STATEMENT OF THE CASE AND FACTS

I. THE ROLE OF THE FLORIDA SUPREME COURT IN THE REAPPORTIONMENT PROCESS.

Florida experienced a tortured history in attempting to satisfy the developing reapportionment law during the 1960's. Legislative efforts to reapportion were challenged in federal court, and were overturned by the United States Supreme Court on three occasions. *Swann v. Adams,* 378 U.S. 553 (1964); *Swann v. Adams,* 383 U.S. 210 (1966); *Swann v. Adams,* 385 U.S. 440 (1967). This litigious environment was of concern to the Constitution Revision Commission which met in 1966 to consider, among other things, how reapportionment would be effectuated in the future.

The solution developed, as reflected in the current Constitution, was to allow reapportionment to be "left to the discretion of the Legislature subject to the judgment of the Supreme Court of Florida."[1] The Supreme Court's role reflects

---

[1] Statement of Commissioner John Mathews, Constitution Revision Commission 1965-1967, Convention Proceedings Nov. 28, 1966 - Jan. 7, 1967. The record of these proceedings was obtained from Florida State Archives Microfilm Publications, Record Group 005, Series 722. The quoted statement of Mr. Mathews is at page 483 of the document. The document will hereinafter be cited as "Convention Proceedings."

federalism inasmuch as the Commission "want[ed] our own state court to do it, rather than a federal district court."[2]

In ratifying this proposal, the citizens of Florida granted this Court an important role in the law-making process since the reapportionment is not final until the Court determines its "validity." Florida Constitution, Art. III, Section 16(c).

The Court operates under a tight timetable in evaluating "validity" since it must enter its judgment within thirty days of the filing of the petition. This timetable caused the Court to first say that "[w]e are passing on the validity . . . on its face." *In re Apportionment Law, Appearing as Senate Joint Resolution Number 1305*, 1972 Regular Session, 263 So. 2d 797, 803 (Fla. 1972). Each decade, however, as redistricting law extended beyond merely one-person, one-vote requirements, the Court's role became more complex. In 1982, the Court evaluated evidence that might indicate a violation of the legal standard announced in *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980). *In re Apportionment Law, Appearing as Senate Joint Resolution 1 E*, 1982

---

[2] Convention Proceedings at 484. Commissioner Mathews added: "So that if we get into the mess of having to have judicial apportionment, that those of us who believe in states' rights will have the opportunity to have your state court take the first crack at it." Convention Proceedings at 485. See also, statement of Commissioner Land: "And if we continue to do this without the provisions that are in this constitution that is now before us, then it will be left in the hands of the United States Supreme Court, which I do not believe and I do not believe that any of us want to have adjudication over the apportionment of our State Legislature." Convention Proceedings at 486-87.

Special Apportionment Session, 414 So. 2d 1040 (Fla. 1982). And in 1992, the Court conducted a deeper review than the Attorney General had recommended[3], stating:

> We cannot accept the narrow view that we should completely ignore the effect of the Voting Rights Act. Article III, section 16(c) requires us to determine "the validity of the apportionment." The Voting Rights Act obviously affects the validity of the Joint Resolution. Therefore, to the extent that we can do so under our own constitution, we believe we are obligated to consider the Voting Rights Act in our evaluation of the validity of the plan.

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session - 1992, 597 So. 2d 276, 282 (Fla. 1992).[4]

The legal standards relevant to reapportionment have continued to evolve since the last reapportionment cycle, which increases the responsibility of this Court. As the Framers of the Constitution intended, however, this Court's responsibility is to consider the applicability of all such legal standards to the proposed reapportionment plan in order to ensure that a plan finally implemented is valid. Similarly, it is the responsibility of the Attorney General to make known to this Court any concerns this

---

[3] The Attorney General suggested "that claims under the federal Voting Rights Act are not facial constitutional claims and need not be considered in this proceeding." 597 So. 2d at 281.

[4] Time constraints, of course, would preclude the full factual review that might be necessary to determine if a legal violation, in fact, exists. But the Court determined to conduct a review on the basis of the facts available, and to retain jurisdiction for a more complete review if any interested person desired. See, 597 So. 2d at 282, 285.

office has regarding the validity of the plans as it did in 1982. *See In re Apportionment Law Appearing as Senate Joint Resolution 1 E,* 1982 Special Apportionment Session, 414 So. 2d 1040 (Fla. 1982).

"Validity" incorporates satisfaction with all applicable provisions of the Florida and United States Constitution, as well as with the federal Voting Rights Act. As this Court said in 1992:

> [R]eapportionment of state legislative bodies is not a power delegated by the Constitution of the United States to the federal government. Under the provisions of the Tenth Amendment to the United States Constitution, this is a power reserved to states. Of course, this Court is obligated to apply any applicable federal constitutional provisions and any federal statutes implementing these provisions.

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session - 1992, 601 So. 2d 543, 545 (Fla. 1992).[5]

II. RELEVANT LEGAL DEVELOPMENTS IN THE 1990'S

During the 1990's, the United States Supreme Court rendered several important decisions concerning voting rights and reapportionment which are relevant to the issues presented to this

---

[5] Even before adoption of the plans at issue, the legislative process for developing the plans was challenged in federal court. *Martinez v. Bush,* Case No. 02-20244-Civ-Jordan (S.D. Fla.) (Filed 1-23-2002). The lawsuit alleges that the public hearings were insufficient and were not scheduled at times convenient to citizens. The complaint also alleges that the Legislature failed to comply with the requirements of Section 203 of the Voting Rights Act, 42 U.S.C. 1973 aa-1a, requiring the provision of election-related information in Spanish in certain Florida counties. See 28 C.F.R. Part 55, Appendix (Broward, Collier, Dade, Glades, Hardee, Hendry, Hillsborough and Orange Counties are subject to the Section 203 requirements).

Court. The decisions concern the reach of Section 5 of the Voting Rights Act and the extent to which race can be considered in developing reapportionment plans. The courts have become less tolerant of undocumented explanations of state policy.[6]

A. <u>The Reach of Section 5</u>.

Five of Florida's 67 counties are covered by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The covered counties are: Collier, Hardee, Hendry, Hillsborough, and Monroe.[7] The Act prohibits the implementation of any change in a "standard, practice, or procedure with respect to voting" (including a reapportionment plan) in the covered counties, until a declaratory judgment is obtained from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote

---

[6] *See* Attorney General's 2002 Florida Reapportionment and Redistricting Memorandum of Law, Page 14, in attached Appendix.

[7] These Florida counties became covered by the preclearance provisions as a result of 1975 Amendments to the Voting Rights Act. The amendments changed the coverage formula to include any state or political subdivision that used, as of November 1, 1972, any "test or device" with respect to voting, and in which less than 50 percent of the voting age citizens were registered to vote or voted in the presidential election of November 1972. The term "test or device" (which previously included literacy tests, moral character requirements, and voucher requirements) was amended to include English-only elections "if the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority." 42 U.S.C. 1973b(b) and 1973b(f)(3). This revised formula captured the five Florida counties by determinations published in the Federal Register in 1975 and 1976. *See*, 28 C.F.R Part 51, Appendix.

on account of race or color [or membership in a language minority group]." 42 U.S.C. s. 1973c. As an alternative to the declaratory judgment action, the Act authorizes the covered jurisdictions to obtain administrative preclearance from the United States Department of Justice.

"Section 5 submissions" of proposed voting changes are made to the Civil Rights Division of the United States Department of Justice and the changes may be implemented if the Department does not interpose an "objection" within 60 days. *Id.*

The "effect" prong of Section 5 has, since 1976, been governed by the standard established in *Beer v. United States*, 425 U.S. 130 (1976), that a voting change would not be precleared if it "would lead to a retrogression in the position of...minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. At the time of the 1992 reapportionment in Florida, the Department of Justice interpreted Section 5 as requiring the denial of preclearance if a submitted voting change violated another provision of the Voting Rights Act, such as Section 2.[8] The Department also interpreted the Act as requiring

---

[8] Unlike Section 5, Section 2 of the Voting Rights Act, 42 U.S.C. 1973, applies nationwide. The provision prohibits the continued use of any voting standard, practice or procedure that "results in a denial or abridgment of the right . . . to vote on account of race or color [or membership in a language minority group]." The standards required to establish a violation of Section 2 were described by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). *See also, Growe v. Emison*, 507 U.S. 25, 40 (1993).

the denial of preclearance if the submitting jurisdiction failed to prove that the submitted change - even if not retrogressive - was otherwise free of discriminatory purpose.

In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997)(*Bossier I*), the United States Supreme Court held that preclearance may not be denied solely because a submitted voting change may violate Section 2 or another provision of the Act. In a second appeal of the *Bossier* case, the Court held that the "purpose" prong of Section 5 covers only a purpose to retrogress the position of racial minorities with respect to their effective exercise of the electoral franchise. *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000)(*Bossier II*).[9]

---

[9] The Department of Justice's erroneous interpretation of Section 5 impacted Florida. Following this Court's approval of the 1992 reapportionment, the Department of Justice entered a Section 5 objection to the Senate plan. The objection did not conclude that the plan had a retrogressive purpose or effect, but rather was based on a theory - no longer viable in light of *Bossier I* and *II* - that the State failed to demonstrate the absence of discriminatory purpose because the Senate plan did not include within the same district, the minority communities in Tampa and St. Petersburg. This Court subsequently revised the Senate plan as it impacted the Tampa Bay area. *In re Constitutionality of Senate Joint Resolution 2G*, Special Apportionment Session - 1992, 601 So. 2d 543 (Fla. 1992)(Justice McDonald's dissent proved to be prophetic: "Frankly, I think that the Justice Department is erroneous in its interpretation of the 1982 Voting Rights Act . . . ."). 601 So. 2d at 549.

Other challenges to the legislative reapportionment plan approved by this Court in 1992 were initiated in federal court pursuant to Section 2 of the Voting Rights Act. The cases were consolidated under the style *De Grandy v. Wetherell* (N.D. Fla.). The litigation challenged House districts in the Pensacola - Escambia County area, Senate and House districts in the Miami-Dade

The Department of Justice has published "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act" which describes the implementation of the *Bossier* decisions and how reapportionment plans will be analyzed during this reapportionment cycle. See, 66 Fed. Reg. 5412 (Jan. 18, 2001).

B. <u>The Extent to Which Race May Be Utilized in Reapportionment</u>.

In 1993, in deciding *Shaw v. Reno*, 509 U.S. 630 (1993), the United States Supreme Court recognized a legal claim that is "analytically distinct" from a traditional vote dilution claim. 509 U.S. at 652. Noting that "**reapportionment is one area in which appearances do matter**" (509 U.S. at 647 (emphasis added)), the Court held that voting precedents support the conclusion that

---

area, and the Tampa Bay matter that was addressed by the Department of Justice. The three-judge district court upheld the challenge as to the Pensacola - Escambia districts, and a remedy was implemented by consent of the parties. The Tampa Bay issue was resolved when the federal court adopted the modified plan that this Court had approved. The three-judge district court also ruled for the plaintiffs as to the Miami-Dade districts, but that decision was overturned on appeal. *De Grandy v. Wetherell*, 815 F. Supp 1550 (N.D. Fla. 1992), *rev'd in part sub nom., Johnson v. De Grandy*, 512 U.S. 997 (1994).

Litigation was not over, however, as certain persons residing in the Tampa Bay area who were affected by the revised plan approved by this Court and the federal three-judge court brought a lawsuit against the Department of Justice and the State of Florida alleging that the revised plan was a racial gerrymander that violated the Equal Protection Clause. Mediation resulted in further modification of the plan, and a settlement was approved by the federal court. *Scott v. United States Department of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom., Lawyer v. Department of Justice*, 521 U.S. 567 (1997).

"redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race' . . . demands the same close scrutiny that we give other state laws that classify citizens by race." 509 U.S. at 644. While recognizing the cause of action, the Supreme Court also signaled how a claim of a racial gerrymander might be defended. The Court described a potential claim of racial gerrymander in which

> a State concentrated a dispersed minority population in a single district **by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions.** We emphasize that these criteria are important not because they are constitutionally required - they are not, cf. *Gaffney v. Cummings*, 412 U.S. 735, 752, n.18 (1973) - but because **they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.** Cf. *Karcher v. Daggett*, 462 U.S. 725, 755 (1983)(STEVENS, J. concurring)("One need not use Justice Stewart's classic definition of obscenity - - 'I know it when I see it' - as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation" (footnotes omitted)).

509 U.S. at 647 (emphasis added).[10]

---

[10] The *Shaw* litigation reached the Supreme Court three more times. Each time the Supreme Court emphasizes the importance of race-neutral redistricting criteria as necessary to defeat the claim. *See*, *Shaw v. Hunt*, 517 U.S. 899 (1996); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Hunt v. Cromartie*, 532 U.S. 234 (2001). At some point, the state attempted to justify the redistricting as necessary to comply with Section 5 or Section 2 of the Voting Rights Act. The defense fell legally short, however, since the Court concluded that the Department of Justice applied Section 5 improperly; and a precondition to a Section 2 claim is a sufficiently large and geographically compact minority group that

The Court further explained this legal theory in *Miller v. Johnson*, 515 U.S. 900, 901 (1995), holding that a plaintiff's burden in such a case is to show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." The Court continued to emphasize the importance of racially neutral, traditional redistricting criteria to defeat such a claim:

> [A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines." *Shaw, supra*, 515 U.S. at 647, 113 S.Ct. at 2827.

515 U.S. at 916.

In *Bush v. Vera*, 517 U.S. 952 (1996), the Court again evaluated a racial gerrymander claim, and once again said that "[f]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race." 517 U.S. at 959. Of course, "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race" (517 U.S. at 958) and various race-neutral principles might justify a plan. The

---

might constitute a majority in a single member district. 517 U.S. at 911-918. Only the uniform application of race-neutral redistricting principles proved to be legally defensible. 532 U.S. at 258.

Vera Court mentioned factors such as incumbency protection, natural geographic boundaries, compactness, contiguity, and conformity to political subdivisions. 517 U.S. at 959-960. "[A] finding by a district court that district lines were drawn in part on the basis of evidence (other than racial data) of **where communities of interest existed** might weaken a plaintiff's claim that race predominated in the drawing of district lines." 517 U.S. at 964 (emphasis added).

Of course, the traditional race-neutral criteria are inter-related and must be applied uniformly and fairly. For example, to the extent that incumbency protection overrides all other standards, **the result might not be "one in which the people select their representatives, but in which the representatives have selected the people."** 517 U.S. at 963 (citing district court decision reported at 861 F. Supp. 1304, 1334 (S.D. Tex. 1994)).

III. THE LEGISLATIVE REAPPORTIONMENT PROCESS

Upon the release of each decennial census, the Legislature is required to "apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory." Florida

Constitution, Art. III, Section 16(a). This apportionment is to be accomplished at the "regular session in the second year following each decennial census." *Id.* House Joint Resolution 1987 apportions the state into forty single-member senatorial districts and into 120 single-member representative districts.

In preparation for the reapportionment, the Florida Senate's Committee on Reapportionment and the House of Representatives' Redistricting Committee jointly conducted twenty-four public hearings at various locations throughout Florida. Notices of the public hearings were published on the Legislature's web page, Online Sunshine (www.leg.state.fl.us/), as well as in local newspapers. Videos, transcripts, tapes and other records of the public hearings are posted on Online Sunshine.[11]

At these public hearings, the legislative representatives stated that reapportionment must satisfy the one-person, one-vote requirements of the Fourteenth Amendment of the United States Constitution, and otherwise comply with law. The representatives, however, did not describe the objective standards which would govern redistricting. Rather, the views of the public were sought. Pursuant to the House and Senate's procedures published on the website, individuals were allowed to address the legislative representatives for four minutes and were permitted to provide

---

[11] By separate motion, the Attorney General has requested that this Court judicially notice the Florida Legislature's web site and its contents.

written comments. Citizens were not permitted to ask questions of the legislative representatives, nor engage in discussion with them.

The record of the hearings often reveals the sentiment of the local community. For example, at the September 24, 2001 hearing in Naples virtually all speakers voiced opposition to any plan that would align Collier County with any east coast community. *See* Transcript of the September 24, 2001 Naples Hearing, pp. 29-78. This sentiment was summarized by Fred Hart, Republican State Committeeman for Collier County:

> And every Republican leader in Southwest Florida, Lee County, and Collier County, believes that we need to maintain those qualities of contiguity, compactness, respect for traditional boundaries, and maintaining a community of interest. And I think the most important factor of all of those, and as you have heard here tonight from all of those eloquent speakers is the community of interest. We are a community of interest. We are the community of Southwest Florida. And we want to keep it that way with our representation in Congress and in the Legislature.

Transcript of the September 24, 2001 Naples Hearing, pp. 46-48.[12]

Similarly, residents of the City of Gainesville and Alachua

---

[12] Citizens on Florida's East Coast shared the view that the two coasts were separate communities of interest. *See*, Transcript of Pembroke Pines Public Hearing at 27 ("What does my community with its urban sprawl and ever overcrowded schools have to do with the issues in somewhere such as Collier County?"); at 73 ("It is very difficult for a legislator from Broward County to understand, empathize and advocate on behalf of a constituent in Collier County or other counties whose needs, concerns, and priorities are so different from their own.")

County requested that their boundaries be respected to the maximum extent possible. *See* Transcript of Gainesville Public Hearing at 21-23, 37-39, 53-60, 66-67, 70-73.

In addition to seeking public comments the Legislature utilized a sophisticated computer software program to develop reapportionment plans. The proprietary program created by the Legislature was named the Florida Redistricting System (FREDS 2000). This program is remarkably advanced over the tools utilized in previous reapportionment cycles.

FREDS includes detailed information about Florida's population broken down by census boundaries, cities, counties and elections precincts. For each such division, information is available revealing racial and national origin data, political affiliation and voting patterns of the population. The election results of the last presidential election, as well the results of statewide races in 2000, 1998, 1996, 1994 and 1992 are included.

Sophisticated mapping capabilities also are included. Maps can be created and viewed virtually instantaneously. Senate or House districts of ideal population size can be drawn on the basis of any of the characteristics included in the program.

Hypothetically, a House district of ideal size could be drawn to include a population in which fifty-two percent of the voters in the district voted for Gore (or Bush) in the 2000 presidential election, and supported Democratic (or Republican) candidates in

each election since 1992; the program also has the ability to draw this district in a manner such that twenty-five percent of the population is Black, or White, or Hispanic. The re-election of particular incumbents can be virtually assured by using election patterns to include in the district voters who are most likely to support the candidate and exclude voters who likely will not support the candidate. Of course, the shape of the districts based on such factors may not be compact -- and, in fact, may be contorted[13] - but the desired objective can be readily achieved.

The FREDS system is relatively easy to use, and was made available to the public at a minimal cost. The accessibility and ease-of-use allowed individual legislators, as well as other interested persons, to devise and propose district boundaries, and the Legislature provided a means for individuals to request that their maps be posted to the Legislature's redistricting web site.

During the 2002 Regular Legislative Session, the Senate and House debated proposed reapportionment plans. Each such plan afforded the required deference to population equality, but neither branch of the Legislature adopted standards to guide the reapportionment. For example, it was not determined that districts should be compact, that county and municipal boundaries should be respected to the extent possible, or that communities of interest

---

[13] The FREDS system has the capability to determine whether all portions of the drawn district are contiguous.

should be united in the same district if possible.

On March 19, 2002, the Florida Senate passed, as amended, House Joint Resolution 1987 which provides for reapportionment of the Florida House of Representatives and the Florida Senate (plans H062H001 and S17S0036). On March 22, 2002, The Florida House of Representatives concurred in the Senate's amendments and passed House Joint Resolution 1987. On March 28, 2002, House Joint Resolution 1987 was signed by the officers of the Legislature and filed with the Secretary of State.

ARGUMENT

I. THE PROPOSED REAPPORTIONMENT OF THE HOUSE AND SENATE SATISFIES THE ONE-PERSON, ONE-VOTE STANDARD OF THE FOURTEENTH AMENDMENT.

The ideal population for a House district is determined by dividing the total State population as revealed by the 2000 Census by 120. The result is an ideal population of 133,186 persons. The ideal population of a Senate district is determined by dividing the State population by 40. The result is an ideal population of 399,559.

Under the plan proposed for the House, the District with the largest population is District 98, with a population of 135,043. This deviates from the ideal population by 1,857 persons, or 1.39 percent. The proposed House district with the smallest population is District 32, with a population of 131,310. This deviates from

the ideal population by 1,876 persons, or 1.4 percent. Therefore, the total deviation between the largest and the smallest House district is 2.79 percent.

Under the plan proposed for the Senate, the district with the largest population is District 39, with a population of 399,606. This deviates from the ideal population by 47 persons, or .01 percent. The proposed Senate district with the smallest population is district 40, with a population of 399,488. This deviates from the ideal population by 71 persons, or .02 percent. Therefore, the total deviation between the largest and smallest districts is .03 percent.

These deviations are well within the range permissible for state legislative reapportionment. *See, Brown v. Thomson,* 462 U.S. 835, 842 (1983)("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.); *Connor v. Finch,* 431 U.S. 407, 418 (1977)(Deviations at issue "substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutionality only in the context of legislatively enacted apportionments.").

II. THE PROPOSED REAPPORTIONMENT OF THE HOUSE AND SENATE SHOULD SATISFY THE PRECLEARANCE REQUIREMENTS OF SECTION 5.

To receive Section 5 preclearance, the State will be required to demonstrate that the proposed reapportionment plans, as they

impact the five covered counties, do not have the purpose and will not have the effect of causing a retrogression in the position of racial or language minorities with respect to their effective exercise of the electoral franchise. *See, Bossier I,* supra; *Bossier II, supra; Beer v. United States,* supra. Retrogression will be examined by comparing the proposed plan, as it affects the covered counties, with the existing - or "benchmark" - plan, as it affects the covered counties. *See,* Department of Justice Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, *supra,* 66 Fed. Reg. at 5412.

Eight districts of the existing, or benchmark, Senate districting plan include portions or all of one of the five covered counties; and eight districts touch the covered counties under the proposed plan. In two of the districts under the benchmark plan, a majority of the persons of voting age were minority, *i.e.*, Black or Hispanic. Two majority-minority Senate districts are retained under the proposed Senate reapportionment plan. In addition, retrogression is not evident if the compositions of the districts are subdivided into Black and Hispanic. Under the benchmark plan, two Senate districts were more than 30 percent Black in voting age population, and one district was 30 percent Hispanic; these statistics are maintained under the proposed plan.

Eighteen districts of both the benchmark House plan and the proposed House plan include all or a portion of a covered county.

Under both the benchmark and proposed plans Blacks constitute a voting age majority in two districts, and Hispanics constitute more than 30 percent of the voting age population in two districts. Under the benchmark and proposed plans, Blacks and Hispanics together constitute a majority of the voting age population in three House districts.

Of course, the Department of Justice preclearance review will be more involved than the above-analysis, but it is reasonable to project that the evidence will confirm that the proposed reapportionment plans, as they impact the covered counties, do not have "the purpose or effect of worsening the position of minority voters when compared to [the] 'benchmark' plan." 66 Fed. Reg. at 5412. Thus, the State should be entitled to Section 5 preclearance of the reapportionment plans. At the same time,

> jurisdictions should not regard Section 5 preclearance of a redistricting plan as preventing subsequent legal challenges to that plan by the Department of Justice. In addition, private plaintiffs may initiate litigation, claiming either constitutional or statutory violations.

66 Fed. Reg. at 5412.

III. THE LACK OF STANDARDS UNDERPINNING THE PLANS PUTS THE STATE IN A QUESTIONABLE POSITION IN DEFENDING THE PLANS IN SUBSEQUENT FEDERAL COURT LITIGATION.

Florida's history confirms that legal challenges to the reapportionment plans - generally instituted in federal court - can be expected. In the 1990's the plans were challenged as they impacted North Florida, Central Florida and South Florida. *See*

footnote 9, *supra*.

Federal case law advanced significantly during the 1990's and this Court should consider that advance in evaluating the validity of the reapportionment plans under review. An important starting point is the recognition of the United States Supreme Court of the primary role of this Court. Justice Scalia has said: "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch has begun to address that highly political task itself." *Growe v. Emison,* 507 U.S. 25, 33 (1993)(emphasis in original). While federal courts may intervene only when a violation of federal law has been established

> that does not mean that the State's powers are similarly limited. Quite the opposite is true . . . Time and again we have emphasized that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."

Voinovich v. Quilter, 507 U.S. 146, 156 (1993).

Unlike a federal court, this Court is not limited, in carrying out its duties to ensure implementation of a fully valid reapportionment, to acting only if a violation of constitutional standards is, in fact, established. This Court can act to avoid that potential liability in the first instance. As Justice O'Connor said in *Bush v. Vera*:

> [T]he States retain a flexibility that federal courts . . . lack, both insofar as they may avoid strict scrutiny altogether by respecting their own

> traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid . . . liability.

517 U.S. at 978.

We suggest that this standard should guide review here. That is, the Court should make "**reasonable efforts to avoid [the State's] liability**" as to claims contesting the validity of the proposed reapportionment plans. To accomplish this task, however, the Court must understand the underpinnings of the reapportionment plans. Many of the single-member districts of the plans under review are very unusually shaped, and such unusual shapes often are the basis for legal challenges since "reapportionment is one area in which appearances do matter." *Shaw I, supra*, 509 U.S. at 647. Also, the FREDS system, in spite of all its benefits, can easily implement motives that may violate constitutional standards.

For example, Senate district 19 juts in all directions, virtually engulfing a portion of district 9. (*See* Map 1 in Appendix) Is the district valid? The answer would depend, in large part, on the justification for drawing the district in this manner. Perhaps legislative representatives can describe why the district was drawn in this manner, and such justification may be "unobjectionable as an abstract proposition and a starting principle." *Bush v. Gore*, 531 U.S. 98, 106 (2000). **"The problem inheres in the absence of specific standards to ensure its equal**

application." *Id.* (Emphasis added).

Our concerns in this regard arise not only because districts in which minorities reside might be more easily challengeable, but because citizens in all areas of the State might be denied the basic right guaranteed by the Florida Constitution to be "equal before the law." Florida Constitution, Art. I, Sec. 2. The issue presented in *Bush v. Gore* was not race-based and yet the Court emphasized the importance of avoiding "arbitrary and disparate treatment of the members of [the] electorate." 531 U.S. at 105.

The types of standards available are repeated continually in the United States Supreme Court cases which we have cited, *e.g.*, compactness, respecting communities of interest, respecting municipal and county boundaries. As noted earlier, citizens of both Collier and Broward Counties made clear their claim that each coast constitutes a separate community of interest. Yet, the House plan (District 101) proposes districts that include population centers in both counties. Map 2 in the Appendix depicts House district 101, which includes approximately 30,000 people from the Pembroke Pines area of Broward County in a district otherwise based in Collier County. Similarly Map 3 in the Appendix depicts Senate District 27, which joins people of Lee County in a district otherwise based in Palm Beach County.

Most people would consider Miami Beach to constitute a "community of interest," and yet the House plan severs a portion of

Miami Beach and Star Island from the coastal community and joins it with very different communities such as Brownsville in the urban core of Miami. *See*, Map 4 in Appendix. The Mayor and City Commission of Miami Beach have adopted a Resolution opposing this proposed House district contending that it "threatens to shatter our community's political cohesion and hush the political voice of thousands of our citizens." (A copy of the resolution is included in the Appendix as Exhibit E.)

Residents of Gainesville and Alachua County requested that their "community of interest" be protected, and yet the House plan further fragments the area. Four House districts reach into Alachua County, a county with a total population of 218,000; and Gainesville itself is fragmented among three districts. See, Map 5 in Appendix.

The House plan does not appear to respect county boundaries in urban areas. For example, under the current plan only one House district includes portions of Broward and Miami-Dade Counties.[14] Under the proposed House plan, three House districts would include portions of Broward and Miami-Dade Counties. In total, seven House districts[15] in the proposed plan include portions of Broward and

---

[14] Only a very small portion of current House district 102 is in Miami-Dade County.

[15] Of course, no redistricting standard, other than population equality, can be applied rigidly. The boundaries of political subdivisions may have to be crossed to achieve population equality. Non-compact districts may be drawn to respect communities of

either Miami-Dade, Collier or Palm Beach Counties. *See* Map 6 in Appendix.

These are a few examples of where appearance does matter. A visual examination of the maps reveals that many districts are not compact, and, in fact are extremely contorted. The districts merit an explanation. Any inappropriate motive could be assumed from such contortions, with the mere explanation that "I know it when I see it." Or perhaps, valid State principles justify the contours. The Legislature's failure to utilize standards means simply this Court does not know.

It is true, of course, that the United States Constitution does not require the use of any particular standards for reapportionment, other than population equality. And the only explicit standards of the Florida Constitution are that districts be contiguous and separately numbered. (Florida Constitution, Art. III, Sec. 16(a).) It would be silly to suggest, however, that the mere satisfaction of these explicit standards mandates a stamp of validity from this Court.

If such were the law, the Legislature could devise reapportionments which encompass Key West and Pensacola into the same district, inasmuch as the district would be contiguous since

---

interest. Population standards may prevent the proper recognition of some communities which share common interests. And, of course, the drawing of one district has a domino effect on surrounding districts. Plan drawing which incorporates traditional reapportionment standards allows for such leeway.

it can be linked by Florida's coastal waters.[16] Tentacles of districts could reach throughout the State joined by roads, streams and narrow bodies of land, so long as population equality is achieved. Particularly with the software available today, districts could be drawn to achieve any desired objective, including - but not limited to - shutting out a minority political party to the maximum extent possible.

An example of a configuration which might raise an issue of potential political gerrymandering is revealed by districts 86 and 87 of the House plan. The districts are joined like "gears" with the teeth of each gear populated by persons affiliated with a particular political party. *See* Maps 7 and 8 in Appendix. The United States Supreme Court has recognized a federal cause of action for political gerrymandering, although the federal court burden of proof is high. *See, Davis v. Bandemer,* 478 U.S. 109 (1986); *Badham v. March Fong Eu,* 694 F. Supp. 664 (N.D. Cal. 1988)(three-judge court). The *Bandemer* Court noted that "it is . . . appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts

---

[16] *See, In re Constitutionality of Senate Joint Resolution 2G,* Special Apportionment Session - 1992, *supra,* 597 So. 2d at 280 ("We hold . . . that the presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court's standard for determining contiguity under the Florida Constitution.")

in state reapportionment decisions." 478 U.S. at 134.

Federalism principles, of course, are not a concern in this Court[17] and we suggest that the Court can act to prevent "arbitrary and disparate treatment of [Florida's] electorate" even if the arbitrariness is a scheme to achieve political advantage. If the Court lacked such authority, the Constitution's basic premise that "[a]ll political Power is inherent in the people" might become a hollow promise.

We recognize, of course, that objective standards have not been required in previous Florida reapportionments. But times have changed with advanced technology and new legal standards. This Court is required to put its stamp of validity on a reapportionment plan devised to remedy the malapportionment revealed by the 2000 Census. As the *Bush v. Gore* Court concluded: "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." 531 U.S. at 109.

The non-arbitrary and fair treatment of Florida's residents in the reapportionment process can be assured only by the application of objective factors or principles in the reapportionment process. We do not suggest that this Court determine the appropriate standards to be used. Under the State's separation of powers, that

---

[17] Article I, Section 2 of the Florida Constitution provides for an independent equal protection guarantee.

task should rest, at least in the first instance, with the Legislature.

CONCLUSION

We suggest that this Court conclude that the presented reapportionment plans, on the basis of the evidence presented, are not valid. Such a conclusion would invoke application of Section 16 (d) of Article III whereby the concerns of the Court could be addressed by the Legislature. The adoption and application of reapportionment standards or principles, may result in plans that, in many respects, resemble the plans now under review - or the plans may be markedly different. But such action would advance the fair treatment of all Floridians in the electoral process; would, consistent with the intent of the Framers of the 1968 Constitution, minimize the federal court litigation which might otherwise be expected for the remainder of this decade; and would ensure that the people select their representatives rather than the representatives selecting their people.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
Attorney General
Florida Bar No. 0114422
The Capitol, PL-01
Tallahassee, Florida 32399-1050

Paul F. Hancock
Deputy Attorney General
Florida Bar No. 0140619

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 2002, a true and correct copy of the foregoing has been furnished by U.S. Mail to the following:

Counsel for Lee County, Florida,
Bob Janes, Douglas R. St. Cerny,
Ray Judah, Andrew W. Coy and
John E. Albion

Gregory T. Stewart
Harry F. Chiles
Carrie Mendrick Roane
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308

James G. Yaeger
County Attorney
Lee County Attorney's Office
Post Office Box 398
Fort Myers, Florida 33902

Counsel for John McKay,
President of the Florida Senate

Barry Richard
Greenberg Traurig
101 E. College Avenue
Tallahassee, Florida 32301

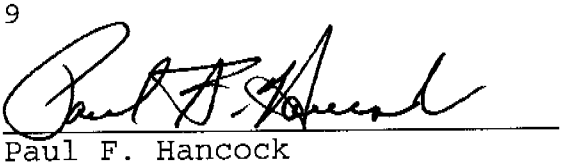
James A. Scott
Edward J. Pozzuoli
Alexis M. Yarbrough
Tripp Scott, P.A.
110 Southeast 6th Street, 15th Floor
Fort Lauderdale, Florida 33301

Counsel for Tom Feeney, Speaker of the Florida House of Representatives

Miguel DeGrandy
Stephen M. Cody
Miguel DeGrandy, P.A.
The Miami Center
201 South Biscayne Boulevard
Miami, Florida 33186

Joseph W. Hatchett
J. Thomas Cardwell
Richard A. Perez
Robert J. Telfer, III
Akerman, Senterfitt & Eidson, P.A.
Post Office Box 10555
Tallahassee, Florida 32302-2555

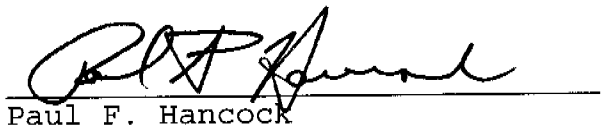
George N. Meros, Jr.
Jason L. Unger
Gray, Harris & Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-3189



Paul F. Hancock

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared with 12-point Courier New font in compliance with Fla. R. App. P. 9.210(a)(2).



Paul F. Hancock