ORIGINAL

IN THE SUPREME COURT OF FLORIDA

IN RE: 2002 JOINT RESOLUTION
OF APPORTIONMENT CASE NO. SC02-194

_____/

JOINT BRIEF
OF THE HONORABLE RAUL L. MARTINEZ, BISHOP VICTOR T. CURRY AND SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT

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STATEMENT OF THE CASE AND THE FACTS

On March 22, 2002, the Republican-controlled Legislature adopted House Joint Resolution ("HJR" or "Joint Resolution") 1987, which redistricts the State's 120 House districts and 40 Senate districts, based upon the 2000 Census. Thereafter, acting pursuant to Article III, Section 16(c) of the Florida Constitution, on April 8, 2002, the Florida Attorney General petitioned this Court for a declaratory judgment determining the validity of HJR 1987.

Petitioners the Honorable Raul A. Martinez ("Mayor Martinez"), Bishop Victor T. Curry ("Bishop Curry") and the Southwest Voter Registration and Education Project ("SWVRP") submit this brief in response to the Court's invitation, pursuant to Article III, Section 16(c) of the Florida Constitution, to members of the public to present their views on the validity of HJR 1987.[1]

FACTUAL BACKGROUND

In determining the validity of the Joint Resolution, this Court should consider both the context of this state's long and well-documented history of discrimination

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[1] Mayor Martinez is a Cuban American, and the Mayor of the City of Hialeah, the state's second largest city of Hispanic residents, which is located in Miami-Dade County. Bishop Curry is an African American radio personality, community activist and pastor of the 13,000 plus member New Birth Baptist Church, also located in Miami-Dade County. The SVREP is a national organization that works with Hispanics and other minority groups throughout the State of Florida. SVREP is committed to educating Hispanic voters about the importance of the democratic process, the importance of voter registration and voter participation. Its motto is "Su Voto Es Su Voz," ("Your Voice is Your Vote").

against racial and language minorities, the lingering vestiges of discrimination, and the present day official practices of the State that continue to have a discriminatory impact upon racial and language minorities, as well as in the context of the process that the Legislature chose to utilize in adopting the Joint Resolution.

Florida has a long and repugnant history of discrimination against minorities. (*See* App. at Exs. 56 and 57). Florida also has experienced several court cases that involve discriminatory election practices. These cases have involved challenges to at-large election schemes, white primaries, majority-vote requirements, and candidate filing fees. These cases clearly establish a pattern of polarized voting in Florida. (App. at Ex. 67). More recently, there are currently cases pending in Florida's federal courts that concern the regrettable and shameful actions perpetrated upon minority voters during the 2000 Presidential election. *See, e.g., NAACP v. Harris*, U.S.D.C., S.D. Fla. Case No. 01-0120-CIV-GOLD.

Florida's history of discrimination continues to affect its minority communities' ability to participate effectively in the electoral process. Indeed, since Reconstruction there have been few Blacks elected to the Florida House. There have been only three Blacks elected to the United States Congress ("Congress") . No black has been elected to the United States Senate. There have been only two Hispanics elected to Congress, and no Hispanics of non-Cuban decent.

1. Florida's Demographics

According to the 2000 Census, Florida's population increased during the last decade to 15,982,378. (App. at Ex. 23)[2] The changing demographics of the State are reflected in the growth of its minority populations. The Florida counties with the largest Black population are Miami-Dade (457,214), Broward (333,304), Duval (216,780), Orange (162,899), Palm Beach (156,055) and Hillsborough (149,423). (App. at Exs. 45 and 46).[3] With the exception of Palm Beach, each of these counties is a covered jurisdiction under one or more provisions of the Voting Rights Act. Blacks now account for 14.6 percent of the State's population, while Hispanics constitute 16.8 percent of the population. (App. at Ex. 44 and Ex.45). The Census also revealed that the State's fastest growing subgroups within the diverse Hispanic population are Mexicans and Puerto Ricans.[4] (App. at Ex. 44).

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[2] Therefore, the ideal population for each Senate district is 399,599 and 133,186 for each House district.

[3] These jurisdictions encompass 68 percent of Florida's Black population. The Counties with the largest Hispanic population are Miami-Dade (1,291,737), Broward (271,652), Hillsborough (179,692), Orange (168,361), and Palm Beach (140,575). (App. at Ex. 44) The cities with the largest Hispanic population are Miami (238,351), Hialeah (204,543), Tampa (58,522), Pembroke Pines (38,700), and Orlando (32,510). *Id.* These Counties and cities include 76 percent of Florida's Hispanic population. *Id*

[4] The Mexican population grew by 125 percent to 364,000, and the Puerto Rican population grew by 95 percent to 482,000. The combined Puerto Rican and Mexican populations now outnumber the Cuban population 845,000 to 833,000. (App. at Ex. 44). The total number of "other" Hispanics subgroups is slightly over one million and includes Hispanics from various countries such as Colombia, Venezuela, Argentina and Peru. *Id.*

The rapid growth of the state's minority population has not translated to Black and Hispanic economic and educational gains. The Census 2000 Supplemental Survey demonstrated that the City of Miami, which has Florida's largest Hispanic population ranks first in large cities below the poverty line. (App. at Ex. 63) Miami also ranked first in lowest median household income while Miami-Dade ranked 21st in the country in lowest median household income for counties. *Id.*

Blacks and Hispanics and low-income families also continue to fall behind high-income households and Whites in their ability to access educational tools such as computers and access to the Internet. (App. at Ex. 54). *The U.S. Census Bureau's Special Study, Home Computers and Internet Use in the United States: August 2000* ("Special Study"), reported that 41 percent of American households had computers and internet access. *Id.* However, high-income households were more likely to have computers or Internet access; among family households with incomes of $75,000, or more 88 percent had at least one computer, and 79 percent had at least one household member who used the Internet in 2000. *Id.*.

2. Florida's Registered Voters

The Florida Department of State, Division of Election's Report on County Voter Registration by Party, (May 10, 2001), reported that the total number of voters registered Democrat is 3,871,530 and Republican is 3,501.004. (App. at Ex. 58) The number of voters of no party affiliation is 1,410,045. The near equality between the

state's registered Democrats and Republicans was evidenced by the *stated* votes cast in the 2000 Presidential election. *Id.* The total number of *stated* votes cast in the 2000 election was 5,824,971 of these votes 2,912,754 were Republican and 2,912,217 were Democrat. *Id.*

3. Voting Rights Act (Section 203 Counties)

There are five counties that are subject to the language assistance provisions in Section 203 of the Voting Rights Act, 42 U.S.C., § 1973aa-1a ("Section 203") for Spanish Heritage. The Section 203 counties are: Broward, Hardee, Hillsborough, Miami-Dade, and Orange. These counties are subject to Section 203 because of a determination by the Director of the Bureau of the Census that more than five percent or 10,000 of each county's population speak Spanish as their primary language or their illiteracy rate is higher than the national average. *See* 28 C.F.R. 55.6. Section 203 requires that the Hispanic residents in these counties must be provided information relating to the electoral process in Spanish.

4. Legislature's Proprietary Software (FREDS)

Prior to 2002, the Legislature commissioned the development of redistricting software, Florida Redistricting System ("FREDS"). The FREDS program was created to provide legislators and the public with an opportunity to access compiled census and elections data to draw congressional and legislative districts.

The FREDS software had several program defects that caused computer damage.[5] The Legislature recalled its original version and although the early operating defects were eventually cured, the system requirements necessary to run the software revealed its limited usefulness. *See, Florida Redistricting System Manual 2000* at 7. (App. at Ex. 35). Although the FREDS software was specifically designed to provide the public with an opportunity to draw districts, the program did not include the home addresses or voting precincts of the legislative and congressional incumbents. Therefore, any one attempting to use the FREDS to draw districts would not be able to ascertain whether the districts they drew unintentionally paired incumbents.

5. Joint Legislative Public Hearings

During the 2000 Session, the Speaker of the House and Senate President appointed members to committees on House and Senate redistricting.[6] The House and Senate also designed and launched individual redistricting websites. Access to the websites would eventually prove to be critical to the public's participation in the redistricting process. All the public hearing notices and changes were first posted on the websites and then in local newspapers. Once the 2002 session began, all notices of redistricting committee meetings were first posted on the websites and later printed in the legislative calendar. Any proposed plan was required to be submitted in a format

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[5] The FREDS cost $20.00 and was purchased through the Legislature's Information Services Division.

[6] The Senate did not form a committee on House redistricting and did not propose

suitable for posting on the respective websites for House and Senate. In addition, all proposed legislative plans were posted exclusively on the websites for review and then later at the committee meeting. Therefore, without access to the internet or the ability to travel to Tallahassee, interested parties could not effectively follow the process.

The House Committees' initial plan was to hold between 30 and 35 hearings within ten regions. (App. at Ex. 29). The House Committees indicated that they would hold between 1 to 7 meetings in each region and each meeting would be within 75 miles driving distance from any Florida City. *Id.* The House Committees' proposed public hearing locations would include areas with significant population growth. *Id.* Translators for the hearing impaired and accommodations for the handicapped were to be provided. *Id.* However, the House Committees proposed public hearing schedule was later reduced and the Legislature only held 24 public hearings. (App. at Ex. 32). The Legislature's final public hearing schedule did not reflect the regional outline presented at its Committees meeting. *Id.* Only a total of four public hearings were held in Miami-Dade and Broward Counties. *Id.* None of the hearings in Miami-Dade and Broward began after 6:00 p.m. *Id.* Overall, the public hearings were held at times and in locations that precluded a vast majority of working citizens from participating. Eighteen of the 24 public hearing were held during the day between normal business hours. Only four of the public hearings were held after 6:00 p.m. The hearing

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House plans.

schedule also failed to include several of Florida's largest and most diverse cities.[7] At many of the public hearings, the public requested that the Legislature revise the hearing schedule to include more cities and communities and to start them after working hours. These requests were rejected. For example, at the first public hearing, several public speakers expressed concerns about the hearing schedule. Alachua County Commissioner Rodney Long requested that the committee hold hearings after working hours:

> And I also ask when you hold these hearings so the public hearings you have them so the public can come. The average person works 9:00 to 5:00 or 6:00 in the evening time

(App. Ex. 6, July 12, 2001 Hearing Transcript at 77).

Committee members also requested that the Committee adopt redistricting criteria:

> Representative Sobel: Most of my questions deal with standards. What are the standards or principles that the Legislature will be guided by in drawing the lines for various districts? Contiguity is the only criterion required by the Florida Constitution, but what about the principles recommended by the Constitution Revision Commission? (*Id.* at 87-88)

The public also requested that the Legislature return and provide an opportunity to review proposed redistricting plans. The League of Women Voters testified:

> We'd also like to urge you to have another set of hearings after you get an initial plan. Unlike our colleagues in the

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[7] Public hearings were not held in high population cities such as St. Petersburg, Hialeah, Port St. Lucie, Fort Lauderdale, and Miami.

> southern part of the state, we are able to come and testify, again, because you are right here in Leon County's backyard. But I think it's only fair to the rest of the state that they have another set of hearings after you get an initial plan. (*Id.* at 56)

At nearly all the public hearings, the public requested that the Legislature adopt redistricting standards and hold the public hearings after business hours (App. at Ex. 66). The public also requested that the Legislature revisit their communities and allow them the opportunity to comment on proposed plans before their adoption. *Id.* However, the Legislature did not adopt redistricting criteria and failed to hold follow-up hearings.

6. Public Redistricting Criteria

Although the Legislature's public hearing start times and locations provided an exclusive and limited number of Florida's citizens to participate, the testimony that was presented to the Committee was uniform regarding the redistricting criteria the public wanted the Legislature to adopt and their plans to reflect. These criteria were as follows:

1. Protect rural counties and group them together because of agricultural interests;
2. Use logical boundaries;
3. Do not unnecessarily split county and municipal boundaries;
4. Keep the core of existing districts;
5. Draw compact districts;
6. Protect minority incumbents and do not pair incumbents;
7. Draw lines that reflect communities of interest;
8. Do not engage in political or racial gerrymandering;
9. Draw districts that reflect the states political registration; and

10. Do not link Southwest Florida with Southeast Florida.[8]

7. House Committee and Floor Proceedings

There were four House committees that were responsible for crafting legislative and congressional plans.[9] The Speaker of the House appointed each member of the House Committees and his appointments were principally based upon partisanship and to ensure that the Republicans constituted a majority of the membership of each Committee. As a result, the number of Democrats included on the House Committees was nominal.[10] The House Committees held meeting at the same times. (*See, e.g.*, December 12, 2001, House Calendar) No amendment that was introduced by a Democratic Committee member or member of the House was adopted in committee or on the floor.

8. Senate Committee and Floor Proceedings

The redistricting proceedings in the Senate mirrored the House proceedings, with one exception. The Senate did not draw a House plan. Instead, the Senate informed the House that it was not going to draw House districts and the Senate

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[8] Exhibit 66 to the Appendix contains the references from the public hearing transcripts.

[9] The House committees were House Procedural and Redistricting Council ("Procedural"), House Congressional Redistricting Committee ("Congressional"), House Redistricting Committee ("House"), and Senate Redistricting Committee ("Senate") (collectively "House Committees").

[10] The partisan break down for each House Committee was as follows: Procedural (13 Republican and 6 Democrat); House (6 Republican and 3 Democrat); and Senate (4 Republican and 3 Democrat).

expected that the House would not draw Senate districts. However, as noted, the House ignored the Senate's overture and drew a Senate map.

There were three Senate committees that were primarily responsible for drafting and approving plans for the chamber's consideration. The number of Democrats included on the Senate Committees was also limited and no Democrat chaired or co-chaired a Senate Committee.[11] As in the House, no Democratic Committee member's proposal was ever adopted in committee or on the floor.

The Senate Legislative meetings of February 28, 2002, March 7, 2002 and March 8, 2002 were each cancelled effectually limiting public participation. (App. at Ex. 39). The Senate Committee posted the final maps after midnight on the morning of the Senate Legislative Committee of March 12, 2002. (App. at Ex. 2e).

At the Committee Meeting of March 12, 2002, the Chair of the Committee voted against the Committee's map and voiced his serious concerns about the public's inadequate notice and ability to participate in the process:

> I'm voting no because I feel like the public didn't have enough time on this particular issue. If you have a conscience that's bothering you, then I guess you could join me, but I'm not asking that. I'm just saying mine did....

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[11] The partisan break down for each House Committee was as follows: Procedural (13 Republican and 6 Democrat); House (6 Republican and 3 Democrat); and Senate (4 Republican and 3 Democrat).

(App. at Ex. 2d, March 12, 2002 Hearing Transcript at 147-48). The Committee approved a Senate map in spite of the Chair's concerns.[12]

When the Republicans finally reached a last-minute resolution of their dispute, the Senate's map was not referred to a House Committee or otherwise considered. The Senate also did not refer the House map to a Senate Committee or otherwise consider the House map. As a result, members of Legislature had no idea of what the proposed legislative maps contained.

One need only to look at the orchestrated partisan tactics utilized in the Legislature during the final vote on the Resolution to gain a full appreciation of the Legislature's failure to comply with their constitutional responsibilities to the public to provide for an open discussion. The Speaker selected two Republicans to debate the resolution. All debate was limited to them, and no Democrat was afforded an opportunity to debate. On the final vote, all Democrats voted "No." (House Journal, page 2950, March 22, 2002).

In an appropriate statement of the legislators' failure to fully understand the proposed maps, Rep. Green (R) would later publicly state that:

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[12] The posting of proposed Senate Committee maps with little or no time for public consideration was customary. Indeed, the Senate's proposed Senate maps that were to be considered by the Senate chamber on March 15, 2002, were not posted until the morning of the 15th.

> she plans to meet with local political leaders and attorneys this week to discuss court action. I was floored when I saw the map Monday.

As a result of the partisan mischief conducted in the Legislature, the Resolution did not comply with traditional redistricting principles. The Resolution ignores the public, their testimony, and the principles established by federal and state law.

SUMMARY OF ARGUMENT

This Court should declare the Joint Resolution invalid, on the following grounds: (1) the legislative process that preceded the enactment of the redistricting plans denied Floridians a meaningful opportunity to participate in the political process, and discriminated against Floridians on the basis of race, ethnicity, age and English language proficiency; (2) both the House and the Senate plans result in retrogression and dilution of opportunities for Blacks to elect their candidates of choice; (3) both the House and the Senate plans were drawn based upon national origin in a manner that impermissibly discriminates amongst Hispanics; (4) both the House and the Senate plans constitute extreme partisan gerrymandering, in that they substantially disadvantage Democrats in their opportunity to influence the political process effectively; and (5) the Senate plan was drawn to circumvent the term limits provision of the Florida Constitution.

ARGUMENT

I. THE LEGISLATURE'S REDISTRICTING PROCESS DENIED FLORIDIANS THEIR CONSTITUTIONAL RIGHT TO PARTICIPATE IN THE PROCESS, AND WAS DISCRIMINATORY.

A. The Legislature's Public Hearing and Legislative Process Violated the Right of the People to Political Power and to Instruct Their Representatives, Embodied in Article I, Sections 1 and 5 of the Florida Constitution.

The Florida Constitution "begins with a Declaration of Rights, a series of rights so basic that the founders accorded [them] a special privilege." *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227 (Fla. 2000). This Court has interpreted these rights to require the greatest protection from government overreaching. *See Traylor v. State of Florida*, 596 So.2d 957, 963 (Fla. 1992). Key among these special rights are the right of the people to political power and the right of the people to instruct their representatives.

The process that the Republican-controlled Legislature implemented during both the public hearing phase and the legislative Session violated the fundamental rights embodied in Article I, Sections 1 and 5. The Leadership repeatedly represented to the people during each of the public hearings that the purpose of the hearings was to "listen to ... and consider [their] input in this very important process." *See e.g.* Transcript, Tallahassee Public Hearing, July 12, 2001 at 4 (Sen. Webster, Chair, Senate

Reapportionment), App. Ex. 6. Yet, the very structure of the process effectively thwarted the average Floridian's opportunity to address their representatives on matters related to redistricting.

The number of hearings that was actually held was substantially fewer than the number of hearings that were initially promised and that were held during the last round of redistricting in 1991; the bulk of the hearings were held during normal business hours, when most Floridians were at work; the hearings were held in locations that were not readily accessible; only one of the 24 hearings was held in a predominately Black community, and only one was held in a predominately Hispanic community; the hearings were all conducted in English; members of the public were not accorded the courtesy of a response to ***any*** of their inquiries about the process and procedures that would be followed and the criteria that would be used to draw the district lines that would control their political lives for the next decade.

There were no public service ads during the public hearing process and, despite repeated requests from the public that it do so, the Legislature did not conduct forums around the State after preliminary maps were developed so as to afford the public an opportunity to comment and instruct their representatives on the plans. The Legislature relied virtually exclusively upon the Internet to provide information to the public about redistricting. These factors combined to deny Floridians the right to

instruct their representatives on redistricting and, thereby denied the people their right to political power.

Although the explosive growth of the Internet over the past decade has enhanced our society's ability to communicate readily with each other, the virtues of the Internet are relevant only to those who have access to it. While many people now use the Internet as regularly as they use the telephone, there are still vast numbers of people in this State who do not have access to the Internet. Blacks and Hispanics still lag behind other groups when it comes to having access to the Internet. *See Falling Through the Net: Toward Digital Inclusion - A Report on American's Access to Technology Tools*, October 2000 at xv-xii. (App. Ex. 53). The Legislature's reliance upon the Internet as its primary vehicle for communicating with the public about redistricting ignores the reality of the "digital divide" – a term used to describe the disparity between the levels of access that minorities and non-minorities have to technology – and effectively denied Blacks and Hispanics an opportunity to participate in the political process, in violation of Article I, Sections 1 and 5.

The infringement of the public's rights under Article I, Sections 1 and 5 is exacerbated by the fact that the Legislature simply ignored much of the public hearing testimony. In direct contravention of the representations that they made to the public that its concerns would be consider, the House legal counsel advised members of the House Committees that they were ***not*** required to give any weight to the public's

comments. *See e.g.* November 26, 2001 Transcript of Procedural and Redistricting Council. ("There's no duty, whatever, for you to factor any given input that you heard in the public hearings.") To invite members of the public to speak about redistricting, under the guise of gaining public input, and then to say that the public input could be ignored constitutes a clear fraud on the public, and a violation of Section 1 and 5 of Article I.

In the House, the House, Senate and Congressional subcommittees on redistricting met simultaneously. Members of the public who were interested in all three levels of districts, or wanted to share their views with each of the respective subcommittees on redistricting were forced to chose only one meeting to attend, because the three different subcommittee meetings were all held at the same time.

On the Senate side, the Legislative subcommittee that prepared the Senate plan cancelled three consecutive meetings, prompting the Chairperson of the Marion County Commission, (and the Chairperson of the Marion County Republican Executive Committee) to characterize the process as "a shame ... a sad process," and to chide the subcommittee for having put the public through so many machinations that many people had given up on trying to attend the meetings and offer input. *See* Transcript of Senate Legislative Committee Meeting, March 12, 2002 (App. Ex. 2d).

The sham nature of the entire public hearings process and the Legislature's deliberations during Session is perhaps best illustrated by the manner in which the

Republican-controlled House eliminated any meaningful debate on the Joint Resolution by allowing only the Republican sponsor of the Resolution and another Republican legislator who voted for the Resolution to debate for three minutes. Democrats were completely denied any opportunity to address the Resolution during the "debate" on the House floor.

The Legislature's entire process – from the public hearings to the Legislative committee meetings to the floor debates just prior to the Legislature adopting the Resolution – were designed to deny the public any meaningful opportunity to participate in the process that led to the adoption of the Joint Resolution, in violation of both the spirit and the letter of the rights guaranteed to the people under Article I, Sections 1 and 5 of the Florida Constitution. Accordingly, this Court should find that the Joint Resolution is invalid.

B. The Legislature's Failure to Conduct the Redistricting Proceedings in Any Language Other than English Violated § 203 of the Voting Rights Act.

Section 203 of the Voting Rights Act provides that "no covered State or political subdivision shall provide voting materials only in the English language," and requires that:

> Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other material ***or information relating to the***

> ***electoral process***, including ballots, it shall provide them in the language of the applicable minority group as well in the English language.

(Emphasis added).

The purpose of Section 203 is to allow language minorities and those persons of limited English proficiency an equal opportunity to participate in the political process. Accordingly, Section 203 "should be broadly construed to apply to ***all stages of the electoral process***." 28 C.F.R. §55.15 (1976) (emphasis added); *United States v. Metropolitan Dade County*, 815 F. Supp. 1465, 1478 (S.D. Fla. 1993) (while Attorney General's administrative interpretation is only suggestive, "it is consistent with the central purpose of § 203 of the Voting Rights Act"). Moreover, the United States Supreme Court has long held that since "[t]he right to vote means more than the mechanism of marking a ballot or pulling a lever," the provisions of the Voting Rights Act should be construed broadly. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969).

Consistent with Congress' intent in amending the Voting Rights Act to include Section 203, and consistent with the well-established United States Supreme Court precedent that the Voting Rights Act should be broadly construed to encompass all stages of the electoral process, the redistricting process is properly viewed as being subject to the language assistance provisions of Section 203.

Since there is no dispute that the Legislature's entire redistricting process, including the Internet websites of both Chambers, all printed materials, and all public hearing and committee proceedings were conducted in English only,[13] this Court should declare the Joint Resolution invalid under Section 203 of the Voting Rights Act.

C. The Legislature's Failure to Adopt Objective Criteria to Guide the Redistricting Process Renders the Joint Resolution Invalid.

Despite repeated requests, both from members of the public and from individual Legislators, the Legislative leadership consistently refused to identify any objective criteria that would be used in drawing districts, other than the constitutional requirements of one-person, one-vote, and contiguity. The House Minority Leader posed the following question to the Chairman of the House Procedural & Redistricting Council, and received the following response:

> Q: What are the criteria that the Legislature will be guided by in drawing the lines for the various districts?
>
> A: We will enter the redistricting process without preconceived notions of where any particular district line will be drawn. ***The only criteria that we can accurately state will be used regardless of the circumstances are those required by law.***

(App. Ex. 62 at ¶8(A) (Emphasis added).

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[13] The impact of the Legislature's failure to comply with Section 203 is dramatic. The chilling effect of participation in the public hearings process was so severe that only 24 Hispanics spoke at the public hearings that were conducted in the covered jurisdictions. *See* (App. Ex. 66).

When a smiliar question about criteria was posed to the chairman of the House Subcommittee on House Redistricting, the response was:

> ***We have to wait to see how the situation unfolds*** as far as any other criteria [than those provided in the Constitution]. I would imagine the members themselves will maybe have their own set, spoken and unspoken . . . .

See December 3, 2001 Transcript, Procedural and Redistricting Council, House Committee Meeting at 14-15 (emphasis added).

Rather than provide the public and its members with an objective set of criteria by which all parties would know any proposed maps would be judged, the Legislative Leadership chose to wait until after the fact to develop their justifications for the maps now before the Court.

The lack of a set of objective criteria renders the Joint Resolution vulnerable to non being precleared under Section 5 of the Voting Rights Act. One of the factors that the United States Justice Department considers relevant for preclearance purposes is "[t]he extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction [and] ignores relevant factors such as compactness." *See* 28 C.F.R. §51.59.

The following are among the redistricting criteria which the Legislature could have adopted but chose not to do so: (1) geographical compactness, (2) respect for political subdivisions, (3) respect for precinct lines, (4) protection of incumbents, (5)

preservation of district cores; and (6) respect for communities of interest. *See Bush v. Vera*, 517 U.S. at 962; *Shaw v. Hunt*, 517 U.S. 899, 905-06 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *cf. Lawyer v. Department of Justice*, 521 U.S. 567, 581 (1997) (considering, in challenge to Florida Senate districts, whether communities of interest had been preserved).

Dr. Gerald R. Webster, Chair and Professor of the Department of Geography at the University of Alabama, and a recognized expert in political geography has reviewed and analyzed both the House and Senate plans adopted pursuant to HJR 1987, as well as the current plans, and a set of alternative plans ("the Fairness Plans"). *See Report on State House and Senate Districts in Florida by Dr. Gerald A. Webster (2002)*, (App. Ex. 64) (hereinafter "Webster Report"). Dr. Webster concludes that the newly adopted plans are worse than both the existing plans and the Fairness Plans under a number of traditional redistricting criteria. The Joint Resolution plans divide more counties and include more total county splits than the current plans, and the new House plan also increases the number of census places that are divide when compared with the current House plan. The new House plan is also less compact than the Fairness House Plan, and unnecessarily moves a large proportion of constituents from their current districts into new districts. *See Webster Report.*

Given that the Legislature's plans fare worse than the current plan and significantly worse than the alternative Fairness Plans, it is clear that the Legislature's motivation could not have been to uphold these traditional criteria.

II. THE HOUSE AND SENATE PLANS ADOPTED PURSUANT TO THE JOINT RESOLUTION VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT

This Court has previously recognized that it is "obligated to consider the Voting Rights Act in [its] evaluation of the validity of the [Legislature's redistricting] plan." *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 282 (Fla. 1992). In addition to the fatal defects cited above, the plans themselves are riddled with flaws that render them invalid under Section 2 of the Voting Rights Act.

In adopting the Voting Rights Act, Congress sought to "banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The Voting Rights Act "marshaled an array of potent weapons against the evil," one of the most potent of which is Section 2. *Id.* at 337. Section 2 of the Voting Rights Act prohibits any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color [or membership in a language minority group]." 42 U.S.C. §1973(a). In 1982, Congress

amended Section 2 to make clear that a violation does ***not*** require proof of discriminatory purpose and may be shown on the basis of discriminatory effects alone. Thus, Section 2 provides that the right to vote has been denied or abridged if:

> 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 process and to elect representatives of their choice.

Id. § 1973(b). In short, Section 2 prohibits any dilution of minority voting strength.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court established the following three-pronged test which must be met as a precondition of proceeding with a vote dilution claim under Section 2. The minority group must establish that: (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) that racial bloc voting usually results in the defeat of the minority group's candidate of choice. *Gingles*, 478 U.S. at 50-51.

As explained above, the three *Gingles* factors are easily satisfied in the Florida legislative redistricting context. The next level of the Court's analysis then:

> is to consider the "totality of circumstances," and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" ... whether the political process is equally open to minority voters.

Id. at 79. (Citations omitted). *See also Johnson v. DeGrandy* 512 U.S. 997, 1011 (1994). In determining how a redistricting plan affects the opportunity of minority groups to participate in the political process and to elect representatives of their choice, courts must undertake a wide-ranging and highly fact-dependent inquiry. *See id.* at 1011-13; *cf. In re Senate Joint Resolution 2G*, 597 So. 2d at 289 (Shaw, J., dissenting) (adjudication of Section 2 claim requires "fact-intensive analysis" with multiple fact-dependent criteria).

The relevant factors include: (1) "the extent of any history of official discrimination in the state ... that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;" (2) "the extent to which voting in the elections of the state ... is racially polarized;" (3) "the extent to which members of the minority group have been elected to public office in the jurisdiction;" (4) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" (5) "the extent to which members of the minority group in the state ... bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," among others. *Gingles*, 478 U.S. at 36-37.

As explained below, Petitioners believe that the Resolution fails to comply with the Voting Rights Act, and so assert for three separate reasons.

A. Both the House and Senate Plans Reflect Statistically Significant Decreases in Minority Voters Within Individual Districts.

The Joint Resolution violates the Voting Rights Act because several districts in which Blacks have historically demonstrated an ability to elect their candidates of choice, the percentage of minority registered voters has been decreased to the extent that Blacks may no longer be able to do so.

The Supreme Court has recognized that:

> manipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door. "Section 2 prohibits either sort of line-drawing where its result, 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters."

DeGrandy, 512 U.S. at 1007 (citing and quoting *Voinovich v. Quilter*, 507 U.S. 146, 153-154 (1993) (quoting *Gingles*, 478 U.S. at 47)). The Legislature's unlawful manipulation of district lines in this case is apparent from or, at the very least, strongly implicated by comparing the Joint Resolution with the current plans. Dr. Allan Lichtman, one of the nation's leading voting rights experts, has analyzed both the House and Senate plans within the Joint Resolution to determine if they result in unlawful dilution of minority voting power. *See Report on State House and Senate Districts in Florida by Dr. Allan J. Lichtman (April 2002),* (App. Ex. 65) (hereinafter

"Lichtman Report"). Specifically, Dr. Lichtman analyzed whether the Legislature's plans would result in *retrogression* – the diminishment of minority voters' opportunities relative to the existing plans – or *dilution* – the frustration of minority voters' opportunities to elect candidates of their choice.[14] *See Lichtman Report* at 2, 6. Dr. Lichtman's analysis "discloses serious warning signs of retrogression and voter dilution" in violation of Section 2, and identifies "clear evidence of retrogression and dilution in Black voter opportunities." *See Lichtman Report* at 10.

In conducting his analysis, Dr. Lichtman reviewed the five important measures of a minority group's voting strength: (1) Black voting-age population ("BVAP"); (2) Black voter registration ("BVR"); (3) Black voter registration among Democratic primary voters; (4) Black turnout in general elections; and (5) Black turnout in primary elections.[15] Dr. Lichtman analyzed Black voter registration by reviewing data provided by the state, and he estimated turnout by employing ecological regression analysis based on previous elections. *See Lichtman Report* at 7-8. Voter registration and voter turnout for both the primary and general elections are critically important in Florida

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[14] Courts have held that evidence of retrogression can be a factor in establishing a Section 2 violation. *See, e.g., Nash v. Blunt*, 797 F. Supp. 1488, 1498 (W.D. Mo. 1992) (three-judge court), *aff'd sub nom. African American Voting Rights Fund Inc. v. Blunt*, 507 U.S. 1015 (1993).

[15] Dr. Lichtman's analysis focuses on the Democratic primary, because Blacks in Florida are overwhelmingly Democrats. *See Lichtman Report* at 7 & n.2

due to the drop-off in Black voter registration and turnout as compared to Black voting-age population.

1. **The House Plan**

Dr. Lichtman analyzed the minority districts outside of Miami-Dade County and districts within Miami-Dade County, where there was a substantial rearrangement of majority-minority districts. He concluded that there was "clear evidence of retrogression and dilution in black voter opportunities in House District 15 and potential problems for black voters in House Districts 39 and 94." *See Lichtman Report* at 10.

Specifically, House District 15's BVAP and BVR each decrease by 5 points from the current plan. *Id.* at 10-11. The percentage of actual voters in the general election declined from a "near-majority of 49 percent . . . to 44 percent," and the percentage of Blacks among Democratic registered voters fell from 70 percent to 60 percent. *Id.* at 10-12. Most telling, the percentage of Blacks among Democratic primary voters "drops from a 52 percent majority . . . to a 48 percent minority." *Id.* at 12. Thus, Dr. Lichtman concludes: "This loss of the African-American majority among Democratic primary voters provides ***a clear indication of the retrogression and dilution of Black voter opportunities*** in District 15." *Id.* (Emphasis added).

In House Districts 39 and 94, Dr. Lichtman predicts that there would be "potential problems" for Black voters to elect the candidates of their choice. *Id.* at 12-

13. In House District 39, the Black voter registration drops 6 points, from 57 percent under the current plan to 51 percent under the newly adopted plan, and the percentage of Blacks among general election voters drops from 48 percent to 43 percent. *Id.* at 12. Although the number of Black Democrats remained largely unchanged, "the changes in Black voter strength in general elections are potentially consequential for the ability of African-American voters to elect candidates of their choice" to House District 39. *Id.* at 12-13.

In House District 94, BVAP drops a dramatic 16 points from the current plan to the plan adopted under the Joint Resolution. *Id.* at 13. Significantly, the Black percentage of registered voters plunges 21 points, from 66 percent to 46 percent, and the percentage of Blacks among voters in general elections declined a drastic 20 points, from a "substantial 66 percent majority to a 46 percent minority." *Id.* at 13. These numbers led Dr. Lichtman to conclude that "the sharp decline in Black voter strength in District 94 presents a potential impediment to the opportunity for Black voters to elect candidates of their choice to House positions." *Id.* at 11.

Dr. Lichtman also focused on Miami-Dade County, where "the complex rearrangement of districts with substantial components of Blacks," *id.* at 10, "indicates that the newly enacted [House] redistricting plan results in the retrogression and dilution of Black voter opportunities." *Id.* at 13. Whereas, the current House plan has four districts – 103, 104, 108, and 109 – in which Blacks constitute a majority of the

voting-age population, registered voters, and turnout in both primary and general elections, the newly enacted plan includes "only three such districts – 103, 104, and 109." *Id.* at 13-15. Although the new District 108 has a BVAP of 58 percent, "a more searching inquiry shows that as a result of low Black registration and turnout rates, Blacks constitute in District 108 only 45 percent of registered voters and 39 percent of actual voters in general elections." *Id.* at 15.

Moreover, House Districts 103 and 109 are "packed" in that they include "concentrations of Blacks well beyond what is necessary to provide Black voters a reasonable opportunity to elect candidates of their choice to House positions." *Id.* at 15. District 103 has 68 percent BVAP and 72 percent BVR. *Id.* at 14, 15. District 109 has 61 percent BVAP and 68 percent BVR. *Id.* These numbers led Dr. Lichtman to conclude that "high turnout Blacks are packed into districts that waste substantial Black voter strength, whereas low turnout Blacks are included in districts where Black voter strength is lacking." *Id.* at 15. Dr. Lichtman further concluded that "[t]he unpacking of new House Districts 103 and 109 could avoid retrogression by enhancing Black voter strength in new House District 108." *Id.* at 15-16.

Additionally, it is evident that House District 118, which has 47 percent BVR can be readily modified to create a majority BVR, thereby eliminating Black voter dilution and creating a fifth Black effective majority district in Miami-Dade County. *See* Statistics Report (App. at Ex. 68). ***Thus, not only does the House plan result in***

retrogression (by reducing the number of effective Black districts in Miami-Dade County from 4 to 3), but the plan also violates Section 2 by failing to create a fifth Black-majority district where it most certainly could have. *Id.* at 15-16.

2. The Senate Plan

Dr. Lichtman's analysis concludes that in Senate District 1 (currently 2) there is "potentially consequential changes in Black voter strength in general elections." *Id.* at 16. New District 1 suffers a drop from a majority BVAP (50 percent) to a minority BVAP (46 percent). Also, the percentage of Blacks among actual general election voters goes down from 48 percent to 46 percent. A well-organized campaign among a racially polarized electorate could lead to minority voters losing the opportunity to elect a candidate of their choice in Senate District 1.

A reduction in Black voting strength also occurred in Senate Districts where Black voters comprise a significant portion (albeit not a majority) of the electorate. For example, Senate District 18, which is District 21 under the existing plan, has 41.2 percent BVAP. Under the Resolution, District 18's BVAP dips to 37.4 percent, making it less likely that the candidate of choice for Black voters will be elected in the future. This retrogression in Senate District 18 is particularly significant because the district includes substantial portions of Hillsborough County, which is one of five (5) counties within the state that is subject to the pre-clearance requirement of Section 5 of the Voting Rights Act. The decrease in the effectiveness of Senate District 18 will

prevent the Joint Resolution from being pre-cleared, and require that District 18 and surrounding districts be redrawn.

Another example of the decrease in the effectiveness of minority districts under the Joint Resolution is Senate District 19 (current District 14) in the Orlando area. The district drops from 32.5 percent BVAP under the existing plan to 29 percent BVAP under the Joint Resolution. Although, these are not majority-minority districts, they are "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups" to elect candidates of their choice within a single district. *DeGrandy*, 512 U.S. at 1020. The reduction in the percentage of Black voters in these districts raises serious concerns about whether the Joint Resolution has rendered such coalition-building illusory for Black voters.

B. The Persistent Lack of Proportionality in the Representation of Blacks Suggests Dilution.

In *DeGrandy*, the United States Supreme Court approved Florida's 1992 plan for Senate districts upon finding that "both minority groups [Blacks and Hispanics] constitute effective voting majorities in a number of state Senate districts substantially proportional to their share in the population." 512 U.S. at 1024. While noting that Section 2 does not require drawing the maximum number of majority-minority districts possible, *see id.* at 1017, the Court made clear that failure to ensure "substantial proportionality" is probative (though not dispositive) of minority vote dilution, *see id.*

at 1015-16; *id.* at 1025 (O'Connor, J., concurring) ("Lack of proportionality is probative evidence of vote dilution.").

In this case, the redistricting plans adopted by the Legislature come nowhere close to achieving "substantial proportionality" with respect to Blacks. Based on the 2000 Census, Blacks now constitute 14.6 percent of Florida's population, up one percentage point from the 1990 Census – which is a 7.3 percent increase in their share of the population. Yet, among 120 House districts the number of majority-black districts remains at 13, or 10.8 percent, unchanged from 1992. Among 40 Senate districts just two — or 5.0 percent — are majority-Black. These data demonstrate a conspicuous lack of proportionality.

Moreover, the relevant data point for measuring proportionality is not the percentage of districts in which Blacks comprise a simple majority of the voting-age population, but rather the percentage of districts in which Blacks comprise an "***effective*** voting majority." *DeGrandy*, 512 U.S. at 1014, 1024 (emphasis added); *Gingles*, 478 U.S. at 38, 50-51 n.17 (repeatedly referring to "effective voting majority"). As the plain language of Section 2 indicates, what matters is the opportunity for members of a minority group "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As a "practical" matter, "[a] simple majority is not always sufficient to provide this opportunity." *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1348 n.4 (8th Cir.

1995). If non-black voters are more cohesive than black voters in districts where Blacks comprise a simple majority, then the lack of proportionality in the House and Senate plans may be even more severe than the data above suggest. Relevant facts bearing on this issue have yet to be developed in the record; however, as noted above, Dr. Lichtman, concludes that the Legislature's plans are likely to produce *even fewer* "effective" black districts than at present.

C. New Election Laws Will Adversely Affect Minority Voting Strength

Another factor relevant to the Section 2 inquiry is "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 45. The impact of three recently enacted laws on minority voting strength has not yet been systemically examined. The first law, §100.061, Fla. Stat., passed in 2001, eliminates run-off elections in primaries for the Fall 2002 election, enabling a candidate to proceed to the general election by winning a plurality of votes. In a primary with several candidates, the candidate who receives a plurality of the vote will win the election even though Black voters prefer another candidate.

Under the state's new open primary law (Article I, §5 of the Florida Constitution), adopted in 1998, in a district that is overwhelmingly Democratic, but Blacks are less than the overwhelming majority of Democrats, Republicans could

decide not to field a candidate in a general election, which would allow Republicans to then vote in the Democratic primary, and defeat the candidate of choice for Black voters.

Additionally, the state is still in the process of attempting to obtain pre-clearance of the Florida Election Reform Act of 2001. The Department of Justice has twice requested that the state submit additional information on its procedures for maintaining and purging voters from the central voter file. In view of the thousands of voters, primarily Black voters, who were purged from the voter rolls just prior to the 2000 Presidential election, the potential for dilution and retrogression is significant.

In sum, the district lines drawn by the House and Senate plans—both on their face and against the backdrop of recently enacted voting laws—suggest that the Legislature has retrogressed and diluted minority voting strength in violation of Section 2. Absent any countervailing evidence (and there is none here) of equal political opportunity between Blacks and non-Blacks, lack of proportionality as well as the reduction of black voters in particular districts raise serious doubts about the legality of the plans.

If this Court is not prepared to find a Section 2 violation on the face of the plans, then it should retain jurisdiction, order comprehensive fact-finding, and then revisit the Section 2 issues "based on the totality of circumstances," as the language of Section 2 expressly requires. Relevant fact-finding would include, without limitation, ecological

regression analysis to determine the effective strength of minority voters in districts where they comprise a majority or a significant percentage of the voting-age population; an assessment of the impact of the "no run-off" and open primary laws on minority voting strength; an historical examination of voting-related discrimination in the state and particular districts; and scrutiny of the effects of past discrimination in education, employment, health, and other areas that may hinder effective minority participation in the political process. *See Gingles*, 478 U.S. at 44-45. Without considering such evidence, the Court cannot conclude that the plans pass muster under Section 2.

III. THE JOINT RESOLUTION VIOLATES THE EQUAL PROTECTION CLAUSE OF BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The Fourteenth Amendment to the United States Constitution prohibits states from purposefully discriminating against any person on the basis of race, ethnicity, or national origin. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). The equal protection guarantee in Article 1, Section 2 of the Florida Constitution is at least as protective as the federal Equal Protection Clause. *See Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987) (state action that "primarily burden[s] certain groups that have been the traditional targets of irrational, unfair and unlawful discrimination" is inherently suspect and subject to strict scrutiny under Article 1, Section 2 of the Florida Constitution).

Disparate treatment, based on race or national origin, triggers strict scrutiny under both the Federal and Florida Constitutions. As this Court wrote a few years ago:

> It is with great dismay then that we must acknowledge, more than two hundred years after declaring this truth to the world, that there are still those among us who would deny equal human dignity to their brothers and sisters of a different color, religion, or ethnic origin. The justice system, and the courts especially, must jealously guard our sacred trust to assure equal treatment before the law.

Powell v. Allstate Ins. Co., 652 So. 2d 354, 358 (Fla. 1995).

In enacting HJR 1987, the Legislature systematically provided preferential treatment to Cuban Hispanics at the expense of other Hispanics; the Legislature also violated the Equal Protection Clause by diluting black voting strength.

A. The Joint Resolution Discriminates Among Hispanics.

Dr. Lichtman analyzed the Legislature's plans and concluded that there was a significant disparity in the plans' treatment of people of Cuban origin versus Hispanic people of non-Cuban origin. "The statistical evidence indicates that the new state House and Senate plans treat Cuban-Hispanics differently than non-Cuban Hispanics." *See Lichtman Report* at 15. Hispanic voters of Cuban origin receive better treatment than Hispanic voters not of Cuban origin.

In Broward and Miami-Dade Counties, the Legislature's plan calls for 11 Hispanic-majority House seats, seven of which have a Cuban majority among the Hispanic population. Thus, Cubans will predominate over non-Cuban Hispanics in 64

percent of these districts, even though Cuban Hispanics comprise only 45 percent of the Hispanic population in Broward and Miami-Dade Counties. *See Lichtman Report* at 15. (App. Ex. 65). Still more telling, the House plan places a full 83 percent of Cuban Hispanics in one of the 11 majority-Hispanic districts, while placing only 55 percent of non-Cuban Hispanics in a majority-Hispanic district – a gap of 28 percentage points. *See id.*

In the Senate plan, there are three districts (Districts 36, 38, and 40) that are majority-Hispanic. All three are in Miami-Dade County. In Miami-Dade County, the ratio of Cuban to non-Cuban Hispanics is roughly 50:50. *See id.* at Table 7. Yet in *all three Senate districts,* the seats do not reflect this parity, but instead, place Cuban Hispanics in the majority in *all* of the districts, predominating over non-Cuban Hispanics. *See id.* at 20. Moreover, 81 percent of Cuban Hispanics are in one of those three majority-Hispanic districts, while only 59 percent of non-Cubans are in a majority-Hispanic district. *See id.* Thus, voters of Cuban origin are far more likely to be represented by the candidate of their choice than are voters of Columbian, Venezuelan, Mexican, Puerto Rican or Peruvian origin.

In other words, compared to non-Cuban Hispanics, Cuban Hispanics are 51 percent more likely in the House plan and 37 percent more likely in the Senate plan to be placed in a majority-Hispanic district. These glaring disparities in practical opportunity for Cuban versus non-Cuban Hispanics to elect legislators of their choice

gives rise to a strong inference of preferential treatment. Absent "the most exceptional circumstances," preferential treatment based on national origin violates the Constitution. *Oyama v. California*, 332 U.S. 633, 646 (1948); *see id.* ("as a general rule, [d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality") (internal quotation marks and citation omitted).

This disparity cannot be explained by claiming that it is the result of geography. When Dr. Lichtman scrutinized data in precincts that were split among legislative districts – i.e., precincts split at the block level, where there is no political data, only racial data – *he found that Cuban-Hispanics and non-Cuban Hispanics were treated differently, even when they lived in the same precinct*. *See Lichtman Report* at 15, 20. (App. Ex. 65). If the legislature's actions were not designed to advantage Cuban Hispanics at the expense of non-Cuban Hispanics, then one would expect to find that when a precinct containing both groups of voters was split, and part of the precinct was placed in a Hispanic-majority district, and part of a precinct was not, there should be an equal distribution of Cuban and non-Cuban Hispanics in the Hispanic-majority and the non-Hispanic majority district. And yet, the distribution of Cuban and non-Cuban Hispanics in these split precincts is not equal: in the Senate plan, 54 percent of Cuban Hispanics in precincts that are split are placed into Hispanic-majority districts, but only 46 percent of non-Cuban Hispanics are placed in such districts. While that difference

may, at first blush, seem slight, it is significant. Given that almost 40,000 Hispanics in Miami-Dade County reside in such "split precincts," an 8 percent gap "is far greater than the standard levels used in social science." *See Lichtman Report* at 15. (App. Ex. 65). Likewise, in the Senate plan, 71 percent of Cuban Hispanics in split precincts find their way into majority-Hispanic districts, but only 64 percent of non-Cuban Hispanics are accorded the same benefit. Again, the difference of 7 percent may seem small, but given the large number of voters captured in this analysis – over 100,000 in Southeastern Florida – the difference is statistically significant. *See id.* at 20.

This disparity was not random. As Dr. Lichtman explains, a simple test of proportions was conducted to determine if there is a statistically significant difference between the proportion of Cubans and the proportion of non-Cuban Hispanics, residing in split precincts, who were placed into majority-Hispanic districts. The results show that in both the House and the Senate plans, there is a less than 1 chance in a 10,000 that these differences are due to random chance. *See Lichtman Report* (App. Ex. 65). Thus, the evidence is highly probative of discriminatory treatment based on national origin.

Nor can the state claim that this disparity was the result of partisan gerrymandering, even assuming such a motive would be legitimate. Because no political data exists at the sub-precinct level, there is no way to split a precinct in a politically-conscious manner: the Legislature lacks data to know the party affiliation

and/or voting history of the voters it is assigning, at the sub-precinct level, among to legislative districts. *See Bush v. Vera*, 517 U.S. 952, 971 (1996) (plurality opinion) (splitting of voter tabulation districts "suggests that racial criteria predominated over other districting criteria in determining the district's boundaries"); *Miller v. Johnson*, 515 U.S. 900, 918 (1995) Thus, there could not have been a political motivation for the way in which the precincts were split.

"Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 532 U.S. 98, 104 (2000). And yet, in the districting plan, the Legislature has valued the votes of Cuban Hispanics more highly than the votes of non-Cuban Hispanics. "The idea that one group can be granted greater voting strength than another is hostile to the . . . basis of our representative government." *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969). The Legislature's plan fails this test, and therefore, should be invalidated.

B. The Joint Resolution Intentionally Dilutes of Black Voting Strength.

Finally, apart from whether the dilution of black voting strength in the House and Senate plans violates Section 2 of the Voting Rights Act, such dilution—if enacted by the Legislature with an intent to reduce the ability of Blacks to participate in the political process and to elect representatives of their choice—may violate the

constitutional guarantee of equal protection. *See Garza v. County of Los Angeles*, 918 F.2d 763, 769-71 (9th Cir. 1990) (finding intentional fragmentation of Hispanic voters to be unlawful under both the Equal Protection Clause and the Voting Rights Act); *cf. Holder v. Hall*, 512 U.S. 874, 885 (1994) (remanding case for consideration of plaintiff's constitutional claim, even though plaintiff had no valid vote dilution claim under section 2).

IV. THE JOINT RESOLUTION IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER IN VIOLATION OF ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION.

The U.S. Supreme Court has held that a claim for partisan gerrymandering is justiciable under the federal equal protection clause, *see Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion). In *Bandemer* the Court noted that in the statewide redistricting context the partisan gerrymandering inquiry focuses on the voters' direct or indirect influence on the elections of the state legislature as a whole. *Id.* at 131. Gerrymandering claims are premised on the notion that each political *group* in a state should have the same chance to elect representatives of its choice as any other political group. *Id.* In *Karcher v. Dagget*, 462 U.S. 725 (1983), Justice Stevens' concurrence provided the reasoning behind focusing on group voting behavior when he wrote that, "the motivation for the gerrymander turns on political strength of members of the group, derived from cohesive voting patterns, rather than on the source of their common interests."

Partisan gerrymandering claims are also cognizable under the equal protection guarantee of Article I, §2 of the Florida Constitution. It is well settled that Florida's equal protection guarantees are at minimum the same as the protections contained in the U.S. Constitution. The Florida Constitution requires that all similarly situated persons are equal before the law. *See Shriners Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990). Further, legislation that infringes upon fundamental constitutional rights must be strictly scrutinized and will not pass constitutional scrutiny unless necessary to advance a compelling state interest. *See The Libertarian Party of Florida, et al. v. Smith*, 687 So. 2d 1292 (1996), where this Court concluded that where "equal protection" is raised, the reference to "reasonable," "nondiscriminatory resolution" must mean that lessened scrutiny will be applied to statutes that **do not** have substantial discriminatory impact upon voting, associational and expressive rights protected by the First and Fourteenth Amendments. This matter involves the voting rights of a discernable group which are fundamental constitutional rights under the state and federal constitutions. *In Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000) This Court wrote:

> The text of our Florida Constitution begins with a Declaration of Rights, a series of rights so basic that the founders accorded these a special privilege.

Id. at 1237 (quoting *Traylor v. State of Florida*, 556 So. 2d 957).

The *Harris* Court also stated that courts must observe with special vigilance whenever the Declaration of Rights is in issue and the right to vote is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished. *Harris*, 772 So. 2d at 1237.

Given Florida's nearly even partisan split between Democratic and Republican voters, the Resolution is an extreme example of partisan gerrymandering. It is an unlawful attempt to disenfranchise more than half of the state's voter population of registered and Democratic voters.

The projected results of the legislative districts is indicative of the Republican's attempt to disseminate against Democratic voters and maintain control of the Legislature for the next decade. *See Lichtman Report* (App. Ex. 65). The results of the projected outcomes of the 2002 races under the legislative house districts using the votes cast in the 2000 presidential election – an election that ended in a statistical tie, for all intents and purposes -- would result in the election of Republicans in an astonishing 68 percent of the districts. *Id.* Likewise, the results of the projected outcomes of the 2002 races under the legislative Senate districts using the votes cast in the 2000 presidential election would result in the election of Republicans to 63 percent of the seats. *Id.*

The Resolution is clearly a discriminatory partisan gerrymander and should be deemed invalid under Article I, §1 and Article I, §2 of the Florida Constitution.

V. THE JOINT RESOLUTION IS INVALID BECAUSE IT VIOLATES THE TERM LIMITS PROVISION OF ARTICLE VI, SECTION 4 OF THE FLORIDA CONSTITUTION.

Article III, § 15(a), requires that senatorial elections be staggered among four-year terms, which results in the election of approximately half of the Senate every two years. Elections in senatorial districts designated with odd-numbers are held in "years the numbers of which are multiples of four." FLA. CONST. ART. III, §15(a). Elections in even-numbered senatorial districts take place in each even-numbered year "the numbers of which are not multiples of four." *Id.* Therefore, during the senatorial elections of 1994, odd-numbered districts elected senators to serve four-year terms that expired in the year 1998. In turn, even-numbered districts in 1996 elected senators to serve until the reelections took place in 2000. In order to ensure that all elections are conducted under validly apportioned senate districts, Article III, §15(a), requires that the duration of some senatorial terms be shortened from four to two years during election years following reapportionment in order to maintain staggered senatorial elections.

The Resolution preserves the constitutional mandate of staggered election system. However, the Resolution renumbers certain senatorial districts to enable senators to extend their terms in office up to ten years, if re-elected. The Resolution violates Article VI, § 4's constitutional term limitation.

Although a plain meaning language interpretation of Article VI may lead to the conclusion that the term limitation prohibits senators *from running* or *appearing* on the ballot for reelection after serving eight consecutive years in office as opposed to simply remaining in office for periods longer than eight years, the relevant law concerning the constitutional interpretation provides that reliance upon a plain meaning interpretation is misplaced. This Court has held that the rule of constitutional construction is that "[w]hen adjudicating constitutional issues, the principles, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of a provision." *Florida Society of Ophthalmology v. Florida Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986) (citing *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1932); *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979) Therefore, it is the **intent** underlying the provisions of our constitution rather than its perceived plain reading that embody the protected spirit of our constitution.

The Term Limit Amendment was adopted pursuant to Article I, §1, which provides that "all political power is inherent in the people," and this Court has consistently considered the will of the people paramount. FLA. CONST. ART. I, §1. In ascertaining the intent of Article VI, §4(b), one needs to simply read the language employed in the language contained in Initiative Petition submitted and approved by this Court in *Advisory Opinion to the Att'y. Gen.—Limited Political Terms in Certain*

Elective Offices, 592 So. 2d 225 (Fla. 1991). The intent paragraph of the Initiative articulates its objective as follows:

> The people of Florida believe that politicians who remain in office too long may become preoccupied with reelection *and* become beholden to special interests and bureaucrats, and that the present limitations on the President of the United States and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office.

Id. The language is solely intended to avoid legislative and executive office holders from serving more than eight consecutive years in office. It expresses Floridians' concerns over prolonged relationships between politicians and special interest groups. The Amendment would be without any practical effect if the article were interpreted to simply prevent the reelection of eight-year political incumbents without also prohibiting their continued retention in office. To conclude otherwise would ignore the clear purpose of the Initiative.

Alternatively, the Court should also hold that the Legislature's scheme to circumvent the Article VI, §4(b) and the adoption of the Resolution is a violation of Article II, §5(b), which requires public officers to "protect, and defend the Constitution and government of the United States and the State of Florida." It could not be seriously argued that the intentional renumbering of senatorial districts to circumvent Article VI, § 4, and the will of the people is *an act in defense of* the state's constitution.

The Court should hold that the Resolution is invalid because it is contrary to the expressed will of the people.

CONCLUSION

In sum, the redistricting plans adopted by the Legislature on their face give rise to a valid inference of intentional discrimination in violation of the United States and Florida Constitutions. At this point, there is nothing in the record to support a finding—contrary to the strong facial evidence of purposeful discrimination—that racial considerations did ***not*** play a dominant role in the Legislature's districting scheme. If the Court is unwilling to declare the Joint Resolution unconstitutional on this ground, then it should declare the Joint Resolution invalid for one of the other reasons alleged, or retain exclusive jurisdiction and appoint a commissioner to make findings of fact an issue a report for the Court's final decision on the vote dilution claim.

Dated: April 18, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing and Appendix hereto was served by U.S. Mail on those parties on the attached service list on this 18th day of April, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was prepared with 14-point Times Roman in compliance with Fla. R. App. P. 9210(a)(2).

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