ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO2-194

IN RE: 2002 JOINT RESOLUTION
OF APPORTIONMENT

AMENDED BRIEF OF THE FLORIDA SENATE

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STATEMENT OF THE FACTS

The extraordinary effort by the Legislature to involve the public in the 2002 redistricting process was unprecedented in Florida history. A joint committee of the Senate and House of Representatives held 24 public hearings throughout Florida between July 12, 2001 and October 17, 2001. Members of the public were invited to attend the meetings and express their views. Some members from each chamber attended every hearing, and most members attended one or more hearings. More than 4,500 persons attended the hearings, and 1,082 persons made presentations to the committee. [App. D, p.141]

User friendly computer software was developed to enable easy access to relevant demographic data and maps of proposals for new district lines. [App. C, p. 113] Transcripts of the hearings and access to the software and data were expeditiously made available to the public on the legislative web site. [App. C, pp. 114 – 115] In a conscientious effort to comply with all constitutional mandates, both houses of the Legislature engaged the services of computer and statistical experts and attorneys with extensive experience in the field.

The senatorial districts described in House Joint Resolution 1987 ("the Senate Plan") are numbered consecutively from 1 to 40. All territory in the state is assigned to districts. All districts are single member. No territory is assigned to

more than one district. [App. C, p.105] All districts are contiguous. [App. C, p. 106]

The total population of the State of Florida, based on the 2000 Census, is 15,982,378. Therefore, the target population for each district in a 40-district senatorial plan is 399,559 persons (15,982,378 divided by 40). In the Senate Plan, Senate District 39, with 399,606 persons, is the most populous. District 40, with 399,488 persons, is the least populous. The total deviation for the Senate Plan is 118 persons, or 0.03%, a level never before achieved in Florida either by the Legislature or by court-ordered plan. [App. C, p.106]

The Senate Plan preserves the number of African American and Hispanic majority and influence districts. The Senate Plan, like the current districts, includes two majority African American districts and increases from four to five the number of African American influence districts containing African American voting age populations in excess of 25%.[1] The Senate Plan also retains three majority Hispanic districts and six Hispanic districts containing more than 25% Hispanic voting age population as in the current districts. [App. C, pp. 107 - 112]

[1] While the total population remains majority African American in District 1, the voting age population of African Americans has dropped from 50.9% to 46.6%. This was necessitated by the fact that the district was underpopulated by 21%.

The Senate Plan also maintains the political balance of existing districts. Half of the newly created senatorial districts have more Republicans than Democrats and half have more Democrats than Republicans. Republicans make up a majority of registered voters in 6 existing senatorial districts and a plurality in 19. Among the newly created senatorial districts, Republicans make up a majority of registered voters in 5 and a plurality in 20. Democrats make up a majority of registered voters in 14 existing senatorial districts and a plurality in 21, compared to a majority of registered voters in 12 and a plurality in 20 in the new plan. [App. C, p. 107]

In terms of ballots cast in the 2000 Presidential election, the Republican candidate, George W. Bush, received more votes than the Democratic candidate, Al Gore, in 24 of the 40 existing senatorial districts. Al Gore received more votes in 16. Among the newly created senatorial districts, George W. Bush would have received more votes in 23 districts, and Al Gore would have received more votes in 17. [App. C, p. 107]

SUMMARY OF ARGUMENT

The Florida Constitution imposes only two state-specific redistricting limitations upon the Legislature: districts must be contiguous and numbering must be consecutive. The Senate Plan complies with both requirements.

With respect to equal protection, the Florida Constitution is no more stringent than the United States Constitution. Consequently, equal protection issues are decided on the basis of federal constitutional case law. The Senate Plan has zero percent deviation from ideal equality in representation and therefore meets the one-person, one-vote mandate. The Senate Plan also meets all constitutional and Federal Voting Rights Act requirements for the protection of minorities. There is no retrogression in any of Florida's five Section 5 counties. In all other respects, the Senate Plan meets the requirements of both the United States Constitution and the Voting Rights Act. Nothing in the Plan raises an issue regarding partisan gerrymandering.

The suggestion of the Attorney General that this Court increase its involvement in the redistricting process despite his acknowledgement that the joint resolution complies with all constitutional requirements is contrary to the clear provisions of the Florida Constitution and the unequivocal declarations of this Court.

The Attorney General's suggestion that the Court return the joint resolution to the Legislature with the requirement that the Legislature adopt formal "standards" has no basis in law and would be an unnecessary and impracticable imposition upon the Legislature's discretion.

STANDARD OF REVIEW

Few functions bring the respective roles of the Court and the Legislature into sharper focus than redistricting. Those roles are clearly delineated in two sections of the Florida Constitution; Article III, Section 16, which lays out the reapportionment procedure, and Article II, Section 3, which embodies the fundamental doctrine of separation of powers. Under those provisions, the Court is granted authority to exercise discretionary judgment only when the Legislature has failed to timely perform its duty to reapportion. If, as currently, the Legislature has enacted a timely reapportionment law, the Court's function is narrow – "determining the validity of the apportionment." Article III, Section 16(c).

In its review of the 1972 reapportionment law, this Court recognized that the standard of judicial review for reapportionment and redistricting legislation is no different than for any other act of the Legislature:

> It is well settled that the state Constitution is not a grant of power but a limitation upon power. Unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution, the Courts have no authority to pronounce it invalid.
>
> * * * *
>
> Hence, this Court, in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of government, but will only measure acts done with the yard stick of the Constitution. The propriety and wisdom of legislation are exclusively matters for legislative determination.

In re: Apportionment Law, 263 So. 2d 797 (Fla. 1972).

Focusing more specifically on the issue of reapportionment, the Court stated:

> At the outset, we emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination. Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites. If these requisites are met, we must refrain, at this time, from injecting our personal views into the proposed reapportionment plan. Even though we may disagree with the legislative policy in certain areas, the fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.

Id. at 263 So. 2d 799.

While acknowledging that the redistricting act appears to meet all constitutional and federal voting act requirements, the Attorney General nevertheless appears to be inviting the Court to enlarge its traditional role on the pretext that "the designed purpose" of the Court's role is to preclude successful challenges. It is not clear what that enlarged role is supposed to involve. What is clear is that there have been no material changes in the Florida Constitution since this Court's historic 1972 decision setting forth in unambiguous language its proper and limited role in the redistricting process.

ARGUMENT

I
THE SENATE PLAN COMPLIES WITH ALL REQUIREMENTS SPECIFIC TO THE FLORIDA CONSTITUTION.

The only restriction on the legislature found in the Florida Constitution with respect to the drawing of district lines is the requirement that the State be apportioned

> into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

Article III, Section 16, Florida Constitution. The Senate Plan meets those criteria.

Contiguity

This Court has consistently refused to read districting and apportionment requirements into the Florida Constitution that are not expressly stated. Thus, the Court has held that there is no requirement that district lines follow precinct or county lines. *In re: Apportionment Law,* 263 So. 2d at 809. The contiguity provision is not violated by the fact that a district is divided by the body of water without a connecting bridge, even when it is necessary to travel by land outside the district in order to reach other parts of the district. *In re: Constitutionality of Senate Joint Resolution 2G*, 597 So. 2d 276 (Fla. 1992).

A district lacks contiguity for purposes of the Florida Constitution only when a part of the district is isolated from the remainder by the territory of another district or when the lands within the district mutually touch only at a common corner or at a right angle. *In re: Apportionment Law*, 414 So. 2d 1040 (Fla. 1982). All of the districts within the Senate Plan meet the requirement of contiguity set forth in Article III, Section 16 of the Florida Constitution.

Numbering of Districts

The Florida Constitution requires only that districts be consecutively numbered and not that districts be adjacent to the next numbered districts. *In Re: Apportionment Law*, 414 So. 2d 1040 (Fla. 1982). The constitution imposes no other restrictions upon the Legislature's discretion to number districts. In the exercise of its discretion, the Legislature has numbered districts every ten years in each reapportionment plan, with varying consequences as to which district voters elect their senators when, and for how long a term. This has been and remains an issue entirely within the discretion of the Legislature.

II

THE SENATE PLAN COMPLIES WITH THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

With respect to equal protection, this Court has recognized that, "There are no provisions in the Florida Constitution relating to apportionment of the legislature more stringent than those of the United States Constitution." *In re: Apportionment Law,* 263 So. 2d 807. Consequently, Equal Protection analysis rests upon federal law.

One Person, One Vote

The state's duty with respect to population equality was set forth in *Reynolds v. Sims,* 377 U.S. 533, 577 (1964):

> [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

The Supreme Court has recognized deviation as high as ten percent as being within an acceptable range. *Voinovich v. Quilter,* 507 U.S. 146 (1993).

For the first time in Florida history, the Senate Plan has achieved a zero percent deviation from the equal population goal. The total population of the State of Florida, based on the 2000 Census, is 15,982,378. Therefore, the target population for each of the forty senate districts is 399,559 persons (15,982,378 divided by 40). Senate District 39, with 399,606 persons, is the most populous. District 40, with 399,488 persons, is the least populous. The total deviation for the Senate Plan is 118 persons, or 0.03%.[2] [App. A, p.1]

There can be no meaningful challenge to the Senate Plan based upon population inequality.

Minority Representation

During the 1990s, the Fourteenth Amendment law as applied to redistricting evolved through a series of U.S. Supreme Court cases regarding the issues surrounding minority districts. *See Shaw v. Hunt,* 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). The theme of these decisions is that race will raise constitutional and voting rights act issues if,

[2] By comparison, the total deviation for senate districts in the Senate plan enacted by the legislature in 1992, based on the 1990 Census, was 2,808 persons, or 0.87%. The total deviation for senate districts in the plan ordered into effect by the Florida Supreme Court in 1992 *(In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 601 So. 2d 543 (Fla. 1992)) was 2,797 persons or 0.86%, and in the plan ordered into effect by the United States District Court for the Middle District of Florida in 1996 *(Scott v. United States Department of Justice,* 920 F. Supp. 1248 (M.D. Fla. 1996) was 5,404 persons, or 1.67%.

and only if, it is the predominant factor in drawing districts. So long as other traditional redistricting principles and considerations of a state are not subordinated to race, the plan meets constitutional muster.

One prominent case that upheld a minority district in the 1990s was *Lawyer v. Department of Justice*, 521 U.S. 567 (1997). *Lawyer* involved a Florida senatorial district in the Tampa Bay area. The Supreme Court upheld, with minor modifications, the existing District 21 against a racial gerrymandering attack. The district consists of parts of three counties in the Tampa Bay area that share strong communities of interest. [App. E, p. 160]

This line of cases culminated with *Easley v. Cromartie*, 532 U.S. 234 (2001), which held that when political affiliation closely correlates with race, the fact that redistricting results in racial grouping is not proof of an equal protection violation unless it is proved that race was the predominant motivating factor.

While instructive, the aforesaid cases have no application to the Senate Plan. When considered within the context of United States Supreme Court guidance developed over the past twenty years, the Senate Plan easily meets the most exacting constitutional standards.

Partisan Considerations

The United States Supreme Court has held that a claim for violation of the equal protection clause based on alleged "partisan gerrymandering" is justiciable. *Davis v. Bandemer*, 478 U.S. 109, 123-26 (1986). However, the High Court has recognized that partisan considerations are part of the legislative process, and the fact alone that reliable Democratic or Republican votes are grouped in a district does not give rise to a constitutional challenge. *See Easley v. Cromartie*, *supra* (2001). A plaintiff claiming partisan gerrymandering must meet an extremely high threshold, and a case of partisan gerrymandering is highly fact specific. *See Republican Party v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991); *Holloway, v. Hechler*, 817 F. Supp. 617 (S.D. W.Va. 1992); *Illinois Legislative Redistricting Commission v. LaPaille,* 782 F. Supp. 1272 (N.D. Ill. 1992); *Fund for Accurate and Informed Representation, Inc., v. Weprin,* 796 F. Supp. 662 (N.D.N.Y. 1992)

There is nothing on the face of the Senate Plan that invites judicial intervention based upon partisan gerrymandering.

III

THE SENATE PLAN COMPLIES WITH SECTION 2 OF THE VOTING RIGHTS ACT.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United State to vote on account of race or color." 42 U.S.C. § 1973(a).

Proof of a Section 2 violation is complex and fact intensive. It requires a searching practical evaluation of the facts constituting the totality of the circumstances and a functional view of the electoral processes leading to the nomination and election of candidates. The Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), said:

> The "right" question, ... is whether "as a result of the challenged practice or structure Plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.*, at 28. *See* also *id.*, at 2, 27, 29, n.118.
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> In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors." *Id.*, at 27. ... [T]he [Senate] Committee determined that "the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, *id.*, at

> 30 (footnote omitted), and on a "functional" view of the political process. *Id.*, at 30, n.120.

Gingles, 478 U.S. at 44, (footnotes omitted); *See also, Solomon v. Liberty County Commissioners*, 221 F. 3d 1218 (11th Cir. 2000); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1949); *Askew v. City of Rome,* 127 F.3d 1355 (11th Cir. 1997).

In *Gingles*, the Supreme Court set forth a framework for plaintiff's proof in a Section 2 vote dilution claim.[3] Three preconditions must first be established: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that the majority "votes sufficiently as a block to enable it ... usually to defeat the minority's preferred candidate." *Gingles,* at 50. If these factors are established, "the court considers whether, on the totality of circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice." *Abrams v. Johnson*, 521 U.S. 74, 91 (1996) (quoting 42 U.S.C. 1973(b)); *Johnson v. DeGrandy,* 512 U.S. 997, 1012 (1994). Notably, the courts have recognized that

[3]Although *Gingles* involved a challenge to a multi-member districting plan, *see Gingles*, 478 U.S. at 50-52, the Supreme Court has subsequently held that the same three prerequisites are necessary to establish a Section 2 claim with respect to single-member districts. *See Growe v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quiller,* 507 U.S. 146 (1993).

Section 2 does not contain a requirement that a racial or ethnic group be accorded proportional representation. *Meek v. Metropolitan Dade County,* 985 F. 2d 1471 (11th Cir. 1993).

The U.S. Supreme Court has also firmly rejected any notion that a state is obligated to maximize representation of a minority group. In *Johnson v. DeGrandy,* the Supreme Court reversed the district court's judgment that the redistricting plan for the state House violated Section 2 because it created 9 majority-Hispanic districts in the Dade County area when it was possible to create 11 such districts. In overturning the district court, the Supreme Court observed that Hispanics constituted 50% of the voting age population in Dade County, and under the challenged plan they constituted super-majorities in 9 of the 18 House districts primarily located in that county. The Court rejected the District Court's mistaken conclusion that Section 2 requires the "maximization" of majority-minority districts and ruled that it failed to consider "whether the totality of the facts, including those pointing to proportionality, showed that the new scheme would deny minority voters an equal political opportunity." *DeGrandy,* 512 U.S. at 1014.

The newly created senatorial districts described in House Joint Resolution 1987 comply with Section 2. Wherever members of a minority group reside in a

geographically compact area in sufficient numbers to constitute a majority in a single member senatorial district, the Legislature created minority majority districts. Furthermore, where the numbers of a minority group are significant but fall short of a majority, the Legislature attempted to create "influence" or "opportunity" districts in which the minority group had sufficient concentration to have a meaningful impact upon the election process.

Among existing districts, there are three where African Americans constitute a majority of the total population.[4] During the 10 years that elapsed between the 1990 Census and the 2000 Census, the demographics of these districts changed. Concentrations of African Americans increased, but total populations grew slower than the growth rate of the state as a whole.[5]

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[4] District 36 in Miami-Dade County is 60.3% African American based on total population in the 2000 Census, District 30 in Broward and Palm Beach counties is 64.2% African American, and District 2 in northeast Florida is 55.2% African American. [App. C, p. 108]. In terms of voting age population, or persons who are 18 years of age and older, the African American percentages for these districts are: 56.3% for District 36, 58.7% for District 30, and 50.9% for District 2. [App. C, p.108].

[5] Existing District 30 now is 42,319 (10.6%) below the target population for a single member senatorial district, existing District 36 now is 64,262 (16.1%) below the target population, and existing District 2 now is 68,938 (17.3%) below the target population. [App. C, p.108].

Each of these majority minority African American districts is preserved in House Joint Resolution 1987.[6] Each of the existing districts needed to gain new territory to achieve equal population. The Legislature accomplished this by adding adjacent areas that share similar socioeconomic characteristics. [App. E, pp. 157 – 158, 162]. The Legislature also considered public testimony and the informed judgment of Senators to determine which communities of interest fit best into the newly created districts. For the most part, the newly created districts keep together the same neighborhoods and communities of interest that historically have been included in African American majority senatorial districts.[7] There are no other

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[6] District 29 in Broward and Palm Beach counties is 64.2% African American based on total population, District 33 in Miami-Dade County is 63.2% African American, and District 2 in northeast Florida is 50.8% African American. [App. C, p.108]. In terms of voting age population, or persons who are 18 years of age and older, the African American percentages for these districts are: 58.3% for District 29, 59.7% for District 33, and 46.6% for District 1. [App. C, p. 108]. The existing district in northeast Florida has the most deviation from the target population. It needs 68,938 more people. Furthermore, adjacent areas have lower concentrations of African Americans, though many such areas share common interests and economic status with the residents in the existing district. [App. E, pp. 157-8]. As a result, the African American voting age population, which is slightly more than 50% in the existing district, is 46.6% in the newly created district. African Americans represent 46.4% of registered voters in the 2000 general election and 63.3% of registered voters in the Democratic primary.

[7] An exception occurs in northeast Florida. Public testimony and the incumbent suggested that the newly created district should incorporate parts of Volusia County in place of Alachua County. [App. E, p. 157]

areas of the state where African Americans live in numbers and concentrations that would support additional majority districts.

Among existing senatorial districts, there are three where Hispanics constitute a majority of the population. All three are located in Miami-Dade County.[8] During the 1990s, the percentages of Hispanics in these districts increased. This is similar to demographic changes observed among the existing African American minority districts. A difference is that while all of the existing African American majority districts need to gain population, one of the Hispanic districts grew much faster than the state average and needs to lose population, while two need to gain population.

Another significant difference is that the three districts are adjacent and in a single county. The total population of Miami-Dade County is 2,253,362. It is 57.3% Hispanic (59.8% in terms of voting age population). Hispanic culture dominates in Miami-Dade County but is found only in isolated areas of the surrounding counties.

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[8] Existing District 34 is 69.7% Hispanic, based on total population in the 2000 Census (72.0% based on voting age population, or VAP). [App. 4]. Existing District 37 is 72.6% Hispanic (75.0% VAP) and existing District 39 is 79.8% Hispanic (82.7% VAP).

Each of the majority minority Hispanic districts is preserved in House Joint Resolution 1987.[9] The newly created districts are entirely in Miami-Dade County, and they keep together the same neighborhoods and communities of interest that historically have been included in Hispanic majority districts. [App. E, pp. 163-164].

There are no other areas of the state where persons of Hispanic origin live in numbers and concentrations that would support additional majority districts.

IV

THE SENATE PLAN COMPLIES WITH SECTION 5 OF THE VOTING RIGHTS ACT.

Section 5 of the Voting Rights Act requires certain "covered jurisdictions" to obtain either administrative preclearance by the United States Attorney General or approval by the United States District Court for the District of Columbia before implementing any change in a standard, practice, or procedure with respect to voting. *See* 42 U.S.C. § 1973(a). Redistricting is such a change. To obtain preclearance, the covered jurisdiction must demonstrate that the proposed change has neither the purpose nor effect "of den[ying] or abridg[ing]... the right to vote

[9] Newly created District 36 is 71.7% Hispanic based on total population (74.3% based on voting age population, or VAP), newly created District 38 is 71.5% Hispanic (73.9% VAP), and newly created District 40 is 83.7% Hispanic (86.3% VAP). [App. C, p. 109].

on account of race or color." 42 U.S.C. § 1973(a); *see McDaniel v. Sanchez,* 452 U.S. 130, 149 (1981). "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 452 U.S. 141.

Section 5 mandates that the minority's existing voting strength not be diminished by the State's actions. *Bush v. Vera*, 517 U.S. 952 (1996). Thus, in the redistricting context, Section 5 has a limited purpose -- to insure that the state does not adopt a redistricting plan that, when compared to the existing or "benchmark" plan,[10] "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

Five counties in Florida are subject to federal jurisdiction under Section 5: Hillsborough, Hardee, Hendry, Collier, and Monroe. The newly created senatorial districts for these counties avoid retrogression and comply with Section 5.

The population of Hillsborough County, based on the 2000 Census, is 998,948 persons. The population is 13.6% African American and 16.7%

[10] Generally speaking, the "benchmark" plan is the most recent plan to have received Section 5 preclearance or have been drawn by a federal court, infused with the most current Census data. 66 Fed. Reg. No. 16, p. 5412-5413 (Jan. 18, 2001).

Hispanic.[11] Presently, there are seven senatorial districts in the Tampa Bay area.[12] Six have substantial non-Hispanic white majorities (Districts 13, 19,.20, 21, 22, and 26). [App. C, p. 111]. Without exception, they have elected white incumbents. One existing district, District 21, has voting age population that is 42.2% African American, 18.4% Hispanic, and 59.6% African American or Hispanic combined. [App. C, p. 110]. This district, without exception, has elected African American incumbents. It is 63,112 persons short of the target population for a senatorial district, based on the 2000 Census. [App. B, p. 80]

Newly created district 18 includes 91% of the population in existing district 21. Areas added to the district fit the socioeconomic and partisan patterns of the district as a whole. The minority voting age population percentages in newly created district 18, based on the 2000 Census, are: 41.5% non-Hispanic white, 37.4% non-Hispanic African American, 1.0% Hispanic African American, 17.2%

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[11] Because persons who are African American and Hispanic count in both categories, the combined voting age population of persons who are African American or Hispanic is 29.7%. [App. C, p. 111].

[12] Senatorial districts in the Tampa Bay area were modified by a settlement plan ordered into effect by a federal court in 1996. *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). The districts in the settlement plan include most of the same populations as the districts they replaced, which had been adopted by this Court and precleared by the U.S. Department of Justice in 1992. *See In re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 601 So.2d 543 (Fla. 1992)

other Hispanics, and 2.8% all other persons. The combined voting age population percentage of African Americans and Hispanics is 55.7%. [App. C, p. 111]

Hardee County, another county subject to Section 5 jurisdiction, has 26,938 people, based on the 2000 Census. The voting age population is 9.3% African American, 30.1% Hispanic, and 39.0% African American or Hispanic combined. The entire county is within existing senatorial district 26, but because of the county's rural character and sparse population, it makes up only 6.6% of the district's total population.

In the new senatorial map, the Legislature put all of Hardee County together with parts of Polk, DeSoto, Highlands, Glades, Okeechobee, and interior St. Lucie counties in newly created District 17. Though Hardee County remains a small share of the overall district population (6.7%), it fits better with the rural character of the newly created district. The new district also has larger percentages of minorities than the coastal district where Hardee County formerly was placed.[13]

[13] The voting age population of newly created district 17 is 11.0% African American, 11.6% Hispanic, and 22.3% African American or Hispanic combined. This compares favorably to the benchmark established by existing District 26, where the voting age population is 5.8% African American, 8.8% Hispanic, and 14.4% African American or Hispanic combined. [App. A, p. 24]

Three south Florida counties, Hendry, Collier, and Monroe, are covered under Section 5. Presently, the three contiguous counties are split among three senatorial districts.[14]

Newly created district 39 combines Monroe County, all of Hendry County except an unpopulated corner adjacent to Lake Okeechobee, rural portions of Collier and Palm Beach Counties, unpopulated conservation areas in Broward County, and portions of Miami-Dade County that overlap existing district 40. The three contiguous south Florida Section 5 counties are kept together in a single senatorial district.[15] Its voting age population is 33.1% African American, 31.7% Hispanic, and 63.7% African American or Hispanic combined. The newly created district includes 83% of the population in the district it replaces. This is significant because minority voters in existing District 40 have had a history of success

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[14] Existing District 40 includes Monroe County and part of Miami-Dade County. Based on the 2000 Census, it is 65,868 under the target population for a senatorial district. [App. B, p. 99]. Its voting age population is 34.6% African American, 31.7% Hispanic, and 64.5% African American or Hispanic combined. [App. C, p. 108]. Hendry County and the rural portions of Collier County are in existing District 29. More than 70% of that district's population is in southeastern Broward County. [App. B, p. 104]. Its voting age population is 15.7% African American, 20.7% Hispanic, and 35.8% African American or Hispanic combined. In both the existing senatorial plan and the new one, the coastal portion of Collier County is placed in districts that have only small numbers of minorities.

[15] The newly created district does not include densely populated portions of coastal Collier County.

electing candidates of choice.[16] The newly created district will preserve the opportunities those voters have enjoyed and will extend the same opportunities to voters in Collier, Hendry, and Palm Beach Counties, as well.

V

NEITHER THE FLORIDA NOR THE UNITED STATES CONSTITUTION REQUIRES THAT THE LEGISLATURE SET FORTH 'STANDARDS' AS A PREREQUISITE TO THE VALIDITY OF A REDISTRICTING ACT.

The Attorney General urges this Court to establish a new constitutional requirement by judicial fiat; that the Legislature must articulate "objective standards" against which the act would then be measured for validity. No such requirement can be gleaned from either the state or federal constitution.

The Attorney General actually turns on its head the legal principle announced in the cases he cites. *See Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995). Those cases held that a state may raise as a defense that redistricting legislation that gives the appearance of racial gerrymandering was

[16] In existing District 40, African Americans make up 35.4% of the registered voters and 54.6% of the registered Democrats. [App. B, p. 99]. Registered voters in the district are 57% Democrats and 26% Republicans. An African American incumbent has represented this district since 1992. These percentages are maintained in newly created district 39. African Americans make up 35% of registered voters and 52.9% of registered Democrats in the newly created district, and registered voters are 58% Democrats and 26% Republicans. [App. A, p. 46].

actually motivated by "traditional districting principles" such as a desire to maintain compactness, contiguity, or respect for political subdivisions.

Nothing in any decision by the U.S. Supreme Court or this Court has ever suggested that a legislative body is constitutionally bound to formally adopt such principles as a condition of validity of a redistricting act. To the contrary, the U.S. Supreme Court, in the very quote cited on page 13 of the Attorney General's brief, takes pains to "emphasize that these criteria are important not because they are constitutionally required – they are not [citation omitted] – but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw,* 509 U.S. at 647.[17]

Florida has used various redistricting principles and considerations when considered by the Legislature to be appropriate. For example, commencing in 1982, the legislature implemented single member districts although under no constitutional obligation to do so. Single member districts were continued in the 1992 and 2002 reapportionment plans. Principles and considerations that were

[17] The only "standards" that the Attorney General specifically mentions are the maintenance of compactness and political subdivision lines. It is noteworthy that in the United States Supreme Court, General Butterworth joined in the statement that compactness is not a redistricting principle in Florida and that crossing county lines is common practice. Brief of the State [of Florida] Appellees in *Lawyer,* 521 U.S. 567 (1997). [App. F].

used by the Senators this year, where appropriate, included communities of interest, socio-economic factors, maintenance of the status quo, protection of incumbents, political considerations, and others. The local knowledge of the elected members of their areas and constituents was considered in developing the Senate plan, along with any other considerations that the members thought appropriate. It is obvious that "one size does not fit all" in redistricting the State of Florida. The evolving history of the location and growth of our population centers along with the unique geographic features and explosions of growth in certain areas require consideration and meshing of many factors to draw districts. To say that the legislature should be required to adopt uniform criteria for the whole state is contrary to the law and would defy common sense.

The only Senate district mentioned by the Attorney General is District 19, and he does not claim that the district is illegal. Instead, he states that the district "juts in all directions, virtually engulfing a portion of district 9," and asks, "Is the district valid?" The answer is yes.

Newly created District 19 is one of 40 single member senatorial districts. Its population is within 6 persons (0.001%) of the target population based on the 2000 Census. [App. A, p. 26] It is contiguous, as are all the surrounding districts, and it is consecutively numbered. It exemplifies the Legislature's policy of meeting the

one-man, one-vote ideal, and it reflects changes in the makeup of its communities of interest since 1992. No racial or ethnic group constitutes more than 37% of the total population in newly created District 19.[18] Its shape is "no different from what Florida's traditional districting principles could be expected to produce." *See Lawyer v. Department of Justice,* 521 U.S. 567, 582 (1997). It includes 58.2% of the population of current district 14. Instead of extending into northern Seminole County, however, it ties together communities in the immediate vicinity of Orlando with growing numbers of minority residents that share common interests and socioeconomic status. [App. E, p. 161] Though the district includes much of the City of Orlando, it does not follow the extremely irregular city line. [App. C, p. 137].

It is consideration of these legitimate factors that results in the somewhat irregular appearance of the district. Such irregularity is not in itself improper:

> . . . [T]he District Court concluded that traditional districting principles had not been subordinated to race in drawing revised District 21. Appellant calls this finding clearly erroneous, charging that District 21 encompasses more than one county, crosses a body of water, is irregular in shape, lacks compactness, and contains a

[18] African Americans make up 33.9% of the total population and 30.3% of the voting age population of newly created District 19. Hispanics make up 26.5% of the total population and 25.2% of the voting age population. Non-Hispanic whites make up 36.6% of the total population and 41.2% of the voting age population. African Americans or Hispanics combined make up 58.9% of the total population and 54.2% of the voting age population. [App. C, pp. 108-109; App. A, p. 26].

> percentage of African American voters significantly higher than the overall percentage of African American voters in Hillsborough, Manatee, and Pinellas counties. Brief for Appellant 40-45. Appellant's first four points ignore unrefuted evidence showing that on each of these points District 21 is no different from what Florida's traditional districting principles could be expected to produce.

Lawyer, 521 U.S. at 582 (1997). On the question of split counties in particular, the U.S. Supreme Court noted that, "Multicounty districting also increases the number of legislators who can speak for each county, a districting goal traditionally pursued in the State." *Id.* at 581, n.9.

Districting and apportionment are quintessential legislative functions. Both this Court and the federal courts have historically recognized the importance of respecting the primacy of the legislative branch in the process. The judiciary became involved only when it became apparent that the legislative branch was failing to perform its function in accordance with constitutional requirements.

The Senate Plan illustrates that the legislative branch has heeded the constitutional guidance from this Court and the United States Supreme Court. When the U.S. Supreme Court invalidated the Florida plan in 1967, it noted 30% and 40% variances in the Senate and House plans respectively. *Swann v. Adams*, 385 U.S. 440 (1967), and there was virtually no consideration given to ensuring adequate minority representation. In contrast, the Senate Plan achieves statistical equality of voting strength among districts, satisfies all other legal mandates, and

reflects a sensitivity to racial and ethnic rights that meets all constitutional requirements. Contrary to the curious position espoused by the Attorney General, the involvement of the Court should recede accordingly in deference to the primary role of the legislative branch in the redistricting process and in keeping with the Court's constitutionally limited function.

CONCLUSION

The Court is respectfully urged to render a declaratory judgment finding that the Senate Plan is valid.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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