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IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

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| RENE ROMO, ET AL.<br><br>PLAINTIFFS,<br><br>VS.<br><br>KEN DETZNER AND PAM BONDI,<br><br>DEFENDANTS. | CASE NO.: 2012-CA-00412 |
| THE LEAGUE OF WOMEN VOTERS OF FLORIDA, ET AL.,<br><br>PLAINTIFFS,<br><br>VS.<br><br>KEN DETZNER, ET AL.,<br><br>DEFENDANTS. | CASE NO.: 2012-CA-00490 |

**COALITION PLAINTIFFS' MOTION TO IMPOSE REMEDY AND RESPONSE TO LEGISLATIVE DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT**

Coalition Plaintiffs hereby respond to Legislative Defendants' Motion to Alter or Amend the Judgment (the "Motion to Alter") and request that this Court adopt a remedial map in place of the enacted 2012 Congressional Plan, which this Court has invalidated as unconstitutional.

## I. INTRODUCTION AND BACKGROUND

Legislative Defendants have repeatedly acted to undermine the will of the voters who overwhelmingly adopted Article III, Section 20 of the Florida Constitution. First, they challenged the FairDistricts ballot initiative, advocated for a deceptive financial impact statement, and attempted to offer a "poison pill" counter-amendment to confuse the public into nullifying the FairDistricts Amendments. Next, Legislative Defendants joined in federal litigation seeking to invalidate Article III, Section 20 and attempted to lure the Department of Justice into

interpreting the FairDistricts Amendments in a way that would restore the Legislature's prior discretion. After these failed efforts, Legislative Defendants promised the public an open, transparent, and apolitical redistricting process. But they failed to deliver and instead enacted a redistricting plan that intentionally violated the Florida Constitution by, among other things, favoring the Republican Party and certain incumbents.

Legislative Defendants' attempts to avoid the FairDistricts Amendments did not end there. Rather than permit Plaintiffs, this Court, and the public to promptly evaluate the 2012 Congressional Plan, Legislative Defendants adopted a scorched-earth litigation strategy. They objected to Plaintiffs' request for an expedited discovery and trial schedule or for a facial review of the 2012 Congressional Plan and resisted meaningful scrutiny of their redistricting efforts by asserting legislative privilege, which delayed these proceedings during over a year of appellate review. Meanwhile, Legislative Defendants distracted from the merits of this case by conducting extensive discovery into Plaintiffs' alternative maps and then by raising groundless claims of unclean hands and fraud on the court.

Now, Legislative Defendants argue that the citizens of Florida must endure a *second* congressional election under an unconstitutional map because of their cynical strategy to "run out the clock." Worse, Legislative Defendants contend they should be allowed to draw the remedial map. And they have signaled their intent only to make minor adjustments to the affected districts in the 2012 Congressional Plan under an unduly narrow, self-serving interpretation of this Court's ruling, leaving Plaintiffs to bring yet another challenge.

This Court should not countenance Legislative Defendants' continued attempts to undermine the FairDistricts Amendments. If Legislative Defendants are allowed to once again avoid constitutional constraints that the voters have placed upon them, it will be a stain on the state of Florida and engender even greater public mistrust in elected officials. This Court has

already found that Legislative Defendants engaged in "necessary cooperation and collaboration" with the political operatives who by their conspiracy made a "mockery of the Legislature's proclaimed transparent and open process… and were successful in their efforts to influence the redistricting process and the congressional plan…." (Final Judgment at 21-22). Allowing Legislative Defendants, the intentional violators of Florida's Constitution, to devise their own "remedy" for their misconduct would only propagate that mockery and provide the Legislature with yet another opportunity to violate the public's trust.

Accordingly, this Court should impose its own prompt and effective remedy. Every effort should be made to allow the 2014 election to proceed under a remedial plan adopted by this Court – either from a remedial plan offered by Plaintiffs, one devised by this Court, or one drawn by an independent expert under this Court's direction – even if the election schedule must be adjusted. If a remedy cannot be fashioned for the 2014 election, this Court should order a special election based on a judicially approved remedial map at the earliest opportunity. Any other course will create too great a risk that the same Legislature that conspired to oppose and then violate the FairDistricts Amendments will adopt another non-compliant plan and cause the public to endure further unconstitutional elections while a second round of challenges is brought and litigated. The same individuals who participated in a mockery of the purportedly open and transparent redistricting process will have made a mockery of the FairDistricts Amendments, the will of the voters, and the electoral franchise that is fundamental to our representative system of government.

## II. ARGUMENT

Although the Legislature is charged with initially preparing a congressional redistricting plan, this Court has the duty, "given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those

standards constitutionally invalid." *In re Senate Joint Resolution on Legislative Apportionment 1176*, 83 So. 3d 597, 607 (Fla. 2012) ("*Apportionment I*"). Therefore, "[j]udicial relief becomes appropriate . . . when a legislature fails to reapportion according to federal and state constitutional requisites." *Id.* at 606. Imposing an effective and timely remedy is particularly important in a redistricting challenge because "the right to elect representatives—and the process by which we do so—is the very bedrock of our democracy." *Id.* at 600; *see also Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."). As this Court aptly put it, the interests at stake in this case are "of the highest importance" and go "to the very foundation of our representative democracy." (Final Judgment at 10). Because Legislative Defendants have not complied with Article III, Section 20, it falls to this Court to fashion an effective remedy to ensure that constitutional elections occur as soon as possible and to minimize the harm to Florida's voters.

### A. <u>This Court Should Impose a Remedy for the 2014 Election</u>

In adopting the FairDistricts Amendments, the citizens of Florida demanded state legislative and congressional districts that are free of partisan gerrymandering. Legislative Defendants chose not to comply with these mandates and now seek to benefit from their misconduct and suppress the will of the voters after employing a litigation strategy driven by delay, obstruction, and diversion. The interests at stake in this case – which form the very bedrock of our democracy – demand that the Legislature not benefit from partisan gamesmanship undertaken at the expense of Florida's voters. Because the 2012 Congressional Plan has been declared unconstitutional, there are effectively no valid districts in place for Florida, and this Court should not fill the void with the same districts found to be invalid.

Instead, this Court should immediately adopt a remedial map and adjust the schedule for the 2014 midterm election so that representatives can be elected from constitutional districts. It

is well established that pre-election deadlines may be moved to ensure a timely constitutional election. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1342-43 (N.D. Ga. 2004) (recognizing that courts have "broad equitable power to delay certain aspects of the electoral process," such as the candidate qualifying period, "if [it] proves necessary to ensure constitutional elections"); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) (directing trial court to impose new election schedule in light of delay during appeal). Although Defendants have argued that the federal MOVE Act creates an insurmountable obstacle to maintaining the current election date, the MOVE Act specifically allows for a waiver under these circumstances to adjust the time period in which absentee ballots must be mailed. *See* 42 U.S.C. § 1973ff-1(g) (providing for waivers when "[t]he State's primary election date prohibits the State from complying with [the MOVE Act]," "[t]he State has suffered a delay in generating ballots due to a legal contest," or "[t]he State Constitution prohibits the State from complying with [the MOVE Act]"). The Secretary of State should immediately request such a waiver, either voluntarily or pursuant to court order, to ensure that constitutional elections will occur on November 4, 2014.

This Court can also move the general election date to facilitate a constitutional election. Federal statutes initially schedule the general election for "[t]he Tuesday next after the 1st Monday in November," 2 U.S.C. § 7, but allow states to hold an election at a different time under certain circumstances, including when a "vacancy is caused by a failure to elect at the time prescribed by law," 2 U.S.C. § 8. Under these provisions, "where exigent circumstances arising prior to or on the date established by section 7 preclude holding an election on that date, a state may postpone the election until the earliest practicable date." *Busbee v. Smith*, 549 F. Supp. 494, 525 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *see also Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 829-31 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993) (finding that state may hold senatorial elections after date prescribed by 2 U.S.C. § 7 in exigent circumstances).

The *Busbee* decision offers a close analogy to the situation before this Court. In *Busbee*, Georgia sought a declaration that certain districts in its 1982 congressional redistricting plan complied with the VRA after the Attorney General failed to grant preclearance. *Busbee*, 549 F. Supp. at 497. After holding a trial from June 28, 1982 through July 1, 1982, the court entered an order on August 24, 1982 declaring the relevant districts invalid under the VRA. *See id.* at 517-19. The court then delayed the primary and general election dates and adjusted the related pre-election deadlines to facilitate legal elections. *See id.* at 519. The court rejected the state's objection that the congressional election could not be delayed, reasoning as follows:

> Although states ordinarily should conduct congressional elections on the date established by section 7, federal law contemplates that those elections may, under certain circumstances, be held at other times. In some years, Congress has recognized, a state may fail to elect its representatives at the prescribed time. Section 8 provides for that contingency . . . . [W]here exigent circumstances arising prior to or on the date established by section 7 preclude holding an election on that date, a state may postpone the election until the earliest practicable date. In this case, for example, Georgia will "fail[] to elect at the time prescribed by law" because its purposefully discriminatory conduct prevented it from securing section 5 approval for constitutionally required changes in its voting procedures. As a result, we believe, section 8 permits a reasonable postponement of the elections in the Fourth and Fifth Congressional Districts.

*Id.* at 524-25.

Florida will similarly "fail[] to elect at the time prescribed by law" if a constitutional redistricting plan cannot be adopted for the November 4, 2014 election. The Florida Constitution mandates that representatives be elected from compact districts that adequately respect political and geographical boundaries and were not drawn with the intent to favor a political party or incumbents. As a result of this Court's decision invalidating the 2012 Congressional Plan, *no* districts – let alone the two districts that this Court specifically ruled were invalid – are in place

at the present time. The fact that the constraints precluding an election are imposed by state, rather than federal, law is of no moment. *Cf. Public Citizen, Inc.*, 813 F. Supp. at 830-31 (finding exigent circumstances where state law required runoff to be held at later date if general election ended with no candidate receiving majority of votes). Thus, exigent circumstances demand that the 2014 election be delayed if necessary to adopt constitutional districts.[1]

There is no reason that Florida's voters should have to endure another unconstitutional election, as the law allows election dates and pre-election deadlines to be adjusted so that the most fundamental right of the citizenry is protected. The chart attached as **Exhibit 1** contains four proposed schedules that would allow for a constitutional election in 2014. The first proposal maintains a November 4, 2014 general election date by moving the primary to September 30, 2014, obtaining a MOVE Act waiver to reduce the time period in which absentee ballots must be sent, and adjusting the pre-election deadlines. The second and third proposals would move the general election to December 2, 2014 with alternative primary dates and pre-election deadlines depending on whether a MOVE Act waiver is obtained. The fourth proposal calls for using the current November 4, 2014 general election date for the primary and then holding a general election on December 9, 2014.[2] Because these proposals establish that it is feasible to have constitutional districts in place for the 2014 election, this Court should promptly adopt a remedial plan and order the 2014 election to proceed on an adjusted schedule.

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[1] Although Defendants have repeatedly insisted that it is too late to affect the upcoming elections, the *Busbee* court was able to impose an effective remedy in late August 1982.

[2] This fourth proposal could be applied to all state and federal elections, not just the congressional election, if that option would lessen any burden on the Secretary of State and Supervisors of Elections.

### B. **If a Remedy Cannot Be Fashioned for the 2014 Election, this Court Should Order a Special Election to Be Held at the Earliest Opportunity**

Ordering a special election is a common way to mitigate the harm caused by an election held under a defective apportionment plan because of time constraints. *See, e.g.*, *Burton v. Hobbie*, 561 F. Supp. 1029, 1034 (M.D. Ala. 1983) (ordering special election after there was inadequate time to remedy defective state legislative plan for regular election); *Watkins v. Fordice*, 791 F. Supp. 646, 648 (S.D. Miss. 1992) (ordering special election for reduced term where remedial plan could not be fashioned for regular election of state legislators); *Taylor v. Monroe Cnty. Bd. of Supervisors*, 421 F.2d 1038, 1042-43 (5th Cir. 1970) (holding that trial court should have considered ordering special election for county supervisors where prior election was conducted under malapportioned plan). In *Burton v. Hobbie*, for example, the court reluctantly allowed a state legislative election to proceed under a defective plan because of "severe time constraints." 561 F. Supp. at 1033. The court, however, ordered a special election to occur one year after the regular election to prevent voters from being "forced to endure three additional years of representation by a malapportioned Legislature." *Id.* at 1035. The *Burton* court did so even over the request of all parties to approve a settlement that sought to avoid a special election on the grounds that it would be "extremely expensive for the State of Alabama and its counties." *Id.* at 1034. The court reasoned as follows:

> We refuse to approve a settlement which would result in the continuation in office for four years of legislators who were not elected under a valid reapportionment plan. *This Court has a solemn duty to relieve the citizens of this state from such deprivations of their legal rights. . . . Were we to postpone elections under [the new plan] until 1986, as requested by the parties, the utility of this plan would be vastly diminished. The Alabama citizens have a right to be represented as soon as practicable by a validly elected legislature. That right would be infringed if elections under a constitutional apportionment plan were postponed.*

*Id.* at 1036 (emphasis added).

Legislative Defendants will undoubtedly offer the same response that was rejected in *Burton* – *i.e.*, a special election will have certain costs associated with it. Here, there are, if anything, more compelling reasons to conduct a special election despite the expense than was true in *Burton*. Legislative Defendants intentionally violated Article III, Section 20 after unsuccessful efforts to defeat, invalidate, and undermine the FairDistricts Amendments. They then waged a campaign of delay and obstruction in this lawsuit to run out the clock so that there is limited time to adopt a new map before the regularly scheduled election. The cost borne by the taxpayers for these efforts surely dwarfs the likely expense of conducting a special election under constitutional districts. Permitting representatives elected from invalid districts to remain in place for a full term would encourage similar conduct in the future, unfairly penalize the voters of Florida, and dilute the effectiveness of the FairDistricts Amendments. That surely cannot have been the intent of the citizens who adopted the FairDistricts Amendments to "clearly act as a restraint on the Legislature in drawing apportionment plans." *Apportionment I*, 83 So. 3d at 597. Accordingly, if this Court finds that a remedial plan cannot be adopted in time for the 2014 election, it should order a special election to minimize the injury to Florida's voters, a schedule for which is found in Proposal 5 of **Exhibit 1**.

### C. <u>This Court or an Independent Expert Should Draw the Remedial Map</u>

Courts must sometimes assume the "'unwelcome obligation' . . . to devise and impose a reapportionment plan" when the state legislature has failed to adopt constitutional districts. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion) (citation omitted). State courts, like their federal counterparts, "have the authority to evaluate the constitutionality of redistricting laws and to enact their own redistricting plans" in appropriate circumstances. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003). In doing so, the state court is not

"'usurping' the legislature's authority," but "fulfill[ing] the state's obligation to provide constitutional districts for congressional elections in the absence of legislative action." *Id.*[3]

Applying this principle, courts have not hesitated to adopt reapportionment plans to remedy constitutional violations when state legislatures have not enacted a compliant plan. *See, e.g.*, *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1083 (N.D. Fla. 1992) ("While it is the duty of the legislature to redistrict the state, when the legislature is unable to adopt a redistricting plan, the obligation of devising a redistricting scheme falls upon the courts."); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202-03 (D. Kan. 1982) (adopting remedial redistricting plan where state legislature failed to replace unconstitutional plan). To facilitate the preparation of a remedial redistricting plan, courts sometimes enlist the assistance of an independent expert. *See, e.g.*, *Rodriguez v. Pataki*, 207 F. Supp. 2d 123, 124-25 (S.D.N.Y 2002); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1216 (N.D. Ga. 2004); *DeGrandy*, 794 F. Supp. at 1081.

The Florida Constitution provides for the Legislature to be afforded the first opportunity to redraw a state legislative plan that has been invalidated by the Florida Supreme Court, but contains no similar requirement for an invalidated congressional plan. *See* FLA. CONST. art. III, § 16(d). Legislative Defendants have previously relied on decisions indicating that the state legislature should be allowed the first opportunity to craft a remedial plan when it is "practicable" to do so. *See, e.g.*, *Wise*, 437 U.S. at 540. Although that may be an appropriate

[3] Legislative Defendants have continued to cite *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), for the proposition that state courts do not have authority to adopt a remedial map because the Elections Clause delegates congressional redistricting to the "Legislature" of each state. *See* U.S. CONST. art. I, § 4. As Coalition Plaintiffs have pointed out on several occasions, the U.S. Supreme Court vacated the district court's ruling on that issue and held that it "is not be regarded as supporting the injunction we have affirmed on the principal ground, or as binding upon state and federal officials . . . ." *See Branch v. Smith*, 538 U.S. 254, 265-66 (2003). The vacation of this ruling was understandable, as "the word 'legislature,' as used in Article I of the federal Constitution, encompasses court orders." *People ex rel.* Salazar, 79 P.3d at 1232.

approach in other situations, this case is unlike any prior redistricting challenge because of the stringent prohibition on partisan intent in Article III, Section 20. Here, the evidence showed that Legislative Defendants, when entrusted with the task of redistricting, intentionally breached that trust and violated the constitutional prohibition on partisan gerrymandering. They sought every avenue to avoid the requirements of Article III, Section 20, going so far as to abuse the public process itself in secret collaboration with partisan operatives. They and the operatives hindered public scrutiny by deleting documents and raising meritless claims of privilege so that litigation would be sufficiently delayed to argue that the 2012 election – and now the 2014 election – must go forward under invalid districts. Now, *these same individuals* who fought the FairDistricts Amendments at every hedgerow and intentionally violated the Florida Constitution argue that this Court should defer to them before crafting a remedial map. It would be a curious result for parties who engaged in intentional misconduct and in doing so delayed the imposition of constitutional districts to be allowed to fashion a remedy for their own constitutional violations.

In any event, it is impracticable for this Court to allow Legislative Defendants an opportunity to prepare another map in light of the impending 2014 election. *See, e.g.*, *In re Legislative Districting of State*, 805 A.2d 292, 298 (Md. 2002) (holding that the court must draw the remedial plan itself when "elections are imminent" and "there simply is no time to return the matter to the political branches"). As Coalition Plaintiffs' proposed schedules show, constitutional districts can be in place for the 2014 election, but only if this Court acts without delay. Any special election or even the 2016 regular election would likewise be jeopardized if Legislative Defendants were allowed to craft a remedial map because there is a demonstrated risk that they will adopt a new plan that still contains constitutional defects and then engage in litigation tactics to again preclude effective and timely review of the remedial districts.

The concern that Legislative Defendants will adopt a non-compliant "remedial" map is not speculative, given that Legislative Defendants evidently intend to revert to the configurations of District 5 and its surrounding districts, including District 10, in H000C9043. The version of District 5 in H000C9043 follows the same invalid winding path as in the 2012 Congressional Plan, except that it does not include an appendage into Seminole County. District 5 in H000C9043 is grossly non-compact with a Reock score of 0.10 – nearly 50% lower than the benchmark district – and snakes through seven counties, keeping none of them whole. (*See* Jt. Ex. 1). This Court has already rejected a vote dilution justification for this configuration of District 5, ruling that it violates the requirements of compactness and adherence to political boundaries in Article III, Section 20 and does not satisfy the *Gingles* preconditions:

> Congressional District 5 does not adhere to the tier-two standards in Article III Section 2. It is visually not compact, bizarrely shaped, and does not follow traditional political boundaries as it winds from Jacksonville to Orlando. At one point, District 5 narrows to the width of Highway 17.
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> * * * *
>
> The Legislature made no effort during the redistricting process to determine if the *Gingles* preconditions existed for this district, nor does the evidence introduced at trial demonstrate that they exist now. The minority population is not sufficiently large and geographically compact to constitute a majority of the voting age population. To achieve a BVAP over 50%, the district connects two far flung urban populations in a winding district which picks up rural black population centers along the way.
>
> * * * *
>
> Nor does the evidence prove the third precondition…. [T]he evidence does not establish that the majority population votes sufficiently as a bloc to enable it usually to defeat the candidates preferred by minorities.

(Final Judgment at pp. 18-20). Plaintiffs have also presented an east-west configuration of District 5 that better respects tier-two criteria without causing retrogression. (*See* Trial Tr., vol.

14, 1744:23-1745:4, 1746:22-1748:19 (Ansolabehere)). Alex Kelly, the principal map drawer for the House, conceded that an east-west configuration of this sort would not result in retrogression. (*See* Trial Tr., vol. 8, 932:17-935:19 (Kelly)). As a result, the constitutional defects in District 5 cannot be cured by simply removing the Sanford appendage.

The exemplar map attached as **Exhibit 2** (the "Coalition Exemplar Remedial Map") reconfigures the districts that this Court found to be unconstitutional.[4] The Coalition Exemplar Remedial Map again confirms that an east-west configuration of District 5 would allow for significant improvements in tier-two compliance without causing retrogression, while creating a compact District 10 with significant minority voting strength. As was emphasized at trial, a serpentine north-south configuration of District 5 unjustifiably aggregates Democratic minorities into a single district and, in doing so, improves the Republican performance of surrounding districts. A north-south configuration also deprives Black and Hispanic voters of significant influence – and perhaps even the opportunity to elect a minority candidate – in an additional Central Florida district.

The following chart compares the tier-two compliance, minority population, and performance of the affected districts in the Coalition Exemplar Remedial Map and H000C9047:

[4] The Coalition Exemplar Remedial Map only attempts to address the districts currently affected by this Court's ruling. Coalition Plaintiffs are evaluating whether to seek reconsideration (or ultimately appellate relief) with respect to the challenged districts that this Court did not invalidate. If this Court revisits its decision regarding those districts, Coalition Plaintiffs will submit a revised exemplar map. By limiting their current remedial submission to changes necessitated by the invalidation of Districts 5 and 10, Coalition Plaintiffs do not waive, and instead hereby reserve, their challenges to the other districts this Court did not expressly invalidate.

| | Compactness | | | | Minority Population | | Performance | | |
|---|---|---|---|---|---|---|---|---|---|
| | Reock | Convex-Hull | Polsby-Popper | Peri-meter | %Blk VAP | %Hisp VAP | 2006 Gov. %D Vote | 2008 Pres. %D Vote | 2010 Gov. %D Vote |
| **CD2** | | | | | | | | | |
| 9047 | .464 | .783 | .419 | 550 | 23.83% | 4.75% | 48.9% | 47.5% | 53.5% |
| CPERM | .307 | .632 | .179 | 960 | 13.37% | 4.62% | 41.1% | 35.4% | 43.2% |
| **CD3** | | | | | | | | | |
| 9047 | .564 | .793 | .366 | 520 | 13.25% | 6.99% | 40.4% | 40.0% | 42.1% |
| CPERM | .598 | .853 | .406 | 350 | 14.36% | 7.74% | 44.5% | 47.0% | 46.2% |
| **CD4** | | | | | | | | | |
| 9047 | .451 | .729 | .131 | 450 | 12.91% | 6.72% | 30.7% | 36.9% | 37.2% |
| CPERM | .491 | .768 | .158 | 354 | 9.64% | 6.45% | 28.6% | 34.1% | 34.4% |
| **CD5** | | | | | | | | | |
| 9047 | .094 | .286 | .039 | 707 | 50.06% | 11.08% | 59.4% | 71.0% | 67.2% |
| CPERM | .119 | .707 | .096 | 714 | **45.12%** | 6.14% | 56.3% | 63.8% | 64.1% |
| **CD6** | | | | | | | | | |
| 9047 | .328 | .724 | .257 | 396 | 9.02% | 5.69% | 43.8% | 45.9% | 43.1% |
| CPERM | .336 | .757 | .347 | 324 | 9.46% | 7.81% | 46.4% | 49.7% | 46.1% |
| **CD7** | | | | | | | | | |
| 9047 | .563 | .771 | .215 | 184 | 9.03% | 16.97% | 39.0% | 49.6% | 47.5% |
| CPERM | .645 | .869 | .415 | 130 | 11.19% | 17.56% | 39.2% | 50.9% | 48.5% |
| **CD9** | | | | | | | | | |
| 9047 | .483 | .800 | .321 | 274 | 12.40% | 41.39% | 45.7% | 60.6% | 55.1% |
| CPERM | .421 | .741 | .315 | 297 | 13.14% | **37.24%** | 45.4% | 58.6% | 52.8% |
| **CD10** | | | | | | | | | |
| 9047 | .391 | .733 | .199 | 298 | 11.14% | 14.20% | 38.9% | 47.6% | 45.6% |
| CPERM | .440 | .742 | .324 | 147 | **25.78%** | **19.18%** | 45.5% | 59.0% | 55.4% |
| **CD11** | | | | | | | | | |
| 9047 | .494 | .712 | .328 | 334 | 7.73% | 7.38% | 40.6% | 43.6% | 41.9% |
| CPERM | .529 | .868 | .471 | 273 | 6.74% | 8.14% | 39.3% | 43.4% | 41.5% |
| | Averages | | | Total | | | | | |
| 9047 | .426 | .703 | .253 | 3713 | | | | | |
| CPERM | .432 | .771 | .301 | 3549 | | | | | |

Legislative Defendants' apparent plan to "trim around the edges" in Districts 5 and 10 further demonstrates why it is impracticable to allow the Legislature an opportunity to redraw the map. Reverting to earlier draft districts that selectively address some of the constitutional infirmities identified by this Court, but fail to cure more fundamental defects – such as the serpentine configuration of District 5 – is not an acceptable approach and risks the loss of additional elections to an unconstitutional map. Because this Court cannot safely delay remedial action for the benefit of Legislative Defendants, it should promptly adopt a remedial plan after allowing input from the parties and, if appropriate, an independent expert.

### D. Alternatively, this Court Should Provide Specific Guidance and Impose Safeguards if Legislative Defendants Are Allowed to Redraw the Map

If this Court determines that Legislative Defendants should have an opportunity to redraw the 2012 Congressional Plan before adoption of a judicially approved plan – and Coalition Plaintiffs steadfastly maintain they should not – this Court should provide clear and specific guidance to the Legislature as to what a constitutional map would require. Doing so is essential to minimize the possibility that a non-compliant map will be adopted based on an unduly narrow interpretation of this Court's ruling. For example, this Court should clarify that merely adopting a configuration of District 5 that maintains an overall serpentine configuration (as in H000C9043 or earlier benchmark maps), will not cure the underlying constitutional defect – namely, that District 5 as a whole is "visually not compact, bizarrely shaped, and does not follow traditional political boundaries as it winds from Jacksonville to Orlando." (Final Judgment at 18). As Plaintiffs demonstrated at trial, these violations of tier-two requirements go far beyond what is necessary to avoid retrogression. The serpentine configuration of District 5 is further suspect because it is derived from the 2002 map, which Legislative Defendants admitted was drawn with partisan intent. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340 (S.D. Fla. 2002).

Without further guidance, there is a significant risk that Legislative Defendants will simply go back to the versions of Districts 5 and 10 in H000C9043. If they do, time will be lost, considerable money will be spent, and other elections will be jeopardized as a second round of challenges is litigated. Additional clarity at this stage will limit the possibility of this outcome, as the history of the Initial Senate Plan illustrates. When the Florida Supreme Court invalidated Initial Senate District 6 (which similarly snaked southward from Jacksonville for purported non-retrogression reasons), it offered the following guidance to the Legislature:

> [T]he Senate in drawing this district did not perform a functional analysis, but rather focused on keeping the core of old District 1.

> Old District 1, however, was drawn at a time when compactness was not a constitutional imperative. Because compactness is now a requirement, the Legislature is permitted to violate compactness only when necessary to avoid conflict with tier-one standards, including the minority voting protection provision.
>
> In support of its argument, the Coalition submitted a proposed alternative plan that includes a black opportunity district contained entirely within Duval County (Coalition District 1). . . . Coalition District 1 has a black VAP of 42.4%. While we recognize that this is lower than the black VAP of the benchmark District 1 (which has a black VAP of 46.9%), our inquiry does not end there. . . . [A functional] analysis indicates that the district will likely afford black voters the ability to elect candidates of their choice. Thus, the Coalition has demonstrated that District 6 can be drawn much more compactly and remain a minority-opportunity district. . . .
>
> We recognize that our role is not to select the "best plan." However, the Coalition's plan demonstrates that Senate District 6 violates the constitutional standards of compactness and utilizing existing political and geographical boundaries. The alternative plan shows how political and geographical boundaries can be better utilized and demonstrates how District 6 can be made more compact by placing it entirely within Duval County rather than stretching southward across five counties to Daytona Beach, without violating Florida's minority voting protection provision. . . . Moreover, the configuration of District 6 draws in Democratic neighborhoods that would otherwise be contained in the surrounding districts. There is no valid justification for Districts 6 and 9. Contrary to any arguments presented either in the Senate's briefs or during oral argument, there is no constitutional impediment to the alternatives set forth in the Coalition plan, which comply with the constitutional requisites.

*Apportionment I*, 83 So. 3d at 667-69. After being advised that a district contained entirely within Duval County would be constitutional, the Senate adopted a remedial map with a Duval-only district, renumbered as Senate District 9. In the second facial review, no party raised an

individual district challenge to redrawn Senate District 9. *See In re Senate Joint Resolution on Legislative Apportionment 2-B*, 89 So. 3d 872 (Fla. 2012) ("*Apportionment II*").[5]

If this Court permits Legislative Defendants to redraw the 2012 Congressional Plan before taking remedial action of its own, it should similarly clarify that the overall north-south serpentine configuration of District 5 violates Article III, Section 20, in part, because Plaintiffs' proposed east-west configuration shows that it is possible to better respect tier-two criteria without retrogression. This Court should also offer any guidance that may assist in the redrawing of District 10. As with Initial Senate District 6, additional guidance may limit or even avoid further challenges, which will benefit the parties, this Court, and the public.

Finally, this Court should not allow Legislative Defendants to draw a remedial plan without oversight. First, to ensure that future elections can go forward under a constitutional map, this Court should impose a deadline for Legislative Defendants to enact a remedial plan – one that is consistent with the proposed election schedules in **Exhibit 1** – and direct that a failure to meet that deadline will result in the imposition of a judicially created map. Second, in light of the evidence of destroyed documents, non-public meetings, and coordination with partisan operatives, Legislative Defendants should be directed to (1) conduct in public all meetings and communications between legislators, staffers, and others regarding the remedial plan, (2) conduct the map-drawing process itself in a public forum and require that all changes to any map be made in public view, and (3) refrain from deleting any documents relating to the remedial plan. These requirements will limit Legislative Defendants' ability to again stymie public scrutiny and will facilitate the prompt resolution of any challenges to the remedial plan.

[5] The NAACP brought an overall challenge to the Florida Supreme Court's minority protection analysis that used Senate District 9 as an example. *See Apportionment II*, 89 So. 3d at 882-83.

## III. CONCLUSION

The citizens of Florida have already endured elections under gerrymandered districts after the Legislature blatantly disregarded their will. Legislative Defendants have expended considerable taxpayer money to resist public scrutiny and defend their unconstitutional conduct. Florida's voters should not have to wait for two more years for constitutional elections, and they certainly should not have to sit by as Legislative Defendants risk additional elections under an invalid congressional plan. Accordingly, this Court should (1) deny Legislative Defendants' Motion to Alter; (2) order that the 2014 election to proceed with adjusted dates and under a remedial plan adopted by this Court based on one of Plaintiffs' submissions, one devised by this Court or one drawn by an independent expert under this Court's direction; or (3) alternatively, if it determines that remedial action cannot be taken in time for the 2014 congressional election, order that a special election be conducted at the earliest opportunity under a remedial plan adopted by this Court or drawn by an independent expert under Court direction. Should this Court, over Coalition Plaintiffs' objection, permit Legislative Defendants to enact a remedial plan, any such enactment must be completed by a deadline set by this Court consistent with the proposed election schedules in **Exhibit 1** and in compliance with this Court's strict and substantive guidance as to what is an acceptable remedy of Districts 5 and 10 (and the surrounding impacted districts) and subject to the openness and transparency restrictions set forth above. This Court should also grant such other and further relief as is just and proper.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 23, 2014 I filed the foregoing using the State of Florida ePortal Filing System. I further certify that a copy of the foregoing has been served via email on all counsel of record listed on the Service List below.

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