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Honorable Perry Thurston
State Representative
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402 S. Monroe Street
Tallahassee, FL 32399

Re: Florida Redistricting Initiative

Dear Senator Smith and Representative Thurston,

As you requested, we have reviewed the letter recently sent by United States Representatives Corrine Brown and Mario Diaz-Balart to Dean Cannon, the Speaker of the Florida House of Representatives. In their letter, Reps. Brown and Diaz-Balart listed eighteen questions about the Congressional and Legislative redistricting initiatives that will be on the Florida ballot in 2010. Answers to all eighteen questions are provided below. As is evident from the answers, the initiatives are fully compliant with both the U.S. Constitution and the Voting Rights Act. If enacted, they would dramatically improve the redistricting process in Florida and make Florida's elections fairer for all political parties and candidates. They would also protect, and indeed enhance, the ability of minorities to participate in the political process and elect representatives of their choice. Please feel free to call on us if you have further questions.

1. *The Voting Rights Act requires that a racial minority's opportunity to elect its representatives of choice not be diluted by a plan. How can this be done without the use of political vote histories, which appear to be prohibited by the amendments' requirement that "no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent"?*

As the Florida Supreme Court has suggested in its opinion concerning the validity of the summary of the ballot measure, nothing in the amendments bars the use of "political vote histories," registration data, or historical election results. What is prohibited is drawing a plan "with the *intent* to favor or disfavor a political party or an incumbent." As long as such information is used for *other* purposes – e.g., compliance with the Voting Rights Act – it is in no way restricted by the amendments. In fact, the use of such information to enable minorities to elect representatives of their choice is perfectly *consistent* with the amendments, which bar

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"denying or abridging the equal opportunity of racial or language minorities to participate in the political process" and "diminish[ing] their ability to elect representatives of their choice."

There is no conflict between (1) using political vote histories to ensure compliance with the Voting Rights Act and (2) not drawing districts with the intent to favor or disfavor a political party or an incumbent. Under the amendments, political vote histories and other similar data may validly be used for some purposes, but not in order to help or harm a party or candidate.

2. *The amendments prohibit plans that favor or disfavor an incumbent. Drawing districts that comply with the Voting Rights Act will inevitably include most of the geographical area from an existing district in which members of the minority community live, since they form a politically cohesive and, in some cases, compact community. But how will the amendments deal with this contradiction since such districts by definition will also favor the incumbent legislator who already represents that area, which is prohibited by Subsection 1?*

There is no contradiction here. It is true that the incumbent legislator may fare well in a district that is drawn, consistent with the Voting Rights Act, so that it includes a minority community that is compact and politically cohesive. In this case, however, the purpose behind the district's formation will *not* be to favor that incumbent. The goal, rather, will be to comply with the Voting Rights Act as well as the amendments' mandate that minorities be able to elect representatives of their choice. Notably, the amendments do not prohibit redistricting plans that produce favorable *results* for incumbents – only plans that *intend* to favor incumbents.

3. *If anyone elected from a majority-minority district[] presents to the Legislature information regarding the political makeup and communities of interest in that district, can the Legislature act on that information to ensure that the district (and other majority-minority districts) are protected? If an incumbent who is also African-American or Hispanic presents this relevant and important information to the Legislature or uses it while drawing [a] plan, does he or she jeopardize that district or the overall plan since the amendments require that no district be drawn to "favor or disfavor . . . an incumbent"?*

It is perfectly acceptable, under the amendments, for the Legislature to use "information regarding the political makeup and communities of interest" in order to comply with the Voting Rights Act and the amendments' requirement that minorities be able to elect representatives of their choice. If such "relevant and important information" is presented to the Legislature, even by an incumbent legislator, it can certainly be employed for these purposes. What is prohibited is using the data in order to favor incumbent legislators rather than to protect minorities' voting rights.

4. *How can the Legislature ensure compliance with Section 2 of the VRA, which requires protection of geographically compact minority groups that are politically cohesive, if it cannot consider registration and performance data in the redistricting process?*

The Legislature *can* consider "registration and performance data" in order to ensure compliance with the Voting Rights Act as well as the amendments' requirement that minorities be able to elect representatives of their choice. The Legislature cannot consider such data in order to help or harm a party or candidate.

5. *When a plan is challenged under the amendments on the grounds that it "denies or abridges the equal opportunity of racial or language minorities" to participate or elect representatives of their choice, the court will certainly have to look at relevant political, racial, and performance data to judge the merits of the claim. How can the Legislature be expected to enact a plan to satisfy judicial review if it cannot rely on the same data courts will use for review?*

As discussed above, the Legislature *can* look at "relevant political, racial, and performance data" in order to comply with the amendments' ban on plans that diminish minorities' ability to elect representatives of their choice. Courts will therefore not have access to any data that the Legislature itself cannot also consult for these purposes.

6. *If the VRA does not compel the creation [of] majority/minority districts, would the amendments prohibit the Legislature from creating [them]? If the amendments had been in place in 2000, would the current majority/minority districts be legal, or would our constituents have been divvied up across more than one district? Please also answer for the congressional seats currently represented by African-Americans or Hispanics, as well as those in the Florida Legislature.*

The amendments do not bar the creation of majority-minority districts. Such districts are permissible as long as they are not created for the purpose of favoring or disfavoring any political party or favoring incumbents. In some cases, in fact, majority-minority districts may be necessary so that minorities are able to elect representatives of their choice. In other cases, minorities will be able to elect representatives of their choice even if they do not constitute a numerical majority of the district. But the amendments would not necessarily prohibit their preservation, depending on the reason.

Unfortunately, it is not possible to assess whether current majority/minority districts would be valid had the amendments been in place in 2000. If those districts were drawn to enable minorities to elect representatives of their choice, then they would be permissible. But if they were drawn to favor or disfavor any political party or protect incumbents, then they would be invalid.

7. *How do the amendments coexist with the U.S. Supreme Court ruling in* Bartlett v. Strickland, *129 S. Ct. 1231 (2009), which held Section 2 of the Voting Rights Act requires the drawing of an effective minority district only if the minority group is more than 50 percent of [the] district's voting age population? Since the amendments were drafted before this decision, will the amendments pass constitutional muster given their requirement that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice,"*

when that will clearly be the result of this U.S. Supreme Court ruling if the amendments pass?

While the amendments echo the language of Section 2 of the Voting Rights Act, they are not identical to it, particularly as it has been interpreted by the Supreme Court. It is true that, under *Bartlett*, there can be a Section 2 "effects" violation only if a minority makes up more than 50 percent of a potential district's voting age population. Under the amendments, in contrast, what is crucial is that a plan not "diminish [minorities'] ability to elect representatives of their choice." Under certain circumstances, a minority group will be able to elect representatives of its choice even if it does not constitute a numerical majority of the district. For example, different minority groups may join into a coalition that is reliably able to win a majority of the district's votes. Alternatively, the minority group may be able to persuade a sufficient number of majority voters to "cross over" for it to elect the representative of its choice. The amendments would take these circumstances into account even though, under *Bartlett*, they cannot give rise to Section 2 "effects" violations.

Bartlett, of course, involved only issues of statutory interpretation. Thus, nothing in the decision can possibly cause the amendments not to "pass *constitutional* muster." The timing of the amendments' drafting is also irrelevant to their validity. If enacted, they would simply apply alongside Section 2 of the Voting Rights Act, as interpreted in *Bartlett*. There could be Section 2 "effects" violations only where a minority makes up more than 50 percent of a potential district's voting age population. But, under the amendments, minorities' ability to elect representatives of their choice would be respected even where there was no Section 2 violation. In other words, the amendments seemingly give protection to minority voters even in those districts (*e.g.*, districts less than 50% minority that elect a minority-preferred candidate) that *Bartlett* does not.

8. *The amendments say that districts cannot be drawn to "diminish [minorities'] ability to elect representatives of their choice," but what is the baseline for comparison?*

The amendments' language is quite similar to that of Section 2 of the Voting Rights Act. Their use of the term "diminish" also evokes the anti-retrogression standard of Section 5.

Under Section 5 (which itself applies to part of Florida), redistricting plans are invalid if they would result in a retrogression in the electoral position of racial minorities. By analogy, the amendments would require, at least, that minorities not be made worse off by any plan in terms of their ability to elect representatives of their choice. Under Section 2, conversely, the Supreme Court has held that the *maximization* of majority-minority districts is not required. Similarly, the amendments would not require the maximum possible number of districts in which minorities are able to elect representatives of their choice. Within these two bounds, the Legislature would have substantial discretion. It would be able to – but would not *have* to – formulate a plan under which minorities would be able to elect more representatives of their choice compared to the stats quo.

9. *If compact districts are mandatory except where the racial component of Subsection (1) permits the creation of irregularly shaped districts, wouldn't any irregularly shaped*

district violate Equal Protection, since race would be the sole factor motivating the decision?

It is *not* the case that deviations from compactness are permissible only in order to protect the ability of minorities to elect representatives of their choice. Rather, under the amendments, such deviations are also permissible in order to (1) ensure that districts are not drawn with the intent to favor or disfavor a political party or an incumbent; (2) comply with federal law (e.g., Sections 2 and 5 of the Voting Rights Act); (3) comply with the requirement of equal population for all districts; and (4) to the extent feasible, respect existing political and geographical boundaries. Therefore, it certainly would not be possible to conclude that any irregularly shaped district was primarily motivated by the amendments' prohibition of diminishing minorities' ability to elect representatives of their choice, let alone by bare racial considerations. Instead, any of the above factors could (and likely would) explain the district's lack of compactness.

10. If compact districts are mandatory except where the racial component of Subsection (1) permits the creation of irregularly shaped districts, how can the abutting districts which don't qualify under Subsection 1 be permissible under the amendments when they too will have to be non-compact simply because they must fit next to non-compact but permissible districts?

Deviations from compactness are *not* only permissible in order to protect the ability of minorities to elect representatives of their choice. As also discussed above, the protection of minorities' ability to elect representatives of their choice would be unlikely to result in irregularly shaped, non-compact districts. The scenario envisioned by this question – a non-compact, majority-controlled district abutting a non-compact district in which a minority can elect the representative of its choice – would therefore be extremely rare. In any event, under such a scenario, the same factors that justified the creation of the minority-controlled district would also shield the majority-controlled district from attack. In other words, the non-compact, majority-controlled district would be an inevitable (and permissible) byproduct of the protection of minorities' ability to elect representatives of their choice.

11. The sponsors of the amendments indicate that if the amendments had been in place in 2002, the plan proposed in litigation by opponents of the Legislature's plan would have found strong support. How many districts where racial or language minorities would have had the opportunity to elect representatives of their choice would that plan have created. Please answer also if the ruling of Bartlett v. Strickland *had been in place at that time.*

It is difficult to say exactly how many districts in which minorities are able to elect representatives of their choice would have been created by any given alternative 2002 plan. More than seven years have passed since such plans were proposed and, of course, none was never actually implemented. But it is clear that there were alternatives presented at that time that maintained a comparable ability of minorities to elect candidates of choice while avoiding some of the other ills, like undue non-compactness, that are among the targets of the amendments.

The Supreme Court's *Bartlett v. Strickland* decision has no bearing on this analysis. As discussed above, *Bartlett* held that there can be a Section 2 "effects" violation only if a minority makes up more than 50 percent of a potential district's voting age population. But *Bartlett* said nothing at all about how states may draw districts in which minorities are able to elect representatives of their choice in circumstances where there is *not* a Section 2 violation. *Bartlett* certainly did not say that minority-controlled districts may be drawn only when there *is* a Section 2 violation. *Bartlett* should therefore have very little impact on Florida's future redistricting decisions. The decision means that Florida's potential exposure to Section 2 liability is somewhat reduced, but it in no way restricts Florida in drawing districts in which minorities are able to elect representatives of their choice.

12. *If the Legislature fails to use registration data to redraw a district which is well-known historically to have a Democratic majority of 55%, and as a result of redrawing the district the Democrats are reduced to 42%, won't the failure to use registration data be evidence of intent to disfavor Democrats and/or an incumbent? If the district is currently represented by a racial or language minority group member, wouldn't that be a violation of the amendments' other provision that those districts be preserved? How must the Legislature resolve this conflict if the amendments pass?*

Registration data *can* be used to protect the ability of minorities to elect representatives of their choice, but cannot be used with the intent of helping or harming a party or candidate. Standing alone, then, changes in the political composition of a redrawn district would not be proof that the redrawing was aimed at helping or hurting a party or candidate. In fact, that the redrawing was carried out without reference to registration data would suggest that it was motivated by other, legitimate considerations, *e.g.*, improving compactness or respecting existing political and geographical boundaries. Put another way, changes in districts' political composition can be a *side effect* of redistricting, but they cannot be its *goal*.

If the district in question is represented by a minority group member, or is one where a minority group could potentially elect the representative of its choice, then there would be no problem with the Legislature's consideration of demographic and political data. The Legislature would therefore be able to avoid this question's scenario – a minority-controlled district being redrawn so that the minority is no longer able to elect the representative of its choice – by taking into account the implications of its actions for minorities. If, however, the Legislature *did* redraw a district and thereby destroy a minority group's current ability to elect the representative of its choice, then that could indeed be a violation of the amendments.

13. *If the Legislature uses registration data to redraw that same district to keep it at 55% (and thus avoid an intent to disfavor the Democratic Party) isn't that use evidence of an intent to favor the Democrat incumbent?*

Assuming that the district is *not* one in which a minority group could potentially elect the representative of its choice, then the use of registration data in order to preserve one party's advantage could be evidence of political motivations that are improper under the amendments. However, if the district is one in which a minority group could potentially elect the

representative of its choice, then the use of registration data would not be done to favor an incumbent or political party, but would instead be evidence of an intent to preserve the right of minority voters to elect their preferred candidate. Furthermore, the amendments would likely be interpreted as allowing consideration of political data for various districts as part of an effort to produce an overall plan that is politically balanced and does not disfavor any political party.

14. If the Legislature fails to use registration or performance data to draw a district in an area of high minority population, and as a result fractures a politically cohesive minority community of interest, isn't that failure clear evidence of "diminish[ing the minority's] ability to elect representati[ves] of their choice"?

As noted above, the amendments do not prohibit use of registration or performance data in drawing districts. The amendments prohibit minorities being made worse off in terms of their ability to elect representatives of their choice. The amendments also do not require the *maximization* of districts in which minorities are able to elect representatives of their choice, a point which is entirely consistent with current federal law. In the abstract, the fracturing of a politically cohesive community of interest, therefore, would not *necessarily* violate the amendments or any provision of the Voting Rights Act. If the minority had also been fractured under the previous plan, then its ability to elect the representative of its choice would not have been *"diminish[ed]"* by the new plan. In addition, if the minority is not numerous enough to elect the representative of its choice under *any* plan, then its fracturing would likely not give rise to a violation of the amendments or a violation of the federal Voting Rights Act.

However, if a minority is sufficiently numerous to elect the representative of its choice, and if the previous plan enabled the minority to do so, then its fracturing would indeed violate the amendments. It is precisely to avoid this scenario that the Legislature may consult demographic and political data. Armed with such data, the Legislature can draw districts in such a way that minorities that were previously able to elect representatives of their choice can continue to have the ability to do so.

15. If the Legislature fails to use registration or performance data to draw a district in an area of high minority population, and as a result does not include non-racial or language minority voters who are needed to elect the minority candidate, isn't that failure clear evidence of "diminish[ing the minority's] ability to elect representati[ves] of their choice"?

This is essentially the same as the previous question, as there is no appreciable difference between fracturing a minority group among more than one district, and excluding certain members of that group from a district. In both cases, assuming sufficient numbers, a minority group that *could* elect the representative of its choice is denied the ability to do so. If that minority group had previously been able to elect the representative of its choice, then the amendments would be violated. Nothing hinges on whether the issue is framed as the "fracturing" of the minority group or the "exclusion" of certain members of that group.

16. Florida's congressional districts have withstood every legal challenge, and they incorporate like-minded communities of interest. Are the framers of this petition correct when they assert that some of Florida's districts are "presumptively unconstitutional"?

Under the U.S. Constitution, electoral districts can be unconstitutional either because they (1) violate the equipopulation requirement; (2) were drawn with race as the predominant factor; or (3) are partisan gerrymanders. However, while the entire Supreme Court agrees that partisan gerrymanders are unconstitutional, the Court has been unable to agree on the appropriate *standard* for determining when gerrymanders cross the line into unconstitutionality.

The framers of the amendments do not contend that Florida's congressional districts violate the equipopulation requirement. Perhaps it has been suggested that some individual districts were drawn with race playing too large a role. There is a stronger argument, however, that some of the existing districts may be unconstitutional because they are partisan gerrymanders. That courts have upheld those districts does not mean that they are constitutionally valid since, as noted above, there is currently no operational standard for determining when partisan gerrymanders are unconstitutional. Notably, a federal court in Florida concluded in 2002 that the "overriding goal" of the Legislature's plan was to "maximize the number of districts likely to perform for" one particular party.

The amendments would ensure that Florida's future districts are not unconstitutional partisan gerrymanders. If districts cannot be drawn "with the intent to favor or disfavor a political party or an incumbent," partisan gerrymandering becomes essentially impossible to carry out. The two main goals of partisan gerrymandering – advancing one party's interests at the expense of another's, and protecting incumbents from challenges – are precisely what is prohibited by the amendments.

17. If the sponsors of this amendment are correct that subsection one incorporates the Voting Rights Act into Florida law, isn't it unconstitutional to say in subsection (3) that the incumbency standard is on equal footing with the VRA standards?

The amendments' provisions regarding minority voting rights are similar, but not identical, to Section 2 of the Voting Rights Act. The Voting Rights Act is not, therefore, incorporated into Florida law. All that is incorporated is the principle that minorities should have an equal opportunity to participate in the political process, with no diminishment of their ability to elect representatives of their choice.

Even if the amendments were identical to the Voting Rights Act, no constitutional problems would ensue. As a binding federal law, the Voting Rights Act, of course, *already* applies to Florida elections and redistricting. There is also no tension between the Voting Rights Act and the amendments' requirement that redistricting not have the intent to help or harm a party or incumbent. The Voting Rights Act aims to safeguard minority voting rights. It certainly does not seek to protect incumbents or to allow one party to exploit the other during redistricting. Lastly, the amendments do not raise any Supremacy Clause issue. They involve only state constitutional law, and thus do not (and could not) somehow subordinate the Voting Rights Act to the amendments' incumbency standard.

18. Is it a violation of the U.S. Constitution for an initiative petition to impose standards on the Florida Legislature in creating congressional districts?

Absolutely not. It is clear that there is nothing problematic about there being standards for congressional redistricting. Almost all states, including Florida, currently have in place some such standards. It is also clear that it is irrelevant whether those standards are imposed by legislative action or popular initiative. In several states, in fact – *e.g.*, Arizona, Arkansas, California, Colorado – popular initiatives not only imposed standards on redistricting, but also took away the state legislatures' responsibility for redistricting and gave it to new independent commissions. No court has ever found such an initiative – let alone a more limited one like Florida's – unconstitutional.

Sincerely,

Paul M. Smith Michael B. DeSanctis