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IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

CORD BYRD, in his official capacity as Florida Secretary of State, et al. *Appellants,* v. BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE INC., et al. *Appellees*.	Case No.: 1D23-2252 L.T. Case No. 2022-ca-000666

BRIEF FOR *AMICUS CURIAE* DR. J. MORGAN KOUSSER IN SUPPORT OF APPELLEES

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Statutes and Rules

My name is J. Morgan Kousser and I am a historian and an expert in the history of Southern politics and political science. I have extensively studied the history of redistricting in Florida, the Fair Districts Amendments ("FDA"), and the history of Black opportunity districts in North Florida. To assist this Court in deciding the instant action, I offer the following *amicus* brief, which summarizes but a few pieces of evidence that help to form the factual basis for my conclusion, developed in connection with my recent work as an expert in *Common Cause et al. v. Byrd et al.*, 4:22-cv-109-AW-MAF (N.D. Fla.), that both the FDA and benchmark Congressional District 5 are supported by a strong basis in Florida's history in voting and redistricting. Because the factual record in this case concerns the 2022 redistricting cycle, I do not discuss it here; instead, I focus on the history of Florida redistricting and how this case fits within Florida's long history of using redistricting as a tool to disadvantage Black voters, which highlights the necessity of the FDA.

I. QUALIFICATIONS AND INTEREST OF AMICUS

I am a professor of history and social science, emeritus, at the California Institute of Technology. I received a Ph.D. and Master of

Philosophy in History from Yale University. I have published three books and edited another, in addition to 47 scholarly articles, 86 book reviews, and 27 entries in reference works. My work has focused, among other things, on minority voting rights and race relations in Southern states, including in Florida. I have authored two books on the subject, including *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974), and *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*.

I have previously testified or consulted in 40 federal court cases and 22 state court cases concerning voting rights or redistricting, including in four Florida cases: *Jones v. DeSantis*,[1] *Williams v. DeSantis* (which settled before trial), *League of Women Voters of Florida, Inc. v. Lee*,[2] and *Common Cause v. Byrd* (pending before the Northern District of Florida). I have also testified twice before subcommittees of the U.S. House Judiciary Committee on voting rights.

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[1] 462 F. Supp. 3d 1196 (N.D. Fla. 2020), *rev'd sub nom., Jones v. Governor of Fla.*, 974 F.3d 1016 (11th Cir. 2020).

[2] 595 F. Supp. 3d 1042 (N.D. Fla. 2022).

As a historian with expertise in Florida's history of discrimination against minority voters, I have a considerable professional and personal interest in the resolution of this case.

II. FLORIDA'S HISTORY OF DISCRIMINATION IN VOTING ON THE BASIS OF RACE

A. Florida's Long and Notorious History of Racial Discrimination in Redistricting and Voting Demonstrates the Need for the FDA

Black voters in Florida have struggled against efforts to diminish their votes, or prevent them from voting altogether, since they first gained the right to vote. Efforts to prevent Black voters from electing their candidates of choice have involved discriminatory redistricting techniques from the very beginning. As the more blunt and overt means of preventing Black voters from actually voting—e.g., all-white primaries, destroying ballots, pervasive violence and intimidation at the polls—were curtailed, vote denial efforts in Florida became increasingly focused on redistricting mechanisms calibrated to diminish and constrain Black electoral power. The FDA's necessity, and the basis for its strong remedial protections, must be understood by placing it in historical context and acknowledging its

important role in addressing and redressing Florida's history of restrictions on minority voting rights.

1. 1865-1900

From the end of the Civil War to the present day, racial conflicts over redistricting have recurred whenever Black Floridians gained (or were poised to gain) political power. Even though racially impartial suffrage was written into the state constitution after the Civil War, Black political equality was severely undercut by two provisions: one relating to the apportionment of the state legislature, and another relating to the method of selection of the principal local officials.

Although 48.8% of the people in Florida were "Colored" according to the census of 1870, the first constitution's redistricting scheme was blatantly malapportioned to ensure that approximately one-third of the voters—those disproportionately from white counties—would elect a majority of the legislature. A second provision of the 1868 constitution prevented Black Floridians from holding local offices by giving the governor the power to centrally

appoint almost all local officials.[3] In addition to these constitutional provisions, Florida continued to pass laws that prevented Black voters from exercising their right to vote.[4]

These provisions demonstrate that from the beginning of Black suffrage, Florida's election laws were centrally concerned with the maintenance and expansion of white supremacy—including through the manipulation of redistricting. It is notable that the contest over the very first apportionment of state legislative seats after emancipation was a racial one; from the beginning, questions of apportionment in Florida were suffused with questions of race and power.

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[3] Article 5, Section 19, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1868con.html.

[4] Kousser, *Shaping of Southern Politics*, 98-99 (describing election laws which were discriminatorily enforced to deny registration to Black voters and toss out Black votes); Charles D. Farris, "The Re-Enfranchisement of Negroes in Florida," *Journal of Negro History*, 39 (1954), 259-83, at 260-61 (describing Florida's enactment of a poll tax as well as an "eight-box law" which disfranchised illiterate persons by requiring them to deposit separate ballots for each office in a different ballot box).

2. 1900-1965

After the end of Reconstruction, most Black Floridians did not recover their voting rights until the passage of the Voting Rights Act in 1965. Even though Florida had a sizeable Black population at all relevant times, the first Black legislator since 1888 did not take office until 1969, and Florida did not elect a single Black member of Congress between 1877 and 1993.[5] No Black state senator was elected until 1982.[6]

This electoral exclusion was enforced by means of explicit racial animus. When, after the passage of the 19th Amendment in 1920, some Black women attempted to register to vote, a Jacksonville newspaper headlined its story "Democracy in Duval County Endangered By Very Large Registration of Negro Women," and city officials made largely successful efforts to prevent the women from

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[5] Canter Brown, *Florida's Black Public Officials, 1867-1924* (Tuscaloosa, Alabama, Univ. of Alabama Press, 1998); J. Morgan Kousser, *Colorblind Injustice: Minority Vote Dilution and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1999), 19; Gerald R. Webster, "Congressional Redistricting in the Southeastern U.S. in the 1990s," *Southeastern Geographer*, 35 (1995), 1-21, at 9.

[6] *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 291 (Fla. 1992).

voting. According to one historian, a campaign to register Black voters near Orlando in 1920 was a principal cause of the infamous Ocoee Riots, in which 30-35 Black citizens were killed and most Black-owned buildings were burned to the ground.[7] And Harry T. Moore, President of the State Conference of the NAACP, was assassinated in 1951 for his efforts to register and organize Black voters.[8]

This animus also was expressed through the law. Before it was struck down by the U.S. Supreme Court in *Smith v. Allwright* in 1944,[9] the all-white Democratic primary was the most powerful guardian of white supremacy in Florida politics.[10] Even after this decision, the Florida legislature nonetheless required all primaries for school boards to be conducted under at-large rules, making it

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[7] Robert Cassanello, "The Right to Vote and the Long Nineteenth Century in Florida," *Florida Historical Quarterly* 95 (2016), 194-220, at 214, 219.

[8] Caroline Emmons, "'Somebody Has Got to do that Work:' Harry T. Moore and the Struggle for African American Voting Rights in Florida," *Journal of Negro History*, 82 (1997), 232-43.

[9] 321 U.S. 649 (1944). Applied to Florida in *Davis v. State ex rel. Cromwell*, 156 Fla. 181 (1945).

[10] Charles D. Farris, "The Re-Enfranchisement of Negroes in Florida," *Journal of Negro History*, 39 (1954), 259-83, at 262-63.

much more difficult for minorities to elect candidates of their choice.[11] This at-large election law for school boards was ruled to have been intentionally discriminatory in *McMillan v. Escambia County*,[12] part of a line of case law which recognizes at-large elections are frequently intended to dilute minority electoral power.

3. 1965-Present

Congress's passage of the Voting Rights Act in 1965 is rightly viewed as a sea change for minority voting rights, including in Florida. For the first time in 80 years, the systematic disenfranchisement of minority voters was challenged by a new wave of legal protections. But far from ending the struggle, the passage of the Voting Rights Act opened up a new front in the struggle for multiracial democracy, including in Florida. From 1965 to the present, at least 69 courts have found that the state, county, or municipal governments of Florida engaged in voting rights discrimination, or in which those governments settled voting rights

[11] Peyton McCrary, "The Struggle for Minority Representation in Florida, 1960-1990," *Florida Historical Quarterly*, 86 (2007), 93-111, at 95-98.

[12] 638 F.2d 1239, 1245 (5th Cir. 1981).

lawsuits. [13] At least five cases brought under Section 2 of the Voting Rights Act were also decided under the 14th and 15th Amendments, indicating findings of discriminatory intent as well as effect.[14]

Redistricting in this time frame continued to play a central role in preventing Black voters from electing their candidates of choice. Before *Baker v. Carr*[15] and *Reynolds v. Sims*,[16] Florida was one of the

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[13] I refer to lawsuits under the 14th or 15th Amendment or Section 2 of the Voting Rights Act, settlements or consent decrees, or objections or successful "more information requests" under Section 5 of the Voting Rights Act. The data comes from a database that I have been compiling since 2009, which was the basis of my testimony before the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, summarized at <https://www.congress.gov/congressional-report/116th-congress/house-report/317/1>, pp. 53-56, an article, "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in *Shelby County*?" Transatlantica, 1 (2015), available at < https://transatlantica.revues.org/7462>.

[14] The five cases were *McMillan v. Escambia County,* 77-0432 (N.D. Fla. July 10, 1978), *rev'd,* 638 F.2d 1239 (5th Cir. 1981), *vacated and remanded,* 688 F.2d 960 (5th Cir. 1982), *on remand,* 559 F. Supp. 720 (N.D. Fla., March 11, 1983), *vacated,* 104 S.Ct. 1577, *aff'd,* [the 688 F.2d 960 decision] 748 F.2d 1037 (5th Cir. 1984); *NAACP v. Gadsden County Sch. Bd.*, 73-177 (N.D. Fla. 1980), *rev'd*, 691 F.2d 978 (11th Cir. 1982), *reheard,* 589 F. Supp. 953 (N.D. Fla. 1984) ; *James v. City of Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985); *Warren v. City of Tampa*, 693 F. Supp. 1051 (M.D. Fla. 1988), and *Baroody v. City of Quincy*, 4:20-cv-217 (N.D. Fla. April 28, 2020).

[15] 369 U.S. 186 (1962).

[16] 377 U.S. 533 (1964).

most malapportioned states in the nation.[17] Rural legislators from predominantly white districts known as the "Pork Chop Gang," because "they fought for 'pork rather than principle,'" ran the legislature with an iron hand, starving public services and especially ignoring the needs of minorities. The rural faction bitterly opposed equal apportionment of the state legislature and quickly faded in power when the reform took place.[18] According to a later House Reapportionment Committee, "it was the issue of reapportionment that finally brought down Florida's 1885 constitution, effectively throwing out the old Florida and ushering in the new."[19]

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[17] William C. Havard and Loren P. Beth, "Representative Government and Reapportionment: A Case Study of Florida," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991), 21-76, at 29.

[18] Michael Hoover, "Turn Your Radio On: Brailey Odham's 1952 'Talkathon' Campaign for Florida Governor," *The Historian*, 66 (2004), 701-29, at 705; Jack Bass and Walter DeVries, *The Transformation of Southern Politics* (New York: Basic Books, 1976), 107; Neil Chethik, "Look up, Tallahassee, Florida's back in town," *Tallahassee Democrat*, Jan. 18, 1982, at 1A.

[19] Florida House of Representatives Committee on Reapportionment, "Reapportionment in Florida: Out of the 19th Century, into the 21st," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991),437-55, at 437.

Shortly after *Baker v. Carr* held reapportionment to be justiciable, a three-judge federal court ruled Florida's apportionment unconstitutional and ordered the legislature to reapportion itself. After two special legislative sessions, the legislature produced a plan that a federal district court reluctantly approved, but that the U.S. Supreme Court found wanting.[20] The legislature then adopted another plan, which the U.S. Supreme Court again rejected.[21] On remand, after the legislature continued to defy the U.S. Supreme Court's rulings, the district court drafted a fourth redistricting plan.[22] This evidenced a repeated willingness to stymie the implementation of court rulings enforcing more equitable redistricting plans.

By 1972, the issue of whether to require single-member legislative districts to facilitate effective minority representation had become prominent in Florida politics. A broad coalition of activists

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[20] Florida House of Representatives Committee on Reapportionment, "Reapportionment in Florida: Out of the 19th Century, into the 21st," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991), 437-55, at 442 ("interference" comment); *Swann v. Adams*, 383 U.S. 210 (1966).

[21] *Swann v. Adams*, 385 U.S. 440 (1967).

[22] *Swann v. Adams*, 263 F. Supp. 225 (S.D. Fla. 1967).

and good-governance groups repeatedly forced the issue's consideration, focusing on the persistent discriminatory effects of multi-member districts. The Legislature considered the subject of reapportionment in 29 sessions from 1955 through 1982, and proponents of single-member districts filed lawsuits and referenda measures on reapportionment[23] The 1982 redistricting finally settled the single-member district question and closed an era of extraordinary conflict over redistricting in which minority representation had been a central issue. In its decision evaluating the 1982 reapportionment, the Florida Supreme Court highlighted the Florida Attorney General's defense of the many new majority-minority single-member districts, noting that "the attorney general submits that the special needs of minority voters were recognized" in the plans.[24]

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[23] Florida House of Representatives Committee on Reapportionment, "Reapportionment in Florida: Out of the 19th Century, into the 21st," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991),437-55, at 452-55.

[24] *In re Apportionment Law Appearing As Senate Joint Resolution 1 E,* 414 So. 2d 1040, 1045 (Fla. 1982).

In the 1990s, with single-member districts firmly settled in Florida's apportionment scheme, the hydra of racial vote dilution grew yet another head. Faced with single-member districts that were harder to configure in a way that would deny minority voters the opportunity to elect their candidates of choice, white legislators sought instead to weaponize minority electoral power for their own political ends. Republican legislators sought to pack minority voters into as few districts as possible, drawing a limited number of seats where minority voters would clearly win and limiting their influence across the legislative body as a whole.[25] Florida's Democratic legislators, in turn, frequently advocated for redistricting plans that would strategically utilize minority voting power to boost white Democratic candidates to victory. In 1992, the Legislature's inability to enact a congressional map precipitated a court-ordered map that created a Black opportunity district in Northern Florida, resulting in the election of a Black congressional representative for the first time in the state since 1886.

[25] Curt Anderson, AP, "Redistricting just won't go away – Lawmakers need special sessions, courts to finish the job," Naples Daily News, March 17, 1992, at 6B.

But litigants from all sides sought to challenge both the legislative and Congressional reapportionments, on a variety of theories, all centered on the use of race in Florida's reapportionment. In one such case concerning state legislative redistricting, the U.S. Supreme Court weighed in, holding that Section 2 of the Voting Rights Act did not require minority districts to be *maximized*.[26] But the Court also recognized "continuing discrimination and racial bloc voting"[27] in Florida, and never suggested discrimination had been sufficiently tempered such that redistricting protections for minority voters were no longer necessary to guarantee political equality in Florida.

The 2000s redistricting cycle represented the next twist in the story of minority representation and reapportionment in Florida. In complete control of the process, Florida Republicans sought to maximize their gains. To accomplish this aim, they shuttled minority populations around on the map to increase the safety of Republican

[26] *Johnson v. De Grandy*, 512 U.S. 997 (1994).
[27] *Id.* at 1000.

incumbents.[28] These changes produced ripple effects throughout the map, many of which worked against minority voting strength.[29] Legislators treated Black voters as pawns, packing them or stranding them in whatever way would minimize Black power while maximizing their own power. Notably, a three-judge court approved an overwhelmingly white majority district stretching from Tallahassee to Jacksonville in litigation over the maps, much like the district at issue in the present litigation.[30]

B. Florida's Voters Enacted the FDA Against This Background of Racial Discrimination in Redistricting and Voting

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[28] *E.g.*, Sean Mussenden, "New seat for Hispanic in Congress not likely," Orlando Sentinel, Feb. 5, 2002, at D3; Lesley Clark, "Redistricting plan gains in Senate," Miami Herald, March 20, 2002, at 11B; Sean Mussenden, "GOP passes district maps; Democrats vow challenges," Orlando Sentinel, March 23, 2002, at B3; Sean Mussenden, "Senate hands Feeney his district – Speaker's path to Congress opens up," Orlando Sentinel, March 22, 2022, at A1.

[29] Steve Bousquet, "Senate maps for Congress take shape – Lawmakers might need a special session to resolve differences between House and Senate plans." St. Petersburg Times, March 20, 2002, at B1; Bousquet, "Tailored Congress districts approved – Now the court battle begins over the districts drawn to keep the U.S. House firmly in GOP hands," *id.*, March 23, 2002, at 1; William March, "Voting Districts Pan Out For GOP – Redistricting Plan Shifts Minorities, Democrats," Tampa Tribune, March 24, 2002, at 1 (Metro).

[30] *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002)

In 2010, Florida voters enacted the Fair Districts Amendments. Advocates for the FDA, as well as public debate concerning its provisions, were animated by—indeed, were focused on—Florida's long and notorious history of racial discrimination in redistricting and voting. The *Orlando Sentinel* recognized the "potent political history behind the debate," including the history of "draw[ing] congressional and legislative districts that concentrated black voters" while "'bleach[ing]' surrounding districts" of Black voters and diminishing their influence statewide.[31]

The public campaign for the FDA emphasized that one of its key goals was to protect the ability of minority voters to elect their chosen representatives. Proponents generally discussed the protection of minorities in addressing the amendment's provisions and goals, and their campaign materials spotlighted minority support. Proponents also stressed the odd shapes of districts and the lack of competition in general elections. For example, the press release that the FDA campaign issued when the measure officially qualified for the ballot

[31] Aaron Deslatte, *Gerrymandering Issue Divides Black Caucus*, Orlando Sentinel (July 26, 2009).

stressed that the FDA would protect minority rights by "mak[ing] it impossible for legislators to draw districts to diminish the ability of minority voters to elect representatives."[32] That release also touted the bipartisan endorsements of a prominent Republican, former State Comptroller Bob Milligan, and former Democratic governor and senator Bob Graham.[33]

Newspaper coverage also stressed that protecting minority voters' ability to elect their candidates of choice was an essential goal of the FDA. Thus, the co-chair of the campaign, Thom Rumberger, a lawyer who had represented the Republican Party during the 1992 redistricting, asserted that the redistricting system "is undemocratic and in dire need of change. We must let voters choose their public officials instead of the other way around." In the 2002 redistricting, he noted, "Minorities and demographically similar groups are either 'stacked' into a single district or 'cracked' into numerous ones; either way, their influence with the policymakers sent to Tallahassee and Washington is undermined and diminished . . . [The initiatives] also

[32] https://www.eqfl.org/breaking-fair-districts-officially-ballot.
[33] https://www.eqfl.org/breaking-fair-districts-officially-ballot.

have language that protects minority representation."[34] Similarly, Mark Ferrulo, the executive director of Progress Florida, one of the organizations supporting the FDA, remarked that the FDA "ensures districts are not drawn to disenfranchise racial or language minorities. This will prevent a particular voting bloc from being diluted over several districts, rendering it politically impotent."[35] It is worth noting that Ferrulo did not merely stress non-retrogression in minority access districts, but, as Rumberger had, the dispersing of minorities across several districts.

In an editorial endorsing the FDA, the *Miami Herald* wrote of the minority protection provisions, "Districts must maintain the equal opportunity of minority communities to elect representatives of their choice and participate fully in the political process. . . . [The FDA] would enshrine the voting rights of minority communities in the state

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[34] Thom Rumberger, "Need for fair districts transcends partisanship," op-ed, *Tallahassee Democrat*, Feb. 18, 2009, at 8A.

[35] Mark Ferrulo, op-ed, "Giving power to the people—Amendment would end gerrymandered districts," *Florida Today*, April 26, 2009, at 19A (emphasis added).

Constitution, as they are now protected in the U.S. Constitution."[36] Likewise, in an editorial endorsing the FDA, the *Tallahassee Democrat* observed:

> The amendments require, and this is critically important, that district plans may not deny any racial or language minorities the equal opportunity to participate in the political process. The importance of this is subtle. Now our districts are drawn so that they can pack a large number of minority voters into just a few districts. Minorities win seats in the Legislature or Congress, and they can keep getting re-elected — but there aren't enough minority representatives to have any real power once they have that seat at the table.[37]

Again and again, proponents pointed to the specific language of the amendments that sought to guarantee non-discrimination and prevent retrogression in the gains in representation that minorities had already made.[38] According to prominent Black legislator Rep.

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[36] Editorial, "Take back democracy – Our Opinion: Support drive to fix the way that representatives' districts are drawn," *Miami Herald*, June 21, 2009, at 4L.

[37] *Our Opinion, Yes to Amendments 5 and 6*, Tallahassee Democrat (Sept. 26, 2010).

[38] Bill Cotterell, "Redistricting amendment thrown off ballot," *Tallahassee Democrat*, July 9, 2010, at 2 Local; Paul Flemming, "Ballot to address legislative districts," *Tallahassee Democrat*, Sept 19, 2010, at 1; Editorial, "Amendments 4 and 5 [*sic*; they meant 5 and 6; they published correction next day]: yes – It's not fair to let politicians choose their voters," *Tallahassee Democrat*, Sept. 26, 2010, Opinion, at 2; Editorial, "We recommend: on Amendments 5

Perry Thurston, "These amendments provide new protections for all voters and especially minorities."[39] Adora Obi Nweze, president of the Florida Branches of the NAACP, declared: "It should frighten all Floridians to know that some elected officials will stop at nothing to protect their political status by trying to avoid having any rules to stop them from continuing to draw districts that serve themselves rather than the people." According to Nweze, opponents of the FDA were trying to turn the clock back to "a very dark time in our history," and she condemned "the blatant use of scare tactics with African Americans and Hispanics to justify the continued gerrymandering of districts that benefit only politicians."[40]

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and 6, yes," *Bradenton Herald*, Sept. 30, 2010, at B6; Editorial, "Vote yes on amendments 5 and 6," *South Florida Sun-Sentinel*, Oct. 13, 2010, at 10A; No byline, "Redistricting measures seek fairness," *Tampa Tribune*, Oct. 14, 2010, at 11; Ellen Freidin, "Know Your Amendments," *Palm Beach Post*, Oct. 17, 2010, at 5S.

[39] Shannon Coleveccio, "Redistrict plan on ballot – Organizers for the Fair Districts proposal have gathered enough signatures to put the measure – to change the way lawmakers draw legislative districts – on the November ballot," *Miami Herald*, Jan. 24, 2010, at 5B.

[40] Paul Flemming, "Ballot to address legislative districts," *Tallahassee Democrat*, Sept 19, 2010, at 1; Bill Cotterell, "Fair Districts Fla. draws opposition," *Tallahassee Democrat*, Sept 21, 2010, at 11.

Public opinion polls taken before the vote indicated strong bipartisan support from Republicans as well as Democrats, Blacks and Latinos, and non-Hispanic whites.[41] In fact, in an election in which Republicans won supermajorities in both houses of the legislature and picked up four Florida congressional seats, the FDA received an overwhelming supermajority—62.9% of the votes.[42] The FDA thus passed with substantial popular support, and its drafters and proponents made clear that they believed the FDA would remedy Florida's long, unbroken history of racial discrimination in voting and districting.

C. Post-FDA Events & 2012 Redistricting

Following the 2012 redistricting, the Florida courts were called upon to vindicate minority rights under the FDA. The *Apportionment* cases, as the line of cases involving the 2012 redistricting are called, show that even when the voters had clearly instructed the legislature to respect minority rights, the legislature was unwilling to do so

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[41] Joseph Eagleton, "Drawing the Line: Public Support for Amendments 5 and 6," in Seth McKee, ed., *Jigsaw Puzzle Politics in the Sunshine State* 109-25 (2015).

[42] Editorial, "Transition time – Scott is handing on to his outsider status," *Tallahassee Democrat*, Nov. 7, 2010, at 2 (Opinion section).

without court intervention. Ultimately, there were eight separate challenges to the 2012 redistricting map; in those challenges, the Florida courts considered the latest iterations of a question that had been considered in every reapportionment cycle since the U.S. Supreme Court's recognition of one-person one-vote and the passage of the Voting Rights Act: how to protect Florida's minority voters from discrimination in redistricting.

After meticulously examining other districts using the same approach as it took for Congressional district 5 ("CD-5"), the Florida Supreme Court required the Legislature to redraft eight congressional districts, using specified guidelines.[43] As the Court later set forth in detail, the Legislature failed to follow the guidelines set down by the Supreme Court. Following more litigation in the trial courts, the Supreme Court finally implemented a plan.[44] In determining which of the proposed plans to adopt, the Court noted that the North/South version of CD-5 at issue had been the "focal

[43] *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 406-413 (Fla. 2015) ("*Apportionment VII*").

[44] *League of Women Voters of Fla. v. Detzner*, 179 So.3d 258, 270, 297 (Fla. 2015) ("*Apportionment VIII*").

point of the challenge to the Legislature's redistricting plan" and that the trial court had found the North/South district "a key component of the Legislature's unconstitutional intent." While requiring an East/West orientation for the district in *Apportionment VII*, the Supreme Court had not specified any minimum percentage of Black voting age population or share of registered Democrats, and it had left the shape entirely up to the Legislature. In adopting the proposed East/West version of CD-5 in *Apportionment VIII*, the Court found that CD-5 "does not diminish the ability of black voters to elect a candidate of choice."[45]

D. Benchmark CD-5

Congressional district 5 ("CD-5") in the congressional map from 2016 (the "Benchmark CD-5") contained a Black community of interest that made its constituents both different in kind from the rest of Florida and similar to each other. That is, across Northern Florida, Black voters acted cohesively and voted together for their preferred candidates while white voters bloc voted against Black-preferred candidates. And many of those Black voters lived within

[45] *Apportionment VIII*, at 271-73.

the boundaries of Benchmark CD-5: the district had a majority-minority voting age population ("VAP") and citizen voting age population ("CVAP"), with the largest share of the eligible electorate being Black (46.7% as of 2020) and representing a clear and cohesive community of interest.

Moreover, various other demographic characteristics distinguished this Black community of interest in Benchmark CD-5. Benchmark CD-5 covered Floridians that tended to be younger, more economically disadvantaged, and less educated than the median Floridian.[46] Floridians in Benchmark CD-5 had a median age of 35.1 years, compared to the state median of 42.8.[47] The median household income in Benchmark CD-5 was $46,344—about three-quarters of the median income of $63,062 statewide.[48] In Benchmark CD-5, 22.2% of all persons lived below the poverty line, including 30% of children under 18, compared to the statewide rate of 13.1%

[46] https://censusreporter.org/profiles/50000US1205-congressional-district-5-fl/ (summarizing American Community Survey 2021 1-year survey data).

[47] *Id.*

[48] *Id.*

of all persons, and 18% of children.[49] 24.1% of Floridians in Benchmark CD-5 had a bachelor's degree or higher, compared to 33.2% statewide.[50]

Moreover, and critically, Benchmark CD-5 also overlaps in large part the so-called "Slave Belt," where the state's cotton plantations were located before the Civil War. As Florida's state council of the National Endowment for the Humanities put it:

> During the 25 years leading up to the Civil War, a five-county region of North Florida grew into a virtual barony of plantations and farms that echoed the wealthiest precincts of the Old South cotton kingdom. The vast majority of Florida's slaves lived in this central part of the Panhandle along the Georgia border. Called "Middle Florida," it centered on the capital city of Tallahassee and included Gadsden, Leon, Jefferson, Madison, and Hamilton counties — and eventually expanded into central Florida's Alachua and Marion counties.[51]

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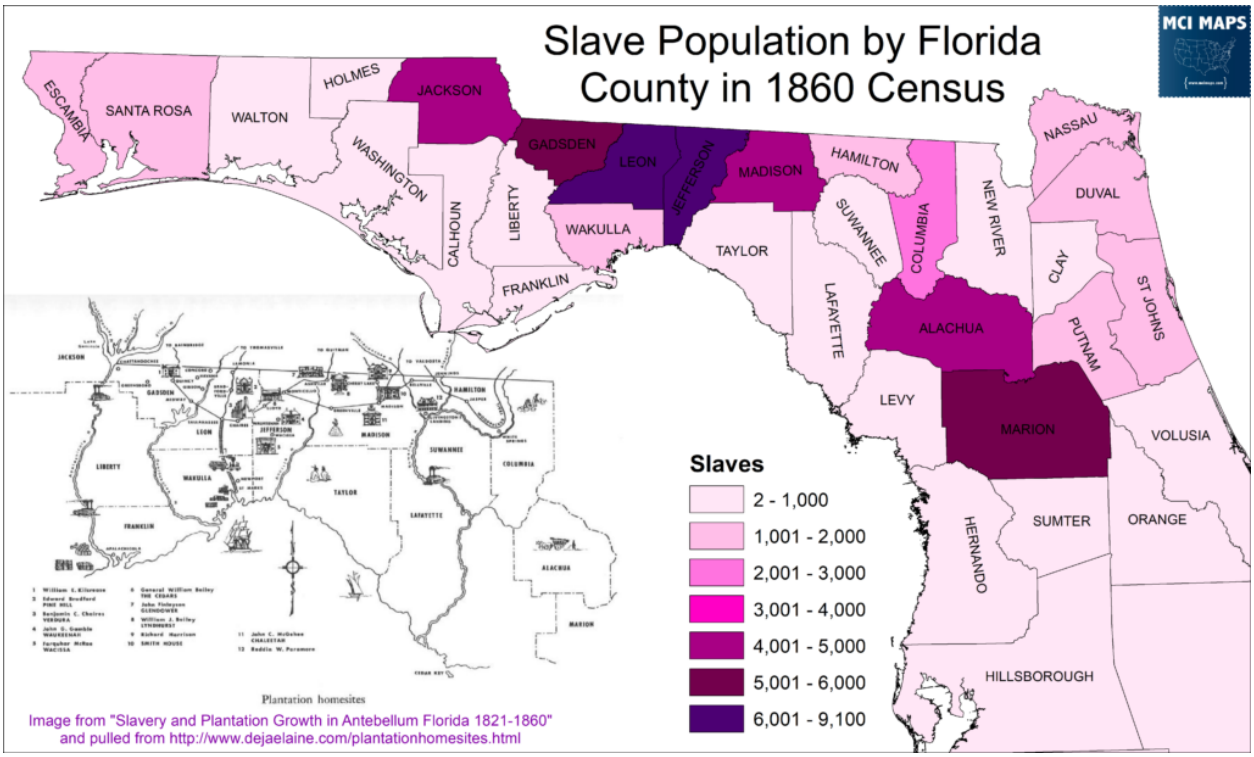
[49] *Id.*

[50] *Id.*

[51] Florida Humanities, *Florida's Culture of Slavery*, Feb. 4, 2020, https://floridahumanities.org/floridas-culture-of-slavery/.

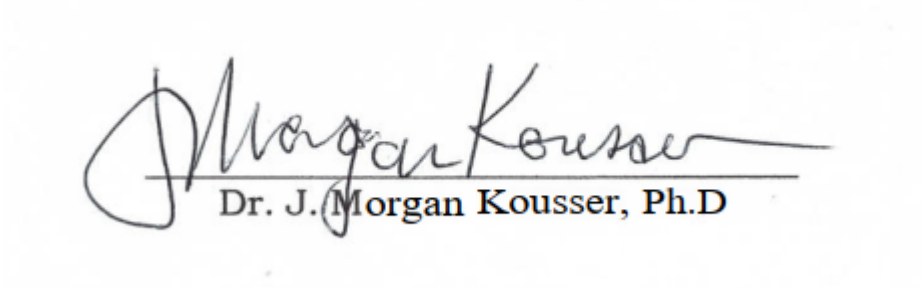


Thus, unlike the concerns expressed in *Shaw v. Reno,* where the Court ruled minority residents in a congressional district had "little in common with one another but the color of their skin," 509 U.S. 630, 647 (1993), the residents of CD-5 not only share a number of common demographic characteristics identified as relevant in *Shaw*, such as their "age, education, economic status, or community in which they live" and but also a "lineal connection to the many enslaved people brought to work there during the antebellum period," identified as relevant in *Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023) (internal citations omitted).

III. CONCLUSION

In sum, the history of Florida redistricting clearly demonstrates the centrality of race, and of racial discrimination, in apportionment. This brief has only scratched the surface of that history. But even in this brief summary, the history makes overwhelmingly clear that Florida's voters were informed, guided, and justified by this history in their decision to enact the FDA, and that choice should be enforced and respected.

Dated: October 23, 2023



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 23, 2023, a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal below:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, under Florida Rule of Appellate Procedure 9.045(e), that this Brief complies with the applicable font and word count requirements. It was prepared in Bookman Old Style 14-point font and it contains 4,998 words.

/s/Reid Levin
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