**Case No. 1D23-2252; LT. Case No. 2022-CA-666**

**FIRST DISTRICT COURT OF APPEAL**
**STATE OF FLORIDA**

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**SECRETARY OF STATE CORD BYRD**, the **FLORIDA HOUSE OF REPRESENTATIVES**, and the **FLORIDA SENATE**,

*Appellants*,

v.

**BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC.**, et al.,

*Appellees*.

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# REPLY BRIEF OF THE FLORIDA SENATE AND THE FLORIDA HOUSE OF REPRESENTATIVES

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## INTRODUCTION

Plaintiffs' answer brief fails to rebut two key arguments that are dispositive of this appeal: 1) *Plaintiffs bore the burden* to prove the existence of a potential remedy—an alternative district configuration that complies with the state and federal constitutions; and 2) *Plaintiffs failed to satisfy their burden* with either of the two alternative district configurations proffered below. The alternative version of District 5 in Plan 8015 would violate the federal Equal Protection Clause, while the alternative version of District 5 in Plan 8019 would violate Florida's non-diminishment provision. Under binding Florida Supreme Court precedent, Plaintiffs' failure to carry their burden of proof should have resulted in a judgment for the Secretary and Legislature. This Court should reverse.

## REPLY ARGUMENT

### I. TO PROVE THEIR NON-DIMINISHMENT CLAIM, PLAINTIFFS HAD THE BURDEN TO DEMONSTRATE THE EXISTENCE OF A LAWFUL ALTERNATIVE DISTRICT CONFIGURATION.

The trial court erred by relieving Plaintiffs of their burden to prove that the Legislature *could have drawn* a North Florida district that complies with both the non-diminishment provision and the Federal Constitution. As the Legislature's initial brief explained

(Leg.IB.32-40), binding precedent from last decade's redistricting cycle and analogous federal cases confirm that Plaintiffs bore the burden to prove that it was *possible* to draw a constitutionally compliant district configuration. Although Plaintiffs deny that they bear any such burden (AB.28-30), the scant three pages devoted to this issue in their answer brief fail to rebut the Legislature's authorities to the contrary.

Florida Supreme Court precedent confirms that, when asserting a claim under the Florida Constitution's redistricting provisions, a plaintiff's burden includes the burden to prove that an alternative, constitutionally compliant district configuration *could have been* enacted—and could serve as a lawful remedy. Challengers presented alternative plans throughout last decade's redistricting cycle, and the Florida Supreme Court held that a challenger who failed to present an alternative, constitutionally compliant district configuration in support of a district-specific claim failed to carry its burden of proof. Leg.IB.34-37 (collecting examples); *In re Senate Jt. Resol. of Legis. Apportionment 2-B*, 89 So. 3d 872, 889-90 (Fla. 2012) ("*Apportionment II*") (concluding that challengers "have not carried their burden of proof" in challenging a district's compactness where their alternative plans "raise[d] concerns" under the non-diminishment provision); *In*

*re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 653 (Fla. 2012) ("*Apportionment I*") ("The FDP does not allege how either district could be drawn differently to be more compact without violating Florida's minority voting protection provision. Accordingly, the FDP has failed to satisfy its burden of proof with respect to these two districts.").

Plaintiffs claim the Florida Supreme Court recognized only that alternative maps "may" be offered to prove partisan intent, but are unnecessary to evaluate a "results-based claim." AB.29-30. On the contrary, the Court looked repeatedly to alternative plans (or the absence of a lawful alternative plan) to evaluate challenges that had nothing to do with partisan intent. Leg.IB.34-37. For example, the Court upheld House Districts 70, 88, 115, and 117 against compactness challenges because the challengers failed to demonstrate that it was possible to draw compact districts without violating Florida's tier-one protections for minority voters. *Apportionment I*, 83 So. 3d at 647-53. Similarly, the Court upheld House Districts 101, 102, 103, and 105 because the challengers failed to prove that it was possible to follow political boundaries while respecting tier-one protections for minority voters. *Id.* at 651-53. And

the Court invalidated Senate Districts 6, 9, and 34 as non-compact because the challengers showed that those districts could have been drawn in a compact way without violating Florida's tier-one protections for minority voters. *Id.* at 665-69, 673-79. The challengers' ability or inability to establish the existence of a constitutionally compliant alternative was dispositive of each of these challenges.

In fact, evidence that a legally compliant alternative is available is far more critical when evaluating a results-based claim than a claim that alleges partisan intent. Because it is *always possible* to draw a district without improper intent, it is therefore unnecessary to prove that it could have been done. Where, however, a challenger asserts a results-based claim—such as the non-diminishment claim Plaintiffs assert here—the challengers must prove that the *result* they seek was achievable, both legally and practically. That is precisely the burden the Florida Supreme Court placed on challengers during the last redistricting cycle—a burden that proved dispositive time and time again.

The federal cases cited in the Legislature's initial brief further confirm that Plaintiffs bore the burden to provide evidence of a lawful alternative map. Leg.IB.38-39. Plaintiffs acknowledge that a

challenger who asserts a vote-dilution claim under Section 2 of the Voting Rights Act must provide evidence of an alternative map to "demonstrate that such a district can be drawn." AB.28-29. But Plaintiffs claim the same need does not exist under the non-diminishment standard, which requires only the preservation of districts that already exist. *Id.* But Plaintiffs refute their own argument when they acknowledge that population changes can make it impossible to preserve districts that already exist. AB.55; *see also Texas v. United States*, 831 F. Supp. 2d 244, 265 n.25 (D.D.C. 2011) ("In some circumstances, a non-retrogressive redistricting plan may not be possible given other legitimate constraints on electoral maps."). For that reason, as under Section 2, it is essential here that challengers prove the existence of a legally compliant alternative that may also serve as a remedial district.

Plaintiffs also overlook a critical difference in the burden of proof between the non-diminishment requirement that existed under Section 5 of the Voting Rights Act and the Florida Constitution's non-diminishment provision. Section 5 was not left to private enforcement; rather, covered jurisdictions were required to submit election-law changes in advance to the United States Department of Justice or the

federal District Court for the District of Columbia for preclearance, and then bore the burden to demonstrate that those changes were not retrogressive. *Georgia v. United States*, 411 U.S. 526, 538 & n.9 (1973); *cf. Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 194 (2017) (describing application of Section 5 before coverage formula was held unconstitutional). Section 5 itself therefore tells us nothing about the proper allocation of the burden of proof in a declaratory judgment action brought by private plaintiffs under a presumption of validity and outside the special burden-shifting mechanism of federal preclearance.

The Florida Constitution adopts the non-diminishment concept from Section 5, but does not adopt its enforcement mechanisms or its allocation of the burden of proof. *See Apportionment I*, 83 So. 3d at 624 n.26 ("While Florida's provision borrows language from Section 5, it does not incorporate the portion of Section 5 placing the burden of proof on the covered jurisdiction . . . ."). The Section 2 precedents cited by the Legislature are therefore the best analogue in evaluating the burden of proof under Florida's tier-one minority-voting protections. As in Section 2 litigation, "[t]he inquiries into remedy and liability . . . cannot be separated" when evaluating Plaintiffs' non-diminishment

claim. *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994) (en banc).

Plaintiffs cite *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015) ("*Apportionment VII*"), for the proposition that, once a court finds any constitutional deficiency in a redistricting plan, the burden shifts to defendants to justify every line-drawing decision the Legislature made. AB.42-43. Plaintiffs misread *Apportionment VII*. That case involved extensive evidence of partisan influence over the redistricting process generally. 172 So. 3d at 378-86. Because it found that partisan taint had infected the map and the process generally, the Court shifted the burden to the defendants to justify the challenged districts. *Id.* at 393-401. Nothing like those facts is present here. And tellingly, in *Apportionment I*, the Court did *not* shift the burden to the map's proponents to prove that non-compact districts could not have been drawn in a manner that complies with all legal requirements. Rather, the Court required the challengers to prove that those districts could have been drawn in a compact way *and* without violation of other legal standards.

The Enacted Plan is entitled to a presumption of validity. Leg.IB.33. This presumption means that the Legislature's

determination that one standard conflicts with and must yield to another is presumed correct until a challenger proves that the legislative judgment was erroneous and that both standards could have been harmonized. To overcome the presumption here, Plaintiffs bore the burden to demonstrate that the Legislature *could have* drawn an alternative congressional district in North Florida that *complies* with the Florida Constitution's non-diminishment standard *without* violating the Equal Protection Clause. As explained in Section II, neither of the two alternative maps proffered by Plaintiffs below demonstrates that such a district could have been drawn.

## II. PLAINTIFFS FAILED TO SATISFY THEIR BURDEN TO DEMONSTRATE THE EXISTENCE OF A LAWFUL ALTERNATIVE DISTRICT CONFIGURATION.

In addition to requiring Defendants to prove the *non-existence* of a lawful remedy, the trial court also erred in concluding that Plan 8015 contains a version of District 5 that could serve as a constitutionally compliant alternative district configuration. The East-West district in Plan 8015 does not comply with equal protection because it is a racial gerrymander. In addition, the "Duval-only" district in Plan 8019 does not comply with the Florida Constitution because it violates the very non-diminishment provision Plaintiffs are suing to enforce. Thus, the

trial court did not find—and Plaintiffs do not contend—that the Duval-only district complies with the non-diminishment standard. Plaintiffs' non-diminishment challenge fails, therefore, because Plaintiffs failed to establish the existence of a lawful alternative district configuration.

### A. The East-West version of District 5 in Plan 8015 would violate the Equal Protection Clause.

The only district that Plaintiffs characterize as a constitutionally compliant alternative is the East-West version of CD-5 in Plan 8015. AB.30. Although this alternative district would comply with the Florida Constitution's non-diminishment provision, the Legislature's initial brief explains why it would violate the Federal Constitution's Equal Protection Clause. Leg.IB.47-54, 56-62. Plaintiffs' arguments that race did *not* predominate in the drawing of Plan 8015's version of CD-5 (AB.61-71) find no support in the record evidence or controlling precedent.

Race plainly predominates in the East-West version of CD-5 in Plan 8015. Under the Florida Constitution, *only* race can justify a departure from the Tier-Two requirement that districts "be compact." Art. III, § 20, Fla. Const. The object of the compactness criterion is

that a district "should not yield bizarre designs." *Apportionment I*, 83 So. 3d at 634.

Plan 8015's version of CD-5, like Benchmark CD-5,[1] is visually bizarre and egregiously non-compact by mathematical measures. Jt.Appx.28-29. It resembles a horizontal seahorse stretching along the Florida-Georgia border, with its head in downtown Jacksonville and its tail hundreds of miles to the West extending narrowly across the top of Leon County into Gadsden County before curling back around with a hooked tail penetrating portions of Tallahassee from the Northwest. Jt.Appx.28. The Leon County appendage captures FAMU, Frenchtown, and much of Tallahassee's Southside while leaving FSU, Southwood, Killearn Estates, and Capital City Country Club in District 2. *Id.*

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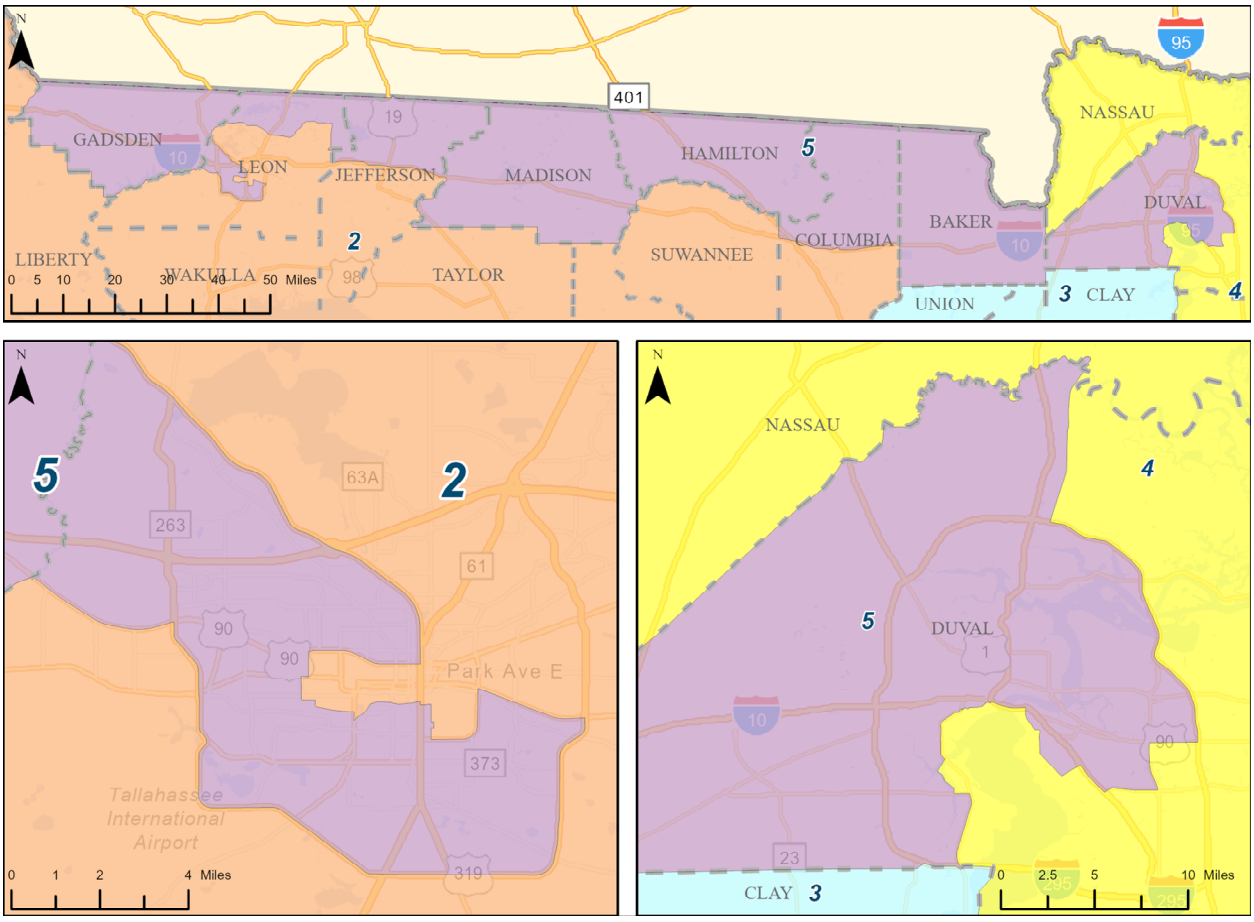
[1] Plaintiffs suggest the Legislature's references to Benchmark CD-5 are an attempt to prove the invalidity of Benchmark CD-5. AB.31, 34, 64-65. The Legislature does not seek to establish the invalidity of Benchmark CD-5, but instead treated that district as an illustrative example of the East-West configuration that Plaintiffs seek. Leg.IB.50-51. The same arguments that demonstrate the predominance of race in Benchmark CD-5 apply to the analogous district in Plan 8015 and to any other district that stretches from Duval to Gadsden County.




Jt.Appx.28. The district scores poorly on quantitative compactness measures as well, with the lowest Polsby-Popper (0.11) and Reock (0.11) scores of any district in either Plan 8015 or the Enacted Plan. Jt.Appx.13, 29.

Plaintiffs claim that the trial court's finding that race did not predominate is entitled to this Court's deference (AB.60), but that finding was rooted in the trial court's incorrect allocation of the burden of proof to Defendants. R.12503-08. That alone warrants reversal on a *de novo* review. The trial court's factual finding, moreover, rests on

clearly erroneous premises. The court's conclusion, for example, that "[t]here is nothing bizarrely shaped about the district" (R.12507) is patently incorrect; the district is grossly misshapen. The trial court also erroneously concluded that "the district's length is largely a factor of North Florida's rural geography and sparse population" (R.12507), but the Enacted Plan shows it is possible to draw districts in North Florida without odd, elongated shapes. Third, the court erroneously relied on the "tradition of congressional districting in North Florida," pointing to a non-compact East-West district spanning from Leon to Duval County in the 2002 congressional map. R.12508. But the 2002 district that the trial court treated as an appropriate historical exemplar was an *acknowledged partisan gerrymander* drawn to favor a Republican incumbent a decade before the Florida Constitution was amended to require compact districts and to prohibit intentional political favoritism. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340 (S.D. Fla. 2002) ("[W]e have no trouble at all finding that the intent of the Florida legislature, comprised of a majority of Republicans, was to draw the congressional districts in a way that advantages Republican incumbents and potential candidates. Indeed, at trial, the defendants stipulated as much."). The whole point of the redistricting standards

that voters enshrined in the Florida Constitution in 2010 was to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. To rely on pre-amendment districts to support the validity of post-amendment districts ignores the will of the voters.

Plaintiffs argue that an East-West district "does not resemble the districts that have been struck down" as racial gerrymanders (AB.66), but to prove their point, Plaintiffs cherry-pick only the most extreme examples of history's most misshapen districts. The Supreme Court has flatly rejected Plaintiffs' argument that, to violate equal protection, a district must resemble a Rorschach blot. *Bethune-Hill*, 580 U.S. at 189 ("Race may predominate even when a reapportionment plan respects traditional principles . . . ."); *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (explaining that the "bizarreness" of a district's shape may be evidence of race-based districting, but is not "a necessary element of the constitutional wrong or a threshold requirement of proof"). So should this Court.

Nowhere in their brief do Plaintiffs suggest any legitimate, *non-racial* basis for the configuration of a 200-mile East-West district in North Florida. Because Plaintiffs have not demonstrated that an East-West configuration is a constitutional alternative, they have not

overcome the presumption of validity and established the invalidity of the Enacted Plan.

### B. The Duval-only district in Plan 8019 would violate the Florida Constitution because it diminishes the ability of black voters to elect representatives of their choice.

The trial court did not find that the Duval-only district complies with the non-diminishment standard—and even Plaintiffs do not claim that it does. AB.72 ("Whether or not a district like CD-5 in Plan 8019 would result in diminishment is not a question that . . . this Court can answer on a cold record."). Indeed, the House Redistricting Committee Chair recognized from the outset that the Duval-only district would diminish the ability of black voters to elect representatives of their choice. R.10959 (describing the district as a "singular exception to the diminishment standard"). The Legislature's initial brief explained why the Duval-only district (like Enacted District 5) would diminish. Leg.IB.54-55. Because it does, Plaintiffs have failed to prove that the Legislature could have avoided diminishment and complied with equal protection.

In *Apportionment I*, the Florida Supreme Court *explicitly rejected* the argument that an appellate court cannot evaluate compliance with the non-diminishment standard on stipulated facts. 83 So. 3d at 626-

27. To perform a non-diminishment analysis, the Court considered Census and political data to determine whether the minority group was "more, less, or just as able to elect a preferred candidate of choice after a voting change as before" *Id.* at 624-25 (quoting H.R. Rep. No. 109-478, at 46 (2006)); *see also id.* at 702 (Canady, C.J., concurring in part and dissenting in part) (noting that "diminish" means "to make less or cause to appear less"). This Court is just as capable of reviewing the stipulated record evidence to determine whether black voters would be "more, less, or just as able" to elect representatives of their choice under Plan 8019's version of CD-5 as they were under Benchmark CD-5.

Plaintiffs, however, avoid engaging with the statistical evidence, since that evidence overwhelmingly demonstrates that the Duval-only district would diminish black voting ability. In Benchmark CD-5, black voters constituted 46.2% of the voting-age population and 68.6% of registered Democrats, while 56.6% of registered voters were Democrats. Jt.Appx.8. Black voters in Benchmark CD-5 represented 66.9% of the average Democratic Party *primary election*. Jt.Appx.9. And in the 14 statewide *general election contests* held in Benchmark CD-5 between 2012 and 2020, Democratic candidates prevailed *all 14*

*times* with an average vote share of 60.9% and an average victory margin of 23.7%. *Id.*

Now consider the Duval-only district, a *majority-white* district in which black voters constitute only 35.3% of the voting-age population and 61.3% of registered Democrats, while only 46.3% of registered voters were Democrats. Jt.Appx.24. Although black voters represent 62.8% of the average Democratic Party *primary election* turnout, the Democratic Party's nominees would have prevailed in statewide *general election contests* in the district only *9 out of 14* times with an average victory margin of only 4.3%. Jt.Appx.25. The district would have elected Republicans Marco Rubio, Rick Scott, Jeff Atwater, Pam Bondi, and Adam Putnam over their Democrat opponents in five elections. Jt.Appx.27.

Under the plain language of the Florida Constitution and Florida Supreme Court precedent, this undisputed statistical evidence establishes that, as compared to Benchmark CD-5, the Duval-only district would diminish the ability of black voters in North Florida to elect representatives of their choice; these voters would be "less able" to elect preferred candidates of choice than under the Benchmark Plan. *Cf. Apportionment I*, 83 So. 3d at 624-25. Because the Duval-

only district would violate the non-diminishment provision, it cannot be considered a lawful alternative district configuration for purposes of establishing Plaintiffs' claim.

To the extent Plaintiffs make a distinction between *performance* and *non-diminishment* and argue that the non-diminishment standard tolerates diminishment, as long as the district still "performs" at some level, the non-diminishment provision's plain language refutes their argument. What matters on a faithful, textual reading of the Florida Constitution's non-diminishment standard is whether the district diminishes. *See* Art. III, § 20(a), Fla. Const. If it does, then the district is non-compliant, and it makes no difference whether, despite the diminishment, the district still "performs." The Florida Supreme Court's precedent confirms that textual reading. Leg.IB.28.

Plaintiffs correctly described how to evaluate non-diminishment in their motion for summary judgment below:

> Plaintiffs must show that a minority group is "less able" to elect their candidate of choice under the new plan than it was under the old plan. [*Apportionment I*, 83 So. 3d] at 624-25. [T]hey must establish that (1) the Benchmark district . . . allowed Black voters the ability to elect the candidate of their choice, and (2) the Enacted Map weakens Black voters' ability to elect the candidate of their choice.

R.3497. Under that standard, the Duval-only district plainly would diminish black voting strength.

Because the district would violate the Florida Constitution's non-diminishment provision, Plaintiffs have not carried their burden to prove that Plan 8019's version of CD-5 is a lawful alternative district configuration.

### C. States cannot create a compelling interest in a race-based district by constitutionally mandating race-based redistricting.

In its initial brief, the Legislature demonstrated that race-based redistricting is not a compelling interest merely because the Florida Constitution mandates it. Leg.IB.56-62. If it were, then any State could nullify the Equal Protection Clause by amending its Constitution to require non-diminishment. According to this theory, no matter how predominant race was in the drawing of a district, the State's mere insertion of a non-diminishment provision into its State Constitution supplies the compelling interest that justifies the district and defeats any equal-protection challenge. By that standard, all of the bizarrely shaped districts that Plaintiffs depict in their brief (AB.67-68) would have been upheld had the States that enacted them (North Carolina and Texas) replicated Florida's non-diminishment

provision in their Constitutions. But the Equal Protection Clause cannot be so easily nullified.

Plaintiffs make two arguments to show that compliance with the non-diminishment standard itself serves a compelling interest. *First*, Plaintiffs point to a history of race discrimination, but Plaintiffs cite no confirmed instances of specific, identifiable race discrimination in the last three decades. AB.77-79. Decades-old wrongs cannot justify present-day, race-based action. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

*Second*, Plaintiffs veer off course and argue that Florida and other States have *authority* to enact minority-protection provisions. AB.80-83. But that is not the question here. The question is not whether Florida had legal authority to enact a non-diminishment provision, but rather whether compliance with that provision is an interest so compelling that it justifies governmental decisions in which race was the predominant consideration. Those are wholly different inquiries. Many provisions of law might be *authorized*—or

have valid applications—without providing a blanket justification for all race-based action that is subject to the demands of strict scrutiny.

## III. THE PUBLIC OFFICIAL STANDING DOCTRINE DOES NOT PROHIBIT THE LEGISLATURE FROM DEFENDING A DULY ENACTED STATUTE'S CONSTITUTIONALITY.

Plaintiffs concede that "the public official standing doctrine does not preclude Appellants from defending the Enacted Plan" (AB.45), but that is exactly how the trial court applied it. It applied the doctrine in an unprecedented way: to silence the Legislature's argument that, in its enactment of new districts, the Federal Constitution compelled a departure from state constitutional standards. That application of the doctrine is wholly unmoored from the doctrine's purpose: to ensure that ministerial officers carry out their statutorily assigned functions.

Nor can it be reconciled with *Apportionment I*. There, in defending state legislative districts, the Legislature explained to the Court why it drew the districts as it did. Sometimes, it argued that districts deviated from one requirement because another requirement of higher stature compelled that deviation. Far from muting the Legislature's argument, the Court conducted a full analysis, explaining that the Court "must be able to undertake a review of the validity of that reason." 83 So. 3d

at 626. The trial court's approach here—to bar the Legislature from asserting that reason in the first place—contravenes *Apportionment I*.

Plaintiffs do not even mention two fundamental limitations on the public official standing doctrine: the doctrine bars only challenges to state statutes, *Reid v. Kirk*, 257 So. 2d 3, 4 (Fla. 1972); *Davis v. Gronemeyer*, 251 So. 2d 1, 3 (Fla. 1971), and only where those statutes impose ministerial duties, *State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681, 682-85 (Fla. 1922) (referring to "ministerial" duties and officers 16 times in describing the contours of the public official standing doctrine). Here, the Legislature does not challenge any statute, let alone one that imposes ministerial duties on it.

Plaintiffs' application of the public official standing doctrine here is untenable. It would mean that, when the United States and Florida Constitutions conflict, the Legislature must either (1) follow the United States Constitution and present no defense when its enacted districts are attacked on state constitutional grounds; or (2) violate the United States Constitution in order to comply with the Florida Constitution, and stand by as its enacted districts are predictably invalidated. Both options guarantee that duly enacted and presumptively valid districts

will be judicially invalidated. Neither is a sensible or practical way to redistrict.

## CONCLUSION

The final judgment should be reversed with instructions to enter judgment for the defendants.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of this brief has been filed with the Florida Courts E-Filing Portal and served by email on October 27, 2023, to:


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## CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the typeface requirements of Rule 9.045(b), Florida Rules of Appellate Procedure because it was prepared in a proportionally spaced typeface using 14-point font Bookman Old Style. This brief complies with the type volume limitations set in Rule 9.210(a)(2)(B), Florida Rules of Appellate Procedure. This brief contains 3,998 words, excluding the parts of the brief exempted by Rule 9.045(e).

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