SC23-1671

In the Supreme Court of Florida

BLACK VOTERS MATTER
CAPACITY BUILDING INSTITUTE, *ET AL.*,
Petitioners,

v.

CORD BYRD, IN HIS OFFICIAL CAPACITY AS
FLORIDA SECRETARY OF STATE, *ET AL.*,
Respondents.

On Petition for Discretionary Review from
the First District Court of Appeal
DCA No. 1D23-2252

SECRETARY BYRD'S BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

Florida's 2022 congressional map disengaged from the "sordid business" of "divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part). Petitioners sued to invalidate that map, arguing that it violated Florida's Fair Districts Amendment by "diminishing" the ability of black voters in North Florida to "elect representatives of their choice." The en banc First District rejected that claim by an 8–2 margin. Petitioners did not establish a non-diminishment violation, it held, because they had not identified a "naturally occurring, geographically compact" black community whose voting power had been diminished. A.29–31. Excusing Petitioners from that textual requirement, the court explained, would pose equal-protection concerns. A.27.

The issues are:

1. Whether Petitioners proved a non-diminishment violation.

2. If Petitioners did prove a non-diminishment violation, whether application of the non-diminishment provision to North Florida violates the Fourteenth Amendment's Equal Protection Clause.

STATEMENT OF THE CASE

A. Legal Background

1. The Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) prohibits racial discrimination in voting. 52 U.S.C. § 10301 *et seq.* Section 2 of the VRA bars diluting minority voting strength. *In re S.J. Resol. of Legis. Apportionment 1176 (Apportionment I)*, 83 So. 3d 597, 622 (Fla. 2012). Section 5 placed "covered jurisdictions" with histories of voting discrimination on electoral probation through the "preclearance" requirement. *Shelby Cnty. v. Holder*, 570 U.S. 529, 535, 537 (2013). Before changing their electoral maps, jurisdictions falling within the VRA's coverage formula had to prove that the changes did not, "on account of race," "diminish[] the ability" of "citizens" to "elect their preferred candidates." 52 U.S.C. § 10304(b). Only five Florida counties were covered jurisdictions; none were in North Florida. *Apportionment I*, 83 So. 3d at 624 (Collier, Hardee, Hendry, Hillsborough, and Monroe).

In 2013, the U.S. Supreme Court invalidated the VRA's coverage formula because it was no longer justified by "current data reflecting current needs." *Shelby Cnty.*, 570 U.S. at 538–39, 553, 557. Section 5 is now functionally inoperative.

2. The Fair Districts Amendment

In 2010, Florida voters amended Florida's Constitution to address standards for drawing congressional districts. Art. III, § 20, Fla. Const. (the Fair Districts Amendment, or FDA). The FDA has two "tiers." Tier 1 bans, among other things, intentional partisan gerrymanders. *Id.* § 20(a). It also prescribes two race-based requirements.

The first racial criterion—the "non-dilution standard"—mirrors Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619. The second criterion—the "non-diminishment standard"—tracks Section 5. *Id.* at 624. Under the non-diminishment provision, "districts shall not be drawn" to "diminish the[] ability" of "racial or language minorities" "to elect representatives of their choice." Art. III, § 20(a). Unlike Section 5's non-diminishment provision, the FDA's provision applies statewide; it is not cabined by a coverage formula. *Apportionment I*, 83 So. 3d at 624.

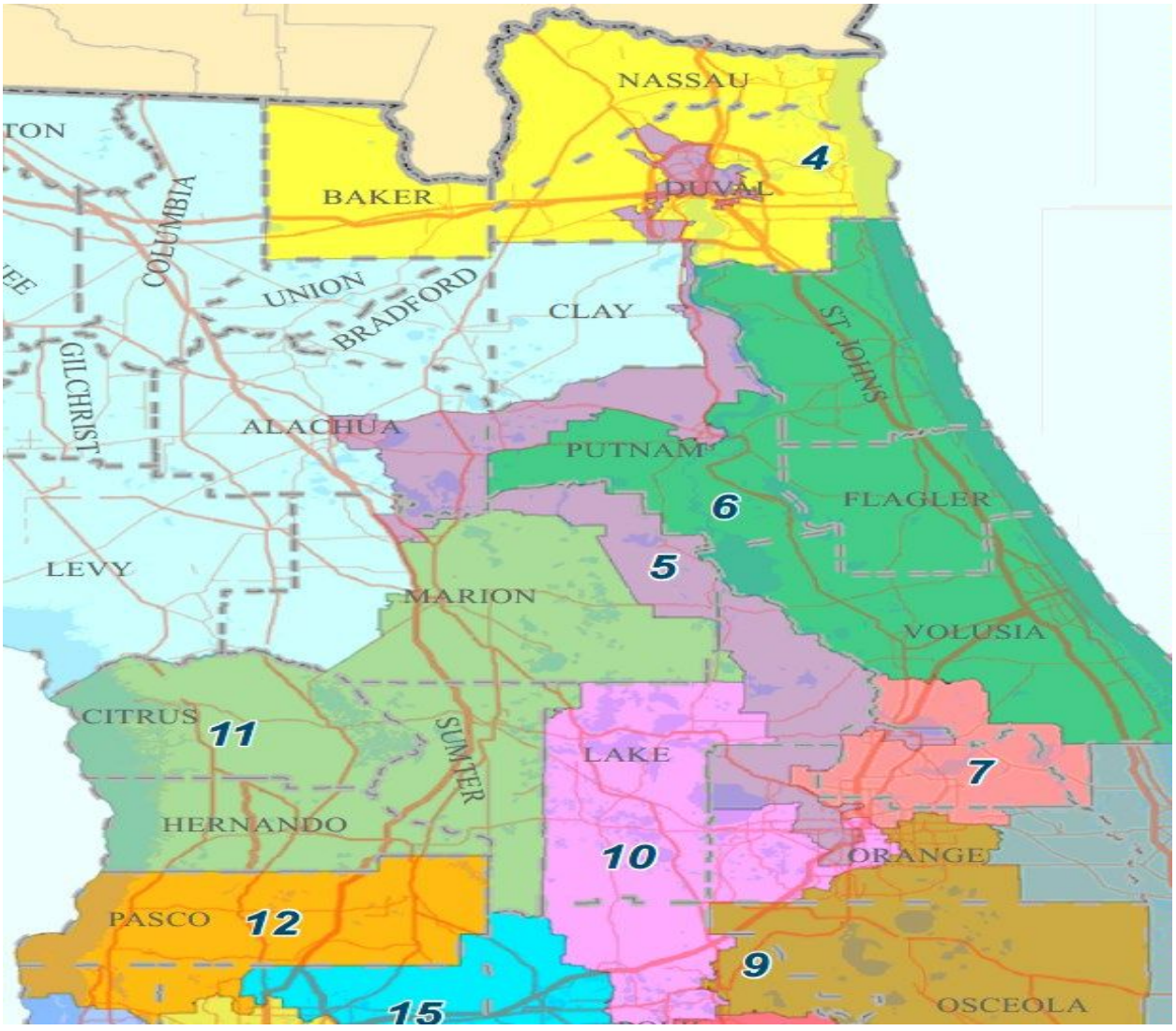
Beneath Tier 1, Tier 2 contains core principles of redistricting. Districts must (1) "be as nearly equal in population as is practicable," (2) "be compact," and (3) "utilize existing political and geographical

boundaries" "where feasible." Art. III, § 20(b). The State must prioritize Tier 1 over Tier 2 when their mandates "conflict." *Id.* § 20(c).

B. Facts and Procedural History

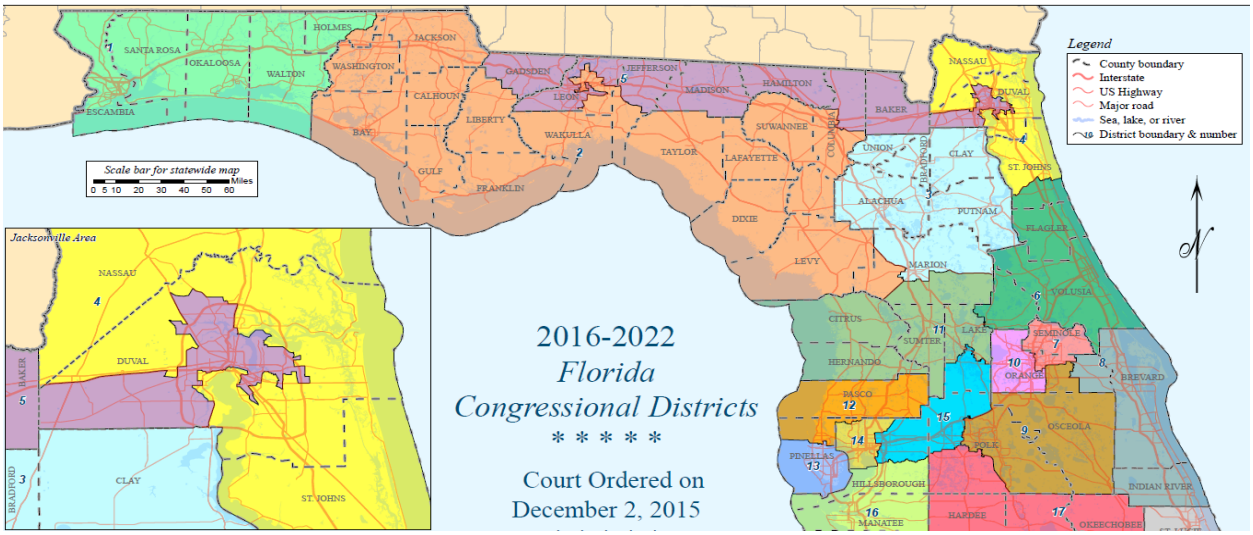
1. The 2016 Plan

After the FDA's ratification and the 2010 census, the State redrew its congressional districts. It first drew Congressional District 5 in a north-south configuration:



League of Women Voters of Fla. v. Detzner (Apportionment VIII), 179 So. 3d 258, 271–72 (Fla. 2015).

That map was invalidated for violating the FDA's restriction on intentional partisan gerrymandering. *League of Women Voters of Fla. v. Detzner (Apportionment VII)*, 172 So. 3d 363, 403 (Fla. 2015). As a remedy, this Court adopted the 2016 Plan. *Apportionment VIII*, 179 So. 3d at 263. That plan drew Congressional District 5 (Benchmark CD-5) in an east-west configuration, spanning from Gadsden and Leon Counties to Duval County:



A.7.

Benchmark CD-5 was no "model of compactness." *Apportionment VII*, 172 So. 3d at 406. It stretched 200 miles, spanned eight counties, split four of them, and narrowed to a three-mile strip at

times. *See Apportionment VIII*, 179 So. 3d at 309. Still, this Court ordered its use through the next redistricting cycle. *Apportionment VII*, 172 So. 3d at 406. The Court did not address, and no party raised, whether doing so complied with equal-protection principles.

2. The Enacted Plan

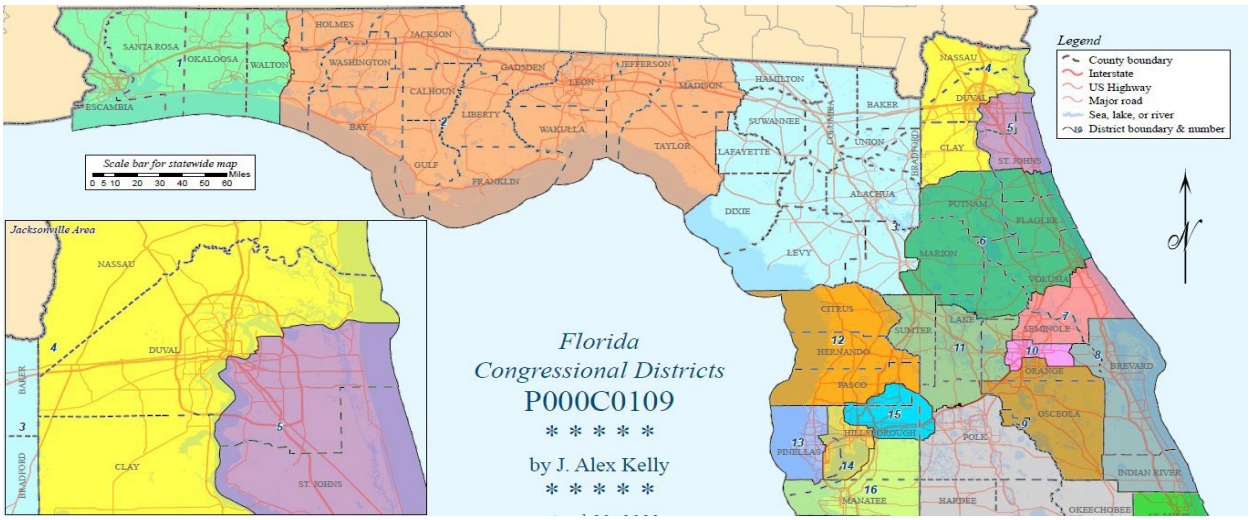
Florida gained a congressional seat after the 2020 census, prompting the Legislature to draw a new congressional plan. A.7–8. The Legislature at first passed a primary plan (Plan 8019) and an alternative plan (Plan 8015).

Plan 8019 (the primary plan)

Plan 8015 (the alternative plan)

A.58–59.[1]

The Governor vetoed both plans, A.59, because they violated the Equal Protection Clause by "includ[ing] a racially gerrymandered" CD-5.[2] To ameliorate that defect, the Legislature passed, and the Governor signed, Plan 109 (the Enacted Plan):



A.9.

3. Lower-Court Proceedings

i. Petitioners, led by the Black Voters Matter Capacity Building Institute, sued to enjoin Respondents, including the Secretary of

[1] http://tinyurl.com/Plan-8015; http://tinyurl.com/Plan-8019.

[2] http://tinyurl.com/2022-Veto-Memo.

State, from enforcing the Enacted Plan. *Id.* They asserted that eliminating Benchmark CD-5 violated non-diminishment. *Id.*

The parties later executed a stipulation streamlining the case. *Id.* In it, they agreed to seek "pass-through" certification and to move for a "schedule that w[ould] permit resolution by [this] Court by December 31, 2023." A.55. The stipulation acknowledged that the First District might "den[y] certification," in which case the parties would "propose an expedited schedule to allow for resolution of all appellate proceedings in time for the Florida Legislature to take up any remedial plan, if necessary, during the 2024 regular legislative session."

The trial court ultimately entered judgment for Petitioners. A.10–11.

ii. Tracking the stipulation, the parties asked the First District to certify the case for pass-through jurisdiction. A.53. The court instead heard the case en banc and reversed by an 8-2 margin.

The majority held that the non-diminishment provision required Petitioners to prove they were part of a "naturally occurring," "geographically compact" black "community" within Benchmark CD-5. A.31. Petitioners had not met that burden, the court held, because

Benchmark CD-5 consisted of "farflung" black populations "artificially brought together" to remedy a partisan gerrymander. *Id.* The non-diminishment provision does not protect such a district—if it did, it would "likely violate" the "Equal Protection Clause." A.27.

Chief Judge Osterhaus concurred. He reasoned that the North Florida gerrymander compelled by the non-diminishment provision could survive the Equal Protection Clause only if "current evidence" proved the gerrymander necessary "to combat pervasive and purposeful discrimination." A.32. Because the record "lack[ed]" that "evidence," the State did not need to preserve Benchmark CD-5. A.38–40.[3]

ARGUMENT

THE COURT SHOULD DENY REVIEW.

Though this Court has jurisdiction, it should decline review. The First District's decision is correct, these facts are unlikely to recur, and review at this late stage would leave state election officials uncertain as they prepare for the 2024 primaries.

[3] Judges Winokur and Long also wrote concurrences. A.40–53. Judge Bilbrey dissented. A.53–78.

A. The decision below is correct.

The First District rightly rejected Petitioners' non-diminishment claim. Petitioners failed to prove that Benchmark CD-5 contained a compact and naturally occurring black community with shared interests, or that the district was reasonably configured. Petitioners' claim is also foreclosed by the Equal Protection Clause.

1. The FDA forbids "diminish[ing] the[] ability" of minorities "to elect representatives of their choice." Art. III, § 20(a). Over two decades before the FDA's adoption, the Supreme Court explained the term "ability to elect" in *Thornburg v. Gingles*, 478 U.S. 30, 49–50 (1986). A.22–25. To establish the Section 2 claim there, voters had to show that the challenged map impaired their "ability to elect" their preferred candidates. *Gingles*, 478 U.S. at 50. That showing turns on the *Gingles* preconditions, which require voters to prove, among other things, that they are part of a "geographically compact" "minority group" that could "constitute a majority in a reasonably configured district." *Allen v. Milligan*, 599 U.S. 1, 18–19 (2023). To be geographically compact, the group must be centralized and share similar "needs and interests." *LULAC*, 548 U.S. at 433–35; *see also Miller v.*

Johnson, 515 U.S. 900, 920 (1995).

As the First District explained, A.28–29, by enshrining the "ability to elect" language in the FDA's non-diminishment provision, Florida's voters imported similar legal requirements. *See Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) ("If a word is obviously transplanted from another legal source," it "brings the old soil with it."). This Court recognized as much last cycle: "The *Gingles* preconditions are relevant" to the "diminishment analysis." *Apportionment VIII*, 179 So. 3d at 286 n.11. The compactness and reasonable-configuration preconditions ensure that the FDA "does not improperly morph into a proportionality mandate." *Allen*, 599 U.S. at 44 n.2 (Kavanaugh, J., concurring). They also focus the scope of Florida's non-diminishment provision, which does not have Section 5's coverage formula to confine its reach. A.21–22. Without those preconditions, Florida's non-diminishment provision would "likely violate" the "Equal Protection Clause" by mandating unconstitutional racial gerrymanders. A.27; *see State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004) (laws should be construed to "avoid any potential constitutional quandaries").

The First District therefore correctly held (A.30–31) that to prove unlawful diminishment, Petitioners had to identify a "geographically compact" black "community" that could elect its preferred candidate in a "reasonably configured district." *Allen*, 599 U.S. at 18–19; *cf. DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice*, 76 Fed. Reg. 7470-01, 7472 (Feb. 9, 2011) (discussing similar limitations for Section 5 of the VRA). They fell short. Petitioners "present[ed] [no] evidence" that Benchmark CD-5 grouped together a "naturally occurring, geographically compact" black "community." A.28–29, 31. Nor did they show that the "oddly elongated, handle-bar-mustache-looking" Benchmark CD-5 was reasonable. A.35; *infra* 12–15.

2. Petitioners also failed to refute that Benchmark CD-5 was an unconstitutional racial gerrymander and that similar configurations drawn during this cycle would be too. A.32–40 (Osterhaus, C.J., concurring).

The Equal Protection Clause typically "forbids racial gerrymandering"—the practice of "assigning citizens to a district on the basis of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (cleaned up).

Racial gerrymanders result when race is the "predominant" reason for the district. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017). A gerrymander's proponent must prove the district is "narrowly tailored" to serve a "compelling interest." *Cooper v. Harris*, 581 U.S. 285, 292 (2017) (cleaned up). Petitioners did not.

Starting with racial predominance, when a district "concentrate[s] a dispersed minority population" by "disregarding traditional districting principles," race is often the predominant cause. *Shaw v. Reno*, 509 U.S. 630, 646–47 (1993). That describes the east-west configuration of CD-5 to a tee. The district stretches 200 miles long, tapers to a few miles wide, spans eight counties, splinters four of them, and curls into a "constitutionally suspect" "hook-like shape" to connect far-flung black populations in Gadsden, Leon, and Duval. *Apportionment I*, 83 So. 3d at 638; A.7. This Court left no doubt last cycle: The east-west configuration is not "compact," but it exists to avoid "diminish[ing] [the] ability" of minorities to "elect representatives of their choice." *Apportionment VII*, 172 So. 3d at 406.

Because the east-west configuration is "obviously drawn" to

"separat[e] voters by race," A.34 (cleaned up), Petitioners had to satisfy strict scrutiny. They failed. Only one compelling interest could justify the east-west configuration: remediating "present effects of past discrimination." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989); *see SFFA v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023). But the record contains no evidence of "pervasive and purposeful racial discrimination substantiating the need for a drastic [non-diminishment] remedy." A.39. The most Petitioners marshaled were "court cases beginning in 1945 and ending thirty years ago." *Id.* Remote instances of "past discrimination cannot, in the manner of original sin, condemn" modern state action. *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality op.). And regardless, Petitioners made no argument that a district combining distant populations based on race alone was the narrowest way to remediate prior voting discrimination.

3. The First District's statements about this Court's precedents also do not merit review. Jur.Br.8–10. The district court correctly held that "[n]one of [this Court's] cases" has considered the "first-of-its-kind, as-applied FDA challenge" brought here, so this Court's

precedents are not on point. A.20. At most, the issues here "merely lurk[ed] in the record" during the 2010 redistricting cycle, so they cannot "be considered as having been so decided as to constitute [a] precedent[]." *Jackson*, 288 So. 3d at 1183 (citation omitted). And as the court explained, this Court's precedents support applying a compactness requirement to a non-diminishment claim, A.2 (citing *Apportionment VIII*, 179 So. 3d at 286 n.11)—an issue this Court expressly reserved when approving the State's 2022 legislative map, *In re S.J. Resol. of Legis. Apportionment 100*, 334 So. 3d 1282, 1289 n.7 (Fla. 2022). Any other statements the First District made about this Court's precedents were "not necessary to the determination of the cause," and thus were "dicta." *Hilkmeyer v. Latin Am. Air Cargo Expediters, Inc.*, 94 So. 2d 821, 825 (Fla. 1957).

B. These circumstances are unlikely to recur.

The decision below also turns on unusual facts that are unlikely to recur. *Cf. Pierce v. Underwood*, 487 U.S. 552, 561 (1988) ("appellate energy" is best expended when it will have "law-clarifying benefits" for future cases). The First District's ruling mainly has force in a unique scenario: when the asserted benchmark "artificially" groups

together "farflung" minority populations. A.31. That occurred here only because this Court ordered Benchmark CD-5 to "remedy" a partisan gerrymander. A.4. But in most cases, the *Legislature* creates districts, and both the FDA and the Equal Protection Clause mandate that those districts be "compact." Art. III, § 20(b); *see Shaw*, 509 U.S. at 646–47. Those requirements make it unlikely that the Legislature will draw a future district with similarly tortured demographics. A.31.

C. Review would shroud the State's electoral map in doubt before the 2024 primary.

Finally, electoral timing counsels against review. "[R]unning a statewide election" requires "a massive coordinated effort." *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). For that reason, the parties sought a "schedule that w[ould] permit resolution by [this] Court by December 31, 2023," leaving the State time to implement a remedial map, if necessary, before the 2024 elections. A.55. Resolution by December 31 was critical to the stipulation—the legislative session begins January 9, 2024, and the State's congres-

sional map should be settled before pre-qualification for congressional primaries (April 8, 2024).[4]

Though the parties sought initial appellate review in this Court, the First District settled the matter itself before the December 31 deadline, and it is the typical "court[] of last resort." *Rivera v. State*, 728 So. 2d 1165, 1166 (Fla. 1998). Further review in this Court would revive uncertainty over the Enacted Plan's validity and prolong this controversy beyond the parties' contemplated deadline as we approach the 2024 elections.

Respondents also have not violated the parties' stipulation in opposing review. *Contra* Jur.Br.13. The stipulation provided that if "the First District denie[d] certification," the parties would consent to "an expedited schedule to allow for resolution of all appellate proceedings" so the Legislature could pass a "remedial plan, if necessary, during the 2024 regular legislative session." Respondents honored that commitment by agreeing to expedition before the First District, and in expediting jurisdictional briefing in this Court. Respondents

[4] https://files.floridados.gov/media/706905/2023-calendar-2024-highlights.pdf.

nowhere consented to additional "appellate proceedings" in this Court following a First District decision. There has now been an appellate resolution about the legality of the State's maps—before December 31—as the stipulation contemplated.

CONCLUSION

Review should be denied.

Dated: December 29, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to counsel for all parties of record on this **29th** day of December 2023.

/s/ Henry C. Whitaker
Solicitor General

CERTIFICATE OF COMPLIANCE

I certify that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman font and contains 2,500 words, excluding sections exempted from the word count under Florida Rule of Appellate Procedure 9.210(a)(2)(E).

/s/ Henry C. Whitaker
Solicitor General