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

Black Voters Matter Capacity
Building Institute, Inc., *et al.*,

Plaintiffs,

Case No. 2022-ca-000666

v.

Cord Byrd, in his official capacity as
Florida's Secretary of State, *et. al.*,

Defendants.
_____/

**SECRETARY OF STATE'S TRIAL BRIEF AND INCORPORATED MEMORANDUM OF LAW**

To assist this Court with resolving the outstanding legal issues, the Secretary of State provides the accompanying memorandum and attached exhibits. In doing so, the Secretary adopts and incorporates by reference the legal arguments made in response to Plaintiffs' motion for a temporary injunction, Plaintiffs' motion for judgment on the pleadings, and Plaintiffs' motion for summary judgment.

**G** 68:16-21 (House congressional redistricting subcommittee, February 18, 2022).

- In Plan 8015, the Florida Legislature drew an East-West district in north Florida, a district that would "remain[] a protected black district." **Ex. H** 45:22-24 (House redistricting committee, February 25, 2022).
- Plan 8015 contained a North Florida "district" whose "configuration" was "similar to the benchmark district." **Ex. H** 24:6-15.
- Plan 8015 was an "attempt at continuing to protect the minority group's ability to elect a candidate of their choice, addressing compactness concerns, and working to make sure we bring this process in for a landing during our regular session." **Ex. H** 24:16-24.
- Inquiring whether "going from the current [Benchmark] CD 5" configuration to a different configuration would "diminish the ability" of black voters "to elect" candidates of their choice. **Ex. G** 83:23-84:7.
- Arguing that there should be a "minority access" district like Benchmark "CD 5" in the Enacted Map. **Ex. I** 85:11-19 (House session, April 20, 2022).

In other words, the existence, creation, and preservation of an East-West, north-Florida district was predicated solely on race.

Notably, at no point in the legislative debate was anything other than a configuration that connected Duval to Leon seriously debated or considered to comply with the non-diminishment standard. Though the Florida Legislature did at one point propose a black-performing district in Duval County, that district dropped the black voting-age population by nearly eleven percentage points compared to the Benchmark Map, from 46.20% to 35.32%, thereby violating *Apportionment I. Compare* **Ex. C** (VAP summary report, Enacted Map), **Ex. D** (VAP summary report, Benchmark Map), *with*

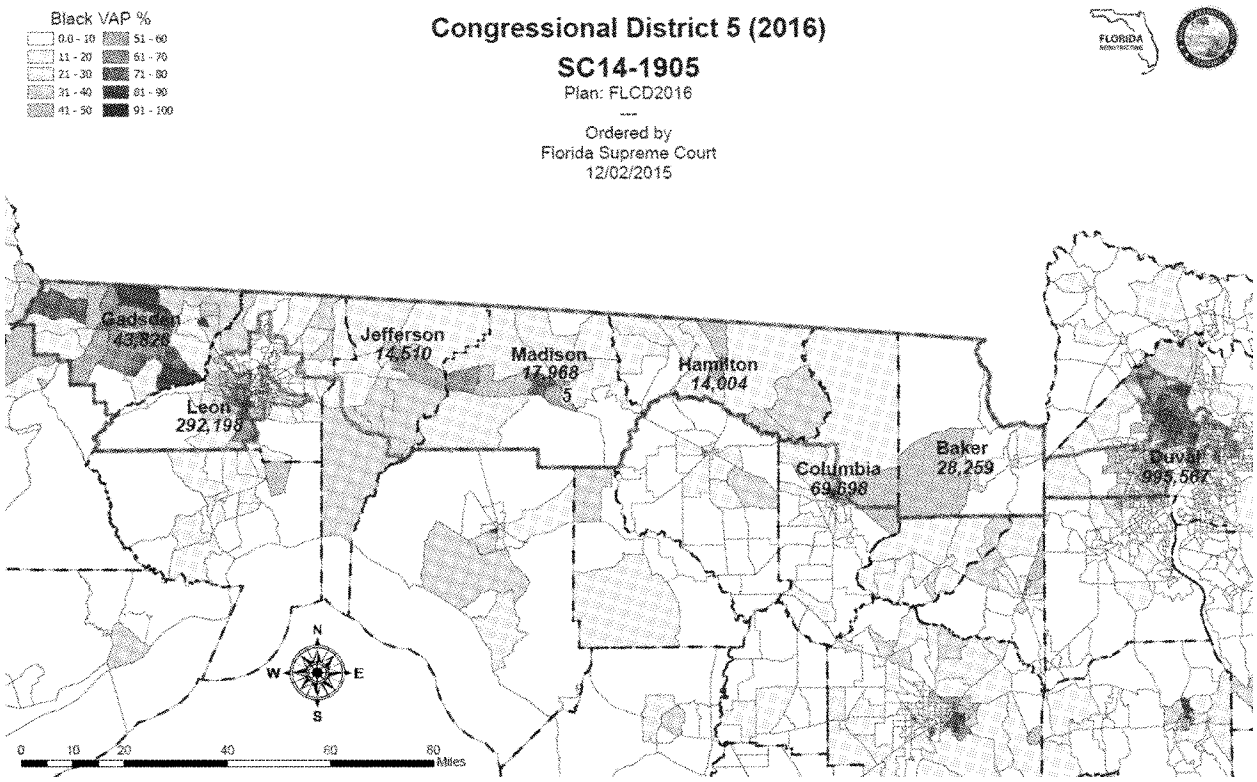
**Ex. J** (VAP summary report, 8019); *see also* **Ex. H** 63:16-65:7 (observing that proposed Duval County district would not guarantee elections for black-preferred candidates with those candidates losing in "one-third" of "test elections").

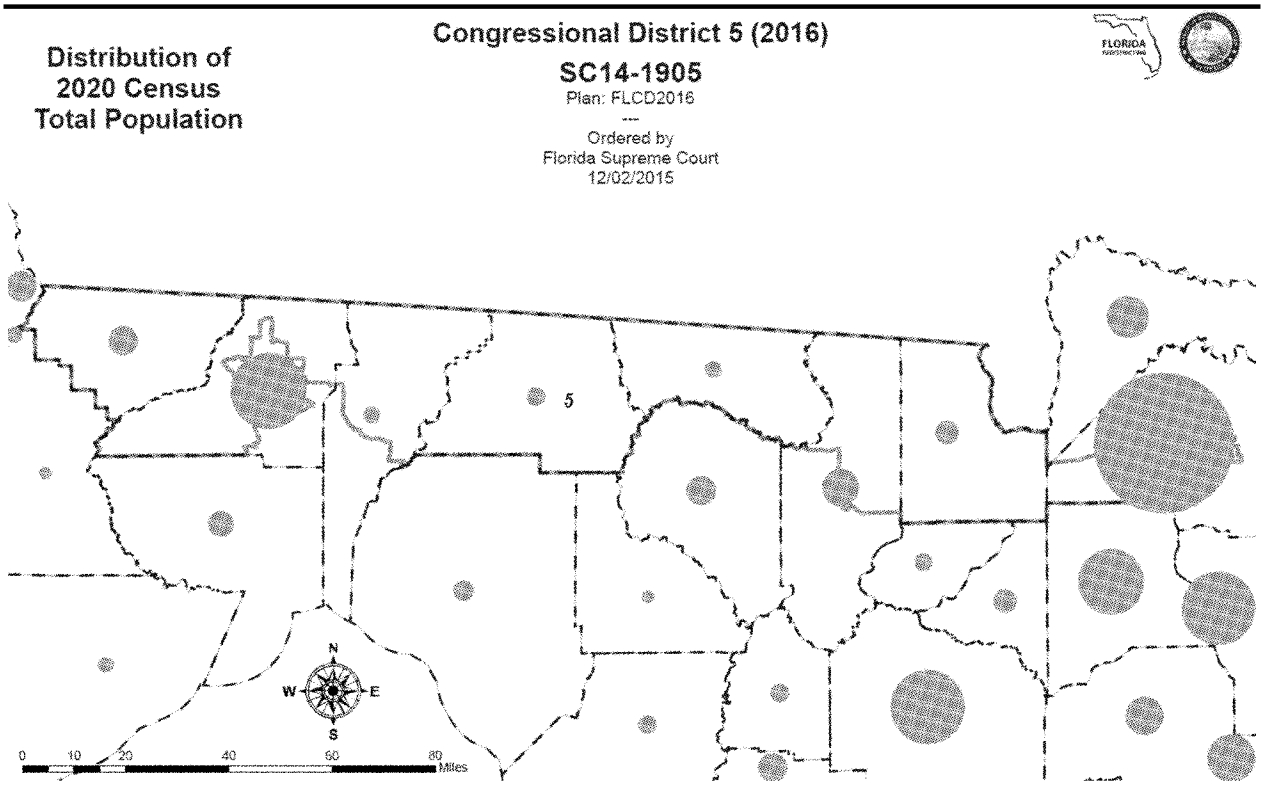
J. Alex Kelly, an experienced mapdrawer himself, confirmed that one could not draw a black-performing district in North Florida that complied with the non-diminishment test (and the U.S. Constitution). As he put it before the Florida Legislature, it was impossible "to draw a compact, politically effective, minority district and check all the boxes, so to speak, without violating some manner of law." **Ex. B** 32:23-33:24. Race would have to predominate.

This inability to draw a black-performing district in North Florida that, at the very least, adheres to the non-diminishment provision, makes sense. In Benchmark CD-5, 82.7% of the district's population (black, white, and other) comes from Duval and Leon Counties. *See* Joint Factual Stipulation (3)(b).

Moreover, the following maps show that the black voting-age population in North Florida resides mostly in Duval, Leon, and Gadsen Counties. These populations must thus be joined to create a black-performing district that doesn't diminish the 46.20% benchmark, as the failed experiment with the Duval-centered district proved.

*Benchmark North Florida Districts, Heat Map & Population Density* (**Ex. K**)



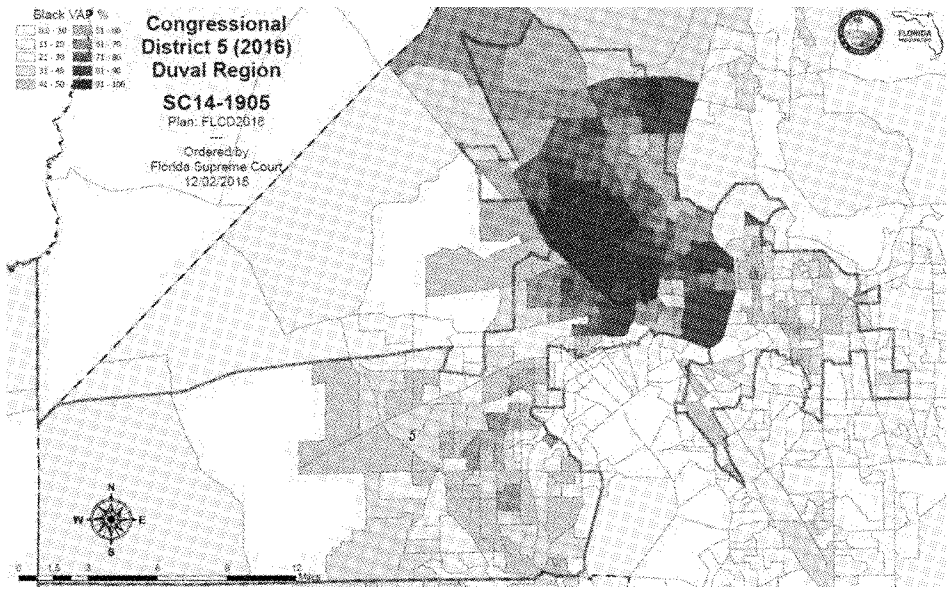
*Fourth*, even without "direct evidence" of "legislative purpose," "circumstantial evidence of [the] district's shape and demographics" makes plain that "traditional race-neutral districting principles" must be subordinated to "racial considerations" to draw a black-performing district in North Florida that also complies with the non-diminishment standard. *Bethune-Hill*, 580 U.S. at 187. To connect the black populations in Duval County with Leon and Gadsen Counties requires that compactness and fidelity to political and geographic boundaries be ignored.

Sprawling over 200 miles, across eight counties, splitting four in the process, **Ex. L** at 2 (Benchmark packet), Benchmark CD-5 was "one of the least compact" districts possible. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) ("*Apportionment VIII*"). Kept substantially the same in the version initially passed by the Florida Legislature but vetoed by Governor DeSantis, the district had the lowest numerical compactness score of any district. **Ex. M** (District compactness report, 8015). Robert Popper, the namesake of the Polsby-Popper compactness measure, also raised concerns during the regular session of the Florida Legislature about the compactness (and constitutionality) of any district that looks like Benchmark CD-5. His written testimony concluded that a district with a similar configuration and similar compactness scores would have "very low compactness scores for any U.S. congressional district," and certainly "the lowest compactness scores in the State of

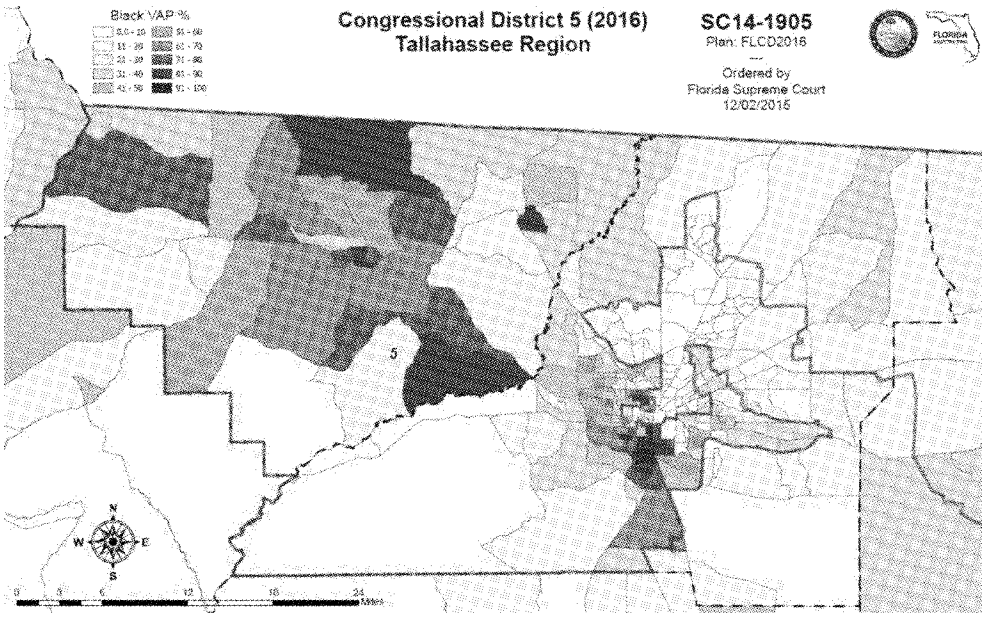
Florida." **Ex. N** at 5 (Popper written testimony); *see also* **Ex. G** (Popper legislative testimony, beginning on page 72).

Indeed, as Benchmark CD-5 shows, the configuration needed to connect black populations requires nips and tucks that slice through North Florida with the precision of a scalpel. In the two major population centers, Duval and Leon Counties, "bizarrely shaped," "far from compact" lines must be drawn to pack black voters—fingers in Duval and a horseshoe in Leon. *Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality op.). Certainly, "[n]o one looking at [Duval's fingers and Leon's horseshoe] could reasonably suggest that the district contains a geographically compact population of any race" nor say that there "has been a wrong" against a particular race that needs a "remedy." *Shaw v. Hunt*, 517 U.S. 899, 916 (1996) ("*Shaw II*") (cleaned up).

*Benchmark Districts, Heat Map, Duval County* (**Ex. O**)



*Benchmark Districts, Heat Map, Leon County* (**Ex. P**)




Nor would it be any defense for the State to retain Benchmark CD-5 by hiding behind the race-neutral districting principle of core retention or continuity of representation. By retaining CD-5, the State wouldn't be acting on those race-neutral principles alone. The State would be deploying those principles *in pursuit of a racial target.* The State would be perpetuating CD-5's race-based lines for race-based reasons. That's unconstitutional.

Consider the Eleventh Circuit's decision in *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002), and the Middle District of Florida's decision in *NAACP v. City of Jacksonville*, 2022 WL 7089087 (M.D. Fla. Oct. 12, 2022). Both cases rejected the government's defense about core retention because in both cases it was undisputed that the government retained the existing districts in pursuit of race-based goals. In *Clark*, the Eleventh Circuit rejected the county's conceded goal of maintaining existing lines

to maximize black voting strength. 293 F.3d at 1267. Likewise, the district court in *NAACP* rejected a municipality's attempt to retain the core of city-council and school-board districts that had been previously drawn for race-based reasons based on substantial evidence that the districts had been maintained for race-based reasons. *See* 2022 WL 7089087, at *23-82 (M.D. Fla. Oct. 12, 2022) (recounting historical backdrop), *119-22 (rejecting core retention rationale); *see also Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023) (explaining that "adherence to a previously used districting plan" can't defeat an effects based "§ 2 claim" because "[i]f that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan").

So too here. Carrying over unconstitutional lines with the express purpose of not diminishing their race-based effect doesn't alleviate equal-protection concerns; instead, it only further perpetuates a racial gerrymander into the next decade.

And that is the kind of district Plaintiffs seek—and have sought throughout this litigation. For over one year, Plaintiffs have sought the implementation of a district in North Florida that mirrors Benchmark CD-5. This was so during the temporary-injunction phase of litigation. *See* Pls. Reply in Support of Mot. for Temp. Inj., Ex. 13, Proposed Maps A & B (seeking to implement alternative maps that both mirror Benchmark CD-5). This was so during expert discovery and at summary judgment. *See* Ansolabehere Expert Report, Map 4 (Demonstration Map that mirrors Benchmark CD-5); Pls. Mot. for Sum. Judg. at 15 (referencing Demonstration Map). This remains

so in the Joint Stipulation, which provides that "an appropriate remedy to the diminishment in North Florida would join the Black community in Duval County with the Black community in Leon and Gadsden Counties to create a North Florida district that satisfies *Apportionment I* and the nondiminishment standard, so long as that remedy is consistent with the courts' rulings." Joint Stipulation IV(D).

In other words, Plaintiffs have pushed one configuration and one configuration alone: a district like Benchmark CD-5, a district "the non-diminishment standard required the creation of" back in 2015. Pls. Memo. in Support of Mot. for Temp. Inj. at 1. A district whose creation, existence, and protection solely concerned race. *See also* Pls. Mem. in Support of Mot. for Temp. Inj. at 5 ("Benchmark CD-5 unites North Florida's historic Black communities.").

* * *

In sum, the specific racial target, the direct evidence available through the legislative record, and the circumstantial evidence showing the subordination of traditional districting criteria all point to the same conclusion: race will invariably predominate in the application of the non-diminishment provision to North Florida.

**B.** Because race predominates, strict scrutiny applies. *See Cooper*, 581 U.S. at 292. It can't be satisfied; there's neither a compelling state interest nor narrow tailoring.

*First*, the compelling state interest. It's a dauntingly high standard. Less than two months ago, the U.S. Supreme Court explained that, outside the higher-education context, "our precedents have identified only two compelling interests that permit

resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot." *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2162 (2023) (citations omitted). Neither of these conditions apply to an East-West CD-5.

During the legislative session, and even in this litigation, it has been argued that mere compliance with the Florida Constitution serves as a compelling interest. That isn't so. Though the State Constitution's race-based provisions might borrow from the federal Voting Rights Act, that Act has only been assumed to be a "constitutional" exercise of Congress's "authority" under "the Fourteenth and Fifteenth Amendments" that "obliges the States to comply." *Bush*, 517 U.S. at 990-92 (O'Connor, J., concurring). The Fourteenth and Fifteenth Amendments never trusted the states with similar powers. To the contrary: those amendments were enacted to *prevent* states from discriminating based on race. *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

And while Article III, § 20(a)'s race-based provisions were modeled on provisions of the Voting Rights Act, there remains significant differences between the two. The Voting Rights Act was the legislative centerpiece of our nation's efforts to overcome race discrimination in voting and elections. It was designed to combat practices that excluded minority groups from participation in the political process. It remains landmark legislation and perhaps the most successful civil-rights law in our

nation's history. *Allen*, 143 S. Ct. at 1499 (noting that many consider the Voting Rights Act "the most successful civil rights statute in the history of the Nation").

The Voting Rights Act was enacted during the civil-rights movement, a century after the Civil War, to bring the Jim Crow era to an end. Congress enacted the Act pursuant to express constitutional authority to enforce the Equal Protection Clause and the other the Reconstruction Amendments. And the remedies that Congress enacted were narrow: § 2 applies only when a series of demanding conditions are satisfied, *id.* at 1509 (noting that, since 2010, plaintiffs nationwide have succeeded in fewer than ten § 2 suits, and that the only state legislative or congressional districts that were redrawn because of successful § 2 challenges were a handful of districts near Milwaukee and Houston), while § 5 applied only to a limited number of select jurisdictions, and only five Florida counties far from North Florida. *See Jurisdictions Previously Covered by Section 5*, DOJ, bit.ly/3Obni3o. Despite the Voting Rights Act's singular pedigree, the U.S. Supreme Court has not decided, but only assumed, that compliance with the Act constitutes a compelling interest. After *Shelby County v. Holder*, it's unclear whether § 5 non-retrogression would be considered a compelling interest. 570 U.S. 529, 557 (2013) (invalidating the Voting Rights Act's coverage formula for determining which jurisdictions are subject to § 5).

By contrast, the non-diminishment provision was adopted in 2010—not during the civil-rights movement or the Jim Crow era. It wasn't adopted pursuant to an express constitutional authority. It isn't tailored to specific jurisdictions. It has no history as

landmark civil-rights legislation. It was part of a package of redistricting standards and guarantees members of some racial groups throughout the State a permanent entitlement to elect the candidates of their choice. The difference between the Voting Rights Act and the non-diminishment provision isn't simply a difference between federal and state law. There are significant differences from top to bottom. If the U.S. Supreme Court has hesitated to decide that compliance with the Voting Rights Act serves a compelling interest, then compliance with the non-diminishment provision surely doesn't clear that high bar.

Nor is complying with the State Constitution, in the abstract, a compelling reason. Were it one, states could, for example, cite compliance with a state-constitutional ban on interracial marriage as a compelling reason to defend the law. Clearly, that's not true. *See Loving v. Virginia*, 388 U.S. 1 (1967).

More generally, if "[a] State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions," then that proper case first requires the race-based problem be "identified" with "specificity," *Shaw II*, 517 U.S. at 909. Only with a "strong basis in evidence" can one "conclude that remedial action was necessary." *Id.* at 910. There's been no such identification of a race-based problem here. Certainly, not in recent memory. *See generally Johnson v. Mortham*, 926 F. Supp. 1460, 1481 (N.D. Fla. 1996) (three-judge court) (holding that there's no strong basis in evidence of "any current voting practice or procedure which denies or impairs the right to vote of African-Americans" or any strong evidence

that any "present effects of past discrimination required adoption of a race-based redistricting plan").

*Second*, narrow tailoring. The non-diminishment provision applies statewide, effectively putting all of Florida under preclearance. Forever. *Apportionment I*, 83 So. 3d at 624 ("Florida's new constitutional provision, however, codified the non-retrogression principle of Section 5 and has now extended it statewide. In other words, Florida now has a statewide non-retrogression requirement independent of Section 5.").

Such a broad sweep isn't narrowly tailored. Without a geographic or temporal limit, there's no tailoring at all.

And because this isn't a Voting Rights Act case, *Cooper*'s good-reasons test doesn't apply. Under that test, "the State must establish that it had 'good reasons' to think that it would transgress the [Voting Rights] Act if it did *not* draw race-based district lines." *Cooper*, 581 U.S. at 293. This is intended to give states "breathing room" that "may prove, in perfect hindsight, not to have been needed." *Id.* Instead, in this case, the proponents of the racial gerrymander—Plaintiffs—must show that the kind of compulsory gerrymander they seek would eradicate some kind of present-day discrimination or the effects of past discrimination. *Miller v. Johnson*, 515 U.S. 900, 920 (1995). That *they* haven't done. *See Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (requiring proponent of position to satisfy the test).

* * *

In sum, a racial gerrymander in North Florida, to satisfy Article III, § 20(a)'s non-diminishment test, would violate the Equal Protection Clause of the U.S. Constitution. That's not something the Florida Legislature or Secretary of State must do. It doesn't matter whether race-based action was taken for beneficial or invidious reasons. Congress may have greater leeway to take race-based actions—within limits. *Shelby County*, 570 U.S. at 540, 549. States don't get that same leeway.

## III. This Court can apply the canon of constitutional avoidance and conclude Article III, § 20(a)'s ambiguous text doesn't apply to Benchmark CD-5.

In the alternative, this Court could interpret the non-diminishment provision not to apply to Benchmark CD-5 and thereby avoid the question of the non-diminishment provision's constitutionality. For the following reasons, because there is no possibility of a reasonably configured district that would exceed 50% BVAP in North Florida, the non-diminishment provision could be read not to apply, as informed by precedent interpreting analogous federal Voting Rights Act provisions.

**A.** Article III, § 20(a) includes two race-based provisions: the non-vote-dilution provision and the non-diminishment provision. The Florida Supreme Court has said that the former "is essentially a restatement of Section 2 of the Voting Rights Act." *Apportionment I*, 83 So. 3d at 619. The latter "reflects the statement codified in Section 5" of the Voting Rights Act. *Id.* at 620. Voting Rights Act cases are instructive but not dispositive in interpreting these separate provisions of Florida law. *See id.*

Unlike the two provisions of the Voting Rights Act,[1] however, the Florida Constitution textually links the non-vote-dilution and non-diminishment provisions. Here again is Article III, § 20(a):

> a) . . . 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**]** . . .

(brackets added).

The two provisions appear in a single sentence with the "same negative verb," "shall not be drawn," linking the "two clauses" with an "or." *Apportionment I*, 83 So. 3d at 619 (citing text). The pronoun "their" also appears twice in the second clause, the non-diminishment provision. Art. III, § 20(a), Fla. Const. "[T]heir" defines the universe of people to whom the second clause applies by referring to the "racial" and "language minorities" in the first clause. *Id.* In this way, the text tells us that the first and second bracketed clauses protect the same people—"racial" and "language minorities" whose "participat[ion] in the political process" is otherwise being impeded. *Id.*

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[1] Section 2 appears at 52 U.S.C. § 10301. It provides: "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

Section 5 appears at 52 U.S.C. § 10304. It prohibits "[a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color," or on account of being a member of a language minority, "to elect their preferred candidates of choice denies or abridges the right to vote." *Id.* § 10304(b).

But who are those "racial" and "language minorities"? The federal cases tell us that these minorities are (1) groupings that are "sufficiently large and" geographically "compact to constitute a majority in a reasonably configured district," *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)); (2) that's "politically cohesive," *Gingles*, 478 U.S. at 51; (3) where "the white majority votes sufficiently as a bloc to enable it" "to defeat the minority's preferred candidate"; and (4) where the "totality of circumstances" establish that the political process is not "equally open" to the minority group. *Id.* at 43. The first three parts of the federal test are called the *Gingles* preconditions.[2]

Together, the *Gingles* "preconditions" and the "totality of circumstances" are intended to identify specific instances of discrimination for which the Voting Rights

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[2] Courts have interpreted the fourth to entail an assessment of the following factors listed in the Senate report accompanying 1980s amendments to the Voting Rights Act:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

*Gingles*, 478 U.S. at 44-45.

Act requires a remedy, such as at-large election schemes diluting the voting strength of a minority group. *See Allen*, 143 S. Ct. at 1503-04; *compare, e.g.*, *White v. Regester*, 412 U.S. 755, 766-67 (1973), *with Whitcomb v. Chavis*, 403 U.S. 124, 149-53 (1971).[3] The first *Gingles* precondition—that a "'minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district'"—is a necessary first step to trigger Voting Rights Act scrutiny. *See Allen*, 143 S. Ct. at 1503 (quoting *Wis. Legislature*, 142 S. Ct. at 1248). As the U.S. Supreme Court explained in *Bartlett v. Strickland*, that trigger for any § 2 analysis is the existence of a majority-minority district. 556 U.S. 1, 15-16 (2009) (plurality op.).

*Strickland* rejected the argument that "the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential [single-member] election district." *Id.* at 12. Thus, a federal Voting Rights Act plaintiff must identify a reasonably configured area where the minority group makes up more than 50 percent of the voting-age population. *Id.* at 15-16. The plaintiff cannot rely on crossover districts (where it is possible for both white voters and the minority group to elect the minority's representative of choice), nor coalition districts

[3] This need for a race-based problem as a predicate to a race-based solution isn't unique to § 2 of the Voting Rights Act. Section 5 of the Act—the analog to Florida's non-diminishment provision—is also triggered only upon finding specific evidence of racism, the kind of pervasive, deep-seated racism that is needed to justify a race-based solution. That makes sense, because § 5 is an "extraordinary measure," the kind of "strong medicine" justified only for "jurisdictions uniquely characterized by voting discrimination 'on a pervasive scale.'" *Shelby County*, 570 U.S. at 534.

(where one minority group works with others to elect the minority's representative of choice). *Id.* ("Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.").

The U.S. Supreme Court rejected as unworkable a scheme that would require the political branches and the courts "to make inquiries based on racial classifications and race-based predictions" without that 50-percent limitation. *Id.* at 17-18 ("Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?").

**B.** Consistent with the Florida Supreme Court's past reliance on federal cases as a guide, this Court could interpret Article III, § 20(a) to require the same initial showing here. Because Article III, § 20(a) links both the non-vote-dilution and non-diminishment provisions—referring to the same minority group for both, *supra*—there is every reason to impose *Strickland*'s 50-percent threshold before either provision can be triggered.[4] Without any such limitation, the non-diminishment provision would rest

[4] *See, e.g.*, *Apportionment I*, 83 So. 3d at 620, 625 ("Because Sections 2 and 5 raise federal issues, our interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent. . . . Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

on even weaker constitutional footing because there would be no conceivable mechanism to identify with specificity the race-based problem that the provision remedies through a race-based solution.

In *Apportionment VIII*, the Florida Supreme Court took a similar course when it rejected the legislature's attempt to justify a district's configuration because "Hispanic voters' ability to elect a representative of their choice [would be] diminished." *Apportionment VIII*, 179 So. 3d at 286. Before relying on the non-diminishment provision, the Florida Supreme Court explained that the legislature had to make "a preliminary showing of cohesion." *Id.* at 286 n.11. This was so because "[t]he *Gingles* preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis"—the preconditions mattered for purposes of the Florida Constitution's non-diminishment analysis. *Id.*

Note that the Florida Supreme Court referred to the *Gingles* preconditions, plural. Without satisfying all three preconditions—which would include the first precondition of showing a reasonably configured district exceeding 50% black voting age population—there's no real mechanism to find the "insidious and pervasive" pockets of racism that must be remedied. *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966). A cohesion-only approach would tell us only that a minority group votes alike, not that there is a sufficiently concentrated group of minority voters who have been the target of discrimination.

Read in this way, the provisions would still continue to serve "dual constitutional imperatives." *Apportionment I*, 83 So. 3d at 619. The non-vote-dilution provision justifies the creation of a district. The non-diminishment provision preserves it. And this Court can leave for another day whether the non-diminishment provision could constitutionally justify the preservation of a once-majority-minority district when it becomes a coalition or crossover district.

**C.** If this Court takes that approach here, this Court can avoid the question of whether the non-diminishment provision is constitutional because the provision would not be triggered for Benchmark CD-5. There isn't "a minority group" that's "sufficiently large and" geographically "compact to constitute a majority in a reasonably configured district." *Wis. Legislature*, 142 S. Ct. at 1248. The breakdown of the district is as follows:

| **Benchmark District 5 Voting Age Population** (See Joint Factual Stipulation (3)(a)) | | | |
|---|---|---|---|
| | **Black** | **White** | **Hispanic** |
| Voting Age Population | 46.2% | 40.2% | 9.1% |

That's fatal under *Strickland*. "When *a minority group* is not sufficiently large to make up a majority in a reasonably shaped district, § 2 [of the Voting Rights Act] simply does not apply." *Cooper*, 581 U.S. at 305 (citing *Strickland*, 556 U.S. at 18-20) (emphasis added). By extension, the non-diminishment provision doesn't either, at least when

there's never been a showing that Benchmark CD-5 was a majority-minority district (it wasn't) that has now become a coalition or crossover district.

Compactness too is a problem for Plaintiffs. It's undisputed that Benchmark CD-5 (and any district configured like it) won't be compact. *See supra.*

### IV. Plaintiffs' public-official-standing arguments can't avoid the issues now before this Court.

Plaintiffs attempt to evade the problems with the racial gerrymander they seek by saying that the Defendants simply can't raise the issues under the public-official-standing doctrine. Defendants incorporate by reference their prior arguments on the issue. Significantly, Plaintiffs raised the argument in a motion for judgment on the pleadings. Plaintiffs should have asserted the public-official-standing doctrine as an avoidance in their reply, but they failed to do so. That means Plaintiffs waived their arguments. Fla. R. Civ. P. 1.100(a), (d); *Gamero v. Foremost Ins. Co.*, 208 So. 3d 1195, 1197 (Fla. 3d DCA 2017); *Burton v. Linotype Co.*, 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989).

## CONCLUSION

For the foregoing reasons, this Court should enter judgment for the Defendants.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal, on August 16, 2023.

/s/ Mohammad O. Jazil
Attorney