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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.
_____/

FLORIDA LEGISLATURE'S TRIAL BRIEF

The Florida House of Representatives and the Florida Senate (collectively, the "Legislature") oppose the Plaintiffs' contention that Congressional District 4 in the Enacted Map should be declared unconstitutional and replaced with a sprawling district spanning more than 200 miles from Duval County to Gadsden and Leon Counties. This Court should reject Plaintiffs' challenge in its entirety. The Enacted Map is lawful and should be upheld.

The Legislature writes separately to address the specific legal basis for upholding the Enacted Map raised in the House's Fifth Affirmative Defense: given the unique geography and population demographics in North Florida, any application of the non-diminishment provision to Benchmark Congressional District 5 would violate the Equal Protection Clause of the United States Constitution.

Background

The 2020 decennial census revealed that the population of Florida had grown significantly, and the State was apportioned an additional seat in the United States House of Representatives. To accommodate this new allocation and the population changes shown by the census, the State of Florida commenced its redistricting process in the fall of 2021 with legislative committee and subcommittee meetings.

Relatively early in the 2022 legislative session, it became apparent that the status of Benchmark Congressional District 5 presented significant legal questions not present elsewhere in the map. The district's configuration resulted from two Florida Supreme Court decisions in 2015 that ordered the creation of an "East-West" district with a sufficient Black voting-age population so as not to diminish the ability of Black voters to elect their candidates of choice as compared to the 2002 benchmark district. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402–06 (Fla. 2015) ("*Apportionment VII*"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271–73 (Fla. 2015) ("*Apportionment VIII*").

The "East-West" configuration adopted by the Florida Supreme Court arose from its conclusion that the "North-South" orientation adopted by the Legislature in 2012 was intended to favor the Republican Party and incumbent Congresswoman Corrine Brown. *Apportionment VII*, 172 So. 3d at 403. Because the plaintiffs in *League of Women Voters of Florida v. Detzner* had asserted *political* gerrymandering claims against the 2012 congressional map, the Florida Supreme Court had no occasion to consider

whether Benchmark Congressional District 5 complied with the Equal Protection Clause's prohibition against *racial* gerrymandering.

On February 1, 2022, Governor DeSantis requested an advisory opinion from the Florida Supreme Court regarding whether the Florida Constitution "requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations (either in Leon and Gadsden Counties or outside of Orlando) to ensure sufficient voting strength, even if not a majority, to elect a candidate of their choice." *Adv. Op. to Gov. re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1107–08 (Fla. 2022). The Governor's request cited intervening precedent from the United States Supreme Court interpreting the Equal Protection Clause and affirming that where "racial considerations predominate[] over others, the design of the district must withstand strict scrutiny." Letter from Ron DeSantis to the Chief Justice and Justices of the Florida Supreme Court at 5 (Feb. 1, 2022) (quoting *Cooper v. Harris*, 581 U.S. 285, 292 (2017)).

The Legislature filed a brief requesting that the Court accept jurisdiction and provide an opinion interpreting the Florida Constitution's non-diminishment requirement in the specific context of Benchmark Congressional District 5. The Legislature's brief noted that judicial guidance on the narrow question presented by the Governor "will provide needed resolution of a question of significant importance to the enactment and executive approval of a congressional redistricting plan for the State

of Florida, and may obviate the need for judicial involvement at later stages of that process." Fla. Legislature's Jurisdictional Br. at 3 (Feb. 7, 2022). Three days later, the Florida Supreme Court issued an opinion "acknowledg[ing] the importance of the issues presented by the Governor" but declining to grant an advisory opinion in the absence of a complete factual record. *Adv. Op. to Gov. re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d at 1108.

On March 4, 2022, the Legislature passed Senate Bill 102, which apportioned the State into 28 congressional districts. That map contained a district that, like Benchmark Congressional District 5, connected portions of Duval County with Gadsden County and portions of Leon County in an attempt to comply with the Florida Constitution's non-diminishment provision. Governor DeSantis vetoed the bill on the basis that the North Florida district violated the Equal Protection Clause.

In a special session, the Legislature considered a new proposed map that incorporated some districts approved by the Legislature at its regular session and a new configuration in North Florida. The new configuration in North Florida proceeded on the premise that the unique geography and population demographics in North Florida would preclude the drawing of a district that satisfied the non-diminishment requirement without racial considerations predominating over traditional redistricting criteria.

The redistricting process concluded with the Florida Legislature's passage and the Governor's approval of Senate Bill 2-C on April 22, 2022.

Argument

I. The Equal Protection Clause prohibits the drawing of a North Florida Congressional District that would satisfy the Florida Constitution's non-diminishment provision as to Benchmark Congressional District 5.

Plaintiffs ask this Court to declare Congressional District 4 unconstitutional under the Florida Constitution because it "diminishes" the opportunity of Black Floridians to elect the candidate of their choice as compared to Benchmark Congressional District 5. But Plaintiffs ask this Court to ignore the other side of the "competing hazards of liability" facing States that consider race in the districting process. *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). That is because the only way to satisfy the Florida Constitution's non-diminishment requirement under the unique geography and population demographics of North Florida is to create a sprawling and non-compact congressional district that subordinates all other redistricting criteria to racial considerations in violation of the federal constitution's Equal Protection Clause. Because the Supremacy Clause requires this conflict to be resolved in favor of the federal constitution, the non-diminishment requirement cannot constitutionally be applied to Benchmark Congressional District 5.

Ordinarily, a State violates the Equal Protection Clause when it makes race the predominant factor in drawing an electoral district. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). In other words, a State may not "subordinate[] traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political

subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Race predominates in establishing district boundaries when "race-neutral considerations come into play only after the race-based decision had been made," *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017)), or when race furnished "the overriding reason for choosing one map over others," *Cooper*, 581 U.S. at 301 n.3 (quoting *Bethune-Hill*, 580 U.S. at 190).

When race predominates over traditional race-neutral districting principles, then, to survive constitutional scrutiny, the district must be narrowly tailored to serve a compelling governmental interest. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Apart from a State's interest in prison safety, the only compelling interest the United States Supreme Court has ever recognized to justify race-based government action is the remediation of "specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023). The Supreme Court has only assumed, but not decided, that a State's compliance with the federal Voting Rights Act advances a compelling interest. *Bethune-Hill*, 580 U.S. at 193.

These standards are demanding because even benign race-based government action offends the "core purpose of the Fourteenth Amendment . . . to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (footnote omitted); *accord Miller*, 515 U.S. at 904 (explaining that the

central mandate of equal protection is "racial neutrality in governmental decision making" and applies "regardless of 'the race of those burdened or benefited by a particular classification'"). Race-based redistricting, "even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). "It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls"—perceptions that the Supreme Court has "rejected . . . as impermissible racial stereotypes." *Id.* at 647. The "Constitution's pledge of racial equality" cannot, therefore, be "overridden except in the most extraordinary case." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2161, 2163.

The Supreme Court acknowledged in *Abbott v. Perez* that "[r]edistricting is never easy." 138 S. Ct. at 2314. States must draw districts that are substantially equal in population. They must comply with the federal constitution's Equal Protection Clause, which prohibits the intentional assignment of citizens to districts on the basis of race without sufficient justification and also forbids intentional "vote dilution"—the invidious minimizing or cancellation of the voting potential of racial or ethnic minorities. *Id.*

At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the VRA pulls in the opposite direction.

Since the Equal Protection Clause limits what the VRA demands—the consideration of race in redistricting—a legislature attempting to produce a lawful districting plan is vulnerable to "competing hazards of liability." *Id.* at 2315 (quoting *Bush*, 517 U.S. at 977 (plurality opinion)). The Supreme Court has assumed, without deciding, that compliance with the VRA is a compelling state interest and that consideration of race in making districting decisions is narrowly tailored if the State has "good reasons" for believing that those decisions are necessary to comply with the VRA. *Cooper*, 581 U.S. at 293 (quoting *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015)).

The Florida Constitution also prescribes standards for establishing congressional district boundaries. Art. III, § 20, Fla. Const. As relevant here, the Tier One standards prohibit the drawing of districts "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." *Id.* at § 20(a).[1] The Florida Supreme Court has held that these requirements parallel the requirements of both Section 2 and Section 5 of the VRA. *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 620 (Fla. 2012) ("*Apportionment I*"). Section 2 of the VRA applies nationwide and prohibits "vote dilution." *Id.* at 620–22. Section 5 of the VRA prohibits

[1] The "Tier One" standards also prohibit the drawing of districts with the intent to favor or disfavor a political party or an incumbent and require districts to consist of contiguous territory. Art. III, § 20(a), Fla. Const. These provisions are no longer at issue in this case following Plaintiffs' abandonment of the partisan gerrymandering claims in Count III of the Amended Complaint.

"retrogression"—a diminishment in the ability of a racial or language minority group to elect representatives of their choice as compared to a "benchmark" district that provided that ability. *Id.* at 623–24. Five Florida counties[2] were subject to Section 5's non-diminishment requirement, *id.* at 624—at least before the coverage formula was invalidated by the Supreme Court in *Shelby County v. Holder*, 570 U.S. 529 (2013). The Florida Constitution's non-diminishment provision applies statewide and—unlike its federal analogue—has no sunset or expiration date.

The "Tier Two" standards of the Florida Constitution, which apply except in the case of a conflict with the Tier-One standards, require districts to be compact, "as nearly equal in population as is practicable," and, where feasible, to "utilize existing political and geographical boundaries." Art. I, § 20(b), Fla. Const.

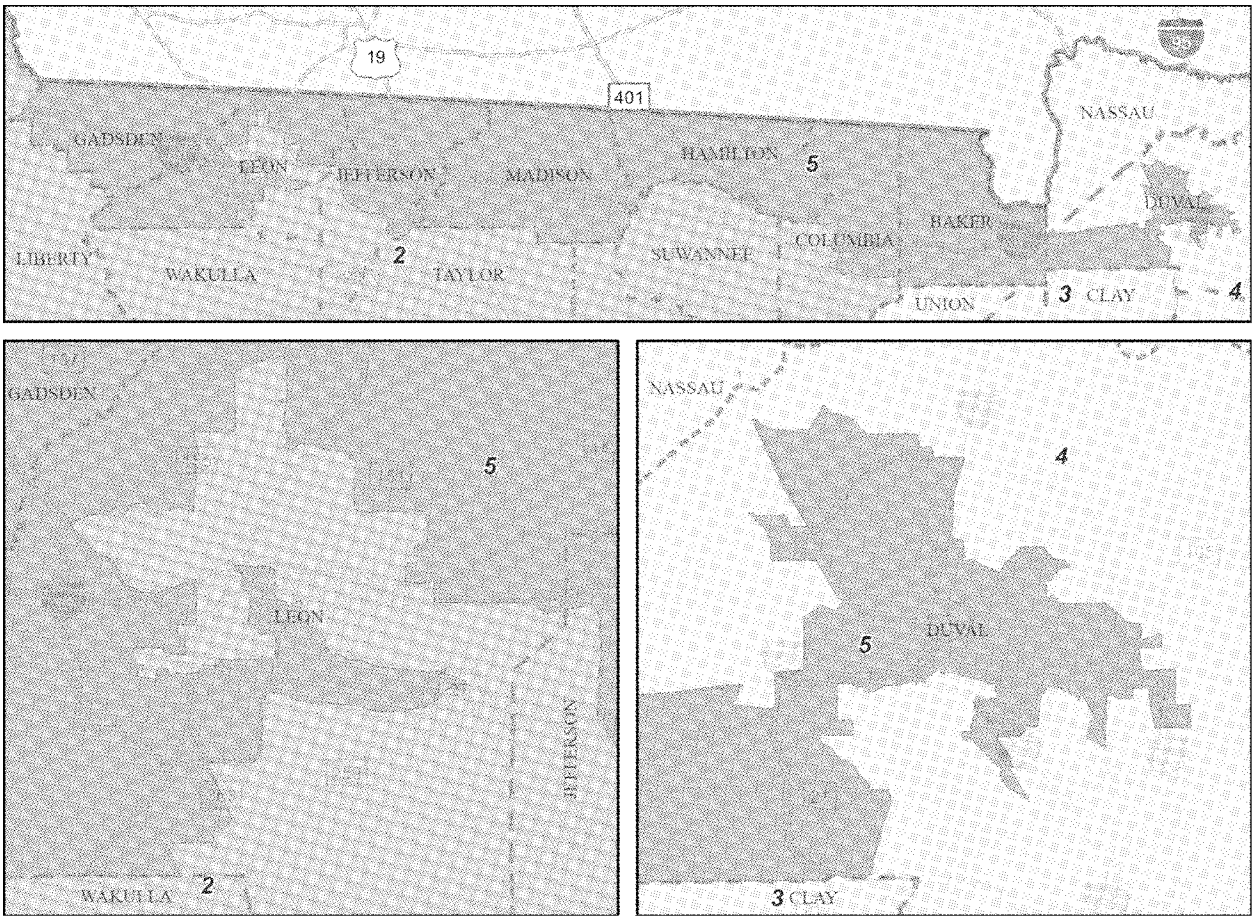
II. The Equal Protection concerns raised by the application of the non-diminishment requirement are limited to Benchmark Congressional District 5.

Because of North Florida's unique geography and population demographics, Benchmark Congressional District 5 presents unique equal-protection concerns in the application of Florida Constitution's non-diminishment provision. Benchmark Congressional District 5's configuration renders it an extreme outlier on the "traditional redistricting criteria" reflected in Florida's Tier Two standards. It is egregiously non-compact and disregards existing political and geographical boundaries on both the east

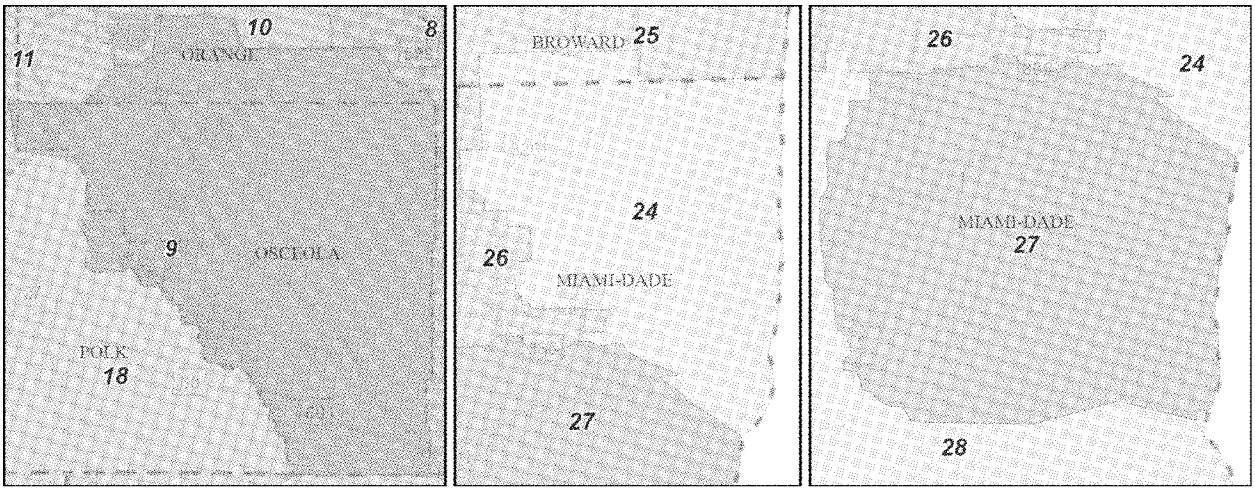
[2] Florida's five "covered counties" were Collier, Hardee, Hendry, Hillsborough, and Monroe—none of which are in North Florida. *Apportionment I*, 83 So. 3d at 624.

and west ends of the district in an attempt to capture a sufficient number of Black voters to satisfy the Florida Constitution's non-diminishment requirement. In short, the population demographics in North Florida reflected in the 2020 census simply do not allow for the creation of a congressional district that accomplishes non-diminishment with respect to Benchmark Congressional District 5 without elevating race to the predominant consideration in the assignment of voters to districts.

Benchmark Congressional District 5 abandons traditional race-neutral districting principles. Its 200-mile length is approximately ten times its 20-mile height, which narrows to approximately two miles north of Tallahassee and west of Jacksonville. The district not only does not respect political and geographical boundaries; it splits four counties and reaches into Jacksonville and Tallahassee with narrow, tortured arms and fingers to carve from these cities large numbers of minority voters. The district strings eight counties together in a line. In the process, it combines some of the State's most densely populated urban areas with some of Florida's most sparsely populated, agrarian counties—and does so to connect pockets of minority voters in urban Jacksonville and Tallahassee that are more than 150 miles apart. Most of the district's population lies at its outermost ends, with comparatively little population found in the five-county corridor that connects those populous, far-flung extremities.



No other district in the Benchmark Map raises the same equal-protection concerns. In contrast to Benchmark Congressional District 5, concerns about racial predominance did not prohibit Florida from drawing congressional districts elsewhere in the State that satisfy the Florida Constitution, the VRA, and the Fourteenth Amendment. For example, Congressional Districts 9, 24, and 27 in the Enacted Map are compact districts both visually and by statistical measurements and were drawn with respect for existing political and geographical boundaries. But these districts also do not diminish the ability of racial and ethnic minorities to elect representatives of their choice.



In Central and South Florida, the geography and population demographics can accommodate congressional districting decisions that are simply not possible in North Florida.

Plaintiffs have not demonstrated[3] that a compelling state interest justifies a North Florida district drawn predominantly on the basis of race. The record contains no evidence that the maintenance of a race-based district is necessary to eradicate the ongoing effects of specific, identifiable instances of past discrimination. *See, e.g.*, *Bush*, 517 U.S. at 982 (plurality opinion) (explaining that a State's interest in remedying past

[3] As the proponents of a race-based assignment of voters to congressional districts, Plaintiffs necessarily bear the burden to demonstrate that the use of race is justified by a compelling state interest and is narrowly tailored to accomplish that interest. *Bethune-Hill*, 580 U.S. at 193 (explaining that, where the State has enacted a race-based district, the burden shifts to the State to prove that consideration of race was narrowly tailored to serve a compelling interest). This allocation of the burden is consistent with the disfavored status and presumptive invalidity of racial classifications under the Equal Protection Clause. *See Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1244 (11th Cir. 2001) ("The proponent of the classification bears the burden of proving that its consideration of race is narrowly tailored to serve a compelling governmental interest.").

discrimination is "compelling" when the discrimination is "specific" and "identified," and the State had a "strong basis in evidence" to conclude that its remedial action was necessary); *Miller*, 515 U.S. at 920–22. Nor does any party claim that the VRA protects Benchmark Congressional District 5 and requires its preservation. Absent a compelling interest in its preservation, Benchmark Congressional District 5's subordination—and indeed outright abandonment—of traditional race-neutral districting principles cannot be justified.

The Supreme Court has repeatedly assumed, without deciding, that a State's compliance with the VRA serves a compelling interest. But the Court has never extended the same presumption to a State's efforts to comply with its own laws requiring government decisions to be made on racial grounds. This distinction is perhaps unsurprising when considering the history that led to the adoption of the Fourteenth Amendment: States' denial of the equal protection of the laws on the basis of race.

Moreover, even if compliance with the VRA serves a compelling state interest, it does not follow that compliance with Florida's non-diminishment standard does too. As the Secretary argues in his Trial Brief, there are important differences between the VRA and Florida's non-diminishment standard. The VRA's mandates are narrow in scope; section 5 of the VRA, which prohibited retrogression, was both time-limited and limited to "covered" jurisdictions in which Congress found evidence of race discrimination in elections. 52 U.S.C. §§ 10303(a)(8), (b), 10304; *Shelby Cnty.*, 570 U.S.

at 537–39. Thus, when the U.S. Supreme Court assumed that compliance with a federal retrogression prohibition advances a compelling state interest, its assumption was limited to a prohibition that applied only to jurisdictions with a demonstrated history of racial discrimination.

Florida's non-diminishment standard, in contrast, has no time limitation and applies statewide without regard to whether an affected jurisdiction has any recent or identifiable history of racial discrimination in elections. Unlike section 5 of the VRA, then, it is *not even arguably* tethered to specific, identified instances of past discrimination that demand remediation. The U.S. Supreme Court has never assumed, let alone held, that there is a compelling state interest in preventing retrogression or diminishment for its own sake, or on a blanket basis. Moreover, the non-diminishment standard does not share the VRA's storied legacy as landmark civil-rights legislation and, unlike the VRA, Florida's non-diminishment standard finds no express constitutional warrant in the Fourteenth Amendment. Mere compliance with Florida's non-diminishment standard is not, without more, a compelling state interest that might justify the elevation of race above traditional race-neutral districting principles consistent with the requirements of the Equal Protection Clause.

Plaintiffs' absolutist approach would require Florida to ensure non-diminishment no matter how much the resulting district would subordinate traditional redistricting criteria to racial considerations. But Plaintiffs offer no limiting principle or logical endpoint to this argument. *Cf. Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170-

73, 2175 (holding that race-based admissions programs could not be reconciled with the Equal Protection Clause, in part, because they lacked any meaningful endpoint). If the 2020 census had revealed that Black population of Benchmark Congressional District 5 had decreased by 50%, the Plaintiffs' approach would require the State to draw an even more sprawling district with tendrils stretching perhaps as far as Panama City and Orlando to ensure non-diminishment. The Equal Protection Clause does not tolerate the total abandonment of traditional race-neutral districting principles in favor of the single-minded pursuit of racial considerations in redistricting. And in regions of the State where application of the Florida Constitution's requirements would necessarily conflict with the requirements of the Fourteenth Amendment, the Supremacy Clause requires the former to yield.

When racial considerations outrank race-neutral considerations in redistricting, the resulting district is subject to strict scrutiny. Here, the non-diminishment standard, as Plaintiffs interpret it, would require not only the elevation of racial over race-neutral considerations, but also the adoption and perpetual preservation of a district so focused on race that it wholly abandons—and does not even minimally advance—traditional race-neutral districting principles. Because the maintenance of Benchmark Congressional District 5 would have violated the Equal Protection Clause, the non-diminishment standard could not compel its preservation.

Conclusion

Plaintiffs' challenge to the Enacted Map should be denied in its entirety, and the Court should enter final judgment in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I 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/ Daniel Nordby