IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Common Cause Florida, FairDistricts Now, Florida State Conference of the National Association for the Advancement of Colored People Branches, Cassandra Brown, Peter Butzin, Charlie Clark, Dorothy Inman-Johnson, Veatrice Holifield Farrell, Brenda Holt, Rosemary McCoy, Leo R. Stoney, Myrna Young, and Nancy Ratzan,

Plaintiffs,

v.

Cord Byrd, in his official capacity as Florida Secretary of State,

Defendant.

Case No. 4:22-cv-109-AW-MAF

PLAINTIFFS' POST-TRIAL BRIEF

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I. INTRODUCTION

1. In 2020, the Florida Legislature embarked on its decennial redistricting of the State's congressional maps, pledging to adhere to the non-diminishment standard set forth in the Fair District Amendments ("FDA") of the Florida Constitution. In particular, the Legislature drafted maps that preserved an existing Black opportunity district, Congressional District 5 ("Benchmark CD-5"), which would allow North Florida's Black voters to elect their candidate of choice. A Black opportunity district had existed in North Florida in one form or another in every congressional plan since 1992 and had at least three times been upheld as lawful by the Florida Supreme Court or a three-judge federal court.

2. This offended Governor Ron DeSantis. In an unprecedented manner, he hijacked the redistricting process and, with much bluster, demanded the elimination of that district. He insisted that he would veto any map that preserved Benchmark CD-5, and he insisted that the Legislature pass his own favored map—drawn by one of his staffers—that eliminated a Black opportunity district in North Florida.

3. Without any supporting case law and with an incorrect view of the facts, the Governor opined that Benchmark CD-5 violated the federal Equal Protection Clause. The Governor publicly blasted the Legislature with his criticisms for months, in increasingly vehement form. Eventually, the Legislature

created a clever compromise. It passed a congressional plan—Map 8019—that satisfied ***all*** of the Governor's purported equal protection objections while still preserving a Black opportunity district in North Florida. With his stated concerns all satisfied, the Governor should have readily agreed to the Legislature's compromise plan. But the Governor wouldn't take "yes" for an answer. He irately vetoed that plan, concocting a brand new objection that flatly violated controlling Florida and federal case law. Nonetheless, in the end, faced with the pressing need for a congressional map and a Governor insistent on having his own way, the Legislature folded and enacted the Governor's map, which eliminated Benchmark CD-5. Thus, for the first time in 30 years, North Florida is without a Black opportunity district.

4. This case presents a single factual question: Why did he do that? Why was the Governor so obsessed with destroying Benchmark CD-5 and replacing it with a congressional map with no Black opportunity district in North Florida? The evidence presented at trial provides the answer. Governor DeSantis insisted on eliminating Benchmark CD-5, at least in part, ***because its elimination would harm Black voters in North Florida***. He did not act for some lofty race-neutral reason, such as a good-faith interpretation of the Fourteenth Amendment's Equal Protection Clause. He intentionally discriminated on the basis of race

against the Black citizens of his own state, in violation of the Fourteenth and Fifteenth Amendments.

5. In the Proposed Findings of Fact and Conclusions of Law submitted herein, we trace the extraordinary events of the 2021-2022 redistricting cycle, unlike any other in Florida history. We lay those facts out against the standards set for assessing racial discrimination in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). To borrow a phrase used repeatedly at trial by the Governor's chief of staff, Alex Kelly: the facts check off every box; they fit the *Arlington Heights* factors like a glove.

6. What seals the deal, however, is the parade of shifting, transparently pretextual arguments the Governor marshalled to ensure that North Florida would not have a Black opportunity district. His counsel admitted under persistent questioning by the Court that there was ***not a single case*** supporting the Governor's purported personal view—and it was nothing more than that—that Benchmark CD-5 violated the federal Equal Protection Clause. Moreover, when the Governor realized that his Equal Protection argument didn't even arguably apply to the Legislature's compromise map, Map 8019, he made up another wholly fictitious—and lawless—objection.

7. He claimed that because the Black Voting Age Population ("BVAP") percentage in CD-5 in Map 8019 was somewhat lower than that of Benchmark

CD-5, it didn't protect Black voters ***sufficiently***. Since his "solution" to this supposed problem was to advocate a plan that entirely eliminated a Black opportunity district in North Florida—and did not protect Black voters ***at all***—it was transparently pretextual. In fact, his focus on Black population percentages was just plain wrong. Under the settled precedents of the U.S. and Florida Supreme Courts, the non-diminishment standard "does ***not*** require maintaining the same population percentages" as in the benchmark district. *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 405 (Fla. 2015) ("*Apportionment VIII*"). Rather, "[a] plan leads to impermissible [diminishment] when, compared to the plan currently in effect . . ., the new plan diminishes ***the number of districts*** in which minority groups can 'elect their preferred candidates of choice'. . . ." *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 260 (2016) (emphasis added).

8. The Governor had no legal basis to conclude that Map 8019 unlawfully diminished Black voting strength. The Legislature's compromise plan maintained the same number of Black opportunity districts in North Florida as before, and so it complied with the FDA. The Governor's objection based on population percentages, BVAP, was baseless and pretextual. Meanwhile, the Governor's own plan, which he browbeat the Legislature into enacting, diminished the number of Black opportunity districts in North Florida from one to zero. The

Governor's illogical and legally baseless "diminishment" argument cannot possibly explain his actions.

9. So what *did* explain those actions? Only an illegal desire to prevent North Florida's Black voters from electing their candidate of choice can explain the Governor's otherwise incoherent—yet, insistent—string of arguments and actions. Justice Kennedy predicted this precise scenario when he warned that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion). That is what we have here: the sorry spectacle of a state intentionally depriving its Black citizens—who have endured more than a century of discrimination and even violence in trying to vote—of the voice in Congress they finally won, at great cost, 30 years ago.

10. This Court should enjoin further use of the Governor's map and require the Legislature to enact a new map untainted by racial discrimination.

11. Plaintiffs respectfully submit the following proposed findings of fact and conclusions of law.

II. STANDING

12. The parties have long agreed on the legal principles governing Article III standing: Plaintiffs must demonstrate an injury-in-fact, causation, and

redressability. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The element of causation has never been disputed.

13. In a redistricting case, a showing of standing must be district-specific. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) ("[A] plaintiff . . . has standing to assert only that his own district has been [improperly] gerrymandered.").

14. Moreover, as this Court has observed, "[w]here at least one plaintiff has standing to maintain the action, there is an Article III case or controversy, and it is unnecessary to address the standing of the other plaintiffs." (Order on Mot. to Dismiss, Dkt. No. 115 at 2 (citing *Horne v. Flores*, 557 U.S. 433, 446-47 (2009))). Thus, Plaintiffs need only demonstrate that a single Individual Plaintiff—or a single member of an Organizational Plaintiff—lives in a district impacted by the alleged misconduct. Plaintiffs have made this showing.

15. Plaintiffs allege that the dismantling of Benchmark CD-5 was motivated, at least in part, by racial discrimination, and that the present-day congressional districts containing the remnants of Benchmark CD-5 are the product of that racial discrimination. Benchmark CD-5 was dismantled into current CDs 2, 3, 4, and 5. Voters in those districts, therefore, have standing to challenge Benchmark CD-5's unlawful destruction, which directly resulted in the unlawful creation of the districts in which they now reside. *Gill*, 138 S. Ct. at

1930; *see also United States v. Hays*, 515 U.S. 737, 744-45 (1995) ("Where a plaintiff resides in a racially gerrymandered district . . . the plaintiff . . . has standing to challenge the legislature's action.").

16. The Secretary's approach to standing has been to consciously avoid learning the facts, while quibbling over the evidence as it was presented. Thus, the Secretary took no depositions of the Individual Plaintiffs and did not even seek proof of their voter registration during discovery. The Secretary took no depositions of the Organizational Plaintiffs and declined to receive evidence of the identities of their members in each of the districts formed from Benchmark CD-5 when it was offered to him during motion practice and later at trial.

17. At trial, two Individual Plaintiffs—Charlie Clark and Dorothy Inman-Johnson—gave undisputed testimony that they currently live in CD-2 and have lived at the same addresses at all relevant times. That alone affords Plaintiffs standing to challenge the destruction of Benchmark CD-5. In addition, two Organizational Plaintiffs—the Florida NAACP and Common Cause Florida—adduced undisputed evidence that they have members who live in each of CDs 2, 3, 4, and 5, sufficient for organizational standing. Despite his misguided attempts to preclude introduction of this evidence, the Secretary has never challenged those facts.

A. Plaintiffs Clark And Inman-Johnson Demonstrated Standing

18. The Secretary has long acknowledged that an individual residing in a congressional district has standing to challenge the events underlying the drawing of that district. That is why he conceded at summary judgment that the Individual Plaintiffs could challenge the districts in which they lived. (Partial Mot. for Summ. J., Dkt. No. 161 at 6). At trial, Charlie Clark testified that he resides in CD-2. (Tr. 258:1-2).[1] Dorothy Inman-Johnson testified that she also resides in CD-2. (Tr. 302:16-18). Accordingly, both Mr. Clark and Mrs. Inman-Johnson have standing to challenge the events giving rise to the current CD-2. *See Gill*, 138 S. Ct. at 1930. This includes the dissolution of Benchmark CD-5.

19. Faced with these incontrovertible facts, the Secretary resorts to smoke and mirrors. Mr. Clark testified that he lives in CD-2 and in his public testimony he gave his home address, which (as the Secretary knows) is within both Benchmark CD-5 and CD-2 in the plan eventually enacted by the Legislature at the Governor's insistence ("the Enacted Plan"). Mr. Clark swore that prior to the 2021-2022 redistricting cycle, he had lived in Benchmark CD-5 and was represented by Al Lawson, Benchmark CD-5's elected representative. (Tr. 256:17-19, 258:1-5). He explained that he had supported the FDA in order to give Black

[1] Citations to the trial transcript for this proceeding are abbreviated as "Tr.".

Floridians "a fair chance to choose somebody of their liking to represent them" (Tr. 260:24-261:4), and that, after it was passed, he was able to elect his congressional candidate of choice, Al Lawson. (Tr. 261:5-13). And on cross-examination, he responded that he was "sure" that he lived in what was formerly Benchmark CD-5. (Tr. 272:14-17).

20. Nevertheless, in summation, counsel for the Secretary suggested that the Court should ignore Mr. Clark's testimony because he "may have been confused about where he lives" and "it's possible he forgot his district." (Tr. 1034:3-6, 1035:7-8). That is truly grasping at straws. Mr. Clark is a well-educated microbiologist, with two advanced degrees, who spent more than 30 years in senior positions in the Florida Department of Agriculture. (Tr. 258:9-13; 278:24-25). He cares enough about his representation in Congress to be a plaintiff in a voting-rights case. He gave his testimony under oath and said that he was "sure" about it in the crucible of cross-examination. Although the Secretary never bothered to depose Mr. Clark, he had months to check the voting rolls maintained under his supervision and to confirm the district in which Mr. Clark voted. He then had more than a week to double-check after Mr. Clark gave his home address under oath at trial. In this context, the suggestion that Mr. Clark might nevertheless be "confused" about his district—and even about his own home address—is meritless and, indeed, offensive.

21. The only ground the Secretary's counsel gave for alleging such "confusion" was the fact that *another* witness had used the word "representative" loosely to refer to someone who addressed the needs of her community, even if she did not live within the boundaries of that elected official's district. (Tr. 315:17-316:8 (Inman-Johnson)). But as Judge Winsor pointed out, Mr. Clark plainly did not use the term that way. (*See* Tr. 1035:20-24 ("JUDGE WINSOR: . . . Mr. Clark said, 'I'm in [Al Lawson's] district. I've been in his district.' He testified to that.")). Moreover, Mr. Clark's undisputed home address irrefutably places him within Benchmark CD-5.

22. As the Secretary's counsel ultimately conceded, as long as the Court credits Mr. Clark's undisputed testimony, which it has no reason to reject, Mr. Clark has standing, and this Court need not consider standing any further:

> JUDGE WINSOR: Assume for a second that we find [Mr. Clark's testimony] credible. And th[en] he would have standing, correct?
>
> MR. JAZIL: Then he would have standing.

(Tr. 1035:23-25 (Summations)).

23. With respect to Mrs. Inman-Johnson, the Secretary's argument is even more obscure. Counsel for the Secretary sought an admission from Mrs. Inman-Johnson that former Representative Al Lawson—who represented Benchmark CD-5—had not "technically" been her representative, despite his efforts on behalf of

her community. (Tr. 315:13-316:8 (Inman-Johnson)). Presumably, the Secretary's point was that Mrs. Inman-Johnson did not live in the portion of current CD-2 that overlapped with former Benchmark CD-5. That is true, but irrelevant. There is no dispute that she lives in the current CD-2 and has lived there at all times since it came into existence. (Tr. 325:16-22 (Inman-Johnson)). Mrs. Inman-Johnson therefore has standing to challenge all events underlying the drawing of the current CD-2. Those events indisputably include the destruction of Benchmark CD-5: had that not occurred, current CD-2 would not exist. If Plaintiffs are correct that the destruction of Benchmark CD-5 was motivated, at least in part, by racial discrimination, then Mrs. Inman-Johnson's district, and its boundaries, are the product of that racial discrimination and are tainted by it. It does not matter what portion of that district Mrs. Inman-Johnson lives in. She has a right to complain about the creation of the district in which she resides. Again, standing is *district*-specific; no court has ever held that it is *more* specific than that.

24. The Secretary's counsel also implied that the Individual Plaintiffs have not met their burden of establishing standing because they did not enter their voter ID cards into the record. As counsel for the Secretary suggested during summation, doing so would have "substantiate[d] where they live and [] assure[d] [the Secretary] beyond any doubt whether or not they'd be affected." (Tr. 1033:16-19). But Plaintiffs are not aware of any case law requiring submission of

a voter ID card (or any other specific type of evidence) to establish standing. Mr. Clark and Mrs. Inman-Johnson provided unrebutted sworn testimony demonstrating their residency in CD-2. That is enough to meet Plaintiffs' burden, which is proof by the preponderance of the evidence. There is no requirement to establish the factual underpinnings of standing "beyond any doubt" (if indeed providing voter ID cards would actually satisfy the Secretary). This suggestion is particularly puzzling coming from the Secretary, who never requested voter ID cards during discovery and who himself controls Florida's voter rolls.

25. Mr. Clark and Mrs. Inman-Johnson have demonstrated through unrebutted evidence that they reside in CD-2 and, accordingly, have standing to bring these claims.

B. The Florida NAACP And Common Cause Florida Have Demonstrated Standing

26. While not necessary to maintain this action, the Organizational Plaintiffs have also shown that they have standing to sue on behalf of their members living in CDs 2, 3, 4, and 5.

27. A membership organization has standing to challenge a district that is the product of unlawful state action when it has members residing in that district. *See Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 269 (2015). Representatives from both the Florida NAACP (Cynthia Slater) and Common

Cause Florida (Amy Keith) presented unrebutted evidence that their respective organizations have such members.

28. In particular, both organizations presented evidence that they have thousands of members located all across Florida. (Tr. 617:5-10 (Florida NAACP)); (Tr. 492:22-493:1 (Common Cause Florida)). Moreover, both organizations specifically identified at least one member who lives in each of CDs 2, 3, 4, and 5. (Tr. 618: 4-11 (Florida NAACP)); (Tr. 493:2-5 (Common Cause Florida)). Both Ms. Slater and Ms. Keith also testified that they personally took additional steps to confirm that the members so identified currently lived in the relevant district (*i.e.*, CD-2, 3, 4, or 5) and were registered voters. (Tr. 618:18-619:11, 626:9-17 (Florida NAACP)); (Tr. 494:13-18, 498:13-18 (Common Cause Florida)). Indeed, three of the four members identified by the Florida NAACP were known to Ms. Slater personally, and she testified based on her own personal knowledge that they had been members of the NAACP and had resided at their same addresses in the districts for more than ten years. (Tr. 619:12-19, 620:15-22).

29. The Secretary has not rebutted any of this evidence. He has not (so far) claimed that the Florida NAACP and Common Cause Florida do not in fact have members in each of CDs 2, 3, 4, and 5. Nor could he credibly do so. Indeed, setting aside Plaintiffs' affirmative showing, the fact that these Plaintiffs are statewide organizations with thousands of members across Florida dedicated to

protecting minority voting rights should suffice, by itself, to permit the Court to make the reasonable inference that, between the two organizations, it is more likely than not that they have at least one member in one of the relevant districts. *See Ala. Legislative Black Caucus*, 575 U.S. at 270.

30. Still, the Secretary may argue that the Organizational Plaintiffs should have affirmatively disclosed the names of the identified members in CDs 2, 3, 4 and 5 or that the members themselves should have testified. There is no such requirement. And, critically, those individual members have a strong privacy interest in their chosen associations that outweighs any interest in open disclosure of their names as members of their respective organizations. *See NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). Both Ms. Slater and Ms. Keith testified to the risks their members face in revealing their names publicly. (Tr. 621:1-12 (Florida NAACP)); (Tr. 494:22-495:23 (Common Cause Florida)). Indeed, Ms. Slater testified that she herself had been threatened due to her membership in the NAACP. (Tr. 621:13-15). The Secretary did not dispute this showing, nor did he seek an order that the names be publicly disclosed.

31. Nevertheless, to address any potential concerns from the Court, both Ms. Slater and Ms. Keith testified that they had a list of the names and addresses of the members identified in CDs 2, 3, 4, and 5 in court and would disclose them to the Secretary on a confidential basis, if asked to do so by the Court. (Tr. 621:16-21

(Florida NAACP)); (Tr. 496:7-13 (Common Cause Florida)). The Secretary did not ask the Court to issue such an order. The Court, therefore, should disregard any after-the-fact complaints from the Secretary that the names and addresses of the individual members are not in the record. Both the Florida NAACP and Common Cause have provided unrebutted evidence that they have members in each of Districts 2, 3, 4, and 5 and accordingly have standing to challenge those districts.

C. Arguments About Remedies Are Premature And Irrelevant To Standing

32. At several points in this litigation, the Secretary has framed his arguments against Plaintiffs' standing around the redressability element. He argued at summary judgment and elsewhere that Plaintiffs could not ask this Court to resurrect a district like Benchmark CD-5 because Plaintiffs did not demonstrate standing to sue in *each* of CDs 2, 3, 4, and 5 under the Enacted Plan. As discussed above, that is simply not true.

33. In any event, this "redressability" issue is a red herring. Plaintiffs have not asked this Court to order the Legislature to draw a new district identical to Benchmark CD-5 or to compel the Legislature to enact Map 8015 or Map 8019. Plaintiffs have asked only that the Legislature be ordered to draw a map free of illegal racial discrimination. (Second Am. Compl., Dkt. No. 131 at 59-60).

34. But even if Plaintiffs had asked for those remedies, and even if the Court found that neither the Florida NAACP nor Common Cause Florida had shown that they have members in CDs 2, 3, 4, and 5, at a minimum the grievances of Mr. Clark and Mrs. Inman-Johnson are "redressable" within the meaning of Article III. "When establishing redressability, a plaintiff need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014) (quoting *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 318 (1st Cir. 2012)); *see also Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1127 (11th Cir. 2019) ("even partial relief suffices for redressability").

35. Plaintiffs' claims of racial discrimination can be redressed, at least in part, by an order invalidating their congressional districts as the products of unlawful racial discrimination and directing the Legislature to draw new districts through a nondiscriminatory process. That, in itself, would remedy a significant source of Plaintiffs' harm: the fact that they presently live and vote in districts tainted by racial discrimination.

36. What is more, upon the invalidation of their present districts, Plaintiffs would then be able to lobby the Legislature to adopt whatever map they preferred. That opportunity would itself constitute Article III "redress," even if it is not

guaranteed that the Legislature would draw any particular map. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152-53 (2010) (plaintiffs' injury was redressable by an order lifting an injunction that prohibited a federal agency from deregulating genetically altered alfalfa, since such an order "w[ould] allow petitioners to go back to the agency, to seek . . . deregulation"—even though there was no guarantee the agency would ultimately "come out in favor of [it]"); *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 467-68 (1st Cir. 2009) (holding that a favorable decision would provide plaintiff "effectual relief" by removing "a barrier to achieving" its desired result, even though additional hurdles would still remain).

37. Even counsel for the Secretary was compelled to concede the point during his summation:

> JUDGE JORDAN: With regard to redressability, if we find against you on the merits but disagree with the plaintiffs on the appropriate remedy and say that the remedy is 8015, does [Mr. Clark] show redressability? The answer is yes, right?
>
> MR. JAZIL: Yes, Your Honor.
>
> JUDGE JORDAN: And . . . if we find against you on the merits and kick everything back to the legislature to come up with a map, [Mr. Clark has] theoretically got a remedy too.

MR. JAZIL: Yes, Your Honor.

* * *

JUDGE WINSOR: And even if he ends up at the end of this, if you're unsuccessful on the merits and he ends up in a district similar to what he's in now, some new map that complies with the Constitution, again, if you're wrong on the merits, would take him from being in a situation where he's being discriminated against to one where he's not being discriminated against based on race, which is their whole claim in this case, right?

MR. JAZIL: Yes.

JUDGE RODGERS: Regardless of whether he gets Representative Lawson back as a representative.

MR. JAZIL: Yes.

(Tr. 1038:19-1039:18).

38. As this colloquy demonstrates, any arguments that the Secretary may make regarding standing are baseless. Plaintiffs have proved by the preponderance of the evidence—indeed, by undisputed evidence—every element of standing necessary to challenge the destruction of Benchmark CD-5 and the drawing of current CDs 2, 3, 4, and 5.

III. TRIAL WITNESSES

39. We briefly review the testimony of the ten witnesses who testified at trial. They appear in the order in which they testified.

A. J. Alex Kelly

40. J. Alex Kelly is currently the acting chief of staff for Governor DeSantis. (Tr. 38:24-39:2). He testified on the first and fourth days of trial. During the 2021-2022 redistricting cycle, Mr. Kelly was the Governor's deputy chief of staff. (Tr. 39:3-6). He drew the Enacted Plan and advocated for it before the Legislature. (Tr. 39:19-22, 40:10-14).

41. Mr. Kelly has been part of the redistricting process since the 2001-2002 redistricting cycle, when he worked as a legislative aide. (Tr. 40:15-19). By the 2012 cycle, Mr. Kelly was the staff director of the House Redistricting Committee and experienced in drawing both state legislative and congressional maps. (Tr. 41:1-7). Mr. Kelly testified that neither Governors Bush nor Governor Scott, who held office during those two redistricting cycles, took a "hands-off" approach to redistricting. They did not propose their own maps or offered any ideas about what maps should be passed. (Tr. 42:18-43:1).

42. With respect to the Enacted Plan, Mr. Kelly intentionally drew the congressional districts of North Florida to eliminate Benchmark CD-5, a Black crossover district. He agreed that his map "eliminated that Benchmark CD-5." (Tr. 57:9-17).

43. Although not a lawyer, Mr. Kelly claimed that the Benchmark CD-5 was unconstitutional, in part due to its length and East-West configuration.

Nonetheless, Mr. Kelly admitted drawing a similarly configured district in 2011, which the Florida Supreme Court had relied upon in creating Benchmark CD-5. (Tr. 60:17-25). Mr. Kelly, however, expressed his view that in implementing Benchmark CD-5 in *Apportionment VII*, 172 So. 3d 363, 405 (Fla. 2015) (*Apportionment VII*) "the Florida Supreme Court got it wrong." (Tr. 76:25). In an extended colloquy with the Court, Mr. Kelly conceded that he was unable to identify any authority supporting his contention that the *Apportionment VII* decision was "wrong." (Tr. 77:16-80:9).

44. Mr. Kelly was familiar with legal requirements for redistricting and the requirements of the FDA. (Tr. 41:15-20). Mr. Kelly understood that answering whether a district unlawfully "diminish[ed]" a minority's voting strength in comparison to the benchmark required a functional analysis, not simply comparing minority and majority population percentages. (Tr. 149:12-21; Tr. 174:23-175:2).

45. Mr. Kelly testified that the Duval-only CD-5 in Map 8019 was entirely contained within a single city and county (Tr. 118:22-25) and that it was compact. (Tr. 124:5-7). Mr. Kelly suggested that the BVAP of Map 8019's Duval-only CD-5 was too low at around 35 percent, but acknowledged that a district with 35 percent BVAP could still elect Black candidates of choice. (Tr. 135:4-9). He admitted that a functional analysis demonstrated that "[m]ore often

than not, this district would perform for the Black community's candidate of choice." (Tr. 156:17-18).

46. Mr. Kelly also explained that, when drawing North Florida's congressional districts, he reviewed the demographic and political statistics of the region (Tr. 171:16-21) and attempted to create a compact district in Northeast Florida with at least 39 percent BVAP, which if confirmed as a performing district in a functional analysis, would comply with both the state and federal constitutions. (Tr. 174:13-175:2; 921:20-922:2). (*See also* Tr. 926:12-20).

B. Charlie Clark

47. Plaintiff Charlie Clark is a Black resident of Leon County. He stated his address in open court and it is a part of the record. (Tr. 256:17-19). Mr. Clark has lived in Florida for four decades and was the first African-American to serve as head of the Florida Department of Agriculture Pesticide Registration Program. (Tr. 258: 8-14).

48. Mr. Clark is the direct lineal descendant of enslaved persons from Haiti who were forcibly transported to Georgia and then Louisiana. (Tr. 268:4-20). Mr. Clark grew up in the segregated Deep South and testified that his "entire existence from the time I entered kindergarten at 3 years old until the time I left for undergraduate college was a totally Black environment, was a totally Black society." (Tr. 257:2-4). Mr. Clark's kindergarten, elementary, junior high, high

school, and first four years of university were all segregated: "Everything I did that was interscholastic, everything I did with sports, everything that I did involving literature was against only other Black children." (Tr. 257:8-13).

49. Under the Benchmark Plan, Mr. Clark resided in Benchmark CD-5 and was represented by his candidate of choice, Al Lawson. (Tr. 258:3-5, 261:5-10, 265:6-7). Mr. Clark voted for Rep. Lawson repeatedly. (Tr. 258:15-16 ("Q. Mr. Clark, do you vote regularly in Florida elections? A. I do."); (Tr. 261:5-13 ("Q. Following the FDA's enactment, were you able to elect your congressional candidate of choice? A. [T]he answer is yes, I was able to. Q. Is that true for every election until 2022? A. Yes. Q. And who was your congressional representative following FDA? A. His name was – is Alfred Lawson, Jr.")).

50. Under the Enacted Plan, however, Mr. Clark now resides in Congressional District 2, and is represented by Rep. Neal Dunn, who was not his candidate of choice. (Tr. 258:1-2; 264:24-265:7). Mr. Clark has seen a meaningful decline in the quality of his representation under the Enacted Plan. Whereas Rep. Lawson was "very responsive" to his constituents, going so far as disclosing his personal number, Rep. Dunn's office has not responded to Mr. Clark's inquiries at all. (Tr. 265:15-17; 266:23-267:7; 270:2-12). Rep. Dunn has not focused on the issues that most directly impact Black communities: "I have not personally heard him speak publicly as I would like as a Black person to say, you

know, X, Y, and Z is wrong." (Tr. 268:21-269:4). Moreover, while Rep. Lawson held town hall meetings with constituents in Leon and Gadsden counties, to Mr. Clark's knowledge, Rep. Dunn has not. (Tr. 269:5-25).

51. Reflecting on the most recent redistricting cycle, Mr. Clark testified that it "was a vicious assault on what I have come to expect as just a regular voter in Leon county." (Tr. 271:8-10).

C. Dorothy Inman-Johnson

52. Plaintiff Dorothy Inman-Johnson testified on day two of the trial. Mrs. Inman-Johnson identifies as African American and has resided in Tallahassee since December 1971. (Tr. 301:11-13, 302:6-7). She testified that she resides in Congressional District 2 under the Enacted Plan. (Tr. 302:16-18, 309:15-24).

53. Mrs. Inman-Johnson grew up in segregated Birmingham, Alabama during a period of racial violence and turmoil, where she witnessed fire hoses and dogs used on Black protestors. (Tr. 301:18-25). With the strong support of her mother, she was active in the civil rights movement as a teenager. (Tr. 301:23-302:5).

54. Mrs. Inman-Johnson is a life member of the NAACP and has served on the Board of Common Cause Florida. (Tr. 302:24-303:3). She is also a dedicated public servant to residents in Northern Florida. Her career includes 26 years as a public-school teacher in Leon and Gadsden counties and service as

executive director of the Capital Area Community Action Agency (which helps low-income families lift themselves out of poverty to attain financial independence). She is also a published author, writing about issues of race and poverty in America. (Tr. 303:11-13, 305:10-12, 306:6-11).

55. Mrs. Inman-Johnson testified to the continued challenges of poverty and issues of social justice that Black and minority communities experience in Tallahassee and throughout Leon County. (Tr. 304:2-306:1). Her desire to address poverty, services for children and low-income families, and housing affordability led her to run for, and win election as, the first Black woman on the Tallahassee City Commission in 1985 and inspired her current election campaign for the Tallahassee City Commission. (Tr. 303:21-304:17, 314:22-25).

56. Mrs. Inman-Johnson testified that the Enacted Plan changed the representation of Tallahassee residents due to the inability to re-elect a minority candidate, such as Rep. Al Lawson. (Tr. 307:23-308:9). As she explained, although she never resided in Benchmark CD-5, the changes to Benchmark CD-5 negatively impacted her because "it was important to have somebody in Congress from our region who had interests in common, had an understanding of our county." (Tr. 308:16-24). Mrs. Inman-Johnson reiterated that Rep. Lawson's representation benefited minorities and their shared interests in the region

regardless of the particular congressional district in which they resided. (Tr. 308:24-309:3, 309:7-9, 316:5-7).

57. In Florida's 2022 General Election, Mrs. Inman-Johnson's candidate of choice for CD-2, Rep. Lawson, lost to incumbent Congressman Neal Dunn. (Tr. 310:15-311:4). Unlike Rep. Dunn, Rep. Lawson "was very accessible" and "he had been very consistent in representing the needs of constituents throughout the district," across the urban, rural, and coastal areas (Tr. 309:7, 311:5-13 (Inman-Johnson)).

58. Like Mr. Clark, Mrs. Inman-Johnson has "no awareness of [Rep. Dunn's] work," as Rep. Dunn and his staff are "not as visible in the Tallahassee area, and they are not easy to contact and get [direct] responses." (Tr. 311:14-16, 314:11-16). In Mrs. Inman-Johnson's opinion, Rep. Dunn "doesn't deal with the request that you're making" and she wished he focused on multiple socioeconomic issues spanning across diverse population centers, urban areas, rural communities, and coastal communities. (Tr. 314:2-8, 314:9-16).

D. J. Morgan Kousser

59. Dr. J. Morgan Kousser was Plaintiffs' expert witness as to Florida's history of voting rights and racial discrimination. (Tr. 330:14-17). Dr. Kousser is a historian and political scientist whose work focuses on elections and election law, political science, and the political and racial history of the South. (Tr. 328:4-21).

Dr. Kousser received his Ph.D. from Yale University and has taught for 50 years at the California Institute of Technology, as well as at Harvard University, Yale University, the University of Michigan, Oxford University, and the Hong Kong University of Science and Technology. (Tr. 328:6-14). Dr. Kousser has published several books and scholarly articles about the intersection of racial politics and election laws across the South. (Tr. 328:24-329:15). Dr. Kousser has previously consulted or testified in over 60 voting rights cases in both federal and state court, including three previous cases in Florida, and has twice testified before a Subcommittee of the House Judiciary Committee on proposed extensions of the Voting Rights Act, in 1981 and in 2019. (Tr. 329:16-330:3; 330:4-9).

60. At trial, Dr. Kousser testified as to the history of discrimination in Florida from the Emancipation period through the 2021-2022 redistricting cycle, marshalling the facts for the Court's consideration under the *Arlington Heights* framework.

61. Based on his review of historical facts, Dr. Kousser concluded that "Florida has used election law from the beginning of the time that Black people could vote in Florida to the present to heighten the discrimination against Blacks." (Tr. 335:6-8).

62. Dr. Kousser emphasized that the issue of race has been front and center in every redistricting, including the most recent cycle. (Tr. 368:23-369:6,

369:10-13). However, based on his analysis of Florida history, he opined that the events of the 2021-2022 redistricting cycle, including the extent of the Governor's intervention, were "extraordinary" compared to prior cycles. (Tr. 420:14-421:1, 421:24-422:6).

63. As for the impacts of this redistricting cycle on Black voters, Dr. Kousser concluded, based on his interpretation of the legislative record, that those consequences were both "foreseen" and "foreseeable." (Tr. 423:14-424:9).

E. Amy Keith

64. Amy Keith, the program director for Common Cause Florida, testified on behalf of the organization on day two of the trial. (Tr. 490:2-8). As Ms. Keith explained, "Common Cause is a nonprofit nonpartisan organization dedicated to upholding the core values of American democracy. We work to create open, accountable government that is of, by, and for the people, and we work to make sure that every eligible voter is able to have a say, have their vote counted, and that our elections reflect the will of the people." (Tr. 491:2-7).

65. Ms. Keith testified that Common Cause Florida has over 93,000 members throughout the state—including at least one member in each of current Congressional Districts 2, 3, 4 and 5. (Tr. 492:22-493:5). Ms. Keith oversaw the process of confirming that Common Cause Florida had at least one member in each of these four districts, and she testified about that process. (Tr. 493:6-494:18).

While Ms. Keith was willing to disclose the names and addresses of those members under a confidentiality order, she explained that Common Cause Florida does not publicly disclose membership records out of concern for harassment or retribution, especially given the current political environment. (Tr. 494:19-495:5, 496:7-13). In fact, Common Cause Florida has recently added de-escalation training to help protect its volunteers who assist voters at the polls from harassment. (Tr. 495:24-496:3).

F. Fentrice Driskell

66. Representative Fentrice Driskell testified on the third day of trial about Florida's legislative process with respect to redistricting in 2021-22. Rep. Driskell has held a variety of positions in the Florida Legislature, and currently serves as the Minority Leader in the Florida House of Representatives. (Tr. 509:11-18). During the 2021-22 redistricting process, Rep. Driskell served on the House Redistricting Committee, which was responsible for considering both state legislative and congressional redistricting maps after they had been passed out of the appropriate subcommittees. (Tr. 512:24-513:10).

67. Rep. Driskell began by describing the outset of the redistricting process in September 2021. (Tr. 515:9-11). She described this stage of the process as placing "great emphasis" on the legal standards that would be applied, pursuant to both federal law and the FDA. (Tr. 515:14-18). Initially, the legislative debates

were over various policy choices that could produce different maps, giving legislators "multiple maps . . . that could potentially be compliant" with the applicable state and federal law. (Tr. 526:1-8, 526:12-20). But "the one thing that would never be in question was whether or not we adhered to the federal and state standards when it came to redistricting." (Tr. 526:22-24).

68. Rep. Driskell testified that Governor DeSantis's intrusion into the congressional redistricting process in January 2022 was extraordinary, but that—at least at first—the Legislature "continued with our business as usual." (Tr. 551:17-552:18P). The Governor's involvement was "not something [Rep. Driskell] had ever even contemplated, particularly because the Florida Constitution says that it's up to the legislature to draw the maps." (Tr. 552:8-10).

69. After the Florida Supreme Court rejected the Governor's request for an advisory opinion, Rep. Driskell noted that "the conversation then started to change and evolve," and the House started trying to "thread the needle to keep the Governor happy[.]" (Tr. 554:6-12). "What it felt like and seemed like at the time from what we were seeing and what we were hearing was that the legislature itself, legislative leadership, was starting to yield to the Governor somewhat." (Tr. 555:19-22).

70. Rep. Driskell noted that, when the Legislature passed the two-map compromise, "they took the extraordinary step of redistricting in the alternative[.]"

(Tr. 557:13-14). She believed that the Duval-only CD-5 in the Legislature's primary map effectively abandoned Black voters across the Panhandle, including in Gadsden County, Florida's only majority-Black county. She also noted the multitude of common interests that voters share throughout the Panhandle region of Florida, including interests in education, health care, and broadband access. (Tr. 559:18-560:23). However, she agreed that both versions of the Northern Florida minority access district in the Legislature's two-map proposal (the Duval-only option and the East-West option) complied with the law. (Tr. 561:1-12).

71. Rep. Driskell recounted how, after the Legislature passed its two-map compromise, Governor DeSantis's efforts to destroy CD-5 reached a whole new level. When the Governor followed through on his veto threat, the Legislature entered "a period of uncertainty." (Tr. 563:5-25). That period ended "the minute" legislative leadership announced they would not be drawing a map in special session. At that point, she believed it was clear that the Governor's map would pass. (Tr. 568:7-9).

72. Rep. Driskell noted that, at the outset of the redistricting process, there was no difference between the process the Legislature employed for the state legislative maps and the congressional map. (Tr. 529:22-530:1). But by the end, the two processes sharply diverged. For the first time in Florida history, the state legislative maps were approved during the Florida Supreme Court's facial review

without objection from any party. (Tr. 550:3-551:1). Rep. Driskell contrasted that to the congressional map, which was vetoed and replaced by a map drawn by the Governor's staff at the Governor's own direction. (Tr. 567:10-13). Unlike the legislative maps, the Governor's map clearly violated the FDA. (Tr. 576:24-577:6). Rep. Driskell attributed this difference to Governor DeSantis. (Tr. 577:7-10, 578:6-11).

73. Rep. Driskell concluded her testimony by condemning the process by which the congressional plan was passed, calling it a "farce." (Tr. 573:18-574:1). She testified that the Legislature failed to live up to the goals it set out for itself at the beginning of the process, including its goal to comply with the Florida Constitution. (Tr. 575:1-578:23).

G. Cynthia Slater

74. Cynthia Slater testified on behalf of the Florida NAACP on day three of the trial. As she explained, the mission of the Florida NAACP is to protect the rights (including voting rights) of Black Floridians and other minorities. (Tr. 616:2-5). The Florida NAACP has about 12,000 members. (Tr. 617:5-8). Ms. Slater is a longtime member and currently serves as the organization's lead for Civic Engagement and President of the Daytona Beach branch. (Tr. 616:10-12). Ms. Slater began her career in education, and after being inspired by a legally blind student, went on to work for the Florida Division of Blind Services. (Tr. 614:5-

18). She was further inspired to join the Florida NAACP after witnessing discrimination against Black Floridians in the Daytona Beach area. (Tr. 615:11-24).

75. Ms. Slater testified about her years of experience serving the Florida NAACP and her familiarity with its membership in North Florida. (Tr. 616:19-617:12). She then explained how the Florida NAACP keeps track of its members. (Tr. 617:13-22). Ms. Slater went on to testify about reviewing those membership records, identifying at least one member in each of CDs 2, 3, 4, and 5. She explained the steps she took to confirm that those records were accurate and that the members identified were in fact members and registered voters who had lived in their respective districts for at least 10 years. (Tr. 618:4-620:22, 626:9-17). Finally, she testified that, although she would reveal the names and addresses confidentially if ordered by the Court, she would otherwise not disclose the names of those members due to fear that they might be threatened for being members of the Florida NAACP. (Tr. 620:23-621:21).

H. Matthew Barreto

76. Dr. Barreto was Plaintiffs' expert witness with respect to mapping and districting analyses. (Tr. 636:19-637:13). He testified on day three of the trial. Dr. Barreto earned his Ph.D. from the University of California, Irvine, and is currently Professor of Political Science and Chicano Studies at the University of

California, Los Angeles ("UCLA"). (Tr. 627:21-24). Additionally, he serves as the faculty director of the UCLA Latino Politics and Policy Institute, as well as faculty director and lead instructor of The Voting Rights Project, a research center within the Institute. (Tr. 631:1-6). The focus of Dr. Barreto's academic work has included voting, elections, and American politics, with a specialty in voting rights analysis. (Tr. 628:17-629:6; 630:7-13). Dr. Barreto teaches courses specifically about the Voting Rights Act and the data, methodology, and techniques for map drawing, analyzing election results, and conducting racially polarized voting analysis. (Tr. 630:7-13).

77. Dr. Kassra A. R. Oskooii, tenured professor of Political Science and International Relations at the University of Delaware, assisted Dr. Barreto with his work on this case. (Tr. 636:12-18 (Barreto)).

78. Dr. Barreto testified at trial about his analysis of the Enacted Plan and whether it preserved a district in North Florida in which Black voters could elect their candidate of choice. His findings included functional analyses of the Enacted Plan as compared to (i) the benchmark map, and (ii) other unenacted maps proposed by the Florida Legislature. Dr. Barreto also testified about his analysis of voting patterns by race and ethnicity to determine if Black and other racial or ethnic groups were cohesive in support of preferred candidates as compared to white, non-Hispanic voters.

79. Dr. Barreto found that, across Northern Florida, Black voters are cohesive and vote together for their preferred candidates while white voters bloc-vote against Black-preferred candidates. (Tr. 650:4-652:15). He also testified that CD-5 in the Benchmark Plan performed for Black voters, i.e., it allowed Black voters to elect their candidate of choice. (Tr. 647:1-648:6, 649:8-650:21, 653:12-656:9). Dr. Barreto similarly analyzed the plans approved by the Legislature as part of their two-map compromise, Maps 8015 and 8019, and concluded that they complied with traditional redistricting principles while still preserving a Black-performing district in North Florida. (Tr. 658:9-662:10 (Map 8015), 664:21-674:11 (Map 8019)).

80. In addition to the congressional maps, Dr. Barreto reviewed Florida's current state legislative maps, which were reviewed and approved by the Florida Supreme Court. (Tr. 675:21-677:3, 679:2-681:22, 684:8-22). He found that there were "extreme inconsistencies" in the Governor's reasoning with respect to the congressional maps as compared to the state legislative maps, which Governor DeSantis could have challenged but did not. (Tr. 684:23-688:15).

81. Dr. Barreto also testified regarding his findings as to the Enacted Plan. Despite minority population growth and white population share decline, the Enacted Plan dismantled a Black-performing district and diminished opportunities for minority voters to elect candidates of their choice as compared to the

Benchmark map and alternative options passed by the Florida Legislature. (Tr. 700:10-705:3).

I. Douglas Johnson

82. Dr. Douglas Johnson was the Secretary's expert witness responding to Dr. Barreto. Dr. Johnson testified on day four of the trial. Prior to this trial, Dr. Johnson testified as an expert five times, and his testimony has been excluded or rejected in whole or in part in *all five* of those cases. (Tr. 813:8-815:16). *See also Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 at *95-96 (N.C. Super. Ct. Sept. 3, 2019).

83. Dr. Johnson did not address, much less dispute, most of Dr. Barreto's conclusions, including that: (1) the Benchmark, Map 8015, and Map 8019 contained performing Black opportunity districts in North Florida (Tr. 816:9-817:1); (2) the Enacted Plan contains no performing Black opportunity district in North Florida (Tr. 817:2-8); (3) the Enacted Plan is drawn to preserve Black opportunity districts elsewhere in Florida (Tr. 818:1-5); and (4) the State legislative maps enacted by the Florida Legislature are also drawn to preserve Black opportunity districts to comply with the FDA (Tr. 818:6-14).

84. Instead, Dr. Johnson's criticism was focused on three tangential issues: (1) Dr. Barreto's use of dot maps; (2) Dr. Barreto's conclusion that the Enacted Plan "cracked" the Black voting strength in Jacksonville; and (3) Dr.

Barreto's statement that Map 8019's CD-5 "closely resembled" State Senate District 5 enacted in the same redistricting cycle. (Tr. 796:3-13).

85. With respect to Dr. Johnson's first criticism, regarding Dr. Barreto's use of dot maps, Dr. Johnson testified that his practice is to use heat maps instead. (Tr. 800:13-19). But Dr. Johnson admitted that dot maps are "useful for spotting where there are any of a given group," including, as relevant here, where Black voters in North Florida live. (Tr. 818:18-22). Of course, that is exactly how Dr. Barreto used dot maps. Moreover, the heat map prepared by Dr. Johnson itself is illegible—it uses six different colors and an inconsistent scale. (Tr. 820:4-21). By comparison, the heat map drawn by the Legislature uses a single shade (green), which gets lighter or darker along a consistent scale, and is consistent with Dr. Barreto's dot map. (Tr. 819:17-820:3). (*Compare* DX89 *to* DX112). Critically, Dr. Johnson's purported reason for preferring heat maps to dot maps—that it better demonstrates a Black "voting strength" (Tr. 801:11-12)—is fatally flawed: it relies solely on the BVAP of the area being analyzed, which absent a functional analysis does not identify voting strength. (Tr. 800:23-801:22). *See infra* Sec. IV.

86. Dr. Johnson's second criticism of Dr. Barreto's testimony focused on the areas of Black population in Jacksonville split by the St. Johns River, which reduced Black voting strength in each of the two districts created by the split. (Tr. 821:6-822:25). Dr. Johnson ignored Mr. Kelly's concession that he had knowingly

split the Black community by drawing a district line down the river. (Tr. 177:23-178:6). Dr. Johnson also acknowledged that he did not conduct any functional analysis to determine the impact of splitting the Black population in this way. (Tr. 824:22-825:10). Nor did Dr. Johnson dispute that Map 8019, which kept Jacksonville whole along the St. Johns River, performed for Black voters, while the Enacted Plan that resulted from the split along the river did not perform for Black voters in the region. (Tr. 827:5-13).

87. Dr. Johnson's final criticism, concerning Dr. Barreto's conclusion that Map 8019's CD-5 and State Senate District 5 closely resemble one another. (Tr. 804:21-25). However, Dr. Johnson conceded, in response to the Court's questions, that he actually agreed with Dr. Barreto's conclusion. (Tr. 8312:170-832:24).

J. Mark Owens

88. Dr. Mark Owens was Defendant's expert witness responding to Dr. Kousser and Dr. Barreto. Dr. Owens has testified as an expert only twice before this case and has only ever been retained as an expert by a single law firm: Holtzman Vogel, counsel for Defendant. (Tr. 874:3-5).

89. Dr. Owens did not dispute Dr. Kousser's factual account of Florida's history of discrimination. (Tr. 874:11-16; 875: 21-25). Time and again, Dr. Owens agreed that the facts to which Dr. Kousser testified were accurate. (Tr.

876:10-877:16, 880:16-882:7). In fact, Dr. Owens did not testify that a single fact to which Dr. Kousser had testified was incorrect.

90. Dr. Owens presented three purported criticisms of Dr. Kousser: (1) a lack of "critical junctures" in his analysis, (2) omissions in the facts of Florida's political history, and (3) disagreement with Dr. Kousser about whether the most recent redistricting process was unusual. (Tr. 856:25-857:8). On cross examination, however, Dr. Owens undermined or contradicted each of these assertions.

91. As for his first criticism ("critical junctures"), while Dr. Owens contested the weight to be accorded pre-1965 history in the Court's analysis, he acknowledged that pre-1965 history still needed to be considered, testifying that it would be "incomplete to ignore events prior to 1965." (Tr. 876:1-4). Dr. Owens also agreed that "Florida's long history of racial discrimination is relevant to the issues in this case" (Tr. 875:21-25), and that "Black voters are still affected by this history of discrimination" (Tr. 881:25-882:10). Dr. Owens further agreed that the Black population living in Benchmark CD-5 had a lineal connection to the many enslaved people brought there to work in the antebellum period. (Tr. 889:23-890:6).

92. As for his second criticism (factual "omissions"), Dr. Owens testified that Dr. Kousser's analysis had omitted a statement from Representative Fine to

the effect that he agreed with Governor DeSantis' legal theory. (Tr. 861:2-8). But on cross examination, Dr. Owens admitted that, to his knowledge, Representative Fine was the *only* representative in the entire Legislature who publicly said that he agreed with the Governor's legal theory. (Tr. 902:15-903:11). Likewise, Dr. Owens testified that Dr. Kousser's analysis had omitted vetoes that "other governors ha[d] done in other states" in the most recent redistricting cycle. (Tr. 861:19-21). But Dr. Owens admitted that Governor DeSantis's veto was "unique this cycle because it was a veto based on the racial composition of voters in the proposed district." (Tr. 907:23-908:1). And its closest predecessor in Florida history was a veto by Governor Collins over half a century ago in the 1950's. *See* n. 4 *infra.*

93. As for his third criticism, on cross-examination, Dr. Owens abandoned his position that the most recent redistricting cycle was not unusual. Indeed, Dr. Owens agreed that the events of the 2021-2022 redistricting cycle were extraordinary in Florida history and that "there were parts in this case that were not done in the last decade." (Tr. 904:7-12). Dr. Owens also testified that he was unaware of any Governor ever before submitting his own redistricting map in Florida history. (Tr. 898:21-24).

94. Despite testifying on behalf of Defendant, Dr. Owens supported Plaintiffs' central arguments. For example, he recognized that Governor

DeSantis's statements throughout the redistricting process "reflected the fact that he recognize[d] the Florida Supreme Court had required that a minority access district be drawn in North Florida pursuant to the FDA," and that "no court had ever agreed with Governor DeSantis's view that the Florida Supreme Court got it wrong when they required the East-West district [*i.e.*, Benchmark CD-5]." (Tr. 893:21-894:7). Dr. Owens also agreed that both Plans 8015 and 8019 complied with the FDA. (Tr. 896:11-18). Finally, Dr. Owens agreed that "the only concern that Governor DeSantis communicated publicly about Congressional District 5 was a concern about its racial composition." (Tr. 898:14-17).

95. Dr. Owens also criticized Dr. Barreto's report by saying that, as a general matter, partisanship and incumbency may affect election outcomes. (Tr. 865:10-14). But aside from this self-evident proposition, Dr. Owens did not criticize any of Dr. Barreto's conclusions or analyses.

IV. FUNCTIONAL ANALYSIS

A. Principles Of Functional Analysis

96. Central to this case is the measure used to evaluate the performance of an electoral map for minority groups—known as "functional analysis." The FDA prohibits drawing district lines that "diminish [minorities'] ability to elect representatives of their choice." Fla. Const. Art. III, sec. 20; *see In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d 1282, 1288 (Fla. 2022) (FDA bars

"impermissible diminishment of a minority group's ability to elect a candidate of its choice"). This standard was "modeled on and 'embraces the principles' of key provisions of the federal Voting Rights Act of 1965 . . . [including] section 5 (diminishment, or retrogression)." *Id.* (quoting *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 620 (Fla. 2012) (*Apportionment I*)) (alteration in original removed). Thus, Florida law is "guided by any jurisprudence interpreting Section 5." *Apportionment I*, 83 So. 3d at 625.

97. The FDA's non-diminishment provision prevents the Legislature from "eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d at 1289 (quoting *Apportionment I*, 83 So. 3d at 625). "[A] minority group's ability to elect a candidate of choice depends upon more than just population figures." 83 So. 3d at 625, 627.

98. "Evaluating the extent to which benchmark and new districts perform for minority voters—that is, enable those voters to elect the candidate of their choice—requires a 'functional analysis' of voting behavior within the districts at issue. Such analysis considers statistical data pertaining to voting age population; voter-registration data; voting registration of actual voters; and election results

history." *In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d at 1289. (citing *Apportionment I*, 83 So. 3d at 625, 627).

99. In this analysis, "it is the '***ability to elect*** a preferred candidate of choice,' not 'a particular numerical minority percentage,' that is the pertinent point of reference." *Apportionment VII*, 172 So. 3d at 405 (quoting *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015)) (emphasis added). Florida law confirms that the BVAP of a district does not determine whether the district will perform for Black voters, and that there is no minimum BVAP that determines when a district will perform for minority voters' candidate of choice. Mr. Kelly agreed:

> Q. And you know that BVAP doesn't tell you whether a district will perform or not, right?
>
> A. Right.

(Tr. 149:12-14). (*See also* Tr. 175:14-17 ("no fixed minimum percentage of BVAP for diminishment purposes")). In different districts, with different populations, the BVAP necessary to perform can vary widely. Mr. Kelly again:

> Q. 35 percent can perform and 44 percent, 46 percent can perform, right?
>
> A. Yes.
>
> Q. And you have to analyze it?
>
> A. Yes.

(Tr. 149:22-150:1).

100. Indeed, in conducting its mandatory review of the state legislative maps redrawn for the 2022 elections, the Florida Supreme Court approved 18 state legislative districts "that perform for Black voters," *In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d at 1289, four of which have BVAPs below 35%. (PX-4034-0437, PX 4034-0456 (State Senate District 16 – 33.2% BVAP, State House District 21 – 29.03% BVAP, State House District 98 – 34.96% BVAP, State House District 117 – 28.93% BVAP)).

101. Florida's duty under the FDA is thus not "to maintain the same percentage of black voters . . . as had existed in the prior districting plans." Rather, it is to avoid "diminutions of a minority group's proportionate strength that strip the group within a district of its existing ***ability to elect*** its candidates of choice." *Ala. Legis. Black Caucus*, 575 U.S. at 276 (emphasis added). Instead of asking "[h]ow can we maintain present minority percentages in majority-minority districts," complying with the FDA requires the Legislature ask: "[t]o what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.* at 279.

102. Thus, a district does not violate the FDA's non-diminishment provision, even if it has a lower BVAP than its predecessor district, when a

functional analysis confirms that it "will in fact perform for [minority] voters." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1323 (S.D. Fla. 2002). And a district "in fact perform[s]" when "under the totality of the circumstances, [minority] voters will have a reasonable opportunity to elect candidates of their choice." *Id.* By contrast, Florida violates its duty to protect against diminishment when it enacts a redistricting scheme that wholly eliminates a district that previously performed for minority voters' candidates of choice.

B. Functional Analysis Of Benchmark CD-5

103. We start with a functional analysis of Benchmark CD-5. As Dr. Barreto, an expert with vast experience in such analyses, explained: to conduct a functional analysis, one begins with the "demographic and political statistics" of the relevant geographical area. (Tr. 650:5-6). This includes the "voting age population by race and ethnicity as well as the partisan lean" of the area. (Tr. 650:8-9). In the context of this case, these statistics are gathered to "let us understand whether or not a Black candidate of choice is likely to prevail." (Tr. 650:9-10). But "BVAP is not the only indicator of whether or not a district performs." (Tr. 649:11-12).

104. Set forth below is relevant data from the 2020 election with respect to the 2016 Benchmark map for Congressional Districts 1-5. The data show that

Benchmark CD 5—the district at issue in this case—stood out from its neighbors with a 46.2% BVAP and Democratic lean.

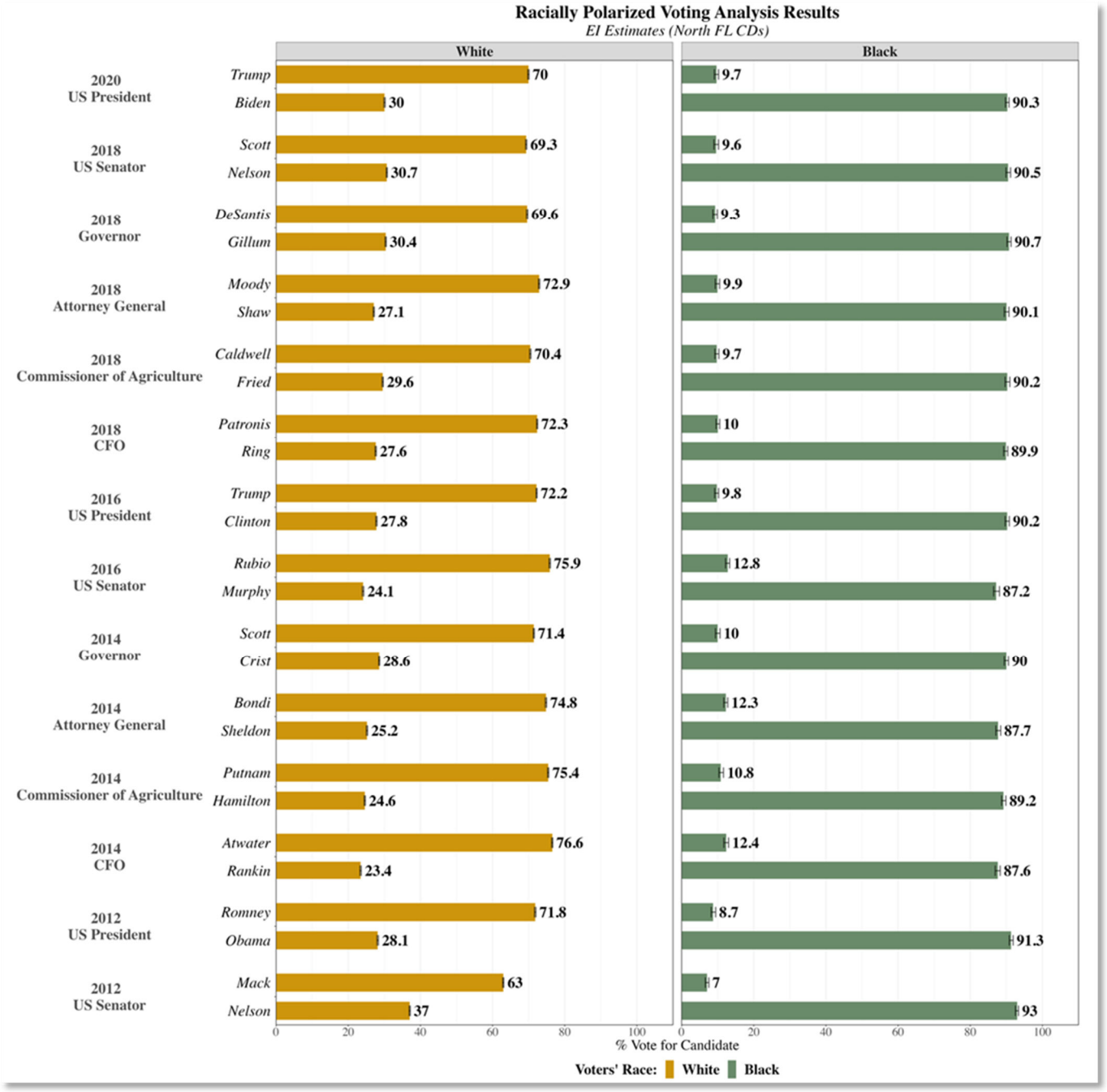
2016 Benchmark Districts	Total Pop	Partisan Lean (Composite Score)			2020 Congressional Election		Total VAP	2020 Voting Age Population						
		Democrat	Republican	Other	Winner	% Votes		White	Minority	Hispanic	Black	Asian	Native	Pacific
1	807881	29.6%	68.1%	2.3%	(R) Gaetz	64.6%	636380	72.7%	27.3%	6.6%	13.2%	4.1%	3.2%	0.4%
2	727856	31.8%	66.7%	1.6%	(R) Dunn	97.9%	588566	75.9%	24.2%	6.7%	12.4%	2.4%	2.5%	0.2%
3	766133	41.5%	56.7%	1.8%	(R) Cammack	57.1%	609560	66.9%	33.1%	10.3%	16.1%	4.7%	2.1%	0.2%
4	871884	35.2%	62.8%	1.9%	(R) Rutherford	61.1%	691279	72.7%	27.3%	8.8%	10.4%	6.0%	1.9%	0.3%
5	748910	61.7%	36.7%	1.6%	(D) Lawson	65.1%	580527	40.2%	59.8%	9.1%	46.2%	3.5%	1.8%	0.2%

(PX 5042-0048).

105. Once the demographic and political statistics are in hand, Dr. Barreto explained, the next step is "understand[ing] . . . the voting patterns." (Tr. 651:1-2). In this case, which focuses on a Black opportunity district in North Florida, the functional analysis requires a "racially polarized voting analysis to understand how different communities in Northern Florida vote, whether or not African Americans and white voters have the same or opposing candidates of choice." (Tr. 651: 2-5). The data below, as presented by Dr. Barreto, shows that in elections from 2012 to 2020 Black voters overwhelmingly favored the Democratic candidate and white voters consistently favored the Republican candidate. This shows cohesive racially polarized voting by both groups.[2]

[2] In oral argument, the Secretary suggested that there was something wrong with Dr. Barreto's racially polarized voting analysis because he included too wide a stretch of Northern Florida in his data set. But the Secretary's expert on mapping, Dr. Johnson, said no such thing. Meanwhile, its political science expert, Dr.

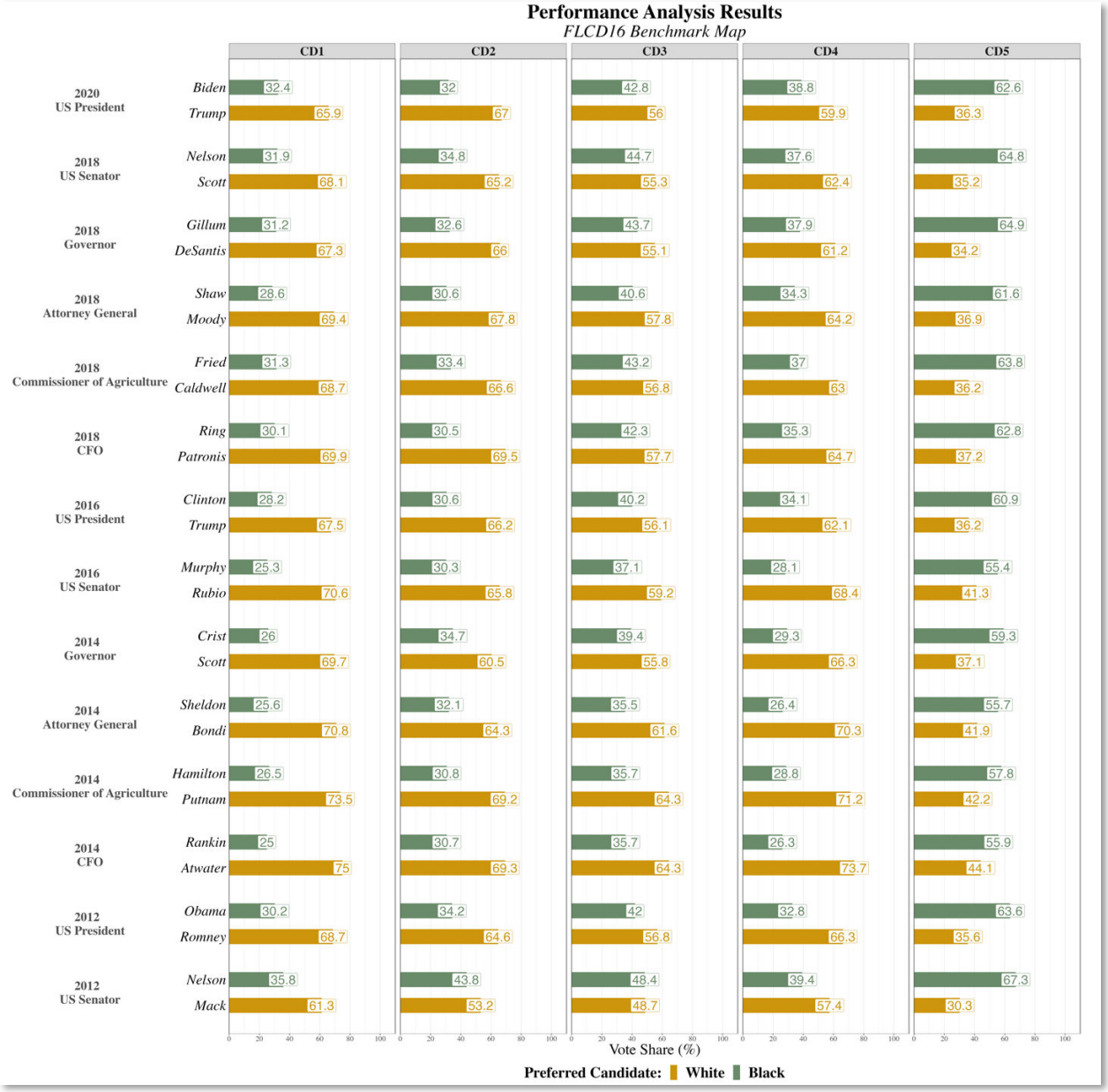
Owens, relied on Dr. Barreto's work to conclude that 90 percent of Black voters typically support Democratic candidates, while the majority of white voters support Republican candidates. (Tr. 871:21-25). Indeed, even without Dr. Barreto's analysis, racially polarized voting by Blacks and whites in Northern Florida is an accepted phenomenon and was relied upon by the three-judge court in *Martinez*, 234 F. Supp. 2d at 1298-99, in upholding a predecessor to Benchmark CD-5 and by the Florida Supreme Court in creating Benchmark CD-5 itself. *Apportionment VII*, 172 So. 3d at 404 n.12.



(PX 5042-0028).

106. As Dr. Barreto explained, the next step is to take "all of the voting district precincts, and compile them into [electoral] districts to determine

[retrospectively] which candidate would have won or lost . . . ." (Tr. 653:16-18). In this case, the pertinent question is "whether . . . the Black preferred candidate won or the white preferred candidate [won]." (Tr. 653: 18-19). As is demonstrated in the table below prepared by Dr. Barreto, this process looks back at the historical results of elections within voting precincts that make up the electoral district being evaluated. This analysis shows that, as of 2020, Benchmark CD 5 in fact performed for Black voters consistently after its creation in 2016 by electing the Democratic candidate—the Black candidate of choice—and would theoretically have performed (had it existed) going back to 2012.



(PX 5042-0031).

107. Based on a similar analysis, the Legislature also concluded during the legislative process that Benchmark CD-5 performed for Black voters in North Florida. (Tr. 655:22-656:2); (JX 0070 at 0008).

C. Functional Analysis Of Backup Map 8015

108. For reasons largely similar to the analysis of Benchmark CD-5, both Dr. Barreto and the Legislature concluded that the backup map passed in 2020 by the Legislature (8019), which contained an East-West district based on Benchmark CD-5, would also perform for Black voters. This was not disputed at trial. (Tr. 660:20-25 (Barreto)).

D. Functional Analysis Of Primary Map 8019

109. The proof at trial showed that the Legislature's primary map (8019) also would have performed for Black voters. Since the Secretary raised a few quibbles (but offered no evidence) on this issue, we review the facts in more detail here. Evaluating whether Map 8019, the Duval-only CD-5 passed by the Legislature in 2020, performs for Black voters of course requires a functional analysis—a task undertaken by the Legislature and by Dr. Barreto, but not by the Governor's office or the Secretary's experts in this case. It is undisputed that the Duval-only CD-5 performs for Black voters.

110. Beginning with Dr. Barreto's analysis, the Duval-only CD-5 under Map 8019 has a 35.32% BVAP and a Democratic partisan lean of 52.9%. (PX 5042-0052). Thus, without more, it would tend to vote Democratic, contrary to the Republican lean of CDs 1-4 in Map 8019.

		Partisan Lean (Composite Score)			2020 Voting Age Population							
HC8019 Districts	Total Pop	Democrat	Republican	Other	Total VAP	White	Minority	Hispanic	Black	Asian	Native	Pacific
1	769221	30.0%	67.6%	2.4%	605557	72.16%	27.84%	6.69%	13.54%	4.24%	3.18%	0.38%
2	769221	43.8%	54.5%	1.6%	619356	65.48%	34.52%	6.42%	23.09%	2.78%	2.34%	0.18%
3	769221	41.4%	57.0%	1.6%	623606	68.61%	31.39%	9.97%	15.61%	3.88%	1.95%	0.16%
4	769221	31.1%	67.0%	1.9%	599181	75.97%	24.03%	7.96%	8.91%	4.92%	2.05%	0.27%
5	769221	52.9%	45.3%	1.8%	598494	46.99%	53.01%	10.75%	35.32%	5.75%	1.93%	0.27%

(PX 5042-0052).

111. Dr. Barreto's racially polarized voting analysis for this region confirms that the candidate of choice for Black voters in North Florida in every statewide election from 2012 to 2020, a total of 14 elections, was the Democratic candidate. (PX 5042-0028).

112. In Dr. Barreto's review of electoral performance results of the precincts contained in Map 8019's CD-5, the Black candidate of choice wins in 9 of 14 statewide elections, including the six most recent statewide elections in 2018 and 2020.

(PX 5042-0069).

113. With a 52% Democratic lean, and consistent Democratic wins in the most recent elections, Dr. Barreto concluded that Map 8019's CD-5 would perform

for Black voters and predictably elect their candidate of choice, the Democratic candidate. (Tr. 671:6-13).

114. This is exactly the conclusion reached by the Legislature in its own functional analysis. (DX98 at 0003). Senate Reapportionment Chair Rodrigues, describing the Duval-only CD-5, said: "even though the [BVAP] has gone down, the functional analysis shows that that is still a Democrat performing seat and that the minority controls the Democrat primary in that seat." (JX 0040 at 24:18-21; *see also* PX 1051 (JX0040 00_26_31 - 00_29_38), PX 1052 (video excerpt containing same)). House Redistricting Chair Leek, again describing the Duval-only CD-5, said: "[t]his district, CD-5, as drawn even in the primary map, still performs. So there was no effect on the functional analysis for CD-5" as compared to the benchmark map. (JX 0038 at 61:4-7).

115. The Governor's office did not dispute this analysis in the legislative record, and the Secretary offered no expert testimony disputing this analysis at trial. In response to a direct question from the Court, the Secretary's counsel admitted as much:

JUDGE JORDAN:	Nobody's come in here and said that nine out of 14 is not performing.
MR. JAZIL:	No one's come in here and said nine out of 14 is not performing.

(Tr. 1010:21-24).

116. Notwithstanding hints to the contrary from the Secretary, there is no basis to reject this uncontroverted fact. As Mr. Kelly acknowledged, the Governor's office relied on the Legislature's analysis:

> Q. The Governor's office did not do its own functional analysis; is that right?
>
> A. Correct.
>
> Q. He just relied on what the legislature provided?
>
> A. Correct.

(Tr. 134:14-18)

117. Likewise, the Secretary's mapping expert, Dr. Johnson, did not "dispute Dr. Barreto's conclusion that . . . the 8019 map with 35 percent BVAP does perform for Black voters." (Tr. 827:5-13).

118. The Secretary's *ipse dixit* suggestion that 9 out of 14 victories is insufficient lacks merit. First, the Legislature concluded that the Duval-only CD-5 would perform, a conclusion grounded in "a strong basis in evidence" and thus entitled to deference. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193-94 (2017).

119. Second, with a 52.9% Democratic tilt and with Black candidates of choice winning *all* of the more recent elections in the data set, it is reasonable to

expect that to continue. (PX5042-0069). As Dr. Barreto explained (and Dr. Johnson did not dispute), "the more recent data [is] more telling of the current composition of that district." (Tr. 671:9).

120. Third, of the five more distant elections in which the Black candidate of choice did not prevail, four of them occurred in the anomalous year 2014, which featured the lowest voter turnout in the data set. (Tr. 843:25-844:3 (Johnson)). In addition to low voter turnout generally, in that year Black voter turnout in Duval County fell a dramatic 10% below white voter turnout (54.8% vs. 44.3%), a difference that by itself may explain the Democratic losses. (Tr. 848:3-11 (Johnson)).

121. Fourth, the Governor's own map drawer, Mr. Kelly, agreed that "[m]ore often than not, this district would perform for the Black community's candidate of choice." (Tr. 156:17-18).

122. All of this supports the undisputed conclusion that Map 8019's Duval-only CD-5 would have given its Black voters a "reasonable opportunity to elect a candidate of their choice." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 405 ("*Apportionment VII*") (Fla. 2015). Of course, a "reasonable opportunity" is not a guarantee and, as the 2014 results show, Black voters must work to get out the vote if they wish their candidates of choice to prevail. The non-diminishment provision, after all, is not an exemption from minority voters'

"obligation to pull, haul, and trade" to obtain electoral success. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

123. In sum, it is undisputed that a functional analysis confirms that Benchmark Map CD-5, Map 8015, and Map 8019 each contain a district that performs for Black voters in North Florida, and thus, complies with the non-diminishment provision of the FDA.

V. FINDINGS OF FACT

A. Florida's History Leading Up To The 2021-2022 Redistricting Cycle

124. As the testimony of Plaintiffs' expert, Professor Morgan J. Kousser, demonstrated, Florida has a long and well-known history of racial discrimination in redistricting and voting. Indeed, "Florida has used election law from the beginning of the time that Black people could vote in Florida to the present to heighten the discrimination against Blacks." (Tr. 335:6-8 (Kousser)). Redistricting has been central to these efforts to suppress the Black vote. The State has deployed the drawing of state legislative and congressional district lines "as a disenfranchising device or a device to diminish Black political influence from the very beginning." (Tr. 335:3-335:8; 335:14-335:17 (Kousser)).

125. From the passage of Florida's first constitution, Black voters have faced efforts to dilute their electoral power and bar them from holding office,

including through discriminatory apportionment. The 1868 Constitution's redistricting scheme resulted in a brazenly malapportioned state Legislature, in which counties that were overwhelmingly white received disproportionate power. (Tr. 337:12-18).

126. In the aftermath of the Civil War, Florida passed a multitude of laws designed to prevent Black voters from exercising their right to vote, including poll taxes and an "eight-box" law that disenfranchised illiterate persons by requiring them to deposit separate ballots for each office in a different ballot box. (Tr. 340:17-341:343:3). These measures were often accompanied by outright violence and intimidation to keep Black voters from exercising their rights, including instances of violence specific to Northern Florida. (Tr. 343:13-24).

127. Florida's efforts to exclude Black Floridians from the electorate continued well into the 20th century. At the crux of these efforts was the all-white Democratic primary, which absolutely barred Black participation in the Democratic primary for decades, until its elimination in 1944. (Tr. 344:2-9).

128. When Black Floridians did seek to register to vote, they faced violent opposition. A campaign to register Black voters near Orlando in 1920 is believed to have been the principal cause of the infamous Ocoee Riots, in which at least 30 Black people were killed during one of the bloodiest days in modern American political history. (Tr. 344:10-15). In another especially egregious act of violence,

Harry T. Moore, the President of the Florida NAACP, was assassinated when his home was bombed on Christmas Eve 1951, in retaliation for his efforts to register Black voters in the state. (Tr. 345:4-13).

129. Throughout the 20th century, Florida—a Jim Crow State—also enforced a range of *de jure* and *de facto* segregation measures to disenfranchise and marginalize Black Floridians. (Tr. 345:14-347:19).

130. The passage of the 1965 Voting Rights Act drove the State to subtler—but no less insidious—means of diluting Black electoral power, including racially driven redistricting and voter roll purges. The state adopted at-large elections for both municipal and county-level offices, and Black voters were strategically "cracked" and "packed" across both state legislative and congressional districts to reduce their electoral influence. (Tr. 353:8–354:5). Black candidates' electoral success nosedived as a result: no Black representative held office in Congress from 1887 to 1993; no Black State House member was elected from 1888 to 1969; and no Black State Senator was elected from 1888 to 1982. (Tr. 356:4-22).

131. From 1965 to the present, there have been at least 69 lawsuits under the U.S. Constitution or the federal Voting Rights Act ("VRA") and objections under the VRA resulting in findings or admissions of discrimination against state,

municipal, or county governments in Florida. (Tr. 348:9-13). At least nine cases involved express findings of discriminatory intent. (Tr. 348:13-16).

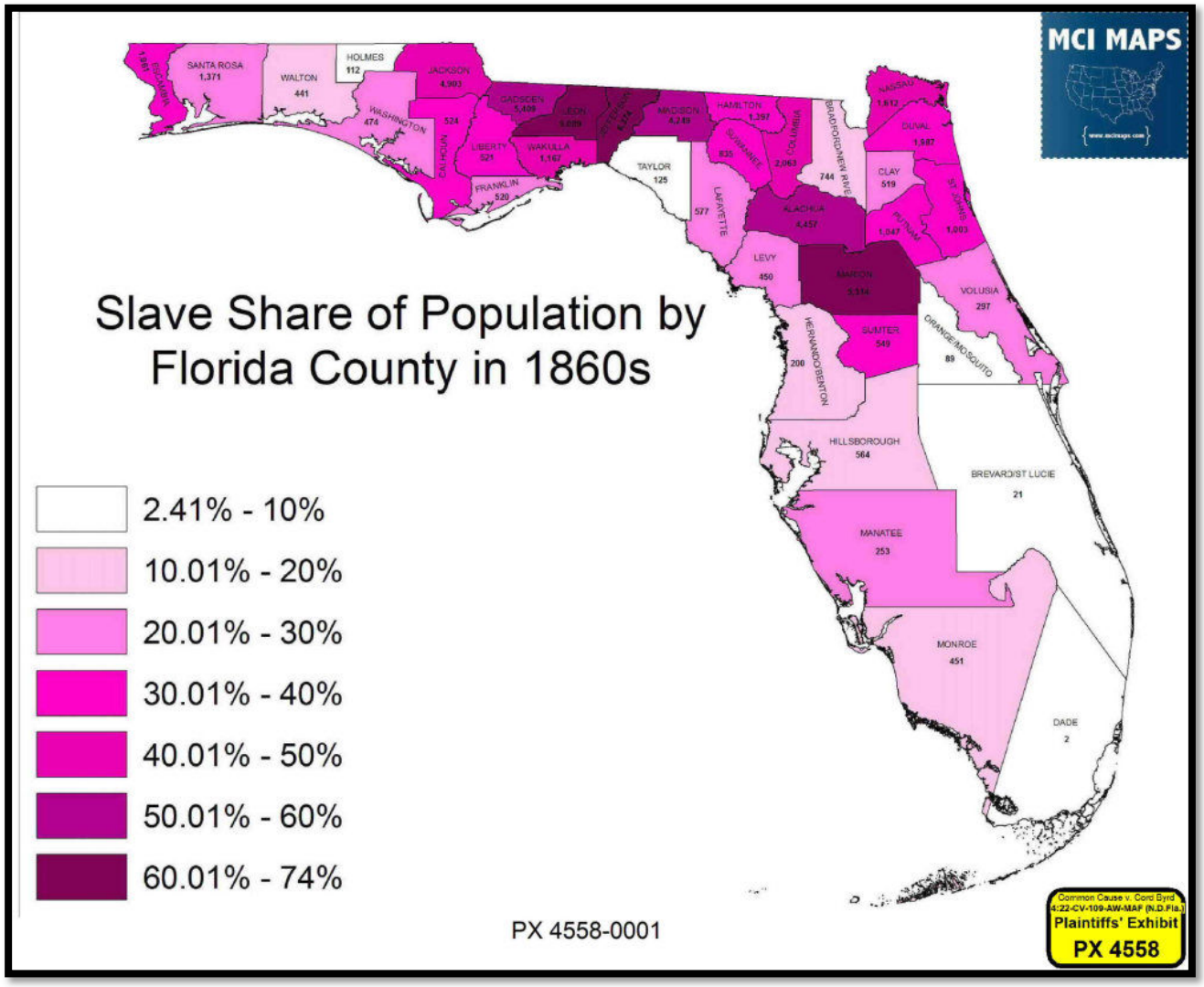
132. This documented history of racial discrimination in redistricting continues to the present day—including specifically in North Florida. As recently as 2022, a federal court enjoined the city council maps drawn in Jacksonville as racially discriminatory. *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229 (M.D. Fla. 2022) (preliminarily enjoining city council maps as racially discriminatory), *aff'd, Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *5 (11th Cir. Nov. 7, 2022), *appeal voluntarily dismissed*, No. 22-13544-HH, 2023 WL 2966338 (11th Cir. Jan. 12, 2023).

133. Black voters in Florida continue to be affected by unequal access to the political process, as shown not only by the steady drumbeat of voting rights lawsuits, but also the continuing focus on race in redistricting, including in the 2021-2022 cycle. (Tr. 366:24-367:7). As Dr. Kousser stated, "[i]n every redistricting since *Baker v. Carr*, race has been the central issue [in Florida], and that continues to be the case" today. (Tr. 369:10-13).

B. A Black Opportunity District In Northern Florida

134. Northern Florida contains a region known as the "Slave Belt," an area of the State where many cotton plantations that depended on the forced labor of

enslaved Black Floridians were located at the time of the Civil War. (PX 4558; Tr. 336:4-21 (Kousser)). That region, which overlaps substantially with Benchmark CD-5, is depicted below:



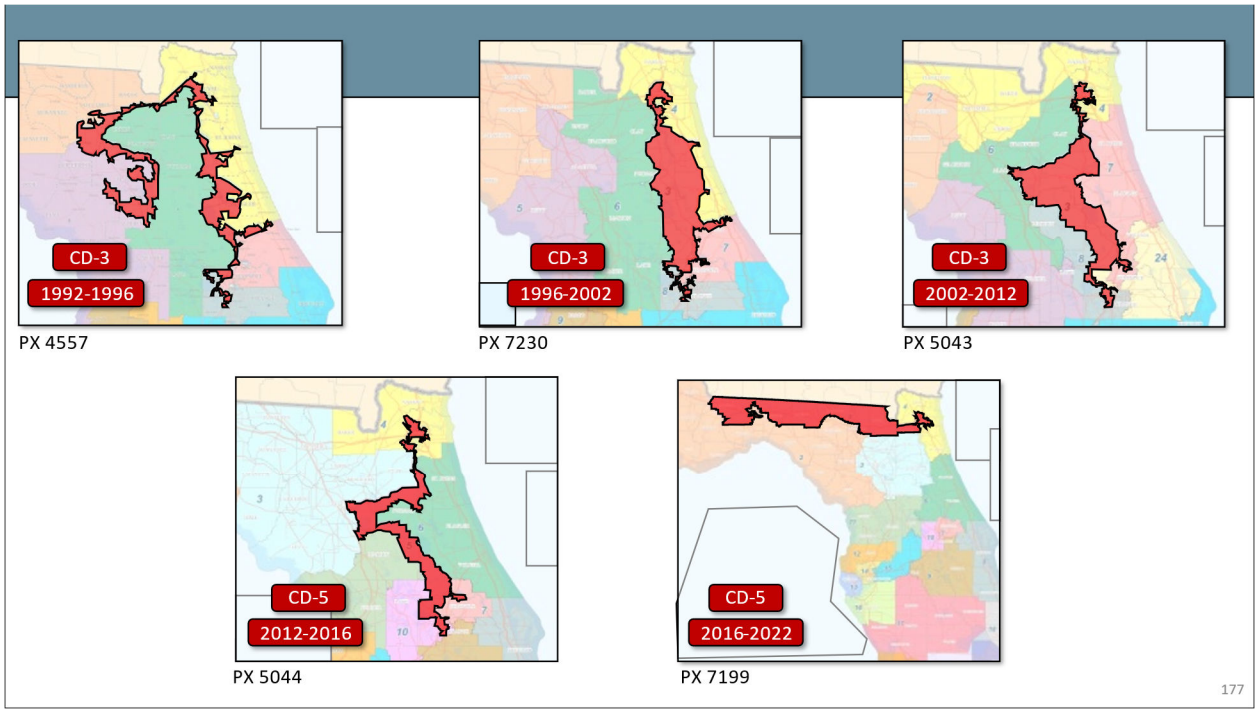
135. A comparatively large proportion of Black Floridians continue to live in that former "Slave Belt" region today. Dr. Owens agreed that the Black population living in Benchmark CD-5 has a lineal connection to the many enslaved

people brought there to work in the antebellum period. (Tr. 889:23-890:6 (Owens)). As Dr. Kousser credibly testified, there is a "long tradition of Black people living [in Northern Florida] and being discriminated against." (Tr. 336:24-337:4 (Kousser); *accord* Tr. 889:4-12 (Owens)).

136. For North Florida's Black voters to have a meaningful chance of electing their preferred candidates, they required a "Black-performing" district—*i.e.*, one in which Black voters comprised a large enough proportion of the population to exert a significant influence on elections. (Tr. 356:23-357:10 (Kousser)).

137. Black voters received such a district in 1992, in the form of Congressional District 3, a minority opportunity district running North-South from Jacksonville to Orlando designed to remedy a violation of Section 2 of the VRA. (Tr. 356:23-357:6). The formation of this district enabled Black Floridians to elect a Black representative to Congress for the first time since 1876. (Tr. 358:13-20).

138. As depicted in the below series of maps, from 1992 until 2022, there was a Black-performing district in Northern Florida, anchored in Jacksonville. That district consistently performed for Black voters' candidates of choice, notwithstanding the fact that its Black Voting Age Population ("BVAP") never reached or exceeded 50 percent. (Tr. 358:2-358:10 (Kousser)).



C. The Fair Districts Amendments And The Creation Of Benchmark CD-5

139. In 2010, Florida's electorate responded to decades of discriminatory redistricting by enacting the FDA, which was supported by a 62% supermajority of voters. (Tr. 360:15-20 (Kousser)). The campaign to pass the FDA was bipartisan, and polling results showed that it was supported by majorities "of Democrats, Republicans, and independents" alike. (Tr. 360:15-20).

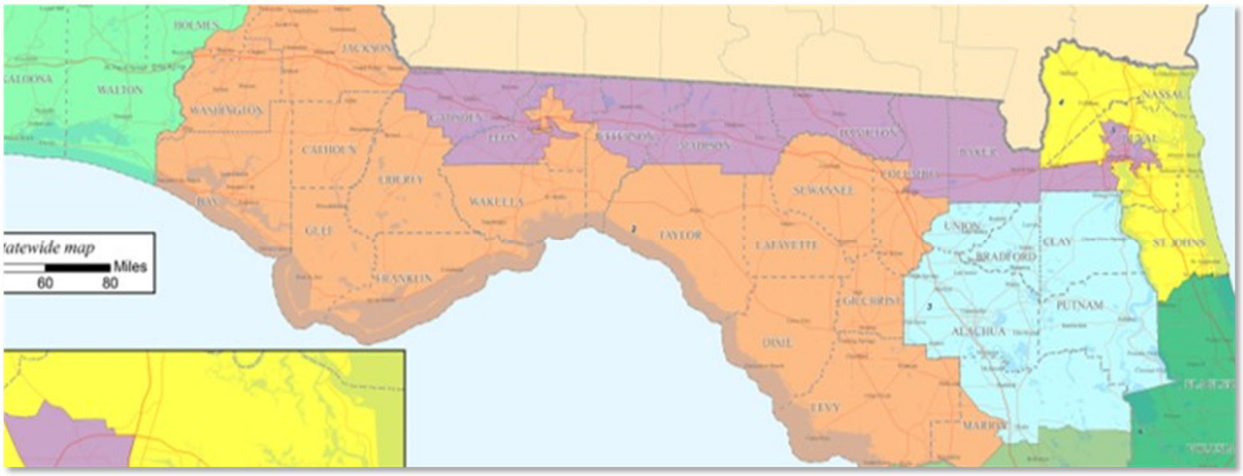
140. The public campaign for the FDA emphasized that the amendments were intended, in part, to codify protections in the VRA in the Florida Constitution—including the VRA's protection against retrogression in Black voters' ability to elect their candidates of choice.

141. For example, Ellen Freidin, the chairman of FDA sponsor organization FairDistricts Florida, stated that the amendments were "drafted very carefully to ensure that minority voters do not lose representation in Florida." (Tr. 361:1-9). Florida NAACP President Adora Obi Nweze warned that, if opponents of the measure succeeded in blocking the FDA's passage, they would turn the clock back to a "very dark time in our history." (Tr. 361:16-24). In an editorial endorsing the FDA, the *Tallahassee Democrat* observed that districts in the state had been drawn "so that they can pack a large number of minority voters into just a few districts. Minorities win seats in the Legislature or Congress, and they can keep getting re-elected—but there aren't enough minority representatives to have any real power once they have that seat at the table." (Tr. 361:25-362:8).

142. Discussion about protecting minority voting rights therefore featured prominently in the public debate preceding the FDA's passage.

143. Despite broad popular support for the FDA, the Legislature sought to skirt the law's requirements in the very first election held after its passage, forcing court intervention to ensure compliance. (Tr. 362:16-364:2). The 2011-2012 redistricting cycle resulted in multiple court challenges, and eight decisions by the Florida Supreme Court, with the Court ultimately ordering the redrawing of several congressional districts. (Tr. 365:2-8).

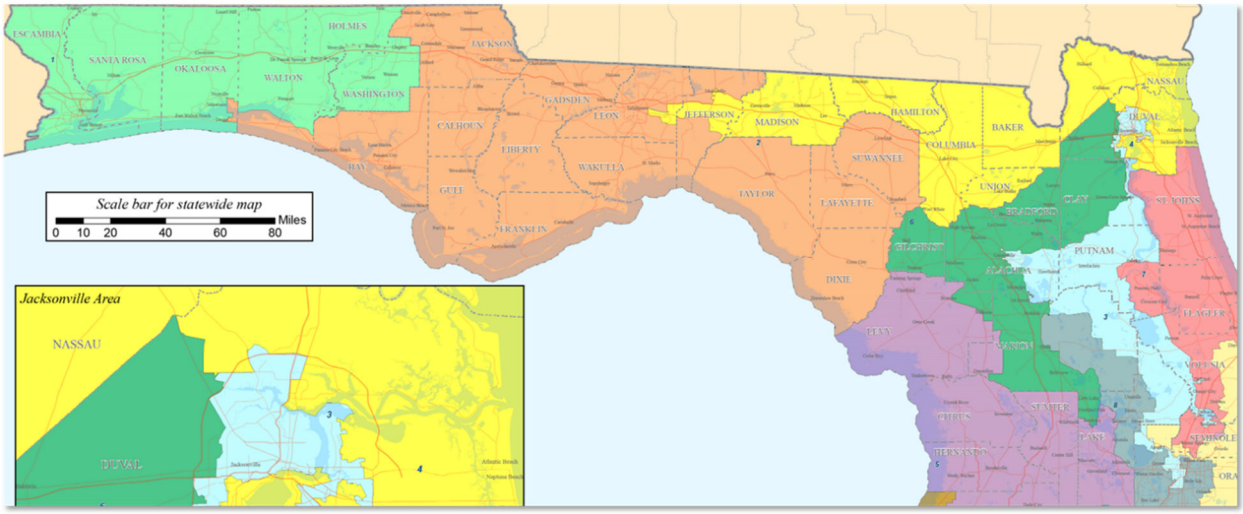
144. Most relevant to this case, the Florida Supreme Court required the creation of Benchmark CD-5, a district with an East-West (Jacksonville-Tallahassee) configuration running along the Georgia border, in place of the Legislature's North-South (Jacksonville-Orlando) Black-performing district. (Tr. 365: 2-8). Benchmark CD-5 is depicted below:



(PX 7198)

145. The Florida Supreme Court concluded that, although Benchmark CD-5 would have a lower BVAP than the North-South district that preceded it, it would still comply with the FDA's non-diminishment requirement because it would still afford Black voters a "reasonable opportunity to elect a candidate of [their choice]." *Apportionment VII*, 172 So. 3d at 405. Indeed, Benchmark CD-5 elected Black voters' preferred candidate, Rep. Al Lawson, in every election until 2022, including in 2016, 2018, and 2020. (Tr. 261:5-13 (Clark)).

146. Moreover, in approving Benchmark CD-5, the Florida Supreme Court rejected any claim that the district's shape rendered it unacceptably non-compact, finding that "length is just one factor to consider in evaluating compactness." *Apportionment VII*, 172 So. 3d at 405-06. In fact, the district's shape reasonably followed the Georgia border, and closely tracked both the historical "Slave Belt" and a congressional district enacted in Northern Florida during the 2001-2002 redistricting cycle that was *not* designed to be a Black opportunity district (depicted below):



(PX 7222)

147. The residents of Benchmark CD-5 shared much in common. On average, they were younger, had lower educational attainment, experienced a higher rate of poverty, and had lower household incomes than the median Floridian. (Tr. 656:19-657:4 (Barreto); PX 5042-0018).

Table 3: Demographic Change between Benchmark CD5 and Adopted CDs 2-5, 2021 ACS 1-Year Estimates[18]

	Benchmark CD5	Adopted CD2	Adopted CD3	Adopted CD4	Adopted CD5
Median Age	35.1	38.6	40.1	39.1	39.2
Median Household Income	$46,344	$56,301	$52,054	$61,311	$77,698
Persons Below the Poverty Line (%)	22.2%	15.8%	17.6%	15.8%	8.7%
Children (under 18) Below the Poverty Line (%)	30.0%	21.1%	19.2%	22.4%	10.5%
High School or Higher Education	87.3%	88.9%	89.9%	90.0%	94.7%
Bachelor's Degree or Higher Education	24.1%	31.5%	28.5%	26.4%	45.0%

148. In special session, then-Senator Audrey Gibson underscored these commonalities, stating: "[I]t's more than about race. It's also about need. And so in order for those folks with health, more health disparities . . . neighborhoods that had been crumbling historically, infrastructure needs, cleaning up brown spills in communities of color that weren't anywhere else—who represents those communities now?" (Tr. 383:19-384:24 (Kousser); PX 1043.1).

149. At trial, Representative Fentrice Driskell echoed these sentiments, testifying to the shared political and economic interests among Floridians in the northern part of the state, including shared interests "in the public education system, the healthcare system, the access to it or the lack of it, broadband access—a whole host and variety of issues that are shared by that particular region of the

state, and those voters certainly deserve to have a member of Congress who understands . . . those shared concerns, in that region." (Tr. 560:3-14).

150. And, as Defendant's expert Dr. Owens acknowledged, residents in Benchmark CD-5 shared a common and unique history: many Black Floridians reside along the state's northern border precisely because that is where the plantations where their ancestors were enslaved were concentrated. (Tr. 889:4-12, 889:23-890:6).

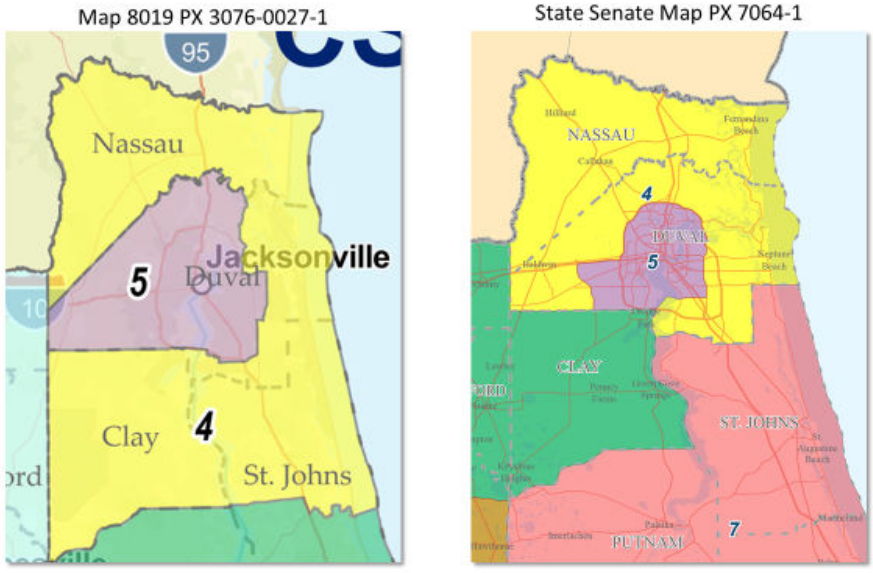
D. The 2021-2022 Redistricting Cycle

1. The Undisputed Redistricting Of The State Legislature

151. The state-level redistricting efforts, over which the Governor holds no veto power, unfolded without a hitch in 2021-2022. On February 3, 2022, the Legislature passed a Joint Resolution establishing state House and Senate districts. The Florida Supreme Court approved these state legislative maps, and in doing so, reaffirmed the Florida Constitution's prohibition against diminishing minority voters' ability to elect their candidate of choice. *In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d at 1288-90.

152. For the first time in modern Florida history, no one challenged the state legislative maps, despite having the opportunity to do so. *Id.* at 1285-86, 1288. The Governor, like any other citizen, has the opportunity to file objections with that court, but he filed none.

153. The Legislature implemented the FDA by creating no fewer than 40 minority opportunity districts throughout the state (out of 160 state legislative districts total). Most relevant here, no one—including the Governor—took issue with Senate District 5, a district "wholly included" within the version of CD-5 proposed in Map 8019, which Mr. Kelly agreed had a "similar geography" to proposed CD-5. (Tr. 129:12-23 (Kelly)). In a colloquy with Judge Rodgers and Judge Jordan, the Secretary's expert Dr. Johnson first agreed that "there's some similarity" between the two districts and, eventually, conceded that they are "very similar." (Tr. 808:1-2; 808:17; 832:16-24).



[3]

[3] A copy of the 8019 map, with the identical image, was admitted as DX98 into evidence. (Tr. 114:11-24).

2. The Legislature Attempts to Draw A Congressional Map That Complies With The FDA

154. The congressional redistricting proceeded very differently. The Governor became actively, and aggressively, involved in opposing a Black opportunity district in North Florida. Five times in 2021-2022, the Legislature proposed plans or draft plans that complied with the FDA and retained a Black opportunity district in Northern Florida. Each time that it did so, the Legislature pointedly rejected a public attack or contrary submission from the Governor that would have eliminated the district. And each time that the Legislature proposed a map that complied with the law, the Governor pushed back—hard. This back-and-forth, with the Legislature sticking to the law and the Governor resisting, was unprecedented in Florida history.[4]

[4] Counsel for the Secretary attempted to defuse this point by directing Dr. Kousser's attention to Governor Collins' efforts more than half a century ago to influence the Florida Legislature's map-drawing process, including by vetoing a congressional apportionment plan. (Tr. 433:25-435:1 (Kousser)). However, as Dr. Kousser pointed out in response, Collins only exercised his veto power, and did not affirmatively propose congressional maps, as Governor DeSantis did here. Moreover, there is nothing in the Collins history that equals the public back-and-forth with the Legislature that occurred here. The Collins story thus does nothing to change the unprecedented nature of Governor DeSantis' intervention (which would be remarkable even if it does have a distant antecedent). As Dr. Kousser explained, "[w]hat's extraordinary here is the degree of the Governor's absorption and his producing maps in the first place." (Tr. 434:14-15).

155. At the start of the congressional redistricting cycle, legislators sought to comply with the FDA by retaining a Black opportunity district in Northern Florida. (Tr. 369:19-370:6 (Kousser)).

156. In early committee meetings, Senate Reapportionment Chair Ray Rodrigues stated that he "intend[ed] for the committee to conduct the process in a manner that is consistent with caselaw that developed during the last decade, is beyond reproach, and . . . free from any hint of unconstitutional intent" (JX 0001 at 15:3-20; *see also* PX 1051 (JX 0001 00_09_37 - 00_19_30), PX 1052 (video excerpt containing same); Tr. 370:7-15 (Kousser)). In a nod to the *Apportionment* litigation following the 2011-2012 redistricting cycle, Chair Rodrigues stated that the Legislature had learned "hard lessons" from the previous cycle that would inform the 2021-2022 redistricting.

157. Tom Leek, Chair of the House Redistricting Committee, likewise avowed that the House would "conduct this process in compliance with the Florida constitution and relevant Federal and State legal standards, including relevant court preceden[ts]." (JX 0003 at 7:9-14; Tr. 372:7-12 (Kousser)).

158. Reflecting on the early committee meetings, Rep. Driskell testified that it was "very clear that the one thing that would never be in question was whether or not we adhered to the federal and State standards when it came to redistricting." (Tr. 526:21-24).

159. From the start, the Legislature also acknowledged that preventing retrogression or diminishment, as the FDA commands, requires a multi-factorial functional analysis, taking into consideration various variables, including voter registration, voter turnout, party data, and minority voting age population. (Tr. 370:16-372:2). There was a unanimous understanding among legal counsel for both chambers that simply comparing the BVAP in a given district to the BVAP in its predecessor district was insufficient to determine whether there had been impermissible retrogression or diminishment. (JX 0006 at 74:3-8; *see also* PX 1051 (JX 0006 01_19_04 - 01_23_36), PX 1052 (video excerpt containing same), 74:15-17; JX 0012 at 23:08-23:17; Tr. 373:1-374:16 (Kousser)).

160. For example, Dan Nordby, Senate Redistricting Counsel, instructed that "[t]here is no predetermined or fixed demographic percentage used at any point in th[is] functional analysis." (JX 0006 at 74:15-17; *see also* PX 1051 (JX 0006 01_19_04 - 01_23_36), PX 1052 (video excerpt containing the same); Tr. 373:5-17 (Kousser)). And Andy Bardos, outside counsel for the House, similarly noted that "[s]imply looking at the voting age population is not enough." (JX 0012 at 23:08-23:17; *see also* PX 1051 (JX 0012 00_22_04 - 00_24_30), PX 1052 (video excerpt containing the same); Tr. 374:2-6 (Kousser)).

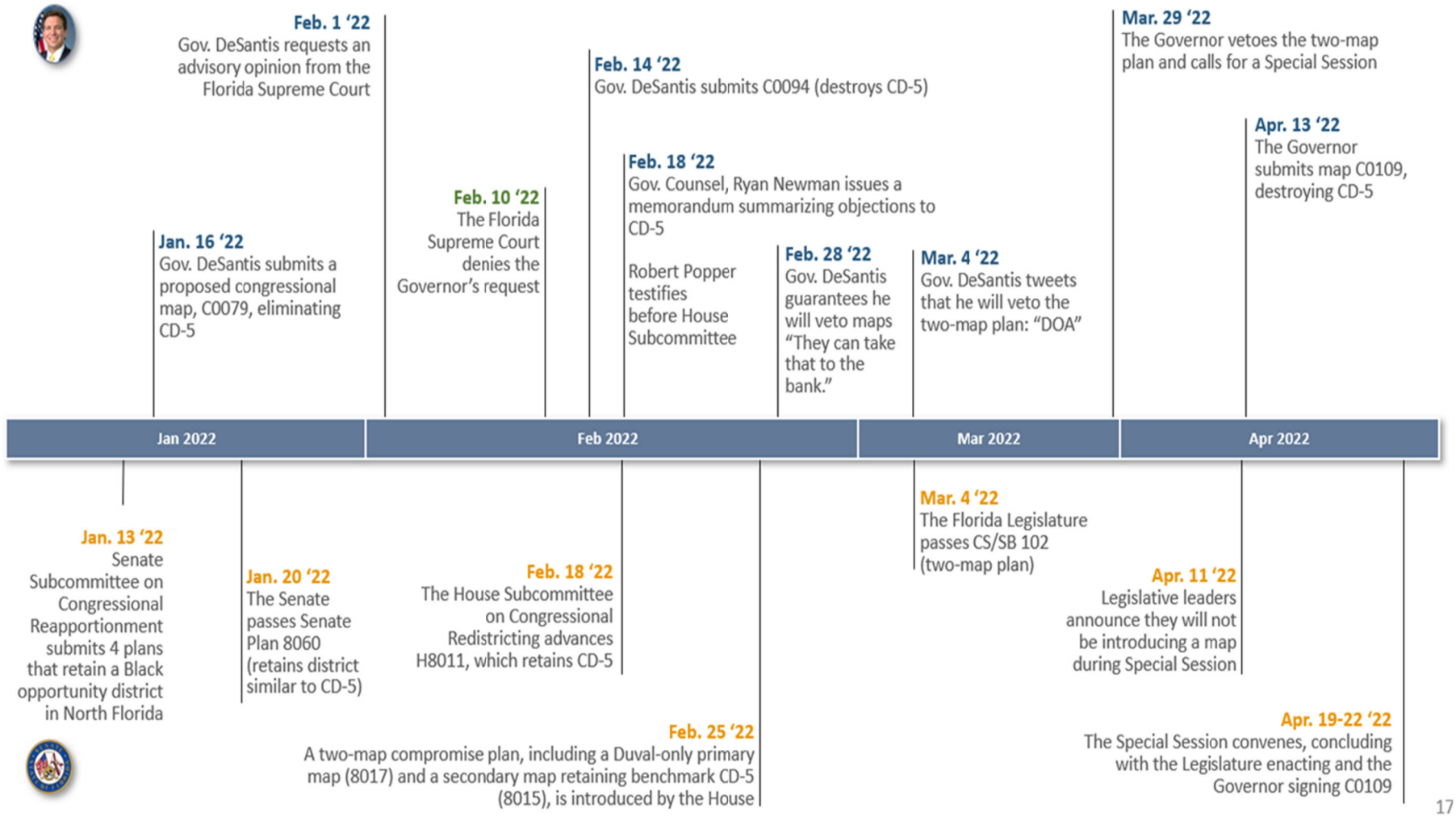
161. Rep. Driskell testified that, based on these initial discussions about functional analysis, she understood that the inquiry required by the FDA's non-

diminishment provision needed to be conducted on a district-by-district basis; that performance (*i.e.*, whether a district was likely to *actually elect* Black voters' candidate of choice), rather than population figures, was the central focus; and that there is no bright-line rule when assessing performance (Tr. 540:18-541:22).

3. Governor DeSantis Intervenes For The First Time

162. The Governor's unprecedented intrusion in the legislative process of drawing the congressional map began just days after the commencement of the 2022 legislative session. It ultimately derailed the Legislature's plans to comply with federal and state law. The timeline is illustrated on the following page.

2022 Redistricting Cycle



163. On January 16, 2022, the Governor, for the first time in memory in Florida, proposed his own congressional map and insisted that the Legislature adopt it. (PX 5053; Tr. 432:22-25, 434:14-15 (Kousser)).

164. Blatantly violating the FDA's non-diminishment principle, the Governor's map destroyed Benchmark CD-5 and splintered the district's residents across four majority-White districts in Northern Florida. (PX 5042-0049). As the Governor's acting chief of staff, Alex Kelly, conceded, the proposed map thereby eliminated the only Black opportunity district in Northern Florida.

165. It is undisputed that the Governor's proposed map *did not* eliminate Benchmark CD-5 for reasons of partisan advantage. As Mr. Kelly explained, that which would itself have been plainly illegal under the FDA. (Tr. 82:24-83:4).

166. In an accompanying press statement, the Governor's office maintained that the "Northern Florida map" containing Benchmark CD-5 was "an unconstitutional gerrymander that unnaturally connects communities in Jacksonville with communities hours away in Tallahassee and Gadsden counties." (Tr. 83:13-19 (Kelly)). The Governor did not explain why this "connect[ion]" was "unnatural"—and as already noted above, the reverse is true. *Supra* at ¶¶ 128-129.

167. The Legislature initially stayed the course. Rep. Driskell recalled that the intervention was extraordinary but that the Legislature "continued with our business as usual." (Tr. 551:17-552:18). On January 20, 2022, the Senate passed

its own map, rejecting the Governor's proposal and retaining Benchmark CD-5. (PX 5062). In a press conference, Chair Rodrigues reiterated that the Senate was "operating under the parameters that the [Florida Supreme] court offered in the legislation—the lawsuits that occurred after the last round of reapportionment," and that it was "clear from those lawsuits that our responsibility in creating these maps is to ensure there's no retrogression"—a responsibility that the Governor's proposed map flouted. (JX 0027 at 3:06-12, PX 1051 (JX 0027 0000_28 – 00_02_14), PX 1052 (video excerpt regarding the same)).

168. The Legislature saw no basis to comply with the Governor's wishes, given the clarity of Florida law. In response, Governor DeSantis sought an advisory opinion from the Florida Supreme Court. His submission to that court asked, in highly tendentious language, whether the FDA required a "congressional district in Northern Florida that stretches hundreds of miles from East to West *solely* to connect black voters . . . so that they may elect candidates of their choice, even without a majority" (JX 0052 at 0004 (emphasis added)).

169. The Governor's request showed that he was well aware of the law in Florida: he acknowledged in his submission that the Court "ha[d] previously suggested that the answer [to his question] is 'yes.'" (JX 0052 at 0004). Of course, the holding in the *Apportionment* cases was no mere "suggestion"; as the

Governor plainly knew, it was a binding determination of Florida law by the State's highest court.

170. Moreover, the Governor's submission to the Florida Supreme Court made clear that he was singularly focused on race, and in particular, on Black voters' ability to elect a candidate of their choice in Northern Florida. (Tr. 379:2-15 (Kousser)). As Dr. Kousser explained, eliminating a Black opportunity district in North Florida was the precise purpose of the Governor's request: "[I]t's central that [his submission] says 'so that [Black voters] may elect candidates of their choice.' . . . This is what he objected to. He didn't want a district set up so that they may elect candidates of their choice, and it was central to everything he did in this legislature." (Tr. 377:9-13).

171. On February 10, 2022, the Supreme Court rejected the Governor's request for an advisory opinion, finding that it was premature absent a more developed factual record on Benchmark CD-5 and other congressional districts. (Tr. 377:20-22 (Kousser); PX 5077.1). The Court made clear that litigation was the appropriate route forward: "History shows that the constitutionality of a final redistricting bill . . . will be subject" to "judicial review through subsequent challenges," which would develop the record necessary to "answer[] the complex" and "fact-intensive" questions "implicated by the Governor's request." (PX 5077.1 at 0002-0003).

172. A fair reading of the Court's opinion is that the Governor should comply (and permit the Legislature to comply) with Florida law in the redistricting plan then under development and let later litigation (if any) develop his novel theory that the FDA violates the Equal Protection Clause. At an absolute minimum, the Court's opinion made clear that the Governor's Equal Protection theory was highly fact-bound and could not be assessed in a vacuum, based on slogans and conclusory assertions. Instead, it required the development of an extensive factual record and a careful assessment of the reasons supporting a district shaped like Benchmark CD-5 and the characteristics of that district's population.

4. Governor DeSantis Intervenes Again And Sends Surrogates To Argue His Case

173. The Governor did not heed the Court's instructions. Instead, just four days after the Court rejected his request for an advisory opinion, he barreled forward with a second proposed map. (PX 5054). This proposal, like its predecessor, purposely destroyed Benchmark CD-5, splintering its population across multiple districts in Northern Florida. In submitting and insisting on another map that violated the FDA by reducing the number of Black opportunity districts in Northern Florida from one to zero, the Governor unilaterally decided the very question he had posed to the Florida Supreme Court. He did so despite a

professed commitment, as stated in his submission to that Court, to ensuring that "the Constitution and laws of the State of Florida are faithfully executed." (JX 0052 at 0002; Tr. 381:13-22 (Kousser)).

174. On February 18, 2022, the Governor had his General Counsel, Ryan Newman, issue a letter to the Legislature reciting the Governor's purported objections to any congressional district resembling Benchmark CD-5. (JX 0056). Even though the Florida Supreme Court had just warned the Governor that his novel Equal Protection theory was "fact-intensive" and required a detailed factual record, Mr. Newman's articulated objections were wholly unsubstantiated. Indeed, as the trial evidence showed, Mr. Newman's objections were at best misleading and sometimes contrary to fact.

175. First, Newman objected to Benchmark CD-5 on the ground that it "span[ned] approximately 200 miles from East to West and cut[] across eight counties." (JX 0056 at 0001). However, from 2002 through 2012, before Benchmark CD-5 was created, Congressional District 4 had likewise stretched across eight counties in Northern Florida. The only meaningful difference between the two districts was that CD-4 had excluded Duval County to form a white-performing district, rather than a Black-performing one. (PX 7223; Tr. 385:2-387:6 (Kousser)). Moreover, the plan eventually enacted by the Legislature at the Governor's insistence (the Enacted Plan) contains a district—CD-2—that also runs

about 200 miles in length. Plainly, then, the Governor had no objection to elongated congressional districts as such.

176. Mr. Newman also asserted, without elaboration or citation to supporting evidence, that the Black communities within Benchmark CD-5 were located in "separate and distinct regions of northern Florida and [were] not defined by shared interests." (JX 0056 at 0002). But Dr. Barreto, Mr. Clark, Mrs. Inman-Johnson, Dr. Kousser, Rep. Driskell and Sen. Gibson all testified that the Black residents of Benchmark CD-5 shared much in common, including a common lineage tracing back to the historical Slave Belt, similar socioeconomic characteristics, and common political values and needs.

177. As Dr. Barreto testified, citing Exhibit PX 5042-018, "the demographic characteristics taken from census data [make] quite clear . . . that the Benchmark CD-5 was a bit unique. It sort of held together as its own community, had a much lower household income than any of the other districts as enacted. It had a higher rate of persons below poverty, and it had a lower rate of persons with a bachelor's degree, and there's some other characteristics. But this is to demonstrate that none of the enacted districts replicate what had been CD-5." (Tr. 656:21-657:4).

178. Dr. Kousser agreed: "These communities share values, particularly political values, to a degree that is shown in Professor Barreto's report . . . share

characteristics like a lack of health insurance, poverty, educational deficiencies, a dependence on Medicaid, which has not been expanded in Florida, unlike most other states in the United States. So there were shared historical characteristics and shared contemporary values and interests that seem to be shared across Northern Florida . . . ." (Tr. 383:5-383:14).

179. Also in agreement were the legislators whose testimony is in the record. Rep. Driskell explained: "When you think about North Florida, there could be shared interests in the public education system, the healthcare system, the access to it or the lack of it, broadband access–a whole host and variety of issues that are shared by that particular region of the state, and those voters certainly deserve to have a member of Congress who understands those concerns, those shared concerns, in that region." (Tr. 560:8-14).

180. Sen. Gibson, who represents the Jacksonville region, put it sharply: "It's more than about race. It's also about need . . . health disparities, . . . neighborhoods that had been crumbling historically, infrastructure needs . . .***[W]ho represents those communities now***?" . . . [I]t becomes difficult without a representative that doesn't understand exactly all of the people they're representing." (Tr. 384:1-20; PX 1043.1).

181. The fact witnesses at trial agreed about the common interests of the community and about their lack of representation under the Enacted Plan.

182. Mr. Clark described "pockets of poverty all through the district." As he noted: "I have seen . . . people that had nothing, and they were not even able to get the basics after large events of climate like hurricanes." (Tr. 262:19-20, 262:23-263:1). He added that his current congressman, who represents a largely white district under the Enacted Plan, has not responded to Mr. Clark's inquiries at all. (Tr. 265:15-17; 266:23-267:7; 270:2-12).

183. Mrs. Inman-Johnson described district-wide issues involving urban environments and poverty, which affect Black families most of all. (Tr. 304:19-22). And like Mr. Clark, she expressed disappointment with the responsiveness and visibility of her representative under the Enacted Plan. (Tr. 311:14-16; 3:14-9:16).

184. Finally, Mr. Newman's letter to the Legislature contended that, when Florida voters adopted the FDA, they did not have before them a "record of pervasive, flagrant, widespread, or rampant discrimination." (JX 0056 at 0004).

185. To the extent Mr. Newman meant that there was no formal legislative "record," the argument is inapplicable to a popular referendum like the FDA, as explained below.

186. But to the extent Mr. Newman was asserting that there was no such history, this is wholly undermined by Dr. Kousser's historical analysis, including his discussion of the campaign for the FDA's passage. (Tr. 387:15-388:17). Mr.

Newman's statement is also contradicted by Mr. Kelly's trial testimony: when asked whether there was a history of pervasive, flagrant, widespread, and rampant discrimination in Florida, Mr. Kelly answered in the affirmative, and added that this was part of the educational curriculum in Florida, for which he was responsible. (Tr. 53:18-54:1; 110:6-9).

187. Mr. Newman also offered a separate argument against Benchmark CD-5, unrelated to the Governor's professed Equal Protection concerns. Specifically, Mr. Newman argued that, in the alternative, the FDA should be interpreted so that its non-diminishment requirement applies only to *majority*-minority districts—that is, districts in which the relevant minority population exceeds 50%. (JX 0056 at 0004-5). This would exclude Benchmark CD-5 from the FDA's non-diminishment command, since that district did not have an absolute majority of Black residents. As set forth below, however, this argument had already been flatly rejected by a binding decision of the Florida Supreme Court.

188. By offering two entirely distinct legal objections to Benchmark CD-5—both of which were unsupported by facts or judicial precedent, and at least one of which was squarely foreclosed by it—the Governor made clear that his opposition to such a district did not stem from genuinely held legal views. Rather, the Governor's objection was to the *very existence* of a district in Northern Florida in which Black voters could elect their candidate of choice.

189. That same day, on February 18, 2022, the Governor's office sent Robert Popper—a senior attorney with the organization Judicial Watch—to testify before the House Reapportionment Committee regarding a proposed congressional district analogous to Benchmark CD-5. (Tr. 388:23-389:6 (Kousser)).

190. Mr. Popper's analysis, too, was superficial, consisting of six pages of double-spaced prepared testimony. Of these, two were devoted to his credentials, two were devoted to reciting black-letter legal principles, and only two addressed his actual analysis of Benchmark CD-5. (*See* JX 0057). Among other material omissions, Mr. Popper's analysis of Benchmark CD-5's legality did not even note the existence of the FDA or the fact that the district had been created and expressly approved by the Florida Supreme Court. The type of careful fact-bound analysis that the Florida Supreme Court had found necessary was wholly absent. Indeed, Mr. Popper's argument involved little more than asserting that Benchmark CD-5 was non-compact in shape, and therefore, unconstitutional. (JX 0057). He did not address—let alone reconcile his view with—the Florida Supreme Court's express holding that Benchmark CD-5 *was indeed* sufficiently compact. *See Apportionment VII*, 172 So. 3d at 405-06.

191. Notably, Mr. Popper conceded that, at least in some circumstances, the FDA's non-diminishment mandate could provide a compelling state interest sufficient to justify a race-based district under federal Equal Protection

jurisprudence. As he explained, complying with FDA "absolutely can be a compelling state interest . . . It depends on the remedy. The remedy has to be narrowly tailored. I do not suggest . . . that the Fair Districts Amendment would be unconstitutional in all its applications . . . It could justify a race-based district." (JX 0037 at 101:5-16).

192. The Legislature resoundingly rejected Messrs. Newman and Popper's arguments and remained committed to complying with the unambiguous and binding decisions of the Florida Supreme Court. In fact, Mr. Kelly acknowledged at trial that the Legislature was "very hostile" to Mr. Popper (Tr. 105:20-106:1) and was not persuaded by the Governor's Equal Protection arguments (Tr. 113:14-21).

193. Indeed, after Mr. Popper's prepared testimony, several legislators directed him to the FDA and asked Mr. Popper to support his assertions about the FDA's incompatibility with the Equal Protection Clause with case law. Like the Secretary at trial, his constitutional argument turned out to be free-floating and fact-free, unsupported by case law. (*See* JX 0037 at 89:25-90-6 ("REPRESENTATIVE HARDING: If you view current Congressional District 5 as racially gerrymandered, are you aware of any court decision holding a state constitutional provision that protects minority voting rights that is insufficient to justify the use of race to draw a district? MR. POPPER: Well, no."); 83:7-12

("VICE CHAIR TUCK: . . . And so are you aware of any court's interpretation of [VRA] Section 5 that requires a district to be compact? MR. POPPER: . . . No. I'm not aware of any federal court decisions that state that it must be compact"), 103:5-15 ("CHAIRMAN SIROIS: Sir, in your written testimony that you provided, . . . I think you said that Florida's non- diminishment standard protects only majority-minority districts. What is your strongest legal authority for that proposition? And didn't the Florida Supreme Court say the exact opposite in its first apportionment decision in 2012? MR. POPPER: Thank you. And forgive me, could you read back to me what I said again? I don't recall that.").

194. This skepticism aligned with the views of House Congressional Subcommittee Chair Rep. Sirois, who stated at the start of the hearing that: "There has been noise outside of our process dealing with the congressional map. I would encourage all members to put that noise aside. Those external influences need to stay external." (JX 0037 at 05:20-23; Tr. 389:7-390:9 (Kousser); *see also* PX 1051 (JX 0037 00_01_46 - 00_04_41), PX 1052 (video excerpt containing same)).

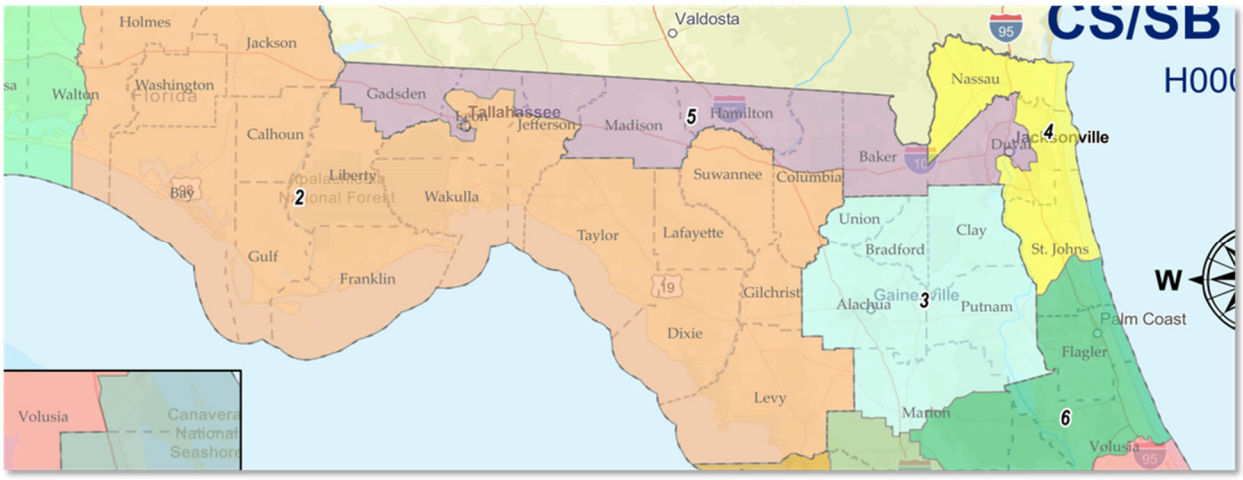
5. The Legislature Offers A Compromise Map

195. In response to the Governor's persistent efforts to thwart the redistricting process, the Legislature proposed a compromise that would have resolved all the Governor's stated concerns with its prior plans while still

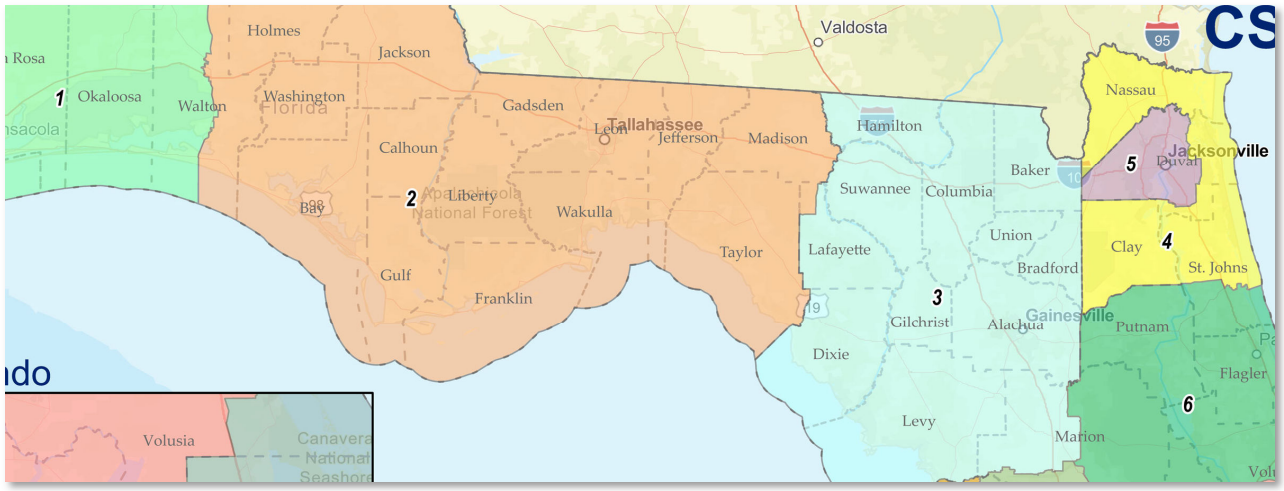
complying with the FDA by retaining a Black opportunity district in Northern Florida.

196. The compromise was a two-map plan, consisting of a primary map (Plan 8019), and a secondary or "backup" map that would come into play only if the primary map were found illegal by a court (Plan 8015). (Tr. 557:12-24 (Driskell)). Adding to the unprecedented nature of the current redistricting cycle, this was the first time in Florida's history that the Legislature had introduced such a two-map plan. (Tr. 392:20-24 (Kousser)).

197. The primary map contained a Black opportunity district wholly confined within Duval County. The backup map largely retained Benchmark CD-5 in its existing configuration, with some improvements with respect to compactness and adherence to political and geographic boundaries. (Tr. 390:10-392:13 (Kousser)). As Dr. Owens testified, in enacting these two maps, the Legislature relied on the FDA as their "guiding principle." (Tr. 896:11-18 (Owens)). These maps are shown below:



Plan 8015 (DX97 at 0003)



Plan 8019 (DX98 at 0001)

198. The Legislature's primary map addressed each of the Governor's professed objections to Benchmark CD-5, while still maintaining a Black opportunity district in Northern Florida. That version of CD-5 (the "Duval-only CD-5") was contained wholly within Duval County and Jacksonville City and adhered to all traditional redistricting principles: it was compact, it adhered to

political boundaries, and it comprised a natural political constituency. (Kelly, Tr. 116: 20-21; 118:18-25; 121:10-13).

199. The Duval-only CD-5 also complied with the FDA's non-diminishment requirement. The Legislature conducted the necessary functional analysis and concluded that, even though its BVAP was 11% lower than the BVAP of Benchmark CD-5, the Duval-only CD-5 would still perform for Black voters' candidates of choice in a majority of elections. Indeed, if such a district had existed historically, it would have elected Black voters' candidates of choice in every election since 2016. (Tr. 391:12-21 (Kousser); Tr. 154:4-10 (Kelly)). As Senate Chair Rodrigues emphasized at the time, "even though the percentage [of Black residents] has gone down" as compared to Benchmark CD-5, "functional analysis" of the Duval-only CD-5 shows that "the minority" (*i.e.*, Black voters) would still "control" the electoral outcome. (JX 0040 at 24:18-22; Tr. 394:3-9 (Kousser), PX 1051 (JX 0040 00_26_31 – 00_29_38), PX 1052 (video excerpt containing the same).).

200. The Governor's Office did not perform its own functional analysis on the Duval-only CD-5, instead deferring to the Legislature's findings. (Tr. 134:14-135:9). As Mr. Kelly conceded, no district is guaranteed to perform for Black voters every time, but the Duval-only CD-5 was likely to perform for Black voters' preferred candidates "[m]ore often than not." (Tr. 152:1-3, 156:10-18).

201. The Legislature made clear that this two-map plan was an attempt to address the Governor's purported legal objections to Benchmark CD-5 while complying with state law and the state constitution. Rep. Leek, the House Redistricting Committee Chair, stated that the primary map, containing the Duval-only CD-5, was intended to address "the novel legal theory raised by the Governor while still protecting a Black minority seat in North Florida." (JX 0038 at 24:6-24; Tr. 393:2-14 (Kousser); *see also* PX 1051 (JX 0038 00_15_41 – 00_23_02), PX 1052 (video excerpt containing same)).

202. The Governor spurned the Legislature's olive branch swiftly and aggressively. On February 28, 2022, while the compromise plan was still under consideration in the Legislature, the Governor stated that he would "veto" the plan under consideration, "and that is a guarantee. They can take that to the bank." (PX 2107; Tr. 398:7-10 (Kousser)). On March 4, 2023, as the Legislature was voting on the compromise plan, the Governor tweeted that he would "veto the congressional reapportionment plan currently being debated by the house. DOA." (PX 2108; Tr. 398:18-23 (Kousser)).

6. Governor DeSantis Vetoes the Compromise Map, And The Legislature Eventually Capitulates

203. Three weeks later, on March 29, 2022, the Governor vetoed the Legislature's compromise plan, claiming that it contained unconstitutional racial

gerrymanders. The last time anyone could identify a Florida Governor vetoing a redistricting plan was over 60 years ago, in the 1950s, to try and end malapportionment in Florida. (Tr. 434:11-20). *See* n. 4 *supra*.[5]

204. An accompanying veto memorandum issued by Mr. Newman explained the Governor's purported objections to the Legislature's two maps. With respect to the Legislature's primary map, which the Legislature had crafted specifically to satisfy the Governor's equal protection objections to Benchmark CD-5, Mr. Newman created an entirely new argument to justify the Governor's veto. He claimed that the Duval-only CD-5 violated the FDA's non-diminishment requirement because its BVAP was lower than that of Benchmark CD-5, so that it didn't protect Black voters *sufficiently*. (Bizarrely, the Governor's solution to this "problem" was to veto both maps and not protect Black voters at all.) Mr. Newman did not dispute the Legislature's functional analysis showing that the Duval-only CD-5 would still *elect* Black voters' candidates of choice despite that reduction in BVAP—which, as discussed above, is the appropriate inquiry when assessing diminishment, not BVAP. (Tr. 404:25-405:5 (Kousser)).

[5] Outside of Florida, during the current redistricting cycle, only one other Governor nationwide vetoed a congressional map passed by his own party—Chris Sununu of New Hampshire—and that was for reasons entirely unrelated to race. (Tr. 907:5-908:1 (Owens)).

205. With respect to Plan 8015, the Legislature's backup plan, Mr. Newman repeated the Governor's prior arguments that the East-West configuration of CD-5 constituted a racial gerrymander that violated the Equal Protection Clause of the federal Constitution. (JX 0055 at 0001, 0007; Tr. 405:6-13 (Kousser)). Mr. Newman once more asserted that such a district was not "narrowly tailored to achieve the compelling interest of protecting the voting rights of a minority community in a reasonably cohesive geographic area." (JX 0055 at 0007).

206. Mr. Newman's veto memo did not repeat his earlier argument (which would have applied to both maps) that the FDA's non-diminishment standard protects only districts that contain an absolute *majority* of Black voters. One might have thought that this represented an acknowledgment that the argument was baseless. That does not seem to be the case, however, because the Secretary has repeated it again in the pending State court litigation. *See* Final Order at 15, *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, No. 2022-CA-666, (Fla. 2d Jud. Cir. Ct. Sept. 2, 2023).

207. After his March 29 veto, Governor DeSantis called for an expedited, three-day special legislative session to address redistricting. However, the Governor delayed that special session until April 19—a full six weeks after the Legislature's two-map proposal was placed before the Governor. (PX 3040 at 0002).

208. This timing was no accident. A new map needed to be in place by early May to be operative for the 2022 primary and general elections. An earlier version of the instant case was simultaneously pending in federal court, with submissions on whether to impose an interim map for 2022 due on April 18—the day before the special session was to commence. (Scheduling Order, Dkt. No. 76 at 2). The Governor's six-week delay appears to have been deliberately timed to back the Legislature into a corner, forcing lawmakers to either acquiesce to the Governor's will or to accept a court-ordered map. (Tr. 407:18-408:15 (Kousser)). Rep. Driskell testified that this six-week period was effectively a black-out, with near "total silence," "no opportunity for public feedback," and "no information" provided ahead of the special session. (Tr. 563:16-22, 566:8-17).

209. Forced into this untenable position, the Legislature ultimately gave way to the Governor's demands. On April 11, 2022, legislative leadership announced that the "[l]egislative reapportionment staff is not drafting or producing a [new] map for introduction during the special session. We are awaiting a communication from the Governor's Office with a map that he will support." (PX 3040 at 0002; Tr. 408:18-409:10 (Kousser)).

210. Rep. Driskell testified that, in her view, this was a "clear statement that the legislative leadership was going to step back and let the Governor take over and be in the driver seat." (Tr. 578:1-5).

211. On April 13, 2022, the Governor submitted his final map (the Enacted Plan), which once again splintered Benchmark CD-5 across four newly configured, majority-White districts: CDs 2, 3, 4, and 5. (PX 7190). While the Governor's calling a special session was not by itself unusual, his submission of not one but three redistricting maps of his own making was unprecedented—as was the Legislature's complete abdication of its redistricting obligations in the lead-up to the special session. (Tr. 422:11-14 (Kousser); Tr. 898:21-24 (Owens)). Mr. Kelly acknowledged the unprecedented nature of the Governor submitting his own maps, not once but three times. (Tr. 75:15-76:2).

7. The Legislature Voices Discontent At The Special Session, But Passes The Governor's Plan

212. Legislators' statements in the lead-up to and during the special session revealed that, rather than embracing the Governor's legal arguments, the Legislature merely conceded in the face of the Governor's unabating attacks. (Tr. 409:21-25).

213. Rep. Driskell described the special session as a "complete departure, night and day" from the redistricting process up to that point. "I thought we were going through this process in a legal way. We had our guardrails. We had our boundaries and our guideposts. And everything got blew up by the Governor in the end." (Tr. 565:9-566:21). The special session was "the Governor's show. It

was his people, his experts, his map drawers. There was really nothing for the legislative committee staff to do." (Tr. 567:10-13).

214. In floor statements after the Governor's plan was introduced, Senate Chair Rodrigues began by reaffirming his belief that the map that the Legislature had enacted and the Governor had vetoed was "completely constitutional." He explained, "Our charge was to . . . pass a map [8019] that would be completely constitutional, withstand all court challenges. So that was the map we brought under those parameters." (JX 0045 at 52:23-53:2; *see also* PX 1051 (JX 0045 00_49_53 - 00_53_55), PX 1052 f(video excerpt containing same)).

215. Senate Chair Rodrigues then recited the Governor's analysis and legal conclusions, while pointedly *not* adopting them. (JX 0045 at 53:11-53:19 ("What the Governor looked at and drew attention to in his veto letter, . . . is that *in his legal analysis*, District 5 did not meet the protection for non-diminishment."); 54:8-54:19 ("So *the Governor looked at items well beyond just the litigation* that occurred in the Florida Supreme Court."); 70:20-70:24 ("*As stated by the Governor's Office* in committee, the *legal analysis that they had* was that District 5 was not protected because it did not make up a majority in a reasonably-shaped district."); 80:20-81:1 ("And you're correct, *in the Governor's veto letter, he references* the black voting age population."); 85:21-86:7 ("[T]he reason the bill was vetoed over that district *is because they did not believe* it was compliant with

the U.S. Constitution . . . ."). (*See also* Tr. 415:3-420:6 (Kousser); *see also* PX 1051 (JX 0045 00_49_53 - 00_53_55), PX 1052 (video excerpt containing the same).

216. General Counsel for the Senate, Dan Nordby, issued a sparse legal opinion, containing just over two pages of analysis, which was at best a "tepid endorsement" of the Enacted Plan's legality. (Tr. 414:15-415:2 (Kousser)). As Mr. Nordby carefully wrote: "In the absence of controlling judicial precedent contrary to the Governor's position on the precise question presented. The alternative approach to these districts reflected in proposed congressional map P000C0109 is worthy of careful consideration by the Florida Senate as it evaluates congressional redistricting legislation in the upcoming special session." (PX 3014 at 0003; Tr. 410:4-13 (Kousser)). As Dr. Kousser pointed out, Mr. Nordby's memorandum "doesn't say this is what the law is [sic]. . . it says this is what the *Governor's position* on the law is." (Tr. 414:19-415:2 (emphasis added)).

217. Moreover, while Mr. Nordby's memo claimed that "[i]ntervening judicial precedent from the United States Supreme Court following the 2022 regular session has . . . emphasized the narrow circumstances under which the Fourteenth Amendment permits the race-based sorting of voters," the case he cited, *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S.Ct. 1245 (2022), was not in fact a novel development. (PX 3014 at -0002). The Supreme Court had

made no relevant doctrinal changes following the 2022 regular session, and had long been consistent in its approach to race-based districting under the Fourteenth Amendment. (*See* Tr. 413:12-414:3 (Kousser)).

218. On April 19, 2022, Alex Kelly appeared before both chambers of the Legislature to testify on the Governor's behalf about the Enacted Plan. (JX 0044; JX 0046). That testimony revealed that Mr. Kelly had considered racial demographics repeatedly when drawing the Enacted Plan, in Northern Florida and across the state. (JX 0044 at 18:08-19:01 (House); JX 0046 at 08:02-18 (Senate)). In fact, Kelly explicitly relied on racial demographics when drawing district lines—albeit supposedly not in Northern Florida. Mr. Kelly had no objection, for instance, to the application of the FDA's non-diminishment principle to the Enacted Plan's CD-24, for which he accepted the Legislature's functional analysis and determined that the district complied with the FDA. (Tr. 166:4-15 (Kelly)).

219. At trial, Mr. Kelly expounded further upon his process in drawing the Enacted Plan, including his consideration of racial demographics in Northern Florida and across the state. He explicitly acknowledged that there was a "compelling state interest" in complying with the FDA with respect to CD-24 (Tr. 167:12-168:4) and that he had considered race and/or ethnicity in drawing district lines in Central Florida, as well as in CDs 20, 26, 27, and 28 (Tr. 159:17-160:25).

220. Mr. Kelly further considered racial demographics in Northern Florida, with the objective of drawing a North Florida Black opportunity district with at least 39 percent BVAP. (Tr. 174:20-174:25). Mr. Kelly testified that he was reasonably acquainted with the demographics of Jacksonville at the time he drew the Enacted Plan and was aware that the Black community in Jacksonville spanned both sides of the St. John's River. (Tr. 177:19-178:6). He nevertheless elected to use the St. John's River as the dividing line through Jacksonville, splintering Jacksonville's Black population between the Enacted Plan's CD-4 and CD-5. (Tr. 667:2-15 (Barreto)). In destroying Benchmark CD-5, Mr. Kelly divided the Black population in Benchmark CD-5 among four majority-White districts in the Enacted Plan—an outcome Mr. Kelly conceded would have been a "reasonable guess" at the outset, and which Mr. Kelly realized would in fact be the result "during the process" of drawing the maps. (Tr. 170:25-171:8 (Kelly)).

221. With respect to traditional redistricting criteria, Kelly testified at trial that the Enacted Plan provided for only a "slight improvement" in county splits as compared to the Duval-only plan (8019), and that two maps were equivalent on city splits. (Tr. 214:1-5, 216:7-217:7).

222. Mr. Newman likewise testified before the House Redistricting Committee about the Enacted Plan. (JX 0044). Like Mr. Popper and Mr. Kelly, Mr. Newman conceded that certain applications of the FDA could withstand strict

scrutiny under the Fourteenth Amendment's Equal Protection Clause, including if you had a "sufficiently compact African American community . . . in a district." (JX 0044 67:24-68:02, 68:03-05; *see also* PX 1051 (JX 0044 01_11_52 - 01_13_15), PX 1052 (video excerpt containing same)). In his view, Benchmark CD-5 did not satisfy this standard because it "cobbled together disparate minority communities from across Northern Florida." (JX 0044 at 68:9-10; *see also* PX 1051 (JX 0044 01_11_52 - 01_13_15), PX 1052 (video excerpt containing same). Once again, Mr. Newman failed to explain why those minority communities were "disparate," let alone state facts that would support that conclusion. Moreover, the Legislature's *primary* map, with its Duval-only CD-5, did not even arguably suffer from such a defect. Indeed, Mr. Newman made no assertion that the Duval-only CD-5 failed to satisfy the Fourteenth Amendment. Rather, he ignored it in his testimony.

223. On April 21, 2022—the day of the final vote—members of the Florida House of Representatives engaged in peaceful protest on the House floor in response to the Enacted Plan's elimination of two Black opportunity districts, CD-5 and CD-10. (Tr. 570:2-571:3 (Driskell)). The protestors sought to "bring the legislature to a pause to think about what we were about to vote on and to really consider and understand what was about to be lost." (Tr. 571:1-3 (Driskell)).

224. Nonetheless, as a result of the Governor's relentless browbeating—and with full knowledge of the Governor's improper motive and the Enacted Plan's deleterious effects—both chambers adopted the Enacted Plan. (JX 0047 at 68:7-14 (Senate); JX 0050 at 84:3-10 (House)).

225. As a result of the Enacted Plan, for the first time in 30 years, there is no Black opportunity district in Northern Florida. In the most recent elections, none of the newly formed districts in Northern Florida elected Black voters' candidates of choice. As Dr. Kousser explained, this result was both "foreseeable" and "foreseen." (Tr. 423:14-19).

226. Indeed, Rep. Leek acknowledged during the special session that neither CD-4 nor CD-5 in the Enacted Plan would perform for Black voters' candidates of choice. (JX 0048 at 34:3-8 ("Representative Davis: . . . [W]ill either District 4 or 5 perform for Black candidates of choice? . . . Representative Leek: Thank you, Mr. Speaker. No."; Tr. 423:20-424:3 (Kousser); *see also* PX 1051 (JX 0048 00_31_52 - 00_32_45), PX 1052 (video excerpt containing same)). CD-4 has the highest BVAP of any of the districts carved out of Benchmark CD-5, at 30.83%; no other new district has a BVAP above 22.65%. (JX 0067 at 0001). Because the non-Black population of CD-4 is 67% Republican, the district does not perform for Black voters. (PX 5042-0052).

227. Looking back on the process, Rep. Driskell testified that the Legislature failed to live up to the goals it set out for itself at the beginning of the process, including its goal to comply with the Florida Constitution. (Tr. 575:1-578:23). When asked what she wanted Floridians to know about the process she stated unequivocally: "that the Legislature failed them, that the Legislature passed a map that it knew would silence Black voices and Black voters and deny them the opportunity to elect representatives of their choice. . . . I would want the people of Florida to know that they deserve better." (Tr. 578:24-579:12).

228. Notably, the proceedings for the 2021-2022 redistricting cycle unfolded against a backdrop of heightened racial tensions across the state. Dr. Kousser testified without opposition that the policies and actions of the DeSantis administration—including the banning of "critical race theory," the state's rejection of AP African American history courses, the banning of books related to systemic racial discrimination, and the general distortion of African-American history in public school curriculum—"have raised the temperature of race relations in Florida to a temperature that it . . . hasn't had since the 1960s and 70s." (Tr. 367:8-368:22).

229. Mr. Clark likewise commented on the current climate of racial politics, including the state Education Board's decision to teach the purported benefits of slavery: "I was actually seething, because I am the product of people

who were at one time slaves in our history, and for somebody to say to me that any portion of slavery could be beneficial to a person who was a slave horrifies me." (Tr. 267:18-23).

VI. LEGAL STANDARDS

A. The *Arlington Heights* Standards Govern

230. The Court asked the parties to address the following issues in their post-trial submissions: "(1) the appropriate legal standard and burden of proof in Fourteenth and Fifteenth Amendment challenges to redistricting, and (2) how that standard applies to the evidence presented in this case." (Order re: Post-Trial Submissions, Dkt. No. 215). We address the first question below and apply that standard to the evidence in Sections VII, VIII and IX below.

231. Redistricting claims brought under the Fourteenth and Fifteenth Amendments, like most cases alleging intentional racial discrimination, are governed by the familiar *Arlington Heights* analysis. While this analysis is familiar, the doctrinal roots of these claims, and their grounding in *Arlington Heights*, warrants some discussion.

232. A redistricting plan violates the Fourteenth Amendment if it is "'conceived or operated as [a] purposeful device[] to further racial discrimination' by minimizing, cancelling out or diluting the voting strength" of minority voters in a population. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (citing *Whitcomb v.*

Chavis, 403 U.S. 124, 149 (1971)). This is often referred to collectively as an intentional vote dilution claim. *See, e.g.*, *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C. 2012) ("The essence of a vote dilution claim under the Fourteenth Amendment is 'that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities.'") (citing *Miller v. Johnson*, 515 U.S. 900, 911 (1995)), *aff'd* 586 U.S. 801 (2012). Importantly, actionable vote dilution includes both claims that votes were "cancel[ed] out" entirely, or—as is the case here—that a particular districting plan was purposefully "conceived" to "minimiz[e]" or "dilut[e]" the "strength" of a minority voting bloc vis-à-vis the preexisting baseline.

233. "Claims of racially discriminatory vote dilution exist under both the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment." *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) ("*Reno I*"). Both of these claims are "essentially congruent." *Finlay*, 664 F.2d at 919. Indeed, "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under ***both*** the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion) (emphasis added).

234. Intentional vote dilution claims like the one Plaintiffs bring here are "analytically distinct" from racial gerrymandering claims and claims brought under Section 2 of the Voting Rights Act. *Miller*, 515 U.S. at 919. "As distinguished from the more specialized set of doctrines that has arisen from the *Gingles* caseline, intentional-vote-dilution theories [under the Fourteenth and Fifteenth Amendments] call for the application of general constitutional principles." *LULAC v. Abbott*, 601 F. Supp. 3d 147, 160 (W.D. Tex. 2022), *appeal dismissed,* 143 S.Ct. 441 (2022). Accordingly, intentional vote dilution cases are governed by the well-known "doctrines established in Equal Protection cases." *Id.* (citing *Reno I*, 520 U.S. at 481-82 (collecting cases)).

235. Thus, to succeed on an intentional vote dilution claim brought under the Fourteenth and Fifteenth Amendments, Plaintiffs must demonstrate that the voting scheme had a discriminatory purpose and effect. *Backus*, 857 F. Supp. 2d at 568. This analysis "deploy[s]" the two-step "*Arlington Heights* framework." *LULAC*, 601 F. Supp. 3d at 163. First, Plaintiffs must show that the challenged enactment has a discriminatory effect and was enacted, at least in part, with a discriminatory intent. *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021).

236. Showing discriminatory effect in an intentional vote dilution case requires Plaintiffs to provide "a reasonable alternative voting practice to serve as

the benchmark 'undiluted' voting practice[,]" such as the various configurations for CD-5 considered by the Florida Legislature. *Reno I*, 520 U.S. at 480. This requirement is incorporated in the *Arlington Heights* factors, which consider alternatives to the alleged discriminatory action.

237. In showing discriminatory intent, importantly, "a plaintiff [need not] prove that the challenged action rested ***solely*** on racially discriminatory purposes, . . . or even that [discrimination] was the 'dominant' or 'primary' [purpose]." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977) (emphasis added). It is enough to "pro[ve] that a discriminatory purpose has been ***a*** motivating factor." *Id.* at 265-66 (emphasis added).

238. "Once discriminatory intent and effect are established[,] 'the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this [discriminatory intent].'" *Greater Birmingham*, 992 F.3d at 1321 (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)). If the law's defenders cannot establish this, the law is unconstitutional.

239. This framework is distinct from the *Gingles* preconditions required in vote dilution claims brought under the Voting Rights Act, which "do[] not apply to cases in which there is intentional discrimination against a racial minority." *Strickland*, 556 U.S. at 20. Because the *Gingles* framework is irrelevant to an intentional vote dilution claim under the Constitution, a district—such as

Benchmark CD-5—need not be *majority*-minority (*i.e.*, have a minority population greater than 50%) to be protected against intentional vote dilution.[6] *See Texas v. United States*, 887 F. Supp. 2d 133, 159-66 (D.D.C. 2012) (three-judge panel applying the *Arlington Heights* framework to find that Texas's redistricting plans constituted unlawful, intentionally discriminatory vote dilution, including in at least one district that was not majority-minority); *vacated on other grounds*, 570 U.S. 928 (2013); *cf. Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) ("to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength.").

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[6] The Eleventh Circuit has suggested, in the particular context of at-large elections, that intentional vote dilution or vote cancellation claims require the *Gingles* preconditions to be shown. *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335 (11th Cir. 2000). However, as set forth in the text below, Eleventh Circuit cases do not bind this three-judge court. In any event, this statement in *Desoto County* was dictum because the court ultimately did "not resolve this question." *Id.* at 1345. Moreover, this dictum is irreconcilable with the Supreme Court's subsequent, clear holding in *Strickland* that the *Gingles* preconditions "do[] not apply [where] there is intentional discrimination against a racial minority." 556 U.S. at 20. *DeSoto County*'s dictum is also against the overwhelming weight of federal court authority, and has been questioned by multiple courts within the Eleventh Circuit. *See, e.g.*, *Ga. State Conf. of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1278-79 (N.D. Ga. 2017) ("the federal courts have almost uniformly accepted that the first *Gingles* precondition should be relaxed" in intentional vote dilution claims); *United States v. Georgia*, No. 1:21-cv-02575, 2021 U.S. Dist. LEXIS 238171, at *17 (N.D. Ga. 2021) (an "expansive interpretation of *DeSoto County* is questionable" in light of recent Supreme Court precedents).

240. Plaintiffs need not prove discriminatory purpose through direct evidence, but may make such a showing through the totality of the circumstances. *Rogers*, 458 U.S. at 618 (applying *Arlington Heights* in a voting dilution case); *see Arlington Heights*, 429 U.S. at 266-68 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). This totality-of-the-circumstances analysis in vote dilution cases draws on the *Arlington Heights* factors as laid out by both the Supreme Court and the Eleventh Circuit. *Arlington Heights*, 429 U.S. at 266-68; *Greater Birmingham*, 992 F.3d at 1321-22. "The *Arlington Heights* factors require a fact intensive examination of the record[.]" *Greater Birmingham Ministries*, 992 F.3d at 1322 n.33.

241. These factors, along with other voting and redistricting specific evidence (as befits *Arlington Heights*' totality-of-the-circumstances inquiry) are applied in redistricting cases brought under both the Fourteenth and Fifteenth Amendments. *See Backus*, 857 F. Supp. 3d at 568 (citing *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-5065, 2011 WL 4837508, at *3 (N.D. Ill. 2012) (collecting cases)).

242. Although the *Arlington Heights* factors provide a starting place, they are "non-exhaustive" in determining whether discriminatory intent existed. *Cooper v. Harris*, 581 U.S. 285, 319 (2017). "[A]n invidious discriminatory

purpose may often be inferred from the ***totality*** of the relevant facts[.]" *Washington v. Davis*, 426 U.S. 229, 242 (1976) (emphasis added).

243. In the end, the fact question itself is simple. Plaintiffs can prevail if they show that the government took the challenged actions at least in part "because of," and not merely "in spite of," their negative effect on an identified minority group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

244. In Equal Protection cases, "the good faith of the state legislature must be presumed," at least as an initial matter. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller*, 515 U.S. at 915). However, "[w]hen there is proof that a discriminatory purpose has been a motivating factor in the [challenged] decision, this judicial deference is not justified," and any presumption of good faith drops away. *Arlington Heights*, 429 U.S. at 265-66.

B. Eleventh Circuit Law Does Not Govern

245. At trial, the Court asked whether Eleventh Circuit law controlled in a three-judge court case. (*See* Tr. 1012:15-1014:12). In our view, three-judge panels in redistricting cases are not bound by circuit precedent, but only by the Supreme Court's rulings. *See, e.g.*, *Ga. State Conf. of the NAACP*, 269 F. Supp. 3d at 1278 n.7 ("several judges have expressed doubt as to whether three-judge district courts are bound by their circuit's precedent. And at least one three-judge court concluded it was not.") (collecting cases); *accord* Joshua A. Douglas &

Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 Georgetown L.J. 413, 438-455 (2019) (concluding that three-judge panels are not bound by circuit precedent in redistricting cases).

246. "When faced with circuit law, the three-judge district court should consider it carefully, but if it finds the prior case law unpersuasive, no formal rule or normative consideration requires unblinking adherence." *Id.* at 454. We agree that, whatever law is formally controlling, the Court should give careful consideration to the decisions of the Eleventh Circuit and other federal courts.

C. The Governor's Discriminatory Intent, Knowingly Ratified By The Legislature, Renders The Enacted Plan Unlawful

247. The Secretary may argue that, even if Governor DeSantis acted with discriminatory intent, the Legislature did not—and that this somehow purges the Enacted Plan of unlawful intent. This argument fails for two independent reasons.

248. First, the Governor, like the Legislature, is a state actor regulated by the Fourteenth Amendment and his actions were part of the legislative process. He, too, violates the Fourteenth Amendment when he acts in a racially discriminatory manner. And here, the Governor's actions were plainly both a but-for and a proximate cause of the Enacted Plan. Indeed, on these unique facts, the Governor bore even more responsibility for the Enacted Plan's passage than the Legislature did.

249. The Governor's office—not the Legislature—drew the Enacted Plan. The Governor publicly bullied the Legislature to pass it. He repeatedly sent his representatives to the Legislature to lobby for it. He vetoed the Legislature's two-map compromise. Then he timed the special session to leave the Legislature with no real choice but to pass the Enacted Plan without modification. And, of course, he signed it into law.

250. Furthermore, the Governor's actions cannot properly be understood as separate to the legislative process. The Governor's actions, as well as those of his staff and representatives, undeniably were central to the legislative process that resulted in the passage of the Enacted Map. The proposition that the Governor's role necessarily played a major part in the challenged legislative enactment is self-evident. "Whether the Governor of the State, through veto power, shall have a part in the making of state laws is a matter of state polity.…And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority." *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932); *see also Moore v. Harper*, 143 S. Ct. 2065 (2023). Indeed, under the Florida Constitution, the Governor's veto power derives from the constitutional powers granted to the Legislature. *See* Fla. Const., art. III, § 8 (granting the veto power under the article of the Florida Constitution dedicated to the "Legislature"). Any suggestion that

the Governor's intent was not relevant to the legislative process contradicts both long-settled law and common sense.

251. In short, the Enacted Plan's presence on Florida's statute books is attributable to the Governor as much as it is attributable to anyone. There may be other cases where a legislative body's enactment of a bill is sufficiently independent to purge the taint of another state actor's discriminatory intent, but this is not one of them. *Cf. Brown v. Illinois*, 422 U.S. 590, 602 (1975) (statements made following illegal arrest—even if technically voluntary—are admissible only if "the causal chain . . . [is] broken" by a "sufficient[] . . . act of free will to purge the primary taint").

252. Second, and independently, even if it could be true that the Governor were entirely separate from the legislative process, it is well-settled that a legislative body cannot "avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections" of outside parties. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). For this reason, Plaintiffs "need not prove that the [decision-making body] *itself* intended to discriminate on the basis of race in order to establish … racially discriminatory intent." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1225 (2d Cir. 1987) (quoting *United States v. City of Birmingham*, 538 F. Supp. 819, 828 (E.D. Mich. 1982)). "It is sufficient [that]

racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker [was] knowingly responsive." *Id.* at 1226. "Any other rule of law would permit a legislative body to place its official stamp of approval on private racial discrimination." *Id.* at 1225 (quoting *City of Birmingham*, 538 F. Supp. at 828).

253. For example, in *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982), the court found intentional discrimination in violation of the Fourteenth Amendment where a city council voted to block a housing project. Although the council members had no "personal racial animus," their vote was "a direct response to . . . opposition" by the city's mayor and members of the public, and council members "knew that . . . opposition was racially inspired." *Id.* at 1059, 1066.

254. The Eleventh Circuit has favorably cited this line of cases on multiple occasions. *See, e.g.*, *Bonasera v. City of Norcross*, 342 F. App'x 581, 584 (11th Cir. 2009); *Hallmark Devs., Inc. v. Fulton Cnty., Ga.*, 466 F.3d 1276, 1284 (11th Cir. 2006). For example, it found a Fourteenth Amendment violation where racially biased private citizens "put the mayor and the [city] council in a head lock" until they capitulated to those citizens' desired course of action. *Stout v. Jefferson Cnty. Bd. Of Educ.*, 882 F.3d 988, 1008 (11th Cir. 2018). The court rejected the defendants' argument that it was improper to "imput[e] the

discriminatory intent of [the] private individuals" to the "state actors" who knowingly ratified their demands. *Id.* at 1007; *see also City of South Miami v. DeSantis*, 561 F. Supp. 3d 1211, 1272 (S.D. Fla. 2021) (finding a Fourteenth Amendment violation where Florida's Legislature passed a law "to effectuate the discriminatory motives" of private activist groups), *vacated on other grounds*, 65 F.4th 631 (11th Cir. 2023).

255. So too here. As the trial evidence showed, the Governor's fervent opposition to a Black opportunity district in Northern Florida was motivated by racial discrimination. The Legislature knew as much, as they confirmed through their contemporaneous statements, their initially firm resistance to his position, their unprecedented attempt to enact a "backup" map in anticipation of a constitutional challenge and even their reluctant acquiescence in his plan. Nonetheless, in the end, the Legislature capitulated to the Governor's racially motivated demands. Whether legislators did so out of their own racial animus—or merely out of fear of the Governor, the desire to placate him, or the practical inability to continue opposing him—is irrelevant.

256. In summations, members of the Court asked whether this reasoning is akin to the "cat's paw" theory recognized in the context of employment law, and Plaintiffs' counsel responded that it was roughly "the same idea." (Tr. 981:21-

983:21). Upon reflection, this response was mistaken. There are similarities, but important differences.

257. As the Supreme Court has explained, "[a] cat's paw is a dupe who is used by another to accomplish his purposes." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). The "cat's paw" theory applies when an employee with discriminatory intent uses the firing agent as a tool to effect that intent, "unbeknownst to [the firing] agent." *Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011). Under this theory, the employee's discriminatory intent may be attributed to the innocent firing agent because of "the agency relationship that exists between an employer and a supervisor." *Brnovich*, 141 S. Ct. at 2350. By contrast, where the firing agent *knows* of the discriminatory motivation for the termination, resort to the "cat's paw" theory is not necessary.

258. The Supreme Court has rejected the "cat's paw" theory in the legislative context, since "legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents," the way supervisors are agents of their employers. *Brnovich*, 141 S. Ct. at 2350.

259. In *Brnovich*, the Supreme Court reversed the Ninth Circuit's finding of intentional discrimination where the legislators who voted for a bill had a "good-faith" belief that the law was necessary to address voter fraud, but that belief was allegedly "based on . . . false and race-based allegations of fraud"

advanced by outside parties. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1037, 1040-41 (9th Cir. 2020), *rev'd sub nom. Brnovich*, 141 S. Ct. 2321. Critically, the legislators did not know, or have reason to know, that the allegations that spurred them to action were false and race-based. To the Ninth Circuit, this did not matter, because the outside parties' animus was "attributable" to the legislature as a matter of law "under the familiar 'cat's paw' doctrine." But to the Supreme Court, that lack of knowledge made all the difference.

260. Here, Plaintiffs do not rely on the "cat's paw" doctrine discussed in *Brnovich*. Plaintiffs do not argue that the Florida Legislature believed in good faith that destroying CD-5 and eliminating Northern Florida's only Black opportunity district was lawful and desirable; that Governor DeSantis "duped" the Legislature into holding this belief; and that the Governor's intent should be imputed to the Legislature under principles of agency law. Quite to the contrary: the Legislature did *not* want destroy CD-5 and violate the FDA. It repeatedly and unambiguously expressed that view. And it ultimately capitulated to the Governor's illicit desires with full knowledge of what it was doing.

261. Nothing in *Brnovich* suggests that the Court meant to insulate this kind of scenario from a Fourteenth Amendment challenge. Again, it has been the law for at least 40 years that legislators cannot *knowingly* ratify the discriminatory desires of outside parties—let alone those of a coordinate branch of government

that is also governed by the Fourteenth Amendment. *See City of Cleburne*, 473 U.S. at 448; *Palmore*, 466 U.S. at 433.

VII. THE *ARLINGTON HEIGHTS* FACTORS DEMONSTRATE THAT RACIAL DISCRIMINATION WAS A MOTIVATING FACTOR IN THE DESTRUCTION OF BENCHMARK CD-5

262. Each of the *Arlington Heights* factors, as supplemented by the 11th Circuit in *Greater Birmingham* (which we accept for its persuasive value), points to racial discrimination being at least a motivating factor in the decision to enact a congressional map that did not include a Black opportunity district in North Florida.

A. The Enacted Plan Has A Discriminatory Impact

263. The first *Arlington Heights* factor directs this Court to consider whether the challenged law had a discriminatory impact. *Greater Birmingham*, 992 F.3d at 1322; *see also Arlington Heights*, 429 U.S. at 266 (courts should consider whether the law "bears more heavily on one race than another.").

264. Here, the impact of the challenged law on Black Floridians is stark and undisputed: Black voters' opportunity to elect their candidates of choice in North Florida has been altogether eliminated. Prior to the Enacted Plan, Black voters in Benchmark CD-5 were routinely able to elect their congressional candidate of choice. (Tr. 647:1-6 (Barreto)). It is undisputed that, under the Enacted Plan, there is now no congressional district in Northern Florida where this

is possible, let alone probable. (Tr. 701:18-702:12 (Barreto); Tr. 904:13-17 (Owens); Tr. 82:25-83:11 (Kelly)).[7] In sum, the Enacted Plan has unquestionably diminished the number of Black opportunity districts in North Florida from one to zero. (Tr. 906:16-19 (Owens)).

265. Benchmark CD-5's destruction had a direct, personal impact on its constituents. At trial, Charlie Clark testified regarding the differences in representation he received before and after the Enacted Plan's implementation. Mr. Clark has received no response from Rep. Dunn's office in response to inquiries he has filed, in stark contrast to Rep. Lawson's administration, which was always "very responsive" to constituents. (Tr. 265:15-17, 266:23-267:7, 270:2-12). Moreover, Rep. Dunn has neglected to speak out on issues that impact his Black constituents, such as the state Education Board's decision to incorporate identify the so-called benefits of slavery in its instruction on African-American history. (Tr. 267:18-268:1, 268:21-269:4 (Clark)). Reflecting on Rep. Dunn's representation, Mr. Clark stated: "I have not personally heard him speak publicly as I would like as a Black person to say, you know, X, Y, and Z is wrong." (Tr.

[7] Notably, the Secretary stipulated that Black voters were unable to elect their candidates of choice in North Florida in the parallel state court proceeding. *See* Joint Stipulation, *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd, No. 2022-CA-666*, Dkt. 331 at 1 (Fla. 2d Jud. Cir. Ct. Aug. 11, 2023.

268:21-269:4). And while Rep. Lawson held town hall meetings to better understand his constituents' needs, including in Leon and Gadsden counties, Mr. Clark has not seen comparable outreach efforts under Rep. Dunn. (Tr. 269:5-25). Mr. Clark described the redistricting process that yielded the Enacted Plan as a "vicious assault on what I have come to expect as just a regular voter in Leon County." (Tr. 271:9-10).

B. The Map Was Passed Against A Background Of Historical Discrimination

266. The second *Arlington Heights* factor asks whether the law was preceded by a history of discrimination. This factor, too, is easily met. Dr. Kousser testified—and Dr. Owens did not dispute—that "Florida has used election law from the beginning of the time that Black people could vote in Florida to the present to heighten the discrimination against Blacks." (Tr. 335:6-13 (Kousser); Tr. 874:11-15 (Owens).

267. Dr. Kousser showed a lengthy history of discrimination, beginning with the first redistricting in Florida after Emancipation, and continuing without interruption through the present. At each stage, he showed that Black voters had been discriminated against through redistricting. (*See, e.g.*, Tr. 336:24-18 (malapportioned 1868 constitution); 346:19-347:5 (use of at-large elections and single member districts prior to 1980); 353:17-354:5 "packing or cracking of local

Black and Hispanic communities" in 1992 redistricting); 348:9-21 (history of violations of the Voting Rights Act and 14th Amendment, including 2022 decision that Jacksonville City Council had engaged in discrimination in redistricting)).

268. This discrimination provides the historical backdrop for Florida voters' enactment of the FDA. Indeed, in the campaign for the FDA, the measure's proponents placed that history of discrimination front and center. Ellen Freidin, Chairwoman of the FDA's sponsoring committee, said that the amendments were "very carefully drafted to ensure that minority voters do not lose representation in Florida" (Tr. 361:1-9 (Kousser)). Florida NAACP President Adora Obi Nweze acknowledged the deep history of discrimination in the state when she warned that, if FDA opponents were successful in blocking the measure, they would "turn the clock back to a very dark time in our history." (Tr. 361:16-24 (Kousser)).

269. Even after enactment of the FDA, this history of discrimination persisted. In 2012, the Legislature abused the FDA as an excuse to pack Black voters from Jacksonville to Orlando into a single district. The Florida Supreme Court was forced to intervene, finding that the Legislature's North-South orientation "overpack[ed] . . . black voters" and "dilute[d] the[ir] influence" in the surrounding districts. *Apportionment VII*, 172 So. 3d at 402. The judiciary's oversight was therefore still critical to proper enforcement of the FDA, including

its non-diminishment requirement. To remedy the Legislature's discrimination, the Court ordered the creation of Benchmark CD-5, the very district at the core of these proceedings.

270. Indeed, this history of racial discrimination in redistricting in North Florida continues to the present day. As noted above, just last year a federal court enjoined the city council maps drawn in Jacksonville as racially discriminatory, and the city decided to drop its appeal. *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229 (M.D. Fla. 2022) (preliminarily enjoining city council maps as racially discriminatory), *aff'd, Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *5 (11th Cir. Nov. 7, 2022) *appeal voluntarily dismissed*, No. 22-13544-HH, 2023 WL 2966338 (11th Cir. Jan. 12, 2023).

271. Apart from these very recent events, Florida's history of discrimination in voting has been documented in many court cases. *See, e.g.*, *DeGrandy v. Johnson*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992) ("A longstanding general history of official discrimination against minorities has influenced Florida's electoral process"); *Davis v. Cromwell*, 156 Fla. 181, 184 (Fla. 1945) (en banc) (striking down Florida's use of white-only primaries); *Solomon v. Liberty Cnty*, 899 F.2d 1012 (11th Cir. 1990), *cert. denied*, 498 U.S. 1023 (1991) (striking down at-large voting system designed to diminish minority voting power);

Bradford Cnty. NAACP v. City of Starke, 712 F. Supp. 1523 (M.D. Fla. Feb 27, 1989) (holding at-large elections was discriminatory and violated Voting Rights Act); *Tallahassee Branch of NAACP v. Leon Cnty*., Fla., 827 F.2d 1436 (11th Cir. 1987) (at-large elections violated Voting Rights Act), *cert. denied*, 488 U.S. 960 (1988); *McMillan v. Escambia Cnty., Fla*., 748 F.2d 1037 (5th Cir. 1984) (at-large elections violated Voting Rights Act); *NAACP v. Gadsden Cnty. Sch. Bd*., 691 F.2d 978 (11th Cir. 1982) (at-large elections violated Voting Rights Act).

272. Dr. Kousser also testified to a history of discrimination against Black voters going beyond voting rights *per se*. From 1950 to 1970, every Florida Governor campaigned as a segregationist. (Tr. 345:22-23 (Kousser)). Through the 1960s, Florida was a segregated state, with segregation in, "schools, buses, trains, other source of motor transportation, airplanes, public accommodations, restaurants, beaches, parks," segregated entrances to courthouses, segregated water fountains, and anti-miscegenation laws. (Tr. 347:6-8; 17-22 (Kousser). Black witnesses in some parts of Florida had to swear on a different Bible than white witnesses. (Tr. 347:9-10 (Kousser)).

273. Dr. Kousser also testified regarding the controversy surrounding banning the alleged teaching of "critical race theory" in schools, Florida's rejection of an African American AP History course, the banning of books that discuss systemic racial discrimination and Black history, and the use of videos that teach

distorted Black history in Florida public schools. He testified that the temperature of race relations has recently risen, noting that "it reflects, echoes, periods of the late 19th century disfranchisement . . . when racial violence was more common" and that the "echoes of the previous periods of racial concern that have been propagated in Florida by the State administration at this point." (Tr. 368:16-22).

274. That history of discrimination directly impacts the lives of the Individual Plaintiffs who testified at trial. Both Charlie Clark and Dorothy Inman-Johnson grew up in the segregated South. (Tr. 257:8-11 (Clark); Tr. 301:19-25 (Inman-Johnson)). They take very personally the heightened climate of racial tension in the state of Florida in the present day, which is in no small part due to the Governor's decision to govern as a bully and a culture warrior. For example, Mr. Clark was outraged about proposed changes to Florida's curriculum relating to how schools teach about slavery, saying, "because I am the I am the product of people who were at one time slaves in our history, . . . for somebody to say to me that any portion of slavery could be beneficial to a person who was a slave horrifies me." (Tr. 267:20-23). Similarly, Mrs. Inman-Johnson was upset about the Governor's threat to remove Tallahassee's duly elected superintendent of schools because he was "not happy" with the curriculum used in Leon County schools. (Tr. 324:23-325:14). Florida's ugly history of racial discrimination resonates in the lives of its Black citizens every day.

275. Defendant argues that portions of this history should be disregarded as insufficiently recent, and through his expert, Dr. Owens, suggested a series of temporal cut-offs. But, as shown above, the historical backdrop that Defendant seeks to ignore is still part of the lived experiences of Plaintiffs and other Floridians, and is not subject to this kind of artificial, bright-line separation. *See Obergefell v. Hodges*, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting, joined by Scalia and Thomas, J.J.) ("[T]o blind yourself to history is both prideful and unwise. 'The past is never dead. It's not even past.'" (quoting W. Faulkner, *Requiem for a Nun* 92 (1951))).

276. Moreover, the 11th Circuit has made clear that, while recent history receives "greater weight" than "distant history," *all* historical evidence—including evidence from the time of the Civil War—is relevant and properly considered. *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 81 F.4th 1328, 1333 (11th Cir. 2023). The Supreme Court just this year looked to so-called "distant" history to understand and contextualize conditions today, finding that a community of interest persists in the "Black Belt" of Alabama, whose Black residents bear a "lineal connection to the many enslaved people brought there to work in the antebellum period." *Allen v. Milligan*, 599 U.S. 1, 21 (2023) (citation omitted).

C. The Specific Sequence Of Events, Procedural Departures, And Contemporary Statements From Key Legislators

277. The third, fourth, and fifth *Arlington Heights* factors—the specific sequence of events leading up to the law's enactment, departures from ordinary procedures, and contemporary statements from key legislators—confirm the discriminatory intent behind the Enacted Plan. The Legislature repeatedly sought to maintain a Black opportunity district in North Florida, consistent with its (correct) understanding of Florida law. It passed the Enacted Plan only reluctantly, at the end of a protracted and unprecedented fight with Governor DeSantis, when it was left with no other option but to ratify the Governor's discriminatory intent. At the outset of the process, the Legislature plainly intended to maintain a Black opportunity district in North Florida. On January 13, 2022, the Senate Subcommittee on Congressional Reapportionment submitted four plans, each of which retained such a district. (Tr. 375:1-7 (Kousser)).

278. There was also consensus about how to comply with the FDA's non-diminishment provision. Both House and Senate counsel stated that the FDA's non-diminishment provision required conducting a functional analysis to determine whether a district would perform for Black voters' candidate of choice. (JX 0006 at 74:3-8; 74:15-17; JX 0012 at 23:08-23:17).

279. Although the Florida Constitution assigns primary responsibility for redistricting to the Legislature, Governor DeSantis hijacked the process in an unprecedented manner. On January 16, 2023, the Governor submitted his own map, C00079, which eliminated Benchmark CD-5 and reduced the number of Black opportunity districts in North Florida from one to zero. (PX 5053; Tr. 432:22-25, 434:14-15 (Kousser)). This was the first time in Florida history that a Governor had publicly submitted his own congressional map to the Legislature. (Tr. 422:11-14 (Kousser); Tr. 898:21-24 (Owens)).

280. The Senate rejected the Governor's plan, instead passing Senate Plan 8060, which retained a district similar to Benchmark CD-5. (PX 5062; Tr. 395:19-396:1 (Kousser)). In discussing this plan, Senator Rodrigues, Chair of the Senate Subcommittee on Reapportionment, emphasized that "our responsibility in creating these maps is to ensure there's no retrogression." (JX 0027 at 3:06-3:12.)

281. But Governor DeSantis made it clear that he would not accept a map under any circumstances that contained a district that allowed Black voters to elect their candidate of choice. In his public statements, he made clear that his objection to the Legislature's map was grounded in race. He submitted an unusual request to the Florida Supreme Court asking, for the first time since 1887, for an advisory opinion on the exercise of his veto power. JX 0052 at 3. He asked whether it was necessary to maintain a district that would enable "black voters … [to] elect their

candidates of choice," as the Florida Supreme Court had previously "suggested" (*i.e.*, explicitly held) when creating Benchmark CD-5. (JX 0052 at 0004.) That court unanimously denied Governor DeSantis's request, finding that the Governor's novel and unprecedented Fourteenth Amendment argument could not be evaluated without a detailed factual record of the sort produced through post-enactment litigation. (PX 5077.1 at 0002-0003).

282. The Governor disregarded the unanimous counsel of Florida's highest court and persisted in his efforts to destroy Benchmark CD-5, without any semblance of a factual record or credible legal argument supporting his equal protection opinion. On February 14, 2022, just days after the Florida Supreme Court had spoken—and without conducting any meaningful analysis of the district's characteristics—the Governor submitted Plan C000094, which eliminated Black access district in North Florida in clear violation of the FDA. (PX 5054).

283. In another unprecedented (or at least highly unusual) move, Governor DeSantis's office paid for Robert Popper, a lawyer for a private organization called Judicial Watch, to travel Tallahassee to testify against Benchmark CD-5 and in favor of the Governor's preferred plan. By bipartisan 14-to-7 vote, the Republican-led redistricting committee resoundingly rejected Mr. Popper's arguments, choosing to retain a Black opportunity district in North Florida. (Tr. 389:7-15 (Kousser)).

284. Similarly, on February 18, 2022, Governor DeSantis's General Counsel, Ryan Newman, issued a memorandum opining—in an unprecedented (or at least highly unusual) fashion—that Florida's own constitution was *itself* unconstitutional under the Fourteenth Amendment, at least with respect to Benchmark CD-5. Mr. Newman made the Orwellian and wholly unsupported assertion that there was no record of "pervasive, flagrant, widespread, or rampant discrimination" in Florida—a claim squarely rejected by the Secretary's own expert. (JX 0056 at 0004). Mr. Newman alternatively argued that the FDA's non-diminishment standard applied only to majority-minority districts—a claim squarely foreclosed by binding Florida Supreme Court and United States Supreme Court precedent. (JX 0056 at 0004-0005).

285. Importantly, Governor DeSantis made no effort to deny or conceal that race the reason for his obsession with eliminating Benchmark CD-5. He has never maintained (and could not lawfully maintain) that his goal in eliminating that district was partisan advantage, incumbency protection, or any other motive that commonly drives redistricting disputes. Instead, throughout the process, the Governor made clear that his objection to Benchmark CD-5 was grounded in the fact that it permitted Black voters to elect their representative of choice. (Tr. 379:10-15 (Kousser) (Governor DeSantis "was concentrating on the racial complexion of the population in North Florida and the ability of Black citizens in

North Florida to elect candidates of their choice under the benchmark district that had been set up under the authorization of the Florida Supreme Court in the apportionment decisions from 2012 to 2015."); Tr. 898:14-17 (Owens) ("Q. And the only concern that Governor DeSantis communicated publicly about Congressional District 5 was a concern about its racial composition, right? A. Yes)).

286. The Legislature rejected the Governor's arguments at least five times by passing or proposing redistricting plans that ignored them. It finally settled on an unprecedented two-map compromise, which gave the Governor everything he had asked for short of eliminating a Black opportunity district in North Florida. There had never been a similar two-map redistricting proposal in Florida history. (Tr. 392:20-24 (Kousser); Tr. 558:7-13 (Driskell)).

287. Although the Legislature had bent over backwards to give the Governor everything he wanted short of flouting the Florida Constitution, the Governor immediately announced— even as the bill was being debated—that he would veto the Legislature's good-faith compromise. However, notwithstanding that immediate announcement, the Governor chose to delay his veto for approximately three weeks, until March 29. (Tr. 407:18-23 (Kousser); JX 0054). He then scheduled a special session—but not to begin until April 19, three weeks after his veto. (Tr. 407:24-208:11 (Kousser)). As described above, this calculated

delay can only be understood as procedural gamesmanship—an attempt to force the Legislature to accede to his proposed plan, notwithstanding the Legislature's firmly held view that the Governor's plan violated Florida law.

288. Legislators' statements in the lead-up to and during the special session made clear that they were conceding to the Governor, not agreeing with his plan. In floor statements, Senate Reapportionment Committee Chair Rodrigues repeatedly re-stated the Governor's analysis and legal conclusions, without adopting them in any way. To the contrary, he made clear that, even after the veto and with the benefit of the Governor's written opinions, his view was that map 8019 was "completely constitutional" (JX 0045 at 52:23-53:2). Similarly, in presenting the Governor's plan, Senator Rodrigues emphasized that this was the Governor's proposal, not the Legislature's, particularly with respect to North Florida. (JX 0045 at 65:22-66:7 ("Northeast Florida is largely the portion of the map that the . . . Governor's—Executive Office of the Governor drew."). The North Florida districts in the Enacted Plan are no compromise; they are the districts the Governor wanted.

289. During the special session, legislators questioned whether there would be a district in North Florida that would perform for Black voters' candidates of choice, and were told the answer was "no". (JX 0048 at 34:3-8 ("Representative Davis: Thank you, Mr. Speaker. Representative, will either District 4 or 5 perform

for Black candidates of choice? . . . Representative Leek: Thank you, Mr. Speaker. No.")). On April 21, 2022—the day of the final vote—members of the Florida House of Representatives engaged in peaceful protest on the House floor in response to the Enacted Plan's elimination of two Black opportunity districts, CD-5 and CD-10. (Tr. 570:2-571:3 (Driskell)). The protestors sought to "bring the legislature to a pause to think about what we were about to vote on and to really consider and understand what was about to be lost." (Tr. 571:1-3 (Driskell)).

290. In sum, the most recent congressional redistricting process was unlike anything Florida has ever experienced. Dr. Kousser testified that the Governor's many interventions were "extraordinary" compared to prior redistricting cycles (Tr. 9/27/23 at 421:25-422:10), and the Secretary's own expert, Dr. Owens, agreed, noting that there were "multiple rounds" in the process "that were not done last decade". (Tr. 10/3/23 at 904:7-12).

291. In an attempt to minimize the unprecedented nature of these events, Defendant has pointed out that other governors have made statements about redistricting or called special legislative sessions. But that willfully misses the point. What was extraordinary about the 2021-2022 congressional redistricting cycle is not that Governor DeSantis made statements about redistricting or called a special legislative session per se. Instead, it was the entire "sequence of events leading up [to] the challenged decision." *Arlington Heights*, 429 U.S. at 267-68.

292. This "sequence" encompasses the Governor's obsessive fixation on eliminating North Florida's only Black opportunity district on any legal basis his staff could conjure up; his willful disregard of binding Florida Supreme Court precedent; his unprecedented submission of his own multiple maps and insistence that the Legislature enact one of them; his unusual attempt to urge the Florida Supreme Court to strike down a key portion of the Florida Constitution that he himself had sworn to defend; his rejection of the Florida Supreme Court's unanimous counsel that further factual development in litigation was required to evaluate his unprecedented Equal Protection argument; his shifting and inconsistent explanations for his opposition to the Legislature's maps; his inexplicable rejection of a legislative compromise that gave him everything he had said he wanted; and his strategic timing of the special session to leave the Legislature with no realistic option but to capitulate to his demands. Even if some of these individual steps, in isolation, could be explained away as innocuous, this extraordinary "sequence of events" must be considered as a whole. *See N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 228 (4th Cir. 2016) (holding that it was clear error for the district court to "focus on certain minor facts instead of acknowledging the whole picture" in undertaking an *Arlington Heights* inquiry).

D. The Impact Of The Challenged Law, And Knowledge Of That Impact

293. The adverse impact of the Enacted Plan is clear, and it was clear at the time of its enactment. As Dr. Kousser testified, the impact was not just "foreseeable," but "foreseen again and again." (Tr. 423:14-19). The Legislature performed a functional analysis on the Enacted Plan before it was passed and confirmed that no district in North Florida would elect Black voters' candidates of choice. (JX 0048; Tr. 487:10-20). In sum, the Legislature undisputedly knew that, in passing the Enacted Plan, it was destroying Black voters' ability to elect their candidates of choice in North Florida, in violation of the FDA's command.

294. What's more, Mr. Kelly was, by his own admission, aware of racial demographics, including in Northern Florida, when drawing district lines. Kelly conceded that he was "generally" aware of the demographics of the benchmark map (Tr. 169:22-170:9), and that he knew the demographics of Jacksonville "reasonably well" from his attempts to draw a Black Opportunity District in Northern Florida (Tr. 177:19-178:6). Thus, he knew that he was "[s]plitting the Black community in Jacksonville into two different congressional districts" when he drew the line separating CDs 4 and 5 down the river. (Tr. 177:23-178:6). And when asked whether it was perfectly obvious, based on his knowledge of the demographics, that he was drawing four white districts in North Florida to replace

Benchmark CD-5, he responded that was "a reasonable guess." Judge Jordan then asked, "Did you realize it at some point", and Mr. Kelly admitted, "During this process, yes, Your Honor." (Tr. 170:22-171:1; 171:7-10).

E. Less Discriminatory Alternatives

295. Finally, there were obvious less-discriminatory alternatives to the Enacted Plan that were consciously rejected. The Legislature's process shows that a variety of maps could be drawn to preserve a Black opportunity district. But in particular, there were two maps that the Legislature passed, 8019 and 8015, which would have preserved Black voters' ability to elect their candidates of choice, and which would have complied with Florida law.

VIII. THE GOVERNOR'S CLAIMED JUSTIFICATIONS ARE PRETEXTUAL AND DO NOT DISPEL THE STRONG INFERENCE OF DISCRIMINATORY INTENT

296. The Governor and his surrogates purported to provide non-discriminatory explanations for his opposition to the Legislature's maps and his insistence on a map that eliminated a Black opportunity district in North Florida. As the trial evidence showed, these purported reasons were so flimsy, so internally inconsistent, and so transparently pretextual that they merely confirm Plaintiffs' core allegation: the Governor took the challenged actions at least in part "because of," and not merely "in spite of," their negative effect on Black voters. *Feeney*, 442 U.S. at 279.

297. In sum, the Governor has offered three different, mutually irreconcilable "neutral" explanations for his actions. Notably, partisanship—*i.e.*, the desire to eliminate a Democratic seat—was not among them. Such a motivation is flatly unlawful under Florida law, and Mr. Kelly was steadfast that partisan goals had no influence on his map-drawing.

298. Two of the three cited "neutral" reasons for the Governor's actions were based on purported interpretations of state law that were flatly contrary to controlling Florida Supreme Court precedent: (1) that a district must be majority-minority to be covered by the FDA; and (2) that a reduction in a district's BVAP, standing alone, violates the FDA's non-diminishment requirement, even if that district nonetheless continues to permit Black voters to elect their candidate of choice. The latter argument is particularly notable because it was not only legally incorrect, but it was the *sole* reason the Governor offered for vetoing the Legislature's primary map, 8019, which contained the Duval-only configuration of CD-5.

299. The Governor's third "neutral" reason, by contrast, was based on federal law. Namely, he asserted that an East-West district resembling Benchmark CD-5 violated the Equal Protection Clause of the U.S. constitution. Notably, this argument, which received the bulk of the Governor's attention, was entirely

irrelevant to Map 8019—the map the Legislature actually wanted to see enacted—because that map did not contain such a district.

300. Moreover, this argument was unsupported by even a single decision of any court at any level. And even if the Governor's novel Equal Protection theory had any potential merit—which it did not—he was expressly (and unanimously) instructed by the Florida Supreme Court that such an Equal Protection violation could not be shown without a detailed factual record that had to be developed in litigation. Meanwhile, as the Governor well knew, the preservation of Benchmark CD-5 was *expressly required* by Florida Constitution, as interpreted by a binding, squarely-on-point decision of the Florida Supreme Court. As Judge Jordan observed in colloquy with the Secretary's counsel, "what the legislature was doing was not unconstitutional, according to the Florida Supreme Court"—or any other court. "It was unconstitutional according to Governor DeSantis." (Tr. 79:23-80:10).

301. This cannot be gainsaid: Florida's Governor purportedly acted on the basis of a federal constitutional theory that was *at best* unprecedented, underdeveloped, and non-binding. He preemptively went far out on a limb to espouse and enforce this theory, knowing that it would require him to disobey the Florida Constitution as authoritatively construed by the Florida Supreme Court. No Florida public servant would act in this manner if their only motive was

enforcing all applicable laws to the best of their ability. Something else had to have been motivating the Governor to step out on that limb—and that was race.

302. Importantly, Plaintiffs have no burden to show that the Governor's stated objections to Benchmark CD-5 or the Legislature's proposed maps were actually *legally erroneous* (although they are). Those issues are now before the Florida state courts, and the Governor may win or may lose. But the outcome of the state litigation has no bearing here. Plaintiffs need only show that the Governor's purported "neutral" objections to a Black opportunity district in North Florida, at the time they were made, were at least in part pretextual—*i.e.*, that, *as a factual matter*, they did not provide the sole motivation for his decisions and actions.

303. At trial, the Secretary agreed that this Court must consider the evidence of pretext:

> JUDGE RODGERS: Do you agree, though, that in ruling in this case, either way, we have to address and consider the plaintiff's arguments about the implausibilities and inconsistencies in the Governor's position that he took in regards to Benchmark CD-5?
>
> * * *
>
> MR. JAZIL: Yes, Your Honor. That would be part of the *Arlington Heights* analysis [. . .]

(Tr. 1000:17-1001:2). The trial evidence supports—indeed, compels—the conclusion that the Governor's reasons were pretextual.

304. "[A] plaintiff can show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered reason for the [defendant's] action that a reasonable factfinder could find them unworthy of credence." *Thomas v. Dolgencorp, LLC*, 645 F. App'x 948, 951 (11th Cir. 2016) (citing *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1348 (11th Cir. 2007)). Here, the record is replete with these indicia of pretext.

A. The Governor Acted Without Legal Basis

305. Perhaps the most shocking aspect of the Governor's conduct in this case was his willingness to usurp the judicial function and proceed without legal authority or judicial approval. This became clear in colloquy with Judge Rodgers during summation. Judge Rodgers asked the Secretary's counsel repeatedly to cite a case that supported what the Governor called a "conflict" between federal and state law necessitating his disregard of Florida's Constitution. The Court received no answer:

JUDGE RODGERS:	So what was the conflict?
MR. JAZIL:	Your Honor, the conflict was illustrated in -- and this is the issue that's playing out in

State court right? So we've got a --

JUDGE RODGERS: I'm sorry, Mr. Jazil, but what was the conflict at the time this was happening in the law? . . . You said, you know, supremacy clause and federal law, Tier I, Tier II, then supremacy clause if there's a conflict. What was the conflict?

* * *

JUDGE RODGERS: I'm sorry. I'm not being clear. I'm asking you to -- as my old civil procedure professor used to say, "Cite me a case." So a case that demonstrates the conflict here, in other words, that -- I'm looking for a case that would suggest that the Fair District Amendments were unconstitutional under the 14th amendment.

* * *

JUDGE RODGERS: Wait. Cite me a case that tells me that.

(Tr. 996:14-998:3).

306. Finally, Judge Jordan put an end to counsel's misery: "You can't cite a case . . ." Judge Jordan then recited his understanding of the Governor's legal argument—which was unsupported by any case law—and Judge Rodgers continued:

JUDGE RODGERS: . . . I guess my question was triggered by your statement about the supremacy clause, right? If there's a conflict, then the supremacy clause prevails -- the federal law prevails under the supremacy clause. ***And***

> ***so are you saying the Governor's opinion created the conflict***?
>
> MR. JAZIL: No, Your Honor. What I'm saying is that the potential enactment of a map that would have gone East and West would have created the conflict. The potential enactment of a Duval-only map would have created the conflict.

(Tr. 998:23-999:7). In short, the answer to Judge Rodgers' question was actually "yes"—the Governor's purported opinion, and nothing in the case law of any court—created the supposed "conflict."[8]

307. This is powerful evidence of pretext. The primary responsibility of Florida's Governor is enforcing and upholding the Constitution and laws of

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[8] Judge Jordan obtained an equally clear admission from Mr. Kelly that the Governor's position was supported only by his own purported personal opinion:

> JUDGE JORDAN: Okay. So as Florida law stood, as interpreted by the Florida Supreme Court in late 2021-early 2022, what the legislature was doing was not unconstitutional, according to the Florida Supreme Court?
>
> THE WITNESS: Yes, Your Honor.
>
> JUDGE JORDAN: Okay. It was unconstitutional ***according to Governor DeSantis***?
>
> THE WITNESS: Yes, Your Honor.

(Tr. 80:3-11 (emphasis added)).

Florida. Ordinarily, state governors do not go out of their way to endorse legal arguments that would invalidate the laws they are charged with upholding. Indeed, state governors ordinarily will advance any remotely plausible federal constitutional argument to save a state statute—let alone a provision of their state's own constitution—from federal invalidation.

308. Here, however, Governor DeSantis did the exact opposite: he went out of his way to conjure a "conflict" between state and federal law at the cost of nullifying a duly enacted provision of Florida's Constitution, which had been endorsed by a supermajority of Florida's voters and authoritatively construed by Florida's highest court. No one forced him to do this; he chose to do it. This shows that the Governor's actions were not motivated by a race-neutral interest in enforcing Florida's laws and Constitution to the fullest extent that the federal Constitution would permit. Instead, it shows that the Governor's claim of a federal-state "conflict" was a fig leaf meant to cover up discriminatory intent.

309. Indeed, Florida law is so insistent on the duty of public officials to enforce the law as it exists, and not as they think it should be, that it denies them standing to assert that enacted laws are unconstitutional. "The right to declare an act unconstitutional is purely a judicial power, and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution." *State ex rel. Atl. Coast Line R. Co. v. State*

Bd. of Equalizers, 94 So. 681, 682-83(1922). In keeping with this separation of powers, "[e]very law found upon the statute books is presumptively constitutional until declared otherwise by the courts" "in a proper proceeding." *Id.* at 682. Unless and until that occurs, "ministerial officers must obey it." *Id.* A public official's unilateral determination that an act is unconstitutional is therefore "unwarranted, unauthorized, and affords no defense." *Id.* at 685.

310. None of this deterred the Governor, however, from bullying the Legislature to bend to his own purported view of federal law. He publicly stated that he would "veto" the plan under consideration, "and that is a guarantee. They can take that to the bank." (PX 2107). And then, while the compromise plan was under debate in the Legislature, he tweeted that he would "veto the congressional reapportionment plan currently being debated by the house. DOA." (PX 2108). These are not the words of a public servant exhibiting good-faith concern about a possible tension with federal law that no court had ever so much as explored. They are the words of a man bent on eliminating a Black opportunity district.

311. Of course, the Legislature noticed. As Rep. Driskell, the Democratic leader of the House, testified, "[T]he process completely went off the rails. There was a significant departure once the Governor got involved, a significant departure away from our guideposts and our boundaries in terms of following the law." (Tr. 575:11-20). Other legislators made similar comments during the committee

hearings. House Congressional Subcommittee Chair Rep. Sirois tried (unsuccessfully) to steer his colleagues away from the Governor's interference. "There has been noise outside of our process dealing with the congressional map. I would encourage all members to put that noise aside. Those external influences need to stay external." (JX 0037 at 05:20-23; Tr. 389:7-388:9). Senator Bracy objected that the Legislature was giving the Governor control over the redistricting process. "What I will say to you, members, is that what the Governor is doing in bullying you all, in dictating what you're going to do, you are essentially losing the power and the independence of the Senate. And you are making the Governor the de facto President from now on, because with a bully, once you give in, it doesn't stop." (JX 0046 at 142:14-142:22).

312. The Governor's unilateral decision to abrogate Florida's Constitution based on his own purported opinion about what the law should be is, most kindly stated, hypocritical. In other contexts, the Governor has insisted that public officials have a duty to enforce the laws on the books and cannot decide for themselves what the law is. He has fired state officials for exactly that alleged transgression.[9] Indeed, when he was in Congress, he introduced legislation to

[9] *See, e.g.*, Tierney Sneed & Steve Contorno, *Judge criticizes DeSantis's firing of Democratic prosecutor but declines to reinstate Andrew Warren*, CNN (Jan. 20, 2023, 4:55 p.m.), https://tinyurl.com/9f7ncc37; Ron DeSantis, *Governor Ron*

prevent just such actions by public officials. As he explained, his proposed bill would have required the U.S. Attorney General "to report to Congress any time the Department of Justice stops enforcement of a law on the grounds that it is unconstitutional. . . . My hope is that this sunlight will prove to be a disinfectant that will serve to hinder the President from usurping the authority of Congress. ***The President is not a king***." Testimony of Representative Ron DeSantis, Serial No. 113-63 (House Hearing), "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws" (February 26, 2014) (emphasis added), https://www.govinfo.gov/content/pkg/CHRG-113hhrg86841/html/CHRG-113hhrg86841.htm. The Governor's long history of outspoken opposition to the very type of conduct he engaged in here is compelling evidence that, in this instance, his actions were not motivated by his good-faith understanding of the FDA's constitutionality.

313. Meanwhile, the Governor's actions all took place during against a backdrop of heightened racial tensions across the state—tensions raised by the Governor himself. This casts a revealing light on his true motivations. Dr. Kousser testified without dispute from the Secretary's expert that the policies and actions of the DeSantis Administration "have raised the temperature of race

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DeSantis Suspends State Attorney Monique Worrell for Neglect of Duty and Incompetence, Aug. 9, 2023, https://tinyurl.com/2x78bzdr.

relations in Florida to a temperature that it hasn't had since the 1960s and '70s." (Tr. 367:8-368:22).

314. Nonetheless, the Governor sent his surrogates out to assert—with a degree of confidence that is shocking given the lack of supporting authority—that "the [Florida Supreme Court] got it wrong." (Tr. 87:22-88:15 (Kelly); *see also id.*, 77:6-77:12 (Q. "You're saying the Florida Supreme Court got it wrong about what the Fair Districts amendment required, right?" A. "Yes." Q. "And Governor DeSantis was able, because he knows better, to reject what they said, right?" A. "But the map the Florida Supreme Court drew violated the equal protection clause.")).

315. In sum, the Governor's repeated, vehement, and categorical objections to a Black opportunity district in North Florida cannot be explained away as a good-faith effort to reconcile state and federal law. The forcefulness and certitude of his refusal to comply with the FDA's clear command were wildly mismatched to the level of legal support that existed for his purported view of the Equal Protection Clause. This type of mismatch is a textbook sign that a proffered justification is pretextual. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) ("The breadth of the [challenged state action] is so far removed from [the state's] particular justifications that we find it impossible to credit them.").

316. We turn now to the three specific legal arguments that the Governor offered during the legislative process to justify eliminating the only Black opportunity district in North Florida. Standing alone, the fact that the Governor offered three different (and mutually inconsistent) legal arguments suggests that each of them was pretextual. Moreover, and most important, his objections to the Legislature's primary map—the one it actually wished to enact—seem to have been conjured at the last minute and were utterly baseless.

B. The Governor's Equal Protection Argument Lacked Legal And Factual Support

317. The argument to which the Governor devoted the most attention was his claim that Benchmark CD-5 (or a similar East-West district) violated the Equal Protection Clause of the U.S. Constitution. This is notable because, in the end, the Legislature passed a map that remedied *all* the Governor's criticisms of Benchmark CD-5: Plan 8019, which contained the Duval-only CD-5. Thus, the Equal Protection argument that received the bulk of the Governor's attention had nothing to do with the map that the Legislature actually wanted to see enacted. As discussed below, to deal with the problem of the new plan, 8019, the Governor then pivoted to a new argument that completely ignored controlling Florida law. This sequence, as sure as anything in this case, demonstrates the pretextual nature of his opposition.

318. Our focus here is on the arguments that the Governor presented in real time during the Legislative session in 2020. The Equal Protection issues are now front and center in the state court litigation, where the Governor's arguments have been developed at much greater length. But the pretext analysis focuses on what the Governor said and believed *at the time*. Whatever the state courts may decide prospectively about the content of Florida law, the record shows as a factual matter that his stated reasons did not provide the sole basis for his actions.

319. According to the Governor, there was an Equal Protection problem with Benchmark CD-5 because it was "a sprawling congressional district . . . that stretche[d] hundreds of miles from East to West solely to connect black voters in Jacksonville with black voters in Gadsden and Leon Counties (with few in between) so that they may elect candidates of their choice, even without a majority." (JX 0052 at 0004). The Governor's Equal Protection arguments were set forth in his request for an advisory opinion in the Florida Supreme Court (JX 0052), in his General Counsel Ryan Newman's letter to the Legislature on February 18, 2022 (JX 0056), and in Mr. Newman's veto memo. (JX 0055). They are all largely the same.

320. The Governor's Equal Protection arguments were so poorly developed, and so flagrantly ignored both contrary authority and contrary facts, as

to suggest bad faith. They did not begin to address the complex mix of facts and law that the Florida Supreme Court had found necessary to answer the question.

321. To begin, as the Governor well knew, the Florida Supreme Court had expressly approved Benchmark CD-5 as required by Florida law and consistent with federal law. *See Apportionment VII*, 172 So.3d at 402-06; *Apportionment VIII*, 179 So.3d at 261 (Fla. 2015) . And as noted above, no court, state or federal, had ever endorsed the Governor's theory that complying with the FDA (or its analogue, Section 5 of the VRA) *itself* constitutes prohibited "racial gerrymandering."

322. Perhaps hoping that the Florida Supreme Court would change its mind, the Governor requested an unusual advisory opinion. The court rebuffed him, unanimously concluding that his theory raised complex legal and factual issues and could not be evaluated without a full record developed in litigation. The Governor could easily could have encouraged one of his many allies to bring such a lawsuit, if he had simply permitted the Legislature to comply with the law and accompanied the new plan with a signing statement signaling his concerns. But the Governor was too impatient to accept the Court's suggestion. Both his hastiness, and the weakness of the arguments he marshaled, suggest that the Governor was driven by the result—the elimination of a Black opportunity district—and not the merit of his Equal Protection theory.

323. Consistent with the Governor's concession in this case, the case law that his three letters cited in support of his theory was slim to none. For instance, his letter to the Florida Supreme Court misleadingly cited *Cooper v. Harris*, 581 U.S. 285, 291 (2017), as though it had somehow changed the law in a material way since the Florida Supreme Court's "prior guidance" in the *Apportionment* cases. Those earlier cases, he argued, "pre-date[] relevant decisions [*i.e.*, *Cooper*] from the U.S. Supreme Court." But *Cooper* is a VRA *section 2* case and has no bearing on the separate non-diminishment standards of section 5 or the FDA. Moreover, *Cooper* merely restated the preexisting standard for constitutionally permissible race-based line drawing: "race-based sorting of voters [must] serve[] a 'compelling interest' and [be] 'narrowly tailored' to that end." (JX 0052 at 0005). *Cooper* did nothing to change the law in this respect.

324. The Governor's Equal Protection arguments can be broken into those addressed to compelling state interest and to narrow tailoring.

1. Compelling State Interest

325. The Governor made an *ipse dixit* assertion that no compelling state interest could support the FDA's non-diminishment provision as applied to a district like Benchmark CD-5. (JX 0055 at 0004). The closest he came to offering substantive support for this argument was in the February 18, 2020, Newman memo, which asserted that, in contrast to the record before Congress when it

passed the VRA, "[w]hen Florida voters approved [the FDA], . . . they did not have before them a similar record of pervasive, flagrant, widespread, or rampant discrimination." (JX 0056 at 0004).

326. To the extent Mr. Newman was arguing that a formal "record" akin to a legislative record is necessary to the validity of a public referendum such as the FDA, there is no support in the law for that proposition (and Mr. Newman offered none). Nor is it clear how such a "record" could even be assembled. Rather, the public can be trusted to make its own informed judgments when voter referenda present sensitive questions about how to address historic discrimination. Justice Kennedy explained this clearly in a case involving a Michigan voter referendum on affirmative action:

> Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject ***against a historical background of race in America that has been a source of tragedy and persisting injustice***. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity.
>
> Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate[,] . . . or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common.

Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 312 (2014) (plurality op.) (emphasis added).

327. Here too, a supermajority of Florida voters endorsed the FDA after a public campaign that focused on, among other things, what Justice Kennedy called the "historical background of race in [Florida] that has been a source of tragedy and persisting injustice." *Id*. The extensive history of discrimination against Black voters in Florida was undisputed at trial. That history was public, open, and notorious. Mr. Kelly is responsible, among other things, for education in the state, and he readily agreed that this subject is taught to future voters in Florida's public schools:

> Q. [Y]ou're responsible for education policy for the Governor . . . [a]nd that includes the long history of discrimination against Blacks in voting in Florida, right
>
> A. Yes.

(Tr. 53:18-54:1; *see also* Tr. 110:6-9 (Q. "[I]n Florida there is a history of pervasive, flagrant, widespread, and rampant discrimination, isn't there?" A. "There was a history, yes.")).

328. Mr. Kelly also agreed with the obvious: that "helping the African American community elect a candidate of choice" was a "compelling state interest" supporting the FDA's non-diminishment provision. (Tr. 142:22-143:1). This echoes the words of Justice Scalia, who opined that the "compelling nature of

the State's interest in [VRA] §5 compliance is supported by our recognition in previous cases that race may be used where necessary to remedy identified past discrimination." *LULAC v. Perry*, 548 U.S. 399, 518 (2006).

329. Contrary to the Governor's *ipse dixit*, there seemed little disagreement among the Governor's representatives during the legislative process that protecting minority voters' electoral strength against state abridgment could provide a "compelling state interest" supporting the FDA's non-diminishment provisions.

330. Robert Popper testified on behalf of the Governor, and while he thought Benchmark CD-5 was not narrowly tailored, he readily agreed that there was a compelling state interest supporting the FDA:

> [Preventing diminishment] absolutely can be a compelling state interest . . . It depends on the remedy. The remedy has to be narrowly tailored. I do not suggest . . . that the Fair Districts Amendment would be unconstitutional in all its applications. . . . It could justify a race-based district.

(Tr. 103:10-20.)

331. Like Mr. Popper and Mr. Kelly, Mr. Newman also conceded in his testimony before the Legislature that, if a district were narrowly tailored, the FDA's non-diminishment provision could withstand strict scrutiny under the Fourteenth Amendment's Equal Protection Clause—for example, if you had a

"sufficiently compact African American community … in a district." (JX 0044 at 67:24-68:12).

332. The Governor's suggestion also ignored the fact that, agreeing with Justice Scalia, a total of eight Justices of the U.S. Supreme Court have opined that there *is* a compelling state interest in preventing diminishment under Section 5 of the VRA, on which the FDA's non-diminishment provision is modeled.[10] *See LULAC*, 548 U.S. at 518 (Scalia, J., joined by Roberts, C.J., Thomas & Alito, JJ., concurring); *id.* at 475 n.12 (Stevens, J., joined by Breyer, J., concurring); *id.* at 485 n.2 (Souter, J., joined by Ginsburg, J., concurring)).

333. Finally, the Governor's argument that there is no compelling state interest supporting the FDA's non-diminishment provision ignores the extensive use of that provision in state and federal districting in Florida. In the last redistricting cycle, there were 40 minority opportunity districts (18 Black and 12 Hispanic), all approved by the Florida Supreme Court. And in the Enacted Plan submitted and signed by Governor DeSantis, Mr. Kelly admitted that CD-24 was drawn in a race-based manner to create a Black opportunity district, in compliance with and reliance on the FDA. (Tr. 165:17-23, 167:12-16, 167:25-168:4).

[10] While *Shelby County v. Holder* set aside the VRA's coverage formula in Section 4, it left the non-diminishment command of Section 5 untouched. 570 U.S. 529, 557 (2013) ("We issue no holding on § 5 itself, only on the coverage formula.").

334. At minimum, a serious, good-faith legal argument would have had to grapple with all of the above facts, but the Governor ignored them entirely. It is hard to view the Governor's argument that there is no compelling state interest supporting the FDA as anything but pretextual.

2. Narrow Tailoring

335. Race may serve as the predominant consideration in the drawing of a district's lines if that use of race is narrowly tailored to meet a compelling state interest. Here, assuming *arguendo* that race was the predominant consideration in the Legislature's drawing of an East-West district resembling Benchmark CD-5, that use of race was narrowly tailored to the compelling interest of preserving a Black opportunity district in North Florida.

336. The Governor's argument that Benchmark CD-5 was not narrowly tailored focused on the fact that the district was 200 miles long; that it was allegedly "drawn solely to combine separate minority populations from different regions of northern Florida"; and that it allegedly connected "communities [that] are in separate and distinct regions of northern Florida and are not defined by shared interests." (JX 0056 at 0002). None of these reasons plausibly supported the Governor's narrow-tailoring argument.

337. Take the Governor's stated concern about the district's length. To the extent this may have been intended as a complaint that Benchmark CD-5 was not

"compact," it ignores the fact that "compactness" is not a federal constitutional standard at all. (JX 0037 at 83:6-15 (Popper)). While "compactness" is a requirement under the FDA, it is a Tier II requirement, subordinate to Tier I requirements—and the Florida Supreme Court had already found Benchmark CD-5 compact enough to comply with the FDA. *See Apportionment VIII*, 179 So. 3d at 272.

338. To the extent the Governor's complaint was a more generalized concern about length, he ignored the fact that population density in North Florida is such that 200-mile-long districts existed both before and after the creation of Benchmark CD-5 (*e.g.*, CD-4 in 2012 and CD-2 in 2022). (*See* PX 5043 (2002-2012 Florida Congressional Districts Map); PX 5051 (2022-2032 Florida Congressional Districts Map); Tr. 665:6-665:25 (Barreto)).

339. The Governor's argument that the populations included within Benchmark CD-5 were "separate and distinct" and lacked "shared interests" was simply asserted as a truism, without analysis or supporting facts. That is a hallmark of pretext. In reality, as the trial evidence showed, Benchmark CD-5 connected a legitimate community of interest in Northern Florida that was in dire need of its own representative.

340. One of the Governor's favorite legal citations makes clear that it is *not* a "racial gerrymander" when a district is drawn to bring together a community of

interest—even if the members of that community happen to share the same race. His arguments have relied heavily on a one-sentence sound bite from *Shaw v. Reno*: "A reapportionment plan that includes in one district individuals … [who are] widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." 509 U.S. 630, 647 (1993). But the Governor disregards *Shaw*'s very next sentence: "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." *Id.* (emphasis added). As this sentence makes clear, factors such as commonality of age, education, economic status or community—all of which are present in Benchmark CD-5, and all of which the Governor ignored—change the equation. The only point of the *Shaw* line of cases is to make "extreme instances of gerrymandering subject to meaningful judicial review"; it is not to invalidate any district where "race … [was] considered in the redistricting process." *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring).

341. The Governor's assertion that Benchmark CD-5's residents had nothing in common but race was patently untrue. As the trial evidence showed, the Black residents of that district shared similar policy concerns and socioeconomic

issues, such as education, income level, and housing and employment patterns. (PX 5042-0016). And due to Benchmark CD-5's location in the area known as the "Slave Belt," there was a "lineal connection to 'the many enslaved people brought there to work in the antebellum period.'" *Milligan*, 599 U.S. at 13 (holding that this is one factor that creates a "community of interest").

342. The common needs of the community served by Benchmark CD-5 were supported by undisputed testimony from witnesses familiar with the district. As Jacksonville Senator Audrey Gibson noted, the common needs and interests of this community are "more than about race." They include deficient health care, crumbling neighborhoods and insufficient infrastructure. (JX 0046 at 139:15-20 (4/19/22 Senate Comm.)). Charlie Clark, who regularly travels from Tallahassee to Jacksonville as a deacon of his church, reported "pockets of poverty [] through[out] the district" and "people that had nothing [who] were not even able to get the basics after large events of climate like hurricanes." (Tr. 262:19-20, 262:24-263:1). Dorothy Inman-Johnson testified about both poverty and the shared problems of urban environments, such as affordable housing and social services for low-income families. (Tr. 304:19-22). Rep. Driskell expressed concern about protecting this community's "shared interests in the public education system, the healthcare system, the access to it or the lack of it, [and] broadband access." (Tr. 560:8-14). Sen. Gibson summed up the consequences of

eliminating Benchmark CD-5: "[W]ho represents those communities matter[s] . . . [I]t becomes difficult without a representative that doesn't understand exactly all of the people they're representing." (JX 0046 at 139:22-1430:12). Indeed, both Mr. Clark and Mrs. Inman-Johnson complained about the lack of interest and responsiveness to the needs of their community by the representatives elected under the newly drawn Enacted Plan, whose districts (by design) include much smaller minority populations. (Tr. 701:18-702:15, referencing PX 5042-0049.)

343. At trial, Mr. Kelly claimed that, even if Benchmark CD-5 joined together an identifiable and legitimate community of interest, Florida law *prohibits* legislators from considering communities of interest in the redistricting process—and that he therefore studiously ignored these highly relevant facts in drawing districts in North Florida. (Tr. 241:23-242:4.)

344. That is wrong. Maintaining communities of interest has long been recognized as a traditional and legitimate districting principle. *Bush v. Vera,* 517 U.S. 952, 977 (1996). Indeed, just last summer, the Supreme Court noted the legitimacy of maintaining a community of interest among a similar group of Black voters in Alabama. It affirmed the district court's "careful factual findings" that "plaintiffs' maps would . . . be reasonably configured" because "they joined together a . . . community of interest called the Black Belt" that "contains a high proportion of black voters, who 'share a rural geography, concentrated poverty,

unequal access to government services, . . . lack of adequate healthcare,' and a lineal connection to 'the many enslaved people brought there to work in the antebellum period.'" *Milligan*, 599 U.S. at 21. The Court might as well have been describing North Florida and Benchmark CD-5.

345. In *Apportionment I*, the Florida Supreme Court rejected an effort by the Legislature to construe the FDA's Tier II "compactness" requirement to *include* an implicit "communities of interest" requirement: "The concept of 'communities of interest' is not part of the constitutional term 'compactness.' Accordingly, we hold that when reviewing compactness, the term should be construed to mean geographical compactness." *Apportionment I*, 83 So. 3d at 634, 656. But nothing in this language—or in common sense—suggests that preserving communities of interest is an illegitimate redistricting criterion, or that the FDA prohibits map drawers from taking communities of interest into consideration.

346. The Governor also ignored the fact that the Florida Supreme Court considered narrow tailoring when it drew Benchmark CD-5 in 2016. In *Apportionment VII*, the Court noted that "an East-West orientation is the *only alternative option* [to meet the constitutional standard]." 172 So. 3d at 403. While Benchmark CD-5 "may not be a 'model of compactness,' . . . [o]ther factors account for this phenomenon," including the geography of the Florida-Georgia border. *Id.* at 406 (emphasis added). In *Apportionment VIII*, the Court added the

observation that Benchmark CD-5 "is more visually and statistically compact than both the 2012 enacted district that was previously invalidated and the Legislature's 2014 remedial plan." 179 So. 3d at 272. All of this means the district was narrowly tailored to meet the compelling state interest in complying with the Tier I requirements of the FDA and preserving a minority opportunity district in North Florida.

347. Finally, the Governor ignored the Legislature's conscientious effort to improve Benchmark CD-5 during the most recent redistricting cycle. By design, the modified version of East-West CD-5 contained in the Legislature's backup Map 8015 was more compact than Benchmark CD-5; more compact than the analogous CD-2 in the 2002 plan; and more compact than any alternative district that had been proposed at the time of CD-5's creation. (JX 0038 at 45:9-48:9 (2/25/22 House Redistricting Comm.)). Mr. Kelly admitted this was true, (Tr. 136:17-20), and Dr. Barreto compared the maps and described the improvements in detail. He pointed in particular to the Duval area, where the proposed Map 8015 closely tracked the boundaries of the county, and to the central part of the district, where the map followed political and geographical boundaries and cleaned up what some have called "jagged edges" in the district lines. (*See* Tr. 658:15-659:9 (Barreto)). By ignoring all this in his zeal to veto the plan, the Governor treated the Legislature's hard work with disdain—more evidence of pretext.

348. A review of the arguments marshalled by the Governor in support of his Equal Protection arguments shows them to be marked by *ipse dixit*, assumed facts that are easily shown to be false, and slipshod case-law analysis. The superficiality of these arguments is entirely disproportionate to the gravity and sensitivity of the issues involved.

349. To be clear, both sides agree that this Court need not decide in this case whether the Governor's Equal Protection argument is actually *correct* as a matter of constitutional law. (Tr. 999:16-21 (summations)). The Court need only decide whether the Governor had an actual, good-faith belief in that argument's correctness—and if so, whether that good-faith belief provided the sole motivation for his challenged actions. As the trial evidence showed, the answer to both these questions is "no."

350. The simplest proof of the deficiency in the Governor's arguments is how they were received by their intended audience, the Republican majority in the Legislature. The Legislature resoundingly rejected the testimony of Mr. Popper and the memorandum of Mr. Newman, both submitted in support of the Governor's Equal Protection argument. From Mr. Kelly:

> Q. [T]he Legislature ignored Mr. Popper's testimony and ignored Mr. Newman's letter, right?
>
> A. Yes.

Q. They were not persuaded by your equal protection arguments?

A. Yes . . . correct.

(Tr. 113:14-21.)

351. Even *after* the Governor's veto, the Legislature was not persuaded. In introducing the Governor's map on the Senate floor, Senator Rodrigues, the redistricting chair, explained that the Legislature had done its job in producing a "completely constitutional" map, which the Governor had nonetheless chosen to veto: "Our charge was to . . . pass a map [8019] that would be completely constitutional, withstand all court challenges. So that was the map we brought under those parameters." (JX 0045 at 52:23-53:2). And although the Legislature then caved to the Governor's demands and passed the Enacted Plan, only one Legislator publicly stated that he actually *agreed* with the Governor's Equal Protection analysis. (Tr. 420:7-420:11, Kousser.)

352. That is hardly a ringing endorsement of the Governor's bad-faith arguments.

C. The Governor's Explanation For Rejecting The Duval-Only CD-5 Is Meritless

353. The Governor's objections to Map 8019—the Legislature's Duval-only proposal—seem to have been made up at the last minute when the Governor was presented with a compromise that completely mooted his Equal Protection

objections. That is particularly important, because Map 8019 was the Legislature's primary map—the map it wanted to be enacted and used. Again, Map 8015, the map with the East-West CD-5 that received the lion's share of the Governor's public criticism was merely a backup.

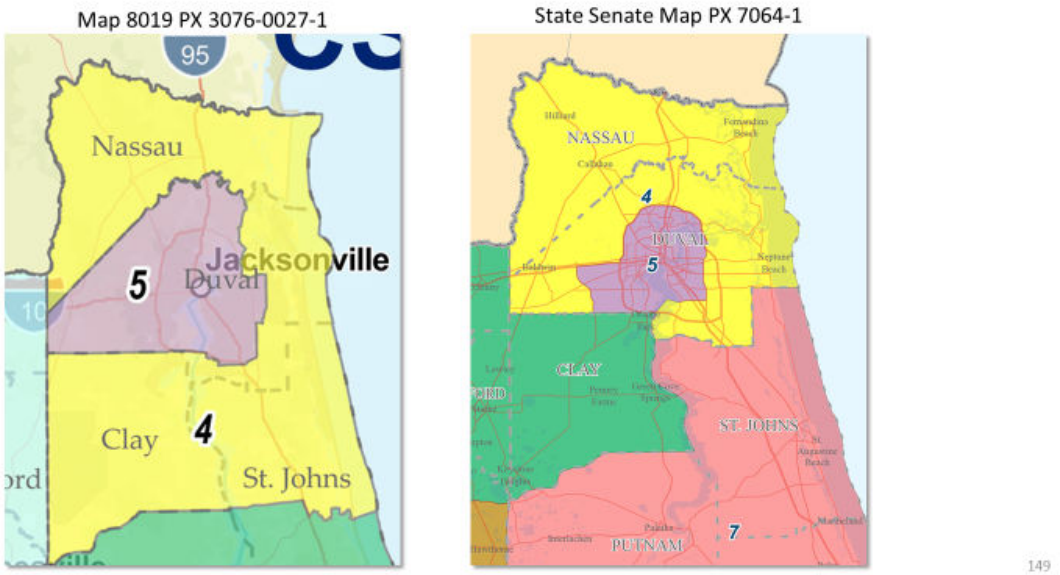
354. The Duval-only compromise addressed *every* objection the Governor had lodged against Benchmark CD-5. The Duval-only CD-5 was highly compact; it was not 200 miles long; it did not cross any political boundaries; and it included only residents of Jacksonville, a preexisting political community, and a natural community of interest. Meanwhile, it still provided Black voters in North Florida with the opportunity to elect a candidate of their choice.

355. Taking the Governor at his word, he should have welcomed the Duval-only compromise, rather than irately vetoing it. Indeed, Mr. Newman, his General Counsel, testified to the Legislature that a Black opportunity district just like the Duval-only district would have been perfectly constitutional:

> That's not to say that there are[n't] other applications of the Florida Constitution's non-diminishment standard [besides the East-West Benchmark CD-5] that could be or that could survive strict scrutiny. One example would be if you had a sufficiently compact African American community, right, in a district.

(JX 0044 at 67:24-68:12 (4/19/22 House Congressional Redistricting Subcomm.)).

356. Moreover, the Governor raised no objection to a Duval-county *state Senate* district that looked remarkably like the proposed Duval-only CD-5, and which the Florida Supreme Court approved as FDA-compliant.



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357. But acquiescence would have meant a congressional district in North Florida where Black voters could elect their preferred candidate—something the Governor opposed, no matter how that district was drawn. Thus, he conjured up a new legal basis for opposing the Duval-only compromise, one that was both unsupported by the facts and self-evidently wrong on the law.

1. The Governor's "Diminishment" Objection Is Contrary To The Facts And The Law

358. As set forth in Section IV above, determining whether a proposed district satisfies the FDA's non-diminishment standard requires a multi-factor

"functional analysis" that evaluates whether minority voters will still be able to elect their candidate of choice in the new district. The test is not a simple-minded before-and-after comparison of the districts' BVAP. Even if a district is redrawn in a way that lowers its BVAP, it still satisfies the non-diminishment test as long as its minority population can continue to elect is preferred candidate. *Supra* at Section IV.

359. That was the standard the Legislature applied during redistricting process (contrary to Mr. Kelly's claim that the Legislature had somehow "moved the goalposts." (*See* Tr. 134:23-135:3 ("[E]arlier in the legislative process, their testimony was that the Black voting age population . . . for whatever district in question might be that it should be relatively the same, and then later in the legislative process they changed their definition.")). As Senate Redistricting Counsel Dan Nordby testified before the Legislature in October 2021, "[T]o determine whether a district is likely to perform for the minority candidate of choice…. [t]here is no predetermined or fixed demographic percentage used at any point in [the] functional analysis." (JX 0006 at 74:3-8; 74:15-17). House Outside Counsel Andy Bardos provided similar testimony: "Simply looking at the voting age population is not enough… turnout rates, registration rates, whether high or low can impact the ability of a minority population to elect candidates of their choice." (JX 0012 at 23:8-17).

360. And the Legislature met that standard in creating Map 8019, the Duval-only compromise plan. (DX98 at 0003). Senate Reapportionment Chair Rodrigues, describing the Duval-only CD-5, said: "even though the [BVAP] has gone down, the functional analysis shows that that is still a Democrat performing seat and that the minority controls the Democrat primary in that seat." (JX 0040 at 24:18-22). Rep. Leek, again describing the Duval-only CD-5, said: "[t]his district, CD-5, as drawn even in the primary map, still performs [for Black voters' candidate of choice]. So there was no effect on the functional analysis for CD-5." (JX 0038 at 61:4-7).

361. The Governor's office did not dispute this analysis in the legislative record, and the Secretary offered no expert testimony disputing this analysis at trial (*i.e.*, suggesting that the Duval-only CD-5 would *not* have performed for its Black voters' candidate of choice). In response to a direct question from the Court, the Secretary admitted as much. (Tr. 1010-11). Rather, as Mr. Kelly testified, the Governor's office relied on the Legislature's analysis of whether the Duval-only CD-5 would perform. (Tr. 134:14-18).

362. Moreover, Dr. Barreto confirmed the Legislature's analysis and concluded that Map 8019's Duval-only CD-5 would have performed for Black voters' candidate of choice. (Tr. 671: 6-13). The Secretary's mapping expert, Dr.

Johnson, did not "dispute Dr. Barreto's conclusion that . . . the 8019 map with 35 percent BVAP does perform for Black voters." (Tr. 827:5-13).

363. So what was the Governor's response to this undisputed demonstration that the Duval-only version of CD-5 complied with the FDA and produced a district that, like Benchmark CD-5, would allow Black voters to elect their candidate of choice? Through his counsel Mr. Newman, the Governor reduced the complex, data-driven, multi-variable functional analysis required by the FDA to the robotic question of "which number is bigger, 46 or 35?" Benchmark CD-5 had a BVAP of 46%; the Duval-only version had a BVAP of 35%. Mr. Newman observed that 35% is less than 46%. (JX 0055 at 0006). Therefore, in the Governor's view, the Legislature's primary map "diminished" the rights of Black voters in Benchmark CD-5 and violated the FDA.[11]

364. In other words: The Legislature's Duval-only plan supposedly violated the FDA by diminishing the strength of Black voters as compared to Benchmark CD-5. Therefore, the Governor's "solution" to this problem was to

[11] Mr. Newman noted that, in making this comparison, he was assuming that the Benchmark CD 5 could be used as a point of reference, even thought it was assertedly unconstitutional. (JX 0055 at 0006 n.1).

diminish it even further—to reduce the number of Black opportunity districts in North Florida from one to none. (Tr. 151:12-15).

365. This was baffling. As members of the Court have recognized, if there was an obligation under the FDA to protect the rights of Benchmark CD-5's Black voters by maintaining their opportunity to elect a candidate of choice, the State could not comply with that obligation by eliminating that opportunity altogether:

> JUDGE JORDAN: With regard to that Florida Constitution non-diminishment target, doesn't the Governor's map, the one that was ultimately passed, have the same non-diminishment problem?
>
> THE WITNESS: Yes, Your Honor.
>
> * * *
>
> JUDGE JORDAN: Even though the Governor's map had the same problem? The Governor's map doesn't solve that problem, right?
>
> THE WITNESS: Correct, Your Honor.

(Tr. 147:1-5; 18-21). Rather than fixing the alleged diminishment "problem" with the Legislature's Duval-only compromise, the Enacted Plan pushed by the Governor was "even worse" on that score. (Tr. 1004:18-19). That hardly supports the Governor's position that the FDA's non-diminishment provision compelled him to veto the Duval-only compromise plan *in favor of* the Enacted Plan.

366. In any event, the "problem" Mr. Newman identified with the Duval-only CD-5 was entirely imaginary. The reduction in BVAP from 46% to 35%—would not have constituted "diminishment" in violation of the FDA, because at either percentage, the district's Black residents would be able to elect their candidate of choice.

367. As the U.S. Supreme Court has held, "[a] plan leads to impermissible retrogression [*i.e.*, diminishment] when, compared to the plan currently in effect …, the new plan diminishes *the number of districts* in which minority groups can 'elect their preferred candidates of choice'. . . ." *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 260 (2016) (emphasis added). The non-diminishment standard "*does not require maintaining the same [minority] population percentages* . . . as in the prior plan. Rather, § 5 is satisfied if minority voters *retain the ability to elect their preferred candidates*." *Ala. Legis. Black Caucus v. Alabama,* 135 S. Ct. 1257, 1273 (2015) (emphasis added).

368. This, one "ask[s] the wrong question" when one inquires: "How can we maintain the present minority percentages in [a district]?" The correct question is: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Alabama*, 135 S. Ct. at 1273-74; *see also Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015) (three-judge

court) (criticizing "[t]he legislature's use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns," to determine whether the district would perform for Black voters' candidate of choice, as inconsistent with VRA Section 5), *appeal dismissed,* 578 U.S. 539 (2016); *Covington v. North Carolina*, 316 F.R.D. 117, 175-76 (M.D.N.C. 2016) (three-judge court) (similar), *aff'd,* 581 U.S. 1015 (2017); *Bethune-Hill v. Va. State Bd. of Educ.*, 326 F. Supp. 3d 128, 180 (E.D. Va. 2018) (three-judge court) (similar).

369. The Florida Supreme Court has adopted this exact standard under the FDA's parallel non-diminishment provision:

> [T]he BVAP itself cannot be viewed in a vacuum . . . . [I]t is the "ability to elect a preferred candidate of choice," not "a particular numerical minority percentage," that is the pertinent point of reference . . ..
>
> [The non-diminishment provision] "does not require maintaining the same population percentages." Instead, . . . this requirement "is satisfied if minority voters retain the ability to elect their preferred candidates."

Apportionment VII, 172 So.3d at 405 (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 275).

370. As noted above, the Legislature conducted the "functional analysis" prescribed by these decisions and determined that the Duval-only CD-5 was likely to perform for Black voters' candidate of choice, notwithstanding the reduction in

BVAP. (JX 0038 at 30:17-23 (2/25/22 House Redistricting Comm.)). The Legislature concluded that the district performed in 9 of 14 elections that it studied, and in all of the most recent elections. And the Secretary offered no proof at the time of the veto or at trial to challenge the Legislature's conclusion. The even quoted the Legislature's conclusion in his veto message. His counsel agreed with the Court that "[n]o one's come in here and said nine out of 14 is not performing." (Tr. 1010:21-24).

371. Indeed, as Mr. Kelly testified (and Dr. Barreto confirmed), BVAP standing alone says ***nothing*** about whether a district will perform for Black voters' candidate of choice:

> Q. And you know that BVAP doesn't tell you whether a district will perform or not, right?
>
> A. Right.
>
> * * *
>
> Q. [Y]ou told me earlier that 35 percent can perform and 44 percent, 46 percent can perform, right?
>
> A. Yes.
>
> Q. And you have to analyze it?
>
> A. Yes.

(Tr. 149:12-14; 149:22-150:1; *see also* Tr. 175:14-17 ("no fixed minimum percentage of BVAP for diminishment purposes")). That's what a functional

analysis is for, but that was of no interest to Mr. Newman and the Governor.

372. Not only is it wrong to look at BVAP alone, but it is a mindless exercise to compare BVAPs in different districts with different geography and different populations. Again Mr. Kelly:

> Q. And so comparing percentages especially -- these aren't the same district. These are completely different geography. One's East-West from Duval to Gadsden County and the other is just Duval. There are different people in those overlapping. There's different geography. ***You can't really compare the percentages, right?***
>
> A. ***Right.*** You would want to do a deeper analysis than just the percentages.

(Tr. 150:2-150:9 (emphasis added)). Indeed, as noted above, of the 18 Black opportunity districts approved by the Florida Supreme Court in the most recent redistricting cycle, four had BVAPs lower than 35%—the BVAP of the proposed Duval-only CD-5. (PX-4034-0437 (State Senate District 16 – 33.2% BVAP, State House District 21 – 29.03% BVAP, State House District 98 – 34.96% BVAP, State House District 117 – 28.93% BVAP); (Tr. 135:4-9) (Kelly)). The reason the comparison is mindless is that performance turns on a "deeper analysis" of other characteristics of the district, and in particular, the voting patterns of the remaining (*i.e.*, non-Black) voters.

373. For these reasons, the Governor had no good-faith basis to believe that the Duval-only CD-5 violated the FDA by "diminishing" Black voting strength merely because its BVAP was not as high as that of Benchmark CD-5.

374. The Governor's argument, as articulated in Mr. Newman's memo, was based on a blatant misreading of a single dictum—actually, a single word—in *Apportionment I*. There, the Florida Supreme Court had stated that "under [the FDA], a slight change in percentage of [a] minority group's population in a given district does not necessarily have a cognizable effect on [its] ability to elect its preferred candidate of choice." (JX 0055 at 0005 (citing *Apportionment I,* 83 So. 3d at 625)). Mr. Newman twisted this sentence to mean that a "reduction in the minority population in a given district [that] is more than 'slight'" *would* violate the non-diminishment rule. And he concluded—based on some unspecified metric, and notwithstanding the apples-to-oranges comparison—that the change from 46% to 35% was more than "slight," and thus, violated the FDA. (JX 0055 at -0006).

375. This "analysis" was contrary to settled law. Again, the correct comparison is performance, not percentages. Mr. Newman's memo ignored the sentence immediately following, which made clear that "a minority group's ability to elect a candidate of choice depends upon more than just population figures" and "requires an inquiry into whether [the] district is likely to perform for minority

candidates of choice. ***This has been termed a 'functional analysis.***'" *Apportionment I*, 83 So. 3d at 625 (emphasis added). What is more, the Court had emphatically added: "[W]e reject any argument that the minority population percentage in each district … is somehow fixed to an absolute number under [the FDA's] minority protection provision." *Id*. at 627.

376. Whatever meaning the Governor purported to dredge from this 2012 dictum, his argument runs headlong into the Florida Supreme Court's explicit holding in *Apportionment VII*, three years later, that the FDA "is satisfied if minority voters retain the ability to elect their preferred candidates," as they undisputedly would have done in the Duval-only CD-5. 172 So. 3d at 405.

377. Before the veto, Mr. Kelly demonstrated that he knew that a Black opportunity district in North Florida that was compliant with both the federal and state constitutions did not require any fixed percentage of BVAP. He devoted time to attempting to create a "compact" district connecting Jacksonville with Gainesville, Palatka and/or Daytona Beach. His goal was to "draw [a] district that met the [FDA's] non-diminishment criteria and at the same time followed other traditional redistricting criteria to essentially resolve [the purported] federal constitutional issue." (Tr. 921:24-922:2). His target was to get "to at least 39, 40, 41 percent" BVAP. Critically, he recognized that "*[w]e would want to do a full functional analysis to be certain*, but I felt like if you [could] get somewhere close

to 40 percent, it would be pretty tough to argue" against the district. (Tr. 174:20-175:25 (emphasis added)). Indeed, if he could have achieved that goal, he admits he "would have been achieving adherence to county lines, city lines, compactness, and also achieving the purpose of non-diminishment." (Tr. 161:24-163:6).

378. This testimony reveals the Governor's explanation as pretextual. If a compact district embracing parts of three or four different jurisdictions would have satisfied both the FDA's non-diminishment command and the Equal Protection Clause with a ***39% BVAP***, if shown to perform in a functional analysis—as Mr. Kelly admitted—what was wrong with the Duval-only CD-5, which was even more compact, included only one jurisdiction, and had been shown to perform through a functional analysis at ***35% BVAP***? Both figures are greater than the BVAP in other court-approved Black opportunity districts and the difference between them, even Mr. Newman should agree, is slight.

379. The Governor's veto memo began—and ended—with a simple exercise in subtraction. This is precisely the "mechanically numerical view as to which counts as forbidden retrogression" that the U.S. Supreme Court and Florida Supreme Court have both squarely rejected. *Alabama*, 135 S. Ct. at 1272; *see also Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 646 (D.S.C. 2002) ("[T]o prevent retrogression in the minority's voting strength, however, we do not arbitrarily strive to achieve any benchmark BVAP."). The Governor cannot have

believed in good faith that this analysis actually required rejection of the Legislature's Duval-only compromise in favor of the Enacted Plan.

380. In sum, Governor was presented, on a silver platter, with an option that complied with his stated view of the Equal Protection Clause (as Mr. Kelly conceded in his trial testimony), while still maintaining a Black opportunity district in North Florida. But, willfully misreading the FDA's non-diminishment standard in disregard of clear and binding case law, he rejected that option as insufficiently protective of Black voters. Then, he forced through a map that eliminated a Black opportunity district in North Florida altogether, giving North Florida's Black voters no political voice at all. His explanations for these actions are incoherent, contradictory, and contrary to law. In short, they were pretextual.

2. The Governor's Remaining Objections Were Contrary To Law

381. A few other objections to Map 8019 also vaguely floated through the Governor's veto memo. They were not the reasons for the veto of the Duval-only map, but they were also just wrong. We address them here.

(a) Use Of Benchmark CD-5 As A Benchmark

382. Although Mr. Newman used Benchmark CD-5 for purposes of his diminishment "analysis" (*i.e.*, 35 is less than 46), he suggested in a footnote that there might be something wrong with using Benchmark CD-5 as a benchmark because it was allegedly unconstitutional. The Secretary expanded on this

argument in summation: "If the benchmark itself is unconstitutional, it is no benchmark at all." (Tr. 1005:11-12).

383. Of course, this was not a reason the Governor actually relied upon in his veto memo—just a musing in a footnote—so it has nothing to do with the Governor's good faith, or lack thereof. Indeed, by relying on purported diminishment vis-à-vis Benchmark CD-5 as his ground for vetoing the Legislature's compromise plan, the Governor implicitly *rejected* this argument. By arguing it now, the Secretary only confirms that the Governor's diminishment rationale for opposing the Duval-only CD-5 was pretextual.

384. In any event, the Secretary's argument is wide of the mark. "As a general premise, the benchmark plan for purposes of measuring retrogression is the last 'legally enforceable' plan used in the jurisdiction." *Colleton Cnty. Council*, 201 F. Supp. 2d at 644, opinion clarified (Apr. 18, 2002) (citing 28 C.F.R. § 51.54(b)(1) and *Holder v. Hall*, 512 U.S. 874, 883-84 (1994)); *see also Apportionment VII*, 172 So. 3d at 404-05 (following this principle and considering the last legally enforceable plan as the benchmark plan). The benchmark plan can be a court-adopted plan, as Benchmark CD-5 was. *See, e.g.*, *Texas v. United States*, 831 F. Supp. 2d 244, 255-56 & n.9 (D.D.C. 2011) (using court-adopted plan as benchmark); *Markham v. Fulton Cnty. Bd. of Registrations & Elections*, No. 1:02-CV1111WB, 2002 WL 32587313, at *5-*6 (N.D. Ga. May 29, 2002) (same).

There is no dispute that the Benchmark Plan, including Benchmark CD-5, was the last legally enforceable congressional plan used in Florida. That plan was used in all elections from 2016 to 2020.

385. A district may not be able to serve as a valid benchmark after it has been "formally declared" unconstitutional by a court. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 644 (D.S.C. 2002), opinion clarified (Apr. 18, 2002); *see also Clark v. Putnam Cnty.*, 293 F.3d 1261, 1265 n.15 (11th Cir. 2002) ("[A]bsent invalidation, the majority-minority electoral districts established by the 1992 plan will serve as the benchmark for the 2000 redistricting."); *DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470-01, 7470 (Feb. 9, 2011) ("Absent such a finding of unconstitutionality … by a Federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review." (citing *Abrams v. Johnson*, 521 U.S. 74 (1997)).

386. Most important, there is no authority for the proposition that a district becomes an invalid benchmark merely because a governor (or other public official) *asserts* it is. That is a recipe for lawlessness. At the time of the relevant events, no court had so much as questioned Benchmark CD-5's constitutionality, and the Florida Supreme Court had expressly ruled it compliant with applicable law. Therefore, it was a legally valid benchmark, and the Governor was required to treat it as such. At an absolute minimum, if he thought otherwise, the Governor was

required to "carefully evaluat[e] [the] evidence" regarding Benchmark CD-5's appropriateness as a benchmark, rather than "rel[ying] on generalizations" as he did here. *Wis. Legislature v. Wis. Elections Comm.*, 595 U.S. 398, 404 (2022).

387. Moreover, even if Benchmark CD-5 were deemed an invalid benchmark, that does not mean that the Governor was free to reduce the number of Black opportunity districts in North Florida from one to zero. Such a district long predated the creation of Benchmark CD-5 and any question about its constitutionality. Until the Governor's actions in 2020, such a district had existed in North Florida continuously since 1992, when a Black opportunity district (then known as CD-3) was created under Section 2 of the VRA. When the original district was invalidated in *Johnson v. Mortham*, 926 F.Supp. 1460 (N.D.Fla. 1996), its replacement was then approved by a three-judge court in 1996. *Johnson v. Mortham,* 1996 WL 297280 (N.D. Fla. May 31, 1996). Since then, no court has ever questioned the constitutionality of that district or its successors.

388. Thus, the plan that replaced CD-3 after the 2000 census also contained a Black opportunity district in North Florida, and was also upheld in court. As noted by the three-judge court in *Martinez v. Bush*, CD-3 "performed for the black candidate of choice in every election from 1992 through 2000," and the "new CD 3 [would similarly] afford black voters a reasonable opportunity to elect candidates

of choice" in elections through the next decennial census in 2010. 234 F. Supp. 2d 1275, 1307-08 (S.D. Fla. 2002).

389. Thus, when the FDA was enacted in 2010, there was an existing Black opportunity district in North Florida and the FDA's non-diminishment provision required that the district be continuously preserved. And it was. In 2012, the Legislature *again* enacted a plan that preserved a Black opportunity district in North Florida. Although the Florida Supreme Court struck that district down as a partisan gerrymander, it required that it be replaced by another Black opportunity district. That is what led in 2016 to the creation of Benchmark CD-5—another Black opportunity district. *See Apportionment VII*, 172 So. 3d at 402-06.

390. If Benchmark CD-5 were somehow not valid as a benchmark, the correct benchmark would be the "last 'legally enforceable' plan used in [Florida]" *before* Benchmark CD-5. Before Benchmark CD-5, a Black opportunity district has existed in North Florida under every districting plan adopted and used since 1992 and one is required to be preserved by the FDA. The upshot: whatever the Governor thought about Benchmark CD-5, under no circumstances was he free to disregard the FDA and destroy the only Black opportunity district in North Florida. And, in any event, this was not the reason for the veto.

(b) The "Doughnut" Shape Of Proposed CD-4

391. Mr. Newman also hinted that there was a problem with the Duval-only version of CD-5 because the adjoining proposed district (CD-4) wrapped around it like a "doughnut." (JX 55 at 0003). The implication was that the proposed CD-4 was not compact and therefore was unlawful. Mr. Newman did not expand on that hint in the Governor's veto memo, and it also was not the stated reason for the Governor's veto of the Legislature's compromise plan.

392. The Governor was correct to abandon this argument. Again, under the federal constitution, there is no "compactness" standard, as Mr. Popper testified before the Legislature. (JX 37 at 0083:6-15). Meanwhile, under the FDA, compactness is a Tier II standard and so must give way to the Tier I non-diminishment standard. As such, the proposed CD-4's purported lack of "compactness" could not have justified the elimination of North Florida's only Black opportunity district.

393. Moreover, there is no evidence before the Court that CD-4 violates the FDA's "compactness" requirement. Its shape is a rectangle with a carve-out. There are dozens of permissible measures of compactness, with none particularly favored. Rep. Driskell testified that the Legislature was specifically advised that compactness was measured in a variety of ways and that "no one method of determining compactness is superior to the other." (Tr. 532:23-534:17). She

further testified that legislators were instructed that "it would be important to consider different options for compactness." (Tr. 534:12-13; *Milligan*, 599 U.S. at 35 (observing that "the scientific literature contains dozens of competing metrics" on the issue of compactness)).

394. The Secretary offered no evidence that CD-4 was not compact. As the Secretary's mapping expert, Mr. Johnson, testified, "[d]epending on the compactness formula and how it's measured," a shape like that of the proposed CD-4 can be considered compact. As he explained, some compactness measures "don't really look at the inside boundaries" of a district, and instead consider whether the outside shape of district is regular. Under these measures, the carve-out in CD-4 "won't have an impact" on the district's compactness score. (Tr. 809:19-810:3.) The Secretary offered no further evidence on the issue, nor did he advocate that the district was not compact under any particular measure. Thus, any objections to the "compactness" of the proposed CD-4 cannot explain the Governor's challenged actions. And, again, this was not the stated reason for the veto.

(c) The Equal Protection Argument

395. Finally, Mr. Newman asserted that ***because*** the Duval only map allegedly did not comply with the FDA, its use of race to draw its district lines made it was invalid under the Equal Protection Clause. But this argument goes

nowhere since, as shown above, the district did comply with the non-diminishment provisions of the FDA. JX 55 at 0006. As Mr. Kelly acknowledged, it was an "essential part of [the Governor's] veto analysis that the [Duval-only] CD-5 in the [Legislature's] primary map [was] not protected by the Fair Districts Amendment" because of its purported violation of the non-diminishment requirement. (Tr. 157:19-22). Without that "essential" predicate, the equal protection objection to Duval-only CD-5 disappears. Mr. Newman admitted as much in his testimony before the Legislature. He acknowledged that an FDA-compliant district drawn to allow a "sufficiently compact African American community" to elect their representative of choice would withstand strict scrutiny. (JX 44 at 67:24-68:12).

D. The Governor Was Wrong In Arguing That FDA Protects Only Majority-Minority Districts From Diminishment

396. One argument that has bobbed through the Governor's position—appearing, disappearing, and appearing again—is the claim that the FDA's non-diminishment requirement applies only to majority-minority districts (*i.e.*, districts with a minority population greater than 50%). This argument was dropped before the veto message, but if accepted, this argument would impose the *Gingles* standards that govern claims under Section 2 of the Voting Rights Act on the FDA's non-diminishment analysis. *Thornburg v. Gingles,* 478 U.S. 30, 50 (1986). Since it is not possible to draw a majority-Black district in North Florida, accepting

this argument would permit elimination of Benchmark CD-5. Of course, since this was true when the Florida Supreme Court created Benchmark CD-5 in 2016 with a BVAP of 46%, the argument would mean, as Mr. Kelly might say, that "the Florida Supreme Court got it wrong."

397. The Governor hinted at this argument in his request for an advisory opinion from the Florida Supreme Court. He asked whether the non-diminishment standard required a district like Benchmark CD-5 "even without a majority" of Black voters. JX 52 at 0004. Mr. Newman further developed the argument in his February 18, 2022, letter to the Legislature. Citing *Gingles* expressly, he argued that the FDA should be interpreted to limit its non-diminishment requirement to majority-minority districts. (JX 56 at 0005). The Governor abandoned this argument in his subsequent March 29, 2022 veto memo, but it has since been resurrected in the parallel state court proceeding, where the trial court rejected it. *See* Final Order at 15, *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, No. 2022-CA-666, (Fla. 2d Jud. Cir. Ct. Sept. 2, 2023).

398. In any event, the argument is wrong. It conflates Florida's *non-diminishment* provision, modeled on Section 5 of the VRA, with Florida's distinct *non-dilution* provision, modeled on the VRA's separate Section 2. The *Gingles* preconditions, including majority-minority status, apply only to Section 2 claims, and not Section 5 claims. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp.

2d 618, 634 (D.S.C. 2002) ("Section 5 requires no separate inquiry into the *Gingles* factors"). And because the Florida Constitution's minority voting protections "follow almost verbatim the requirements embodied in the Federal [VRA]," Florida courts' "interpretation of Florida's corresponding provision[s] is guided by prevailing United States Supreme Court precedent" with respect to the respective federal provision. *Apportionment I,* 83 So.3d at 619-20.

399. Both the Florida Supreme Court and the U.S. Supreme Court consider VRA/FDA dilution claims and VRA/FDA diminishment claims to be separate theories, responding to different conditions, and imposing different requirements. *See Bartlett*, 556 U.S. at 24-25 ("The inquiries under §§ 2 and 5 are different."); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) ("[§§ 2 and 5] were designed to combat different evils, and, accordingly . . . impose very different duties upon the States").

400. Simply put, the non-dilution provisions require the creation of a *new* majority-minority district. Such districts are required only where a plaintiff can establish the preconditions identified in *Gingles*, which include (among other things) a showing that the minority group at issue could constitute at least 50% of the voting age population in a reasonably compact area. *See Apportionment I*, 83 So. 3d at 621-23. Non-diminishment, by contrast, does not require the creation of new minority districts. It protects against backsliding in *existing* districts where a

minority group presently has the ability to elect its candidate of choice. *See id.* at 619-20.

401. A minority group may have the ability to elect its candidate of choice where it "composes a numerical, working majority of the voting-age population." *Bartlett*, 556 U.S. at 13. But it may also have that ability if it "make[s] up less than a majority of the voting-age population," but "is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* Either way, the non-diminishment requirement "mandates that the minority's [existing] opportunity to elect representatives of its choice not be diminished." *Vera*, 517 U.S. at 983; *see Texas v. United States*, 831 F. Supp. 2d 244, 266-67 (D.D.C. 2011) ("[Section 5 has] no preference for how the minority group is able to elect is preferred candidate, whether by cohesive voting by a single minority group or by coalitions made up of different groups. . . . [The lack of] an obligation to *create* a crossover district under Section 2 does not equate to freedom to *ignore* the reality of an existing crossover district in which minority citizens are able to elect their chosen candidates under Section 5.").

402. Thus, the VRA/FDA non-diminishment standard "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district. *Ala. Legis. Black Caucus*, 575 U.S. at 275. Instead, it requires the state to

"maintain a minority's ability to elect a preferred candidate of choice" in any new redistricting plan. *Id.* at 275-77. The state must ensure that the group retains the ability to elect its preferred candidate by conducting "a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 275-7 (citation omitted); *see also Apportionment VII*, 172 So. 3d at 405-06.

403. In short, the VRA/FDA non-diminishment standard is not about particular *population thresholds*; it is about ensuring that minority groups are not stripped of the power to *affect electoral outcomes* in districts where they presently have that power. *Ala. Legislative Black Caucus*, 575 U.S. at 279. It does not impose "an inflexible racial floor of 50 percent plus one person." *Harris v. McCrory*, 159 F. Supp. 3d 600, 626-27 (M.D.N.C. 2016) (observing that a district with 47.76% BVAP was protected against retrogression by Section 5, but that an *increase* of that district's BVAP above 50% was not required by Section 5); *see also Vera*, 517 U.S. at 983 (same for district with 35.1% BVAP); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 565 (E.D. Va. 2016) (three-judge court) (districts with BVAP of 40.9% and 45.3% were both subject to, and "consistent with[,] Section 5's requirements").

404. Consistent with this view, the Florida Supreme Court has never required that the relevant minority group constitute more than 50% of the voting age population in a district for the non-diminishment provision to apply. Instead, it

has held that the Legislature "cannot eliminate majority-minority districts or weaken ***other historically performing minority districts*** where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Apportionment I*, 83 So. 3d at 625 (emphasis added). The Supreme Court repeated and reaffirmed this standard just last year in approving the state legislative districts. *See In re Senate Joint Resolution of Legislative Apportionment 100*, 334 So. 3d at 1289.

405. Because a "majority-minority" district is, by definition, a district in which a minority group comprises an absolute majority (more than 50%), *see Apportionment I*, 83 So. 3d at 622-23, the phrase "other historically performing minority districts" necessarily refers to districts in which the minority group does *not* comprise a majority. Indeed, the Florida Supreme Court created Benchmark CD-5 specifically to comply with the FDA's non-diminishment provision, and preserve a "historically performing minority district[]" in North Florida—even though Benchmark CD-5 did not then have a population that was majority-Black. *See Apportionment VII*, 172 So. 3d at 403-05 (noting that BVAP of Benchmark CD-5 was 46.9%).

406. Thus, the *Gingles* argument against Benchmark CD-5 was entirely baseless under existing Florida law. It was in direct contravention of the Florida Supreme Court decision creating Benchmark CD-5, as well as all analogous

federal precedent. This argument could not have provided a good-faith explanation for the Governor's actions and, in fact, he did not rely upon it in his veto message. But the mere fact that he willing to posit the argument, wholly inconsistent with his other arguments, shows a Governor grasping at pretexts to object to a Black minority district in North Florida.

* * *

407. In sum, the trial evidence showed that Governor DeSantis's contemporaneous explanations for his opposition to a Black opportunity district in Northern Florida were pretextual. They ignored or willfully misread binding case law. Their key factual predicates were either entirely absent or demonstrably false. And they were shifting and internally inconsistent, if not entirely illogical. Not only are they "unworthy of credence," *Thomas*, 645 F. App'x at 951, they cannot *possibly* have been the sole explanation for the Governor's actions—especially his irate rejection of the Legislature's Duval-only compromise.

408. Indeed, far from *refuting* the inference of racially discriminatory intent, the Governor's blatantly pretextual explanations *bolster* that inference. *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) ("The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent."); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (employer's

proffer of a pretextual explanation "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination").

409. Indeed, when taken together with the *Arlington Heights* factors, the Governor's assertion of these pretextual justifications leaves just one plausible explanation: the Governor was fixated on eliminating a Black opportunity district in North Florida from the start *because* it would have an adverse effect on Black voters, and he had his staff reverse-engineer a shifting series of meritless and contradictory legal arguments to get there.

IX. BURDEN SHIFTING

410. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). Here, the Secretary "must persuade the court, by a preponderance of the evidence, that [the Governor and the Legislature] would have arrived at the same decisions and adopted the same redistricting scheme even absent the prohibited racial motivation." *Rybicki v. State Bd. of Elections of Ill.*, 574 F. Supp. 1082, 1107-08 (N.D. Ill. 1982).

411. When determining if the defendant has met this burden, courts must be mindful that "racial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265–66. For this reason, at this stage of the

analysis, the judicial deference ordinarily accorded to legislators when evaluating their handiwork is "no longer justified." *Id*.

412. "A court assesses whether a law would have been enacted without a racially discriminatory motive by considering the substantiality of the state's proffered non-racial interest and how well the law furthers that interest." *N. C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233-34 (4th Cir. 2016); *see also Hunter*, 471 U.S. at 228-33. Stated otherwise, the court must determine "whether [non-racial] concerns were sufficiently strong to cancel out any discriminatory animus" underlying the challenged action. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 614 (2d Cir. 2016).

413. This is a demanding burden. To meet it, the defendant must show "either (1) that as a factual matter there was no other way defendants could have responded to the [] problem . . . or (2) that other factors relied on by defendant[] either in taking the actions which they did or in failing to act at various times so clearly militated in favor of the course of conduct which they took that the existence of discriminatory . . . purpose and intent could not have made a real difference in determining the ultimate course of conduct taken." *Brody-Jones v. Macchiarola*, 503 F. Supp. 1185, 1243 (E.D.N.Y. 1979).

414. The defendant cannot discharge this burden merely by showing that *some* legitimate interest could be achieved by the challenged law. *See McCrory*,

831 F.3d at 235 ("[W]e do not ask whether the State has an interest in preventing voter fraud—it does—or whether a photo ID requirement constitutes one way to serve that interest—it may—but whether the legislature would have enacted [the challenged] photo ID requirement if it had no disproportionate impact on African American voters. The record evidence establishes that it would not have.").

415. Here, the Governor's professed non-racial explanations for the Enacted Plan cannot cancel out the discriminatory motive that Plaintiffs have demonstrated. As shown above, all of the purported "race-neutral" explanations that the Governor and his staff provided for his actions were pretextual. His arguments were internally inconsistent and either entirely unsupported by, or directly contrary to, both law and fact. They cannot discharge the Secretary's burden of showing that "there was no other way" the challenged map could have been drawn, or that the "other factors relied on by [the Governor] . . . so clearly militated in favor of [his] course of conduct" that his discriminatory intent "could not have made a real difference in determining the ultimate course of conduct taken." *Brody-Jones*, 503 F. Supp. at 1243.

416. Even assuming, *arguendo*, that the Governor still would have vigorously opposed an East-West district like Benchmark CD-5 absent any discriminatory motive, he cannot possibly meet his burden of showing that he still would have opposed the Legislature's Duval-only compromise. As discussed

above, his Equal Protection arguments against an East-West CD-5 were legally unprecedented and lacked any basis in fact. But the "diminishment" argument he pivoted to once the Legislature proposed a Duval-only CD-5 was even worse. It was utterly illogical and squarely foreclosed by case law.

417. The only common throughline that explains all of the Governor's actions was the goal of eliminating a Black opportunity district in North Florida for its own sake. Defendant has not yet articulated, and cannot articulate, another theory that successfully explains this otherwise inexplicable series of events.

418. Undisputed evidence shows that, without the Governor's discriminatory intervention, the Legislature was poised to enact a map that would have maintained a Black opportunity district in North Florida. That is what the Legislature repeatedly tried to do, in passing plan after plan, until it ultimately acceded to the Governor. [PX 5062, DX98, PX 2303].

419. In sum, the record evidence establishes, by at least a preponderance of the evidence, that the Governor's successful campaign to ram the Enacted Plan through the Legislature was motivated at least in part by an intent to reduce the political power of Black voters in North Florida by preventing them from electing their candidates of choice. Defendant, meanwhile, cannot meet his demanding burden of demonstrating that the same outcome would have resulted absent any intent to discriminate against Black voters.

420. As such, the Enacted Plan violates the Fourteenth and Fifteenth Amendments.

X. CONCLUSION

421. This Court should enjoin the further use of the Enacted Plan and instruct the Legislature to draw a new congressional map free from the taint of racial discrimination.

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Respectfully submitted,

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LOCAL RULE CERTIFICATION

I hereby certify that this post-trial brief complies with the page limit set forth by the Court at the end of trial.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

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