IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CORD BYRD, et al.,

Appellants,

v.

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

Appellees.

Case No.: 1D23-2252
L.T. No.: 2022-ca-000666

UNOPPOSED MOTION TO EXCEED WORD LIMIT

Appellees request a 3,000-word enlargement of their answer brief's word limit. *See* Fla. R. App. P. 9.210(a)(2)(B). In support, Appellees state:

This case is of great public importance, as reflected by the Court's decision to hear it en banc on an expedited basis. This case further implicates complicated issues of both Florida and federal constitutional law. On top of that, Appellees must respond to two separate initial briefs (totaling 131 substantive pages and 24,153 words), which raise overlapping but distinct arguments.

To fully respond to Appellants' arguments, and to fully address the important issues raised in this case, Appellees request a modest 3,000-word enlargement of the word limit for their answer brief.

The Secretary consents to this motion for an extension of words and the Florida House and Florida Senate take no position.

WHEREFORE, Appellees respectfully request that the Court grant them leave to file the attached answer brief of no more than 16,000 words.

Dated: October 18, 2023

Respectfully Submitted,

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CERTIFICATE OF CONFERRAL

Under Florida Rule of Appellate Procedure 9.300(a), Appellees certify that they have consulted with counsel regarding this motion and can represent that the Secretary consents to this motion and the Florida House and Florida Senate take no position.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2023 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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IN THE DISTRICT COURT OF APPEAL
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Case. No. 1D23-2252
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Cord Byrd, in his official capacity as Florida Secretary of State, the Florida House of Representatives, and the Florida Senate,

***Appellants*,**
v.
Black Voters Matter Capacity Building Institute, et. al,

***Appellees*.**

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INTRODUCTION

There is no dispute that the Enacted Plan actually diminishes the electoral power of Black voters in North Florida, who were previously able to elect their candidates of choice in Congressional District 5 under last decade's Benchmark Plan but no longer have the ability to elect their preferred candidates in *any* district under the Enacted Plan. Under binding Florida Supreme Court precedent, that alone is sufficient to prove a diminishment claim under Article III, Section 20(a) of the Florida Constitution.

Rather than defend the Enacted Plan under the constitutional standard for diminishment established by the Florida Supreme Court, Appellants seek to reinvent the standard altogether. In so doing, Appellants try to shift the focus *away* from binding precedent, *away* from the trial court's factual findings, and *away* from the Enacted Plan at issue—instead pointing to *other* legal doctrines, evidence *outside* the trial court record, and Florida's *previous* congressional map. But while Appellants may choose to ignore the law and the facts that govern this appeal, this Court cannot overrule existing precedent, nor does it have a basis to disturb the trial court's well-supported—and often undisputed—factual findings.

Ultimately, Appellants' arguments are nothing more than an attempt to muddy the waters of a straightforward constitutional challenge. The trial court's holding that the Enacted Plan diminishes minority voting strength in North Florida in violation of the Florida Constitution was compelled by the stipulated facts and binding Florida Supreme Court precedent. This Court is similarly bound. Appellees respectfully request that the Court swiftly affirm the decision below.

STATEMENT OF THE CASE AND FACTS

I. FACTUAL BACKGROUND

A. The Florida Constitution protects minority voters from redistricting plans that diminish their ability to elect their candidates of choice.

In 2010, an overwhelming majority of Floridians voted to enshrine the Fair Districts Amendments in the Florida Constitution, establishing new standards for congressional and state legislative redistricting. Pursuant to those Amendments, Article III, Section 20(a) states, in relevant part: "[Congressional] districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." The Florida Supreme Court has recognized that this provision

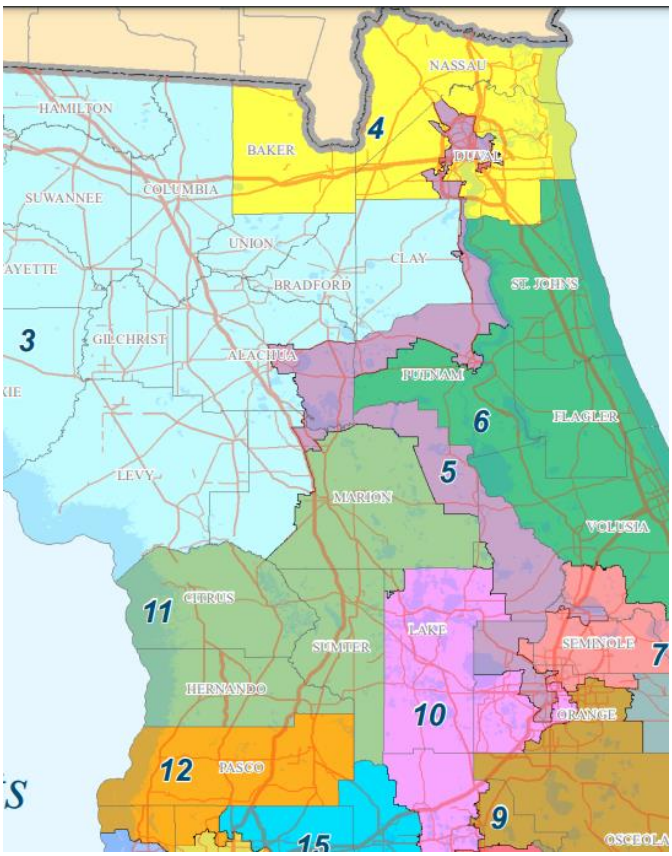
contains two separate requirements borrowed from the federal Voting Rights Act (VRA): non-dilution and non-diminishment. *See In re S. J. Res. of Legis. Apportionment 1176* ("*Apportionment I*"), 83 So. 3d 597, 619 (Fla. 2012).

The "non-diminishment provision" prohibits mapmakers 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." *Id.* at 625. To evaluate a diminishment claim, courts must evaluate minority voting strength in the new plan as compared to the previous "benchmark" plan. *Id.* at 624-25.

B. The Florida Supreme Court ordered the adoption of Benchmark CD-5 in 2015 after finding the previous district did not comply with the Florida Constitution.

In the last redistricting cycle, several plaintiffs challenged the state's 2012-enacted CD-5, alleging that the Legislature packed Black voters into a single district to gain a partisan advantage in the rest of the region. As the trial court explained at the time, the challenged district "is visually not compact, bizarrely shaped, and does not follow traditional political boundaries as it winds from Jacksonville to Orlando," narrowing at one point to the "width of Highway

17." *Romo v. Detzner*, No. 2012-CA-000412, 2014 WL 3797315, at *9 (Fla. Cir. Ct. July 10, 2014). An image of the district appears below. R. 8369.



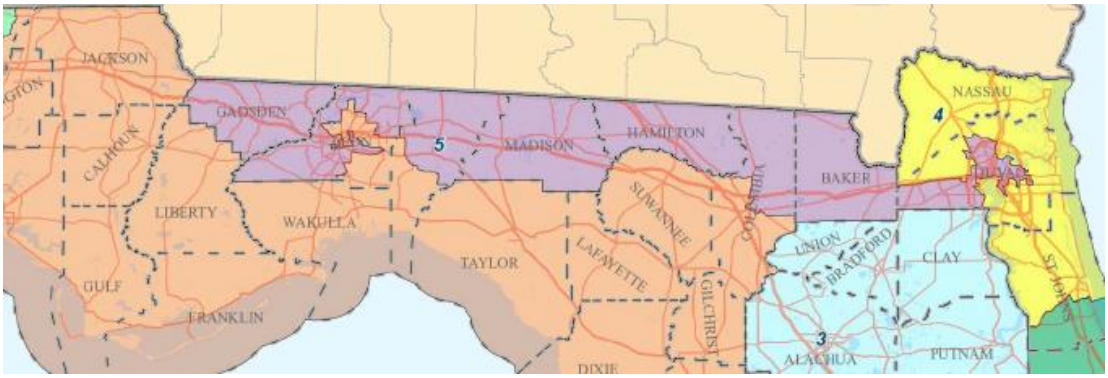
At the time, the Legislature justified the shape of CD-5 as necessary to increase the Black voting age population (BVAP) above 50% to comply with the Florida Constitution. *See Romo*, 2014 WL 3797315, at *9. As the trial court explained, however, the district did not need 50% BVAP to comply with the non-diminishment provision: the previous district had been a "plurality BVAP district," and the

district could continue to elect a Black candidate of choice as such. *See id.* at *9-10.

In *League of Women Voters of Florida v. Detzner* ("*LWV I*"), 172 So. 3d 363 (Fla. 2015), the Florida Supreme Court affirmed the trial court's findings as to CD-5 and ordered the new CD-5 (now "Benchmark CD-5") to be drawn in an East-West configuration from Tallahassee to Jacksonville across Florida's northern border. *Id.* at 403. Rather than mandate any specific racial composition of the district, the Florida Supreme Court "le[ft] it to the Legislature to redraw the district based on the guidance the Court provided." *League of Women Voters of Fla. v. Detzner* ("*LWV II*"), 179 So. 3d 258, 271 (Fla. 2015). During the remedial special session, "[b]oth the Senate and the House . . . adopted the East-West version of District 5" known as Benchmark CD-5 today. *Id.* at 272. At the time of its adoption, Benchmark CD-5 had a BVAP of 45.12%. *LWV I*, 172 So. 3d at 404. As the Florida Supreme Court observed, the district complied with the non-diminishment provision of the Florida Constitution by preserving a historically performing Black district, remedied the partisan violations in the previous plan, and was "more visually and statistically compact" than its predecessor. *LWV II*, 179 So. 3d at 272; *see*

also LWV I, 172 So. 3d at 406 (citing improved compactness scores and "fewer incorporated city and county splits than the Legislature's North-South district").

Benchmark CD-5 was in place during the 2016, 2018, and 2020 congressional election cycles. An image of Benchmark CD-5—"drawn by legislative staff, passed by both the House and Senate," and approved by the Florida Supreme Court, *LWV II*, 179 So. 3d at 272—is shown below. *See* R. 8041.



C. At the Governor's urging, Florida's new redistricting plan eliminated this historically performing minority district.

During the 2020 redistricting cycle, the Legislature reaffirmed the Florida Supreme Court's determination that Benchmark CD-5 performed for Black voters in North Florida and proposed new configurations which the Legislature concluded would preserve Black voters' ability to elect their candidate of choice. R. 8463-8467.

Governor DeSantis, however, wanted to eliminate Benchmark CD-5 and sought the Florida Supreme Court's blessing to do so. On February 1, 2022, the Governor submitted a request for an advisory opinion on whether "the Florida Constitution's non-diminishment standard" required a district from to Jacksonville to Tallahassee which allowed Black voters to elect the candidates of their choice, "even without a majority." R. 8578-8583. In that letter, he acknowledged that existing Florida Supreme Court precedent "suggest[s] that the answer is 'yes.'" R. 8581.

On February 10, 2022, the Florida Supreme Court denied the Governor's request, declining to either revisit its precedent or authorize the Governor to eliminate a historically performing district in North Florida. *See Advisory Op. to Governor re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1108 (Fla. 2022).

In March 2022, responding to continuing threats from the Governor's Office to veto plans retaining a district resembling Benchmark CD-5, the Legislature passed a redistricting plan that contained both a "Primary Map" (Plan 8019) and a "Secondary Map" (Plan 8015) with two different configurations of CD-5, both of which the Legislature

maintained would comply with the non-diminishment provision. *See generally* R. 8748-8764. The Primary Map (Plan 8019) configured CD-5 to include only portions of Duval County. *See* R. 8757. As the House Redistricting Chair explained, this version of CD-5 was "very visually different than the benchmark district" but the Legislature's functional analysis had concluded it was still a "reliable performing district." R. 9056. The Secondary Map (Plan 8015) retained the basic East-West configuration of CD-5, while making marked improvements on the district's visual compactness and political subdivision splits as compared to Benchmark CD-5. *See* R. 8749; *see also infra* Argument III(C)(3) (comparing plans).

The Governor vetoed both redistricting plans and called a special session. On April 21, 2022, the Legislature passed a redistricting plan submitted by the Governor's Office, which is shown below. *See* R. 8050.

The Enacted Plan eliminates the Benchmark configuration of CD-5 and disperses Benchmark CD-5's hundreds of thousands of Black voters between newly-enacted CD-2, CD-3, CD-4, and CD-5. None of these districts are districts in which Black voters are able to elect their candidates of choice. *See* R. 8036-8037.

II. PROCEDURAL HISTORY

A. At the temporary injunction stage, Appellees prevailed on the merits of their diminishment claim but could not secure a new district in time for the 2022 election.

The same day Governor DeSantis signed his map into law, Plaintiffs, now Appellees—Black Voters Matter Capacity Building Institute, Inc., the League of Women Voters of Florida, Inc., the League of Women Voters of Florida Education Fund, Inc., Equal Ground Education Fund, Florida Rising Together, and individual Florida voters, including several Black voters from Benchmark CD-5—sued Appellants Cord Byrd, in his official capacity as Secretary of State, the Florida House of Representatives, and the Florida Senate, alleging that the Enacted Plan violates the Florida Constitution. *See* R. 2677-2687.

While Appellees alleged multiple violations of the Florida Constitution, in April 2022 they sought a temporary injunction against

the Enacted Plan exclusively on the basis that it resulted in the diminishment of Black voters' ability to elect their candidate of choice in North Florida, in violation of Article III, Section 20(a). *See generally* R. 336-361.

In May 2022, Judge J. Layne Smith held an evidentiary hearing, heard expert testimony, and ultimately concluded Appellees had "demonstrated the Enacted Plan will result in diminishment of Black voters' ability to elect their candidate of choice." *Black Voters Matter Capacity Bldg. Inst.*, No. 2022-ca-000666, 2022 WL 1684950 (Fla. Cir. Ct. June 17, 2022); R. 1168. Judge Smith further found that a temporary injunction would be in the public interest, *id.* at *8-9; R. 1177-1180, and ordered the adoption of a remedial map to go into effect for the 2022 elections, *id.* at *9-10; R. 1180-1181.

Soon thereafter, upon Appellants' request, this Court issued a preliminary order staying the trial court's temporary injunction. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070 (Fla. 1st DCA 2022), *writ denied*, 340 So. 3d 475 (Fla. 2022). It did so not on the merits of Judge Smith's decision, but because it concluded that Judge Smith erred procedurally in ordering a new redistricting plan in a temporary injunction proceeding. *Id.* at 1073, 1082-83. As

this Court explained, it "could not reach whether [the Enacted Plan] comports with [the Fair Districts Amendment]" because there had been "no final adjudication." *Id.* at 1073. Appellees sought review in the Florida Supreme Court, but that Court declined to issue a constitutional writ, again without addressing any of the merits of Appellees' claim. *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, 340 So. 3d 475 (Fla. 2022). This Court ultimately vacated the trial court's temporary injunction for the same reasons it had previously stayed it. *Byrd v. Black Voters Matter Capacity Bldg. Inst.*, 340 So. 3d 569, 571 (1st DCA 2022).

B. The Parties stipulated to facts regarding diminishment and streamlined the issues for the trial court's consideration.

Following the temporary injunction proceedings, the Parties exchanged discovery and expert reports, conducted depositions, and filed summary judgment motions. In advance of the summary judgment hearing, however, the Parties reached a stipulation to streamline the issues for the trial court's consideration. The joint stipulation limited the case to Appellees' diminishment claim in North Florida and stipulated "to the facts relevant to [Appellees'] diminishment claim" under the Florida Constitution. R. 8034-8037. Appellants also

stipulated that Appellees had standing to challenge the alleged diminishment in the Enacted Plan in North Florida and withdrew several of their affirmative defenses. *See* R. 8026.

In light of this joint stipulation, the Parties agreed that trial should be vacated. R. 8058. The trial court accordingly limited its analysis to the facts and exhibits stipulated by the parties, R. 8033-8057, and a handful of records over which the court took judicial notice, R. 12505.[1]

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[1] The trial court took judicial notice of only four additional pieces of evidence: Florida's Congressional Districts from 2002-2012, R. 8041-8048; the Governor's Advisory Request to the Florida Supreme Court, R. 8578-8583; the transcript of the House Redistricting Committee meeting from February 25, 2022, R. 9027-9223; and the Summary of CS/SB 102 (Establishing Congressional Districts of the State), as prepared by the Committee on Reapportionment, R. 8748-8764. And while the Parties agreed that they could rely on certain data available on floridaredistricting.gov, R. 8034, the trial court declined to "go searching and rummage through" the state's redistricting website, in part to avoid creating an unwieldy record on appeal. R. 12129. Accordingly, the court declined to consider any "external manipulation" of this data and granted Appellees' motion to strike the racial population "heat maps" now included in the Secretary's Brief at 14. R. 12464-12465. As the trial court explained, those heat maps "should have been done through expert testimony subject to cross-examination," which Appellants elected not to proffer through the Stipulation. On appeal, Appellants extensively and improperly rely on evidence the court declined to take judicial notice of and affirmatively struck from the record. Appellees' brief, meanwhile, relies only on facts from

Specifically, the Parties stipulated, and the trial court found, that while Black voters in Benchmark CD-5 "had the ability to elect the candidate of their choice," "[n]one of the Enacted districts in North Florida are districts in which Black voters have the ability to elect their preferred candidates." R. 8036-37. These factual findings were compelled by the undisputed demographic and electoral data. *Compare, e.g.*, R. 8035 ("In Florida's eight statewide elections in 2016, 2018, and 2020, the Black preferred candidates won a majority of the vote in Benchmark CD-5 in each election."), *with* R. 8037 ("In the 2016, 2018, and 2020 statewide elections, candidates preferred by Black voters failed to win a majority of votes in any of the four Enacted CDs that took parts of Benchmark CD-5."). As the Parties and the Court recognized, "[u]nder the Enacted Plan in 2022, North Florida did not elect a Black member of Congress for the first time since 1990." R. 8037.

The Parties' Stipulation also identified several outstanding legal issues: whether the preconditions in *Thornburg v. Gingles*, 478 U.S.

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the Parties' Stipulation or from documents over which the trial court specifically took judicial notice.

30 (1986), apply to the non-diminishment provision, whether Appellants proved their remaining affirmative defenses (that is, whether the non-diminishment provision violates the Equal Protection Clause to the U.S. Constitution either facially or as applied to North Florida), and whether the public official standing doctrine bars the Appellants' affirmative defenses. *See* R. 8027.

C. The trial court concluded that the Enacted Plan violates the Florida Constitution and rejected Appellants' affirmative defenses.

The trial court heard argument on these issues on August 24, 2023. At the hearing, the Legislative Appellants conceded that the Enacted Plan results in diminishment in violation of the Florida Constitution. R. 12483-12484 (Senate counsel conceding, "[A]s compared to the Benchmark CD-5, the Enacted Map does not have a district that satisfies the nondiminishment requirement" and House counsel conceding same).

After reviewing the Parties' arguments, stipulations, and taking judicial notice of certain documents, the trial court issued a written order entering judgment for Appellees on all remaining legal issues. First, applying the non-diminishment standard established by the Florida Supreme Court in *Apportionment I*, the trial court found that

Appellees had standing to challenge the diminishment in the Enacted Plan and held that "[u]nder the stipulated facts, [Appellees] have shown that the Enacted Plan results in the diminishment of Black voters' ability to elect their candidate of choice in violation of the Florida Constitution." R. 12475, 12479. The court further rejected the Secretary's novel argument that the *Gingles* preconditions in *Gingles* apply to the non-diminishment claims, explaining that this argument "ha[s] no basis under either federal precedent or Florida Supreme Court precedent." R. 12484.

Second, the trial court held that Appellants' "racial gerrymandering affirmative defense [] fails at every level, for multiple, independent reasons," including because "there [is] no specific district under which [the trial court] could evaluate whether racial gerrymandering occurred," and Appellants "lack standing to raise a racial gerrymandering challenge in the first place." R. 12493. Third, the trial court found that even if Appellants had cleared these hurdles, they did not prove—through direct or circumstantial evidence—that race would necessarily predominate in the drawing of any district that complies with the Florida Constitution's non-diminishment provision in North Florida. R. 12501-12508. Finally, the trial court concluded:

> Even *if* [Appellants] had standing to bring a racial gerrymandering challenge, and *even if* they could bring that challenge to a district that does not exist, *and even if* the lines of that district were predominantly drawn on the basis of race, [Appellants'] claim would still fail because the drawing of such a district would be narrowly tailored to address a compelling state interest.

R. 12508-12509.

In light of these conclusions, the trial court declared the Enacted Plan unconstitutional under the Florida Constitution, Article III, Section 20; enjoined the Secretary from conducting any elections under the Enacted Plan; and afforded the Legislature the opportunity to enact a remedial plan in compliance with the Florida Constitution. R. 12519-12520.

SUMMARY OF ARGUMENT

As two courts have already found based on binding Florida Supreme Court precedent, the Enacted Plan diminishes the electoral power of Black voters in North Florida in violation of the Florida Constitution.

Rather than dispute liability under the Florida Constitution based on existing law, Appellants attempt to avoid liability by remaking the law through a series of novel legal arguments, none of which has merit. The Secretary's contention that only majority-Black

districts are protected from diminishment is foreclosed by Florida Supreme Court precedent setting forth the legal standard for diminishment claims and belied by the Legislature's application of the non-diminishment standard when drawing and defending legislative districts. Nor does the diminishment standard require plaintiffs to proffer a remedial district proven to comport with both the Florida Constitution and the U.S. Constitution, and even if it did, Appellees *have* identified such a version of CD-5 here. This Court should also reject Appellants' invitation to review the constitutionality of Benchmark CD-5—a district that was never challenged when it was in effect and has since been replaced. Appellants failed to preserve that issue and are procedurally barred from advancing it now.

Appellants also offer no basis to disturb the trial court's conclusion that their Equal Protection Clause affirmative defenses fail several times over. As the trial court correctly concluded, Appellants bear the burden to prove their affirmative defenses, and they cannot prove a racial gerrymandering claim in the absence of a specific electoral district. Even if they could, Appellants' affirmative defenses are barred by the public official standing doctrine, and as government entities being sued in their official capacities, they have not—and

cannot—demonstrate that they have suffered any personal harm sufficient to confer standing. Moreover, the trial court correctly found that Appellants failed to prove either that race predominated in the ever-shifting districts they challenge or that the Florida Constitution would *require* race to predominate in any district that complies with the Florida Constitution's non-diminishment provision. Finally, even if Appellants had proven that race would necessarily predominate in *any* remedial district, a district that remedies the Enacted Plan's diminishment would be narrowly tailored to serve a compelling interest and, therefore, passes constitutional muster.

Despite their many attempts to escape liability for diminishing Black voters' ability to elect candidates of their choice in North Florida, Appellants' arguments fail at every turn and should be rejected. The undisputed facts and unwavering Supreme Court precedent compel affirmance of the trial court's decision.

STANDARD OF REVIEW

In reviewing redistricting challenges, an appellate court must "uphold the trial court's factual findings so long as these findings are supported by competent, substantial evidence." *LWV II*, 179 So. 3d at 271; *see also Cooper v. Harris*, 581 U.S. 285, 293 (2017)

(explaining that "findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error"). The trial court's application of law is reviewed *de novo*. *Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011).

Moreover, "when a case is tried upon stipulated facts the stipulation is binding not only upon the parties but also upon the trial and appellate courts" and "no other or different facts will be presumed to exist." *Troup v. Bird*, 53 So. 2d 717, 721 (Fla. 1951); *see also Delgado v. AHCA*, 237 So. 3d 432, 436-37 (Fla. 1st DCA 2018) ("wholeheartedly endors[ing]" this "enduring principle" regarding pretrial stipulations). An appellate court's concern is "simply to determine whether the trial court properly applied the law to the stipulated facts." *Trumbull Chevrolet Sales Co. v. Seawright*, 134 So. 2d 829, 835 (Fla. 1st DCA 1961).

ARGUMENT

I. The trial court properly concluded that the Enacted Plan violates the non-diminishment provision of the Florida Constitution.

The central question of this case is straightforward: Does the Enacted Plan violate the non-diminishment provision? Because the law and the facts point in only one direction, this Court's job is

simple. And because this Court does not have the power to overturn Florida Supreme Court precedent, Appellants' attempts to remake the law on non-diminishment are not for this Court to entertain.

A. The Parties' stipulations establish a textbook diminishment violation.

The trial court's holding on Appellees' only remaining claim is clear-cut: Based on the Parties' stipulated facts, and as Legislative Appellants conceded, the Enacted Plan presents a straightforward diminishment violation. R. 12542-12547.

The non-diminishment provision bars the State from adopting redistricting plans "that have the purpose of *or will have the effect of* diminishing the ability of any citizens on account of race or color to elect their preferred candidates of choice." *Apportionment I*, 83 So. 3d at 620 (cleaned up) (emphasis added). This means "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." *Id.* at 625. The non-diminishment standard accordingly calls for a comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is

measured." *Id.* at 624. And whether a minority group's voting power has been diminished is determined by a "functional analysis" of "whether a district is likely to perform for minority candidates of choice." *Id.* at 625.

Appellants do not dispute that Benchmark CD-5 was a district in which Black voters were able to elect their candidate of choice. R. 12481-12482. And Appellants do not dispute that the Enacted Plan contains no district in North Florida that allows Black voters to elect their candidate of choice. R. 12482-12483. As a result, Appellants do not dispute that the Enacted Plan "actually diminish[es]" Black voters' ability to elect their preferred candidates by "eliminat[ing]" a "historically performing minority district." *Apportionment I*, 83 So. 3d at 625.

Applying the unambiguous legal standard for diminishment claims to these undisputed facts, the trial court correctly concluded that the Enacted Plan violated Article III, Section 20(a) of the Florida Constitution. This Court should affirm.

B. The trial court properly rejected the Secretary's attempt to graft the *Gingles* preconditions onto Florida's non-diminishment standard.

As the trial court correctly explained, the Secretary's attempt to apply the *Gingles* criteria to the non-diminishment provision is "inconsistent with Florida Supreme Court precedent" and improperly "conflates Florida's *non-diminishment* provision with Florida's *non-dilution* provision." R. 12480, 12484-12489. This Court should likewise reject the Secretary's invitation to re-write the non-diminishment standard.

As the Florida Supreme Court has explained, Florida's non-dilution provision "is essentially a restatement of Section 2 of the [VRA]," *Apportionment I*, 83 So. 3d at 619, while the non-diminishment provision reflects Section 5 of the VRA, *see id.* at 620. 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 is guided by prevailing United States Supreme Court precedent." *Id.* at 619-20.

Both the Florida Supreme Court and the U.S. Supreme Court consider dilution claims and diminishment claims to respond to different conditions and to impose different requirements. Simply put, the non-dilution provision requires the creation of a *new* majority-minority district; such districts are required only where a plaintiff

can establish the preconditions identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), 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 states to affirmatively create new minority districts; it simply protects against backsliding in *existing* districts where a minority group has the ability to elect their candidate of choice. *See Apportionment I*, 83 So. 3d at 619-20. The non-diminishment standard "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015). Instead, it requires the state to "maintain a minority's ability to elect a preferred candidate of choice" in any new redistricting plan, which the state should accomplish by conducting "a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 275-76 (citation omitted); *see also LWV I,* 172 So. 3d at 405-06 (reciting standard).

Under the test established by the Florida Supreme Court, in determining whether a previously-existing district "performs" for the

minority group's candidate of choice—and is therefore protected from diminishment—one considers (1) "whether the minority group votes cohesively," (2) "whether the minority candidate of choice is likely to prevail in the relevant contested party primary," and (3) "whether that candidate is likely to prevail in the general election." *LWV II*, 179 So. 3d at 287 n.11; *see also* R. 8035 (stipulating to all three factors here). This three-part test for non-diminishment is plainly different from the three-part test for dilution under *Gingles,* which considers (1) numerosity (50%) and compactness, (2) minority voting cohesion, and (3) racial polarization. *See Apportionment I*, 83 So. 3d at 622 (*citing Gingles*, 478 U.S. at 50).

Consistent with its non-diminishment test, the Florida Supreme Court has never required that the relevant minority group constitute 50% of the voting age population of the district at issue 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). Because a "majority-minority" district is, by definition, a district in

which a minority group comprises a numerical majority (50%) of the voting age population, *see id.* at 622-23, "other historically performing minority districts" necessarily refers to districts in which the minority group does *not* comprise 50%. Indeed, in the last redistricting cycle, the Florida Supreme Court determined that Benchmark CD-5's predecessor—with a 46.9% BVAP—was a Black ability-to-elect district protected under the Florida Constitution's non-diminishment provision. *See LWV I*, 172 So. 3d at 403-05.

The Secretary's brief neither addresses the Florida Supreme Court's prior application of the non-diminishment provision (which has not applied the *Gingles* preconditions) nor grapples with the actual three-part test for diminishment claims that the Florida Supreme Court articulated in *LWV II*. Instead, the Secretary's argument relies on (1) the unremarkable observation that both the non-dilution provision and non-diminishment provision appear in the same sentence of the Florida Constitution, and (2) a single footnote from the Florida Supreme Court in which it stated that the *Gingles* preconditions are "relevant" to a Section 5 analysis. *See LWV II*, 179 So. 3d at 286 n.11. The Florida Supreme Court has already addressed—and rejected—the first contention regarding the text of the Florida

Constitution. *Apportionment I*, 83 So. 3d at 619-20 (recognizing both provisions as "dual constitutional imperatives" which impose separate requirements). And in stating that the *Gingles* preconditions were "relevant" to a Section 5 retrogression analysis, the Florida Supreme Court referred specifically to the cohesiveness factor—not to any numerosity (50%) or compactness requirement. *See LWV II*, 179 So. 3d at 286 n.11.[2]

Notably, the Secretary stands alone in his attempt to apply the *Gingles* preconditions to the non-diminishment legal standard. Just last year, the Florida House argued to the Florida Supreme Court that any "suggest[ion] that the non-diminishment standard incorporates . . . the *Gingles* prerequisites" would directly conflict with U.S. Supreme Court precedent and would eliminate "the line between vote dilution (section 2) and non-diminishment (section 5)." R. 7885; *see also id.* R. 7878-79. Consistent with this position, the House and Senate collectively protected fifteen legislative districts with BVAPs under 50% under Florida's non-diminishment standard in the 2022

[2] Appellants have stipulated that Black voters were cohesive in Benchmark CD-5 and that voting is racially polarized in the district. *See* R. 8035.

redistricting cycle. *See* R. 7882 (11 House districts); R. 7968 (4 Senate districts). The Florida Supreme Court held that both chambers complied with the non-diminishment provision in approving these districts. *See In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d 1282, 1289-90 (Fla. 2022).

Throughout the congressional redistricting process, too, the Legislature understood that Benchmark CD-5 was entitled to protection under the non-diminishment provision. *See supra* Background I(C). The Governor similarly understood that Benchmark CD-5 was protected from diminishment under existing law, as he recognized in his Advisory Request to the Florida Supreme Court. *See id.* at 8578-8583 (asking whether the Florida Constitution required that Black voters maintain an ability to elect preferred candidates in North Florida "even without a majority" and acknowledging that existing precedent "suggest[s] that the answer is 'yes'").

The Secretary's attempt to apply the *Gingles* preconditions to diminishment claims is thus nothing more than an afterthought to avoid the trial court's plain application of binding Florida Supreme Court precedent to the undisputed facts.

C. The non-diminishment standard does not require proof of a remedial district to establish liability.

Although Legislative Appellants concede that Appellees proved a violation of Florida's non-diminishment provision, *see, e.g.*, Leg. Br. at 32, they nonetheless argue Appellees bear a further burden to affirmatively put forward a remedial district before they can prevail on their claim. This supposed requirement finds no support in the caselaw.

The Florida Supreme Court has established a relatively simple test to prove diminishment: a showing that a district which previously afforded minority voters the ability to elect their candidate of choice no longer does so. *Apportionment I*, 83 So. 3d at 620, 624-25. This requires examination and comparison of two maps: the Benchmark Plan and the Enacted Plan. *Id.* at 624-25. It does not require plaintiffs to identify and defend a hypothetical remedial map to establish liability.

In sharp contrast to the non-diminishment standard at issue here, Section 2 (non-dilution) plaintiffs *are* required to provide evidence of an alternative map as an express element of the Section 2 test. *See Gingles*, 478 U.S. at 46-51; *see also Allen v. Milligan*, 599

U.S. 1, 19-20 (2023) (defining illustrative plans as "example districting maps" that plaintiffs must adduce as part of the "first *Gingles* precondition"). This requirement makes sense: Section 2 claims seek the creation of *new* opportunity districts that have not previously existed and those plaintiffs must therefore demonstrate that such a district can be drawn. In this way, Section 2 claims are not at all "analogous" to Section 5 claims which protect *existing* districts contained in existing maps, as the Legislature suggests. Leg. Br. at 39. This Court should therefore disregard the Section 2 cases the Legislature cites for the principle that plaintiffs must put forward evidence of a remedial district as part of their prima facie case. *See* Leg. Br. at 38-39. As discussed above, *supra* Argument I(B), Section 2 offers no insight into the non-diminishment requirements already laid out by the Florida Supreme Court.

Legislative Appellants' Florida-specific precedent fares no better. Although it is true that the Florida Supreme Court frequently considered alternative plans in the last redistricting cycle, *see* Leg. Br. at 34-36, the Court was explicit about the role alternative plans played: "The Court permitted alternative plans because alternative plans may be offered as relevant proof that the Legislature's

apportionment plans consist of district configurations that are not explained other than by the Legislature considering impermissible factors, such as intentionally favoring a political party or an incumbent." *Apportionment I*, 83 So. 3d at 611. In other words, the Florida Supreme Court treated alternative plans as evidence of the Legislature's unlawful intent, and even then, the Court described alternative plans merely as something courts "*may*" review to the extent helpful. *Id.* (emphasis added). Here, by contrast, Appellees have voluntarily dismissed their intent claims, R. 8026, and the only claim remaining is whether the Enacted Plan *results* in unlawful diminishment in North Florida, R. 2709. Appellants can point to no precedent or principle that would transform an evidentiary tool that *may* be used for intent claims into a mandatory prerequisite for a results-based claim.

Finally, even if Appellees were required to provide evidence of a lawful remedial district, they have done so here. Plan 8015, passed by the Legislature and vetoed by the Governor, includes a remedial version of CD-5 which the trial court found complies with traditional redistricting criteria just as well—and sometimes better—than both the Enacted Plan and Benchmark CD-5, which the Florida Supreme Court blessed last cycle. R. 12567-12571. On this record, and for the

reasons discussed in more detail below, there is simply no basis to conclude that Plan 8015 would not be a lawful remedy. *See infra* Argument III(C)(3).

II. Benchmark CD-5's constitutionality is not properly before this Court.

Although Appellants did not preserve this issue for appeal, Appellants challenge the constitutionality of Benchmark CD-5 and contend that it cannot serve as the baseline to measure diminishment. *See* Sec'y Br. at 25-35; Leg. Br. at 48-52 (arguing that race predominated in the drawing of Benchmark CD-5). Appellants are procedurally barred from raising these arguments at this late stage. But even if they were not, their attempt to evade the diminishment standard by attacking a district that is no longer in effect and was never declared unconstitutional fails as a matter of law.

A. Appellants are procedurally barred from challenging Benchmark CD-5's constitutionality.

Appellate courts do not entertain issues on appeal that were not preserved at the trial court. *Holland v. Cheney Bros., Inc.*, 22 So. 3d 648, 649-50 (Fla. 1st DCA 2009). Under the "[t]raditional rules of preservation of issues," an issue "must be presented to the lower court" if it is to be preserved, "and the specific legal argument or

ground to be argued on appeal must be part of that presentation." *Id.* "It is the function of the appellate court to review errors allegedly committed by the trial court," not to entertain issues "which the complaining party could have and should have, but did not, present to the trial court." *Hernandez v. Kissimmee Police Dep't*, 901 So. 2d 420, 421 (Fla. 5th DCA 2005).

Appellants first abandoned any question as to Benchmark CD-5's constitutionality through the Parties' Stipulation. That Stipulation, which was submitted "to narrow the issues before the [trial court]," R. 8026, identified a single legal question (Question #1) for the trial court to determine related to Appellees' affirmative diminishment claim: "Whether [Appellees] must satisfy the preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for the non-diminishment provision to apply." R. 8027. Appellants further conceded that "if the non-diminishment standard applies to North Florida (Question #1)"—that is, if the *Gingles* preconditions do not apply to a diminishment claim—then Appellees had shown that there was no Black-performing district where there previously was, the essence of a diminishment claim. R. 8027. In support of that conclusion, which the trial court independently verified, R. 12488-12489, the Parties stipulated

to a host of "facts relevant to [Appellees'] diminishment claim" comparing Benchmark CD-5 to the newly enacted districts in North Florida. R. 8026; *see also* 8034-8037 (stipulating facts for Benchmark CD-5). Indeed, the stipulated facts specifically referred to the "districts used for the 2016-2020 congressional elections" as the "Benchmark Plan." R. 8034-8035. Appellants cannot now turn around and contend that the district described in the "facts relevant to [Appellees'] diminishment claim" is in fact irrelevant to evaluating diminishment.

Appellants went even further during the merits hearing before the trial court, affirmatively disclaiming any challenge to the Benchmark Plan. After Appellants repeatedly criticized Benchmark CD-5 in that hearing, counsel for the Secretary and the trial court engaged in the following colloquy:

> **MR JAZIL**: As you can see, Your Honor, with surgical precision, the Benchmark District captures Black population in Duval; with surgical precision, it captures the Black population in Leon.
>
> **THE COURT**: Well, let me ask you this. Are you challenging the map that is -- was the law in the State of Florida? Are we looking back and you challenging what the Supreme Court did prior?
>
> **MR. JAZIL**: ***Your Honor, I am not.***

R. 12127 (emphasis added); *but see* Sec'y Br. at 1-2, 24-35 (arguing Benchmark CD-5 is unconstitutional and that the Equal Protection Clause "invalidates [Appellees'] proffered benchmark map"). Counsel for the House, for his part, agreed that the trial court did not need to address Benchmark CD-5's constitutionality. *See* R. 12185-12186 (trial court repeatedly asking counsel for the House, "[A]re you asking me to say that the Florida Supreme Court violated the U.S. Constitution back in the prior redistricting cycle?" and Mr. Bardos repeatedly responding, "I don't think the Court has to address that directly"). Counsel for the Senate went even further, explaining that the Senate "did not presume that the Benchmark District violated the Equal Protection Clause" but instead "took the Benchmark District as a premise, accepted it and tried to draw a district in a new map, accounting for the 2020 census, that accomplished nondiminishment as compared to that." R. 12241; *but see* Leg. Br. at 48-52 (now arguing Benchmark CD-5 is a racial gerrymander). Indeed, the Legislative Appellants' newfound challenge to the constitutionality of Benchmark CD-5 is not only inconsistent with their representations to the trial court but also particularly misplaced in light of their concession before *this* Court that "the Enacted Plan does not contain a

congressional district in North Florida that would satisfy the Florida Constitution's non-diminishment provision with respect to Benchmark District 5." Leg. Br. at 32.

Even if Appellants had not waived their challenge to the Benchmark Plan in *this* litigation, the doctrine of res judicata precludes their challenge now given their failure to contest the constitutionality of the Benchmark Plan when it was developed and adopted last cycle. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) ("[R]es judicata bars relitigation in a subsequent cause of action not only of claims raised, but also [of] claims that could have been raised."); *see also Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013) ("[R]es judicata prevents the same parties from relitigating the same cause of action in a second lawsuit and is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to *every other matter which might with propriety have been litigated and determined* in that action." (quotations omitted) (emphasis in original)). Each of the Appellants in this case—Florida's Secretary of State, the Florida House, and the Florida Senate—was a party to last decade's congressional redistricting litigation, *see, e.g.*, *League of Women Voters of Fla. v. Detzner*, 178 So. 3d 6, 6 (Fla. 1st

DCA 2014) (listing all Defendants), yet no party challenged Benchmark CD-5 when it was drawn or while it was in effect. To the contrary, Benchmark CD-5 was "drawn by legislative staff [and] passed by both the House and the Senate," and "none of the parties in th[e] case"—including all three Appellants here—"object[ed] to" its adoption. *LWV II*, 179 So. 3d at 272-73.

Relatedly, the principle of finality also dictates that Appellants cannot revisit the validity of the Benchmark Plan, which all parties and the public relied upon after it was implemented by the Florida Supreme Court. *Fla. Power Corp. v. Garcia*, 780 So. 2d 34, 44 (Fla. 2001) ("[T]here must be a 'terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues therein.'" (quoting *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979)); *see also Paylan v. Dep't of Health*, 226 So. 3d 296, 299 (Fla. 2d DCA 2017) ("The [finality] doctrine is applied where there are common facts and issues presented in different proceedings and there has not been a significant change in circumstances."). As discussed, the Legislature *itself* adopted the district at issue when it was given the opportunity to remedy constitutional

violations in the 2012 congressional plan. *See supra* Background I(B). And as the Senate acknowledged before the trial court, the Legislature considered Benchmark CD-5 to be the benchmark for purposes of analyzing compliance with the Fair Districts Amendments during the 2021 redistricting cycle. *See supra* Background II(C).

For all of these reasons, this Court should decline to consider Appellants' belated arguments concerning the constitutionality of the Benchmark Plan.

B. Benchmark CD-5 is the benchmark district as a matter of law.

In any event, the Secretary's argument that Benchmark CD-5 cannot serve as the benchmark to measure diminishment fails as a matter of law. "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 v. McConnell*, 201 F. Supp. 2d 618, 644 (D.S.C. 2002), opinion clarified (Apr. 18, 2002) (citing 28 C.F.R. § 51.54(b)(1) and *Holder v. Hall*, 512 U.S. 874, 883-884 (1994)); *see also LWV I*, 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. *See,*

e.g., *Texas v. U.S.*, 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. Civ.A.1:02-CV1111WB, 2002 WL 32587313, at *5-*6 (N.D. Ga. May 29, 2002) (same).

There is no dispute that the Benchmark Plan was the last legally enforceable congressional plan used in Florida. *See* R. 8034 (stipulation describing the Benchmark Plan as the "districts used for the 2016-2020 congressional elections"). Because courts presume the previous map is the appropriate benchmark unless the district has been "formally declared" unconstitutional, which it has not here, Benchmark CD-5 remains a valid benchmark today. *See McConnell*, 201 F. Supp. 2d at 644. None of the guidance the Secretary cites, Sec'y Br. at 45, supports the opposite proposition. *See DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*; Notice, 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)); *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."). The Section 2 cases the Secretary cites, Sec'y Br. at 45, similarly miss the mark, as none involved the question of a benchmark plan to measure diminishment.

Appellants notably do not identify which district they now believe *should* be the proper benchmark for measuring diminishment. It cannot be the Legislature's 2012-enacted District 5, as that district *was* formally invalidated in the last redistricting cycle. *See supra* Background I(B). To the extent Appellants contend the Court should look further back to Florida's 2002 enacted congressional plan, that map also contained a historically performing Black district. *See LWV I*, 172 So. 3d at 385 (Court "noting that the BVAP of the 2002 version of District 5 was 'only' 46.9%, but that the district 'will afford black voters a reasonable opportunity to elect candidates of choice and probably will in fact perform for black candidates of choice'") (quoting *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1307 (S.D. Fla. 2002)). No matter which benchmark is at issue, the Enacted Plan eliminates a historically performing Black district and thus violates the non-diminishment provision.

III. Appellants have not proven their Equal Protection Clause affirmative defenses.

The trial court was correct to conclude that the Appellants' "racial gerrymandering affirmative defense [] fails at every level, for multiple, independent reasons." R. 12493. This Court likewise has no basis to conclude that race would necessarily predominate in the drawing of *any* district that would remedy the diminishment in the Enacted Plan, and Appellants lack standing to make such a defense. Moreover, to the extent this Court even reaches the merits of Appellants' affirmative defense, this Court must defer to the factual findings of the trial court below, which found that the Legislature *did* draw a version of CD-5 where race did not predominate, a factual finding entitled to deference on appeal. Finally, even if this Court disregarded Judge Marsh's factual findings as clear error, the use of race here would be constitutionally justified under the Fair Districts Amendments.

A. Appellants bear the burden to prove their affirmative defense.

As the trial court agreed, R. 12555, Appellants squarely bear the burden of proving their affirmative defense. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010) (citing *Hough*

v. Menses, 95 So. 2d 410, 412 (Fla. 1957)); *Philip Morris USA, Inc. v. Buchanan*, 155 So. 3d 1156, 1157 (Fla. 1st DCA 2014) ("As with any other affirmative defense, moreover, the defendant, not the plaintiff, has the burden of proof…."). This is because "[a]n affirmative defense is an assertion of facts or law *by the defendant* . . . and the plaintiff is not bound to prove that the affirmative defense does not exist." *Custer*, 62 So. 3d at 1096 (emphasis added); *see also id.* at 1097 (holding that defendant "was required to present evidence to the *fact-finder*"). Like in *Custer*, the "burden of proof [does not] shift[]" to Appellees merely because Appellants raised the specter of racial gerrymandering "during [Appellees'] case-in-chief." *Id.* Indeed, in the racial gerrymandering context, it is always the party claiming unconstitutional gerrymandering—here, Appellants—that has the burden to prove that race predominated in the allegedly gerrymandered district. *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also id.* at 928-29 (O'Connor, J., concurring).[3]

[3] Further, because Appellants pled their Equal Protection arguments as affirmative defenses, *see* R. 2746; 2729; 12076-12082, they are estopped from arguing now that the trial court improperly assigned them the burden on proof, even if such assignment was in error. *See McKinney Supply Co. v. Orovitz*, 96 So. 2d 209, 211 (Fla. 1957)

Appellants are not absolved of their burden just because redistricting plans generally come with an "initial presumption of validity," as the Legislature argues. *Apportionment I*, 83 So. 3d at 606. This presumption means a court will "defer to the Legislature's decision to draw a district in a certain way, *so long as that decision does not violate the constitutional requirements*." *Id.* at 608 (emphasis added). As the Florida Supreme Court confirmed in *LWV I*, once a court finds a violation of Florida's constitutional requirements, the burden "shift[s] to the Legislature to justify its decisions, and no deference should [be] afforded to the Legislature's decisions regarding the drawing of the districts." 172 So. 3d at 400. That is precisely what occurred here: Appellees challenged the Enacted Plan under the non-diminishment provision of the Florida Constitution; Appellants stipulated to the facts relevant to that diminishment claim; and the trial court applied the well-established legal standard to the undisputed facts to conclude that the Enacted Plan violates the non-

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(holding that a party who induces an argument waives the right to argue on appeal that the argument was improper or prejudicial); *Goodwin v. State*, 751 So. 2d 537, 544 (Fla. 1999) ("If the error is 'invited,' or the defendant 'opens the door' to the error, the appellate court will not consider the error a basis for reversal.").

diminishment provision of the Florida Constitution. Once a violation of the constitutional standard is found, "there is no basis to continue to afford deference to the Legislature." *Id.* Accordingly, it is Appellants who bear the burden of justifying their noncompliance with the Florida Constitution, not Appellees.

For all the reasons below, Appellants failed to satisfy their burden.

B. Appellants do not have standing to assert their affirmative defenses under the Equal Protection Clause.

Appellants lack standing to assert their Equal Protection Clause affirmative defenses under Florida's public official standing doctrine and because they have not suffered a concrete injury.

1. The trial court correctly held that the public official standing doctrine bars Appellants' affirmative defense.

Under Florida's public official standing doctrine, it is well established that public officials are jurisdictionally barred from challenging the constitutionality of their legal duties in court. *See State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681, 683 (Fla. 1922). The judicial branch alone has the power to declare what the law is, including whether the duties imposed by the Florida

Constitution are themselves unconstitutional. It is not up to the public officials charged with those duties to decide for themselves, based on their own views on the law, which constitutional provisions to abide by. *See Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019); *see also Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legis. Info. Servs.*, 7 So. 3d 511, 514 (Fla. 2009) ("[N]o branch may encroach upon the powers of another."). As such, public officials from the other branches of government are barred from challenging the constitutionality of their legal duties—either affirmatively, *see Dep't of Revenue of State of Fla. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981) ("Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion."), or as an affirmative defense, *see Atl. Coast Line*, 94 So. at 682 (holding that because "the allegation . . . that [a provision] is unconstitutional means that it has been so declared by a court of competent jurisdiction," any affirmative defense alleging as much before such a judicial declaration has been made is not "true" and therefore "no defense").

To be sure, the public official standing doctrine does not preclude Appellants from defending the Enacted Plan. It simply precludes them from substituting their judgment for that of a court's in deciding the constitutionality of the non-diminishment provision's application. To allow otherwise would authorize elected officials to unilaterally and preemptively nullify the Florida Constitution by picking and choosing to comply only with those constitutional provisions with which they agree, unless and until a court says otherwise. The public official standing doctrine exists precisely to prevent that absurd result. *See id.* at 685 (holding that laws are "presumed to be . . . constitutional and legal, until their unconstitutionality or illegality has been judicially established"). After all, "the oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined." *Id.* at 683.

The public official standing doctrine squarely applies to Appellants' affirmative defenses under the federal Equal Protection Clause. There is no question that the Florida Constitution imposes a duty on the Florida House and Senate to redistrict in accordance with Article III, Section 20(a). *See* Art. III, § 20, Fla. Const. (setting "standards for establishing congressional district boundaries" under Article

describing "Legislature"). There is no question that the Secretary is charged with the duty of enforcing the state's election laws, including redistricting maps. § 97.012, Fla. Stat. And there is no question that neither the Secretary nor the Legislature is authorized to exercise the judicial power. Art. II, § 3, Fla. Const. (expressly codifying separation of powers doctrine); *see also Mil. Park Fire Control Tax Dist. No. 4 v. DeMarois*, 407 So. 2d 1020, 1021 (Fla. 4th DCA 1981) ("Powers constitutionally bestowed upon the courts may not be exercised by the legislature.").[4] While Appellants assert that they need not comply with the non-diminishment provision based on their conviction that doing so would run afoul of the federal constitution's Equal Protection Clause, they are not at liberty to challenge the duties conferred

[4] No court has limited the public official standing doctrine's applicability to the executive branch. *See Atl. Coast Line*, 94 So. at 682 (explaining that the public official standing doctrine "involves the right of a branch of the government, other than the judiciary" to determine a law's constitutionality); *cf. Chiles v. Phelps*, 714 So. 2d 453, 456 (Fla. 1998) (equating standing principles for executive and legislative officers); *Greater New Orleans Expressway Comm'n v. Olivier*, 892 So. 2d 570, 576 (La. 2005) (rejecting argument that public official standing doctrine applied only to executive officers).

on them by Florida law.[5] Accordingly, "until a *court* holds that Article III, Section 20(a) is unconstitutional, *none* of the Appellants has standing to challenge those duties in court." R. 12499.

Thus, under the public official standing doctrine, Appellants lack standing to assert their constitutional defenses in this action.

2. Appellants lack the personal harm necessary to raise a claim under the Equal Protection Clause.

Appellants also lack standing to raise their affirmative defense because they have failed to show that they have personally suffered an injury. Florida's standing framework requires the party asserting a violation of law to "demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.'" *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Florida courts rely on federal court

[5] While Legislative Appellants may exercise discretion as to *how* they comply with the Constitution's dictates, they have no discretion to choose not to comply with them at all. *See State ex rel. Allen v. Rose*, 167 So. 21, 22-23 (Fla. 1936) (explaining that mandamus, which "only lies to enforce a ministerial act or duty," "may be invoked to compel the exercise of discretion" as long as it does not "compel such discretion to be exercised in any particular way").

decisions to interpret the injury-in-fact requirement. *See Pet Supermarket, Inc. v. Eldridge*, 360 So. 3d 1201, 1205-06 (Fla. 3d DCA 2023).

The U.S. Supreme Court has held that only voters who reside in an allegedly racially gerrymandered district can demonstrate standing because only "[v]oters in such districts may suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995). A voter "who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (quoting *Hays*, 515 U.S. at 745); *see also Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("*Shaw II*").

Appellants do not dispute that, as government entities sued in their official capacities, they do not and cannot demonstrate that they would suffer "special representational harms" as voters sorted into a challenged district based on race. *See Hays*, 515 U.S. at 745. For this reason, too, they lack standing to assert their affirmative defenses.

3. Appellees have not waived their standing arguments.

The Secretary's waiver argument has no basis in law. Without relevant citation, the Secretary claims that Appellees should have raised Appellants' lack of standing as an avoidance. But Rule 1.140(h)(2) makes clear that a plaintiff may raise a defendant's "failure to state . . . a legal defense" via a "motion for judgment on the pleadings or at the trial on the merits," and that a plaintiff may raise "lack of jurisdiction of the subject matter . . . at any time." *See also Dep't of Transp. v. Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d 388, 389 (Fla. 1st DCA 2021) (holding that "trial court lacked subject-matter jurisdiction . . . because [party] lacked standing under the public official standing doctrine"), *reh'g denied* (May 17, 2021), *review dismissed sub nom. Miami-Dade Cnty. Expressway Auth. v. State*, No. SC21-841, 2021 WL 3783383 (Fla. Aug. 26, 2021).

Moreover, Appellees' assertion that Appellants lack standing does not allege any additional facts and therefore, by definition, cannot be an avoidance. *See Buss Aluminum Prod., Inc. v. Crown Window Co.*, 651 So. 2d 694, 695 (Fla. 2d DCA 1995) ("An avoidance is an allegation of additional facts intended to overcome an affirmative

defense."); *Kitchen v. Kitchen*, 404 So. 2d 203, 205 (Fla. 2d DCA 1981) (explaining that avoidances "admit the allegations of the plea to which they are directed and allege additional facts that avoid the legal effect of the confession"); *see also Abston v. Bryan*, 519 So. 2d 1125, 1127 (Fla. 5th DCA 1988) ("A reply to an affirmative defense is permitted only in order to allege new facts that may be sufficient to avoid the legal effect of the facts contained in the affirmative defense.") (citation omitted); *Reno v. Adventist Health Sys./Sunbelt, Inc.*, 516 So. 2d 63, 64 (Fla. 2d DCA 1987) (citing *Kitchen*). Here, Appellants' lack of standing to assert their affirmative defense results not from Appellees' factual allegations but from Appellants' failure to establish the legal prerequisites for their claim.

C. The trial court did not clearly err in finding that Appellants did not offer sufficient evidence of racial predominance.

The trial court's conclusion that race does not have to predominate to remedy the diminishment in CD-5 is well supported by U.S. Supreme Court precedent as well as by the trial court's findings that the Legislature itself considered and passed a map that ensured compliance with the non-diminishment provision consistent with traditional redistricting criteria.

1. Racial predominance is a demanding standard.

Just as Appellants bear the burden of proving their affirmative defenses, *see Custer*, 62 So. 3d at 096, it is always the party claiming unconstitutional gerrymandering—here, Appellants—that has the burden to prove racial predominance. *See Miller*, 515 U.S. at 916.

Appellants failed to meet this burden, both at the trial court and on appeal, because they continue to conflate racial *consciousness* in redistricting, which is entirely permissible, with racial *predominance*, which triggers strict scrutiny. As the U.S. Supreme Court has explained, redistricting legislatures will "almost always be aware" of race, but such consideration "does not [mean] that race predominates in the redistricting process." *Miller*, 515 U.S. at 916 (citations omitted). Just this year, the U.S. Supreme Court reaffirmed this principle, reiterating "[t]he line that we have long drawn [] between consciousness and predominance" of race. *Allen*, 599 U.S. at 29, 33 (2023) (plurality opinion). Contrary to Appellants' suggestion, Sec'y Br. at 46, 49, a mapmaker's desire to comply with the VRA or other minority voting protections—here, the Fair Districts Amendments—does not itself show that race predominated in the redistricting process. *See Allen*, 599 U.S. at 29-31 (plurality opinion) (race did not

predominate even though "it was necessary for [mapmaker] to consider race" to meet VRA requirements); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (the intentional creation of majority-minority districts in service of VRA does not trigger strict scrutiny); *see also Robinson v. Ardoin*, 605 F. Supp. 3d 759, 838 (M.D. La. 2022) (finding no racial predominance even though "some level of consideration of race" is "necessary" to comply with the VRA).

The burden of proving racial predominance is a "demanding" one. *Miller,* 515 U.S. at 928 (O. Connor, J., concurring); *see also Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("*Shaw I*") (describing the "difficulty of proof" in proving racial predominance). Those alleging a racial gerrymandering claim must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the [mapmakers'] decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. To satisfy this burden, challengers "must prove that the [mapmakers] subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* Racial predominance requires a fact-intensive, "holistic" analysis that may include "use of an

express racial target," *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192 (2017), "substantial disregard of customary and traditional districting practices," *Miller*, 515 U.S. at 928 (O'Connor, J., concurring), or a district configuration that is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race," *Shaw I*, 509 U.S. at 658. Given the "evidentiary difficulty" of proving racial predominance, "courts must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 915-16.

As Appellees explain below, the Fair Districts Amendments themselves do not require race to predominate. Nor did the trial court clearly err in concluding that race did not predominate in the drawing of CD-5 in Plan 8015.

2. The Fair Districts Amendments do not require race to predominate in the redistricting process.

The Secretary's theory of facial unconstitutionality fundamentally mischaracterizes the non-diminishment provision. And while Legislative Appellants do not argue the non-diminishment provision is facially unconstitutional—indeed, they argue it can and has been

applied constitutionally in other districts, *see* Leg. Br. at 53-54—they, too, overstate the non-diminishment provision's reach.

a) The non-diminishment provision does not require minority-performing districts in perpetuity or without geographic limit.

Contrary to Legislative Appellants' representation, the trial court's interpretation of the non-diminishment provision would not "require Florida to ensure non-diminishment no matter how much the resulting district would subordinate traditional redistricting criteria," nor would it require the "perpetual preservation" of such a district. *See* Leg. Br. at 60-62. To the contrary, the non-diminishment provision protects districts only under certain circumstances: when a minority community in an existing district is large enough and politically cohesive enough to band together to elect a candidate of choice. *LWV II*, 179 So. 3d at 286 n.11. A functional analysis, which considers both demographic information and voting behavior, helps to make this determination. *Apportionment I*, 83 So. 3d at 625.

The functional analysis underlying the non-diminishment provision ensures that where the minority population of a benchmark district sufficiently declines, disperses, or diverges in its political preferences such that it is no longer able to elect the minority group's

preferred candidate, the district will no longer be protected under the non-diminishment provision. Indeed, in this past redistricting cycle, the Legislature itself concluded that CD-10, which was previously considered a Black-performing district, declined in Black voter registration to an extent the Legislature concluded it was no longer protected under the diminishment provision. *See* R. 9121 (House Redistricting Committee Chair Leek explaining the House's conclusion that "CD10 [is] no longer a protected district" based on "performance trends"). Notably, the Legislature made no such findings with respect to CD-5.

For this precise reason, Legislative Appellants' hypothetical—in which they posit "[i]f the 2020 census had revealed that Black population of Benchmark District 5 had decreased by 50% [the State would have to] draw an even more sprawling district with tendrils stretching perhaps as far as Panama City and Orlando to ensure non-diminishment," Leg. Br. at 61—would never come to pass. If Benchmark CD-5's Black population had decreased this dramatically, a functional analysis would reveal that the district would no longer "perform" for Black-preferred candidates because Black voters could no longer exercise enough political power in the primary (let alone

the general election) to elect a candidate of choice. *LWV II*, 179 So. 3d at 286 n.11. As a result, a minority-performing district would not be required going forward.

In essence, the functional analysis acts as a backstop against racial gerrymandering—legislators are not required to contort the district into a bizarre shape to capture a significantly dwindling minority population. Nor is there any evidence this occurred here. As the trial court found, the Legislature *improved* CD-5's shape in Plan 8015 as compared to Benchmark CD-5, while maintaining minority voters' ability to elect their candidate of choice. R. 12506-12507; *see also infra* Argument III(C)(3).

b) The non-diminishment provision does not require racial targeting or racial quotas.

The idea that the non-diminishment provision requires Florida to employ a "specific racial target" or "quota," Sec'y Br. at 29, 55, gravely mischaracterizes the Florida Supreme Court's precedent. In fact, the Court has explicitly *rejected* the idea that "the minority population percentage in each district . . . is somehow fixed to an absolute number under Florida's minority protection provision," cautioning that such an approach "would run the risk of permitting the

Legislature to engage in racial gerrymandering." *Apportionment I*, 83 So. 3d at 627. The Court reiterated the same several years later. *LWV I*, 172 So. 3d at 405 (rejecting Legislature's contention that they were required to achieve fixed racial targets for CD-5). In so holding, the Court specifically cited to *Alabama Legislative Black Caucus,* 575 U.S. at 275, where the U.S. Supreme Court emphasized that Section 5 of the VRA, the federal analogue to Florida's non-diminishment provision, "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district.

Nor is there any evidence the Legislature engaged in this kind of racial targeting. In fact, the BVAP of CD-5 *decreased* from 46.2% in the Benchmark Plan to 43.4% in Plan 8015, *see* R. 8043, 8750, thus belying any claim that the Legislature was committed to maintaining an express racial target at the expense of race-neutral criteria.

c) The tiered structure of the Fair Districts Amendments does not require race to predominate.

Finally, the Secretary's contention that the tiered structure of Article III, Section 20 necessarily requires racial gerrymandering, *see* Sec'y Br. at 28, has already been debunked by the Florida Supreme

Court. The Court has held that the plain language of the non-diminishment provision does *not* give the State "*carte blanche* to engage in racial gerrymandering in the name of nonretrogression," *Apportionment I*, 83 So. 3d at 627, and it has rejected minority voting protections that it deemed "simply not compact" enough to trigger Tier I's minority voting protections, *see LWV I*, 172 So. 3d at 436.

While the Fair Districts Amendments require mapmakers to consider race under certain circumstances, Article III, Section 20 is no different than the Voting Rights Act in this regard. *See Allen*, 599 U.S. at 30-31 (plurality) (even though "Section 2 itself demands consideration of race," "such race consciousness does not lead inevitably to impermissible race discrimination" (internal quotation marks and citations omitted)). The fact that states are required to engage in race-conscious redistricting to comply with minority voting protections (whether in the VRA or the Florida Constitution) does not mean race is required to predominate in the drawing of a district.

In short, the Secretary's facial challenge to the non-diminishment provision defies binding precedent from the Florida and U.S. Supreme Courts and is belied by the Legislature's own application of the non-diminishment standard.

3. Appellants similarly failed to prove their as-applied affirmative defense.

As the trial court recognized, although Appellants maintain that *any* district in North Florida that complies with the non-diminishment provision would violate the Equal Protection Clause, the Court cannot reach such a determination as a matter of law. R. 12556-12557. Put simply, Appellants' racial predominance argument fails from the start because they have failed to identify a specific offending electoral district. The U.S. Supreme Court has made clear that "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill*, 580 U.S. at 191; *see also Ala. Legis. Black Caucus*, 575 U.S. at 262-63 ("We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of *one or more specific electoral districts*." (some emphasis added) (citations omitted)). This precedent forecloses Appellants' affirmative defenses, which aim to establish that *any* district—not a "specific electoral district"—in North Florida that complies with the non-diminishment provision would be a racial gerrymander.

In any event, even if the Court were to consider whether a hypothetical compliant district violates the U.S. Constitution, the trial court found as a matter of fact that race did not predominate in Plan 8015's version of CD-5, drawn and passed by the Florida Legislature. R. 12502-12508. The trial court's determination "as to whether racial considerations predominated in drawing district lines" is a factual finding reviewed for clear error. *Cooper*, 581 U.S. at 293; *see also La Ley Sports Complex at City of Homestead, LLC v. City of Homestead,* 255 So. 3d 468, 469 (Fla. 3d DCA 2018) (explaining that under clear error, findings of fact are only disturbed if they are "totally unsupported by competent and substantial evidence"). As the U.S. Supreme Court has described, this standard means that as long as the trial court's finding on predominance is "plausible," that finding "must govern" even if a different finding would have been "equally or more" plausible. *Cooper*, 581 U.S. at 293. Although Florida courts do not regularly review claims of racial gerrymandering, in the redistricting context, an appellate court should similarly "uphold the trial court's factual findings so long as these findings are supported by competent, substantial evidence." *LWV II*, 179 So. 3d at 271; *see also La*

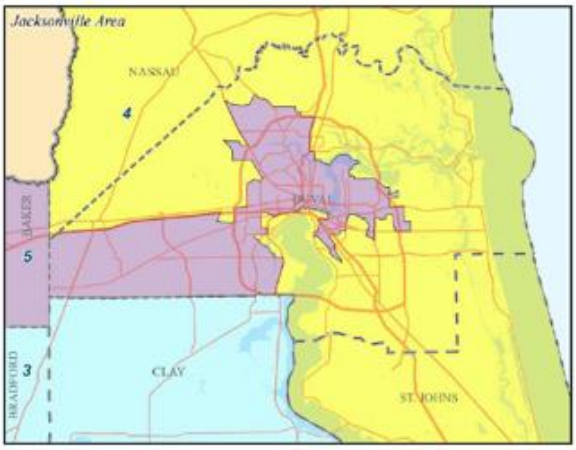
Ley Sports Complex, 255 So. 3d at 469 ("[T]he trial court's findings of fact are clothed with the presumption of correctness.").

The trial court's finding that race did not predominate in the drawing of CD-5 in Plan 8015 is supported by ample evidence, including a close examination of the district's compliance with traditional redistricting criteria. R. 12502-12508. At the outset, the trial court confirmed that CD-5 in Plan 8015 complies with the mandate of equal population and was contiguous, which are basic requirements for any congressional district. R. 12505. But the trial court also found the district performs "extraordinarily well on adherence to utilizing 'existing political and geographic boundaries'" (a Tier II criterion), meaning that the district utilized existing city lines, county lines, roadways, waterways, and railways for its boundaries. R. 12505-12506; *see also Apportionment I*, 83 So. 3d at 637 (noting that the "basic purpose of this provision is to keep communities together and sensibly adhere to natural boundaries across the state"). As the trial court explained, CD-5 in Plan 8015 performs better on this Tier II criterion *than all but one* district in the Enacted Plan. R. 12506 (noting that CD-5 in Plan 8015 relies on "non-political and geographic boundaries" "for only 2% of its boundaries," while "the

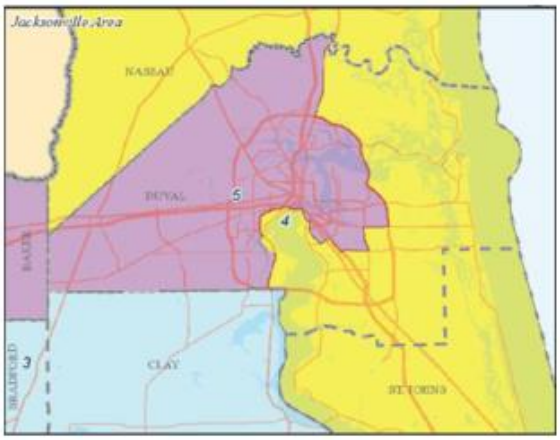
average district in the Enacted Plan" relies on such boundaries 14% of the time).

As the trial court found, CD-5 in Plan 8015 also performs reasonably well on compactness, particularly as compared to Benchmark CD-5, which had previously been approved by the Florida Supreme Court. R. 12506-12507. As the trial court described, "CD-5 in Plan 8015 both decreases the footprint of the district and smooths the boundaries of Benchmark CD-5 even further," R. 12506, including in Jacksonville as shown below:

Jacksonville Inset (Benchmark)

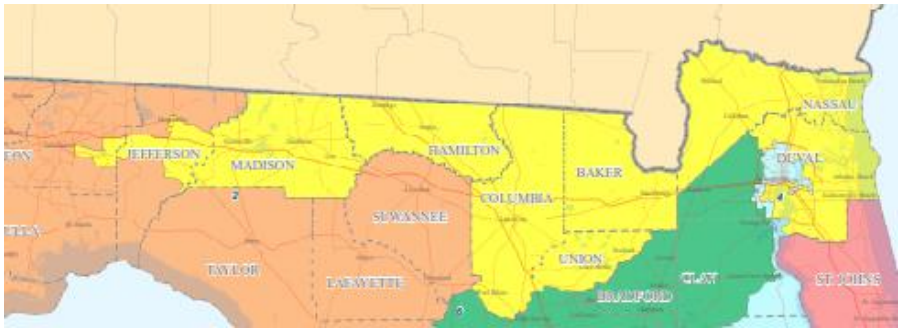


Jacksonville Inset (Plan 8015)



Compare R. 8041, *with* R. 8749. And although the district is long in size, the trial court found "that the district's length is largely a factor of North Florida's rural geography and sparse population." R. 12507. Indeed, as the trial court recounted, "well before the East-West CD-

5 ever existed, Florida's congressional plan from 2002 to 2012 included a district that spanned from Leon County to Duval County," as shown below, indicating such a district is consistent with the state's history of redistricting in the region. R. 12507; R. 11651.



Because the trial court concluded that "CD-5 in Plan 8015 performs reasonably well on objective, non-racial traditional redistricting criteria," R. 12508, it properly concluded that Appellants failed to establish racial predominance in the district, even if mapmakers were conscious of race and had intended to comply with the non-diminishment provision in drawing it. R. 12566. As the U.S. Supreme Court has held, a district's compliance with traditional redistricting criteria "may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw I*, 509 U.S. at 647; *see also Allen*, 599 U.S. at 29-30 (plurality opinion) (finding that race did not predominate where mapmaker considered race but also considered traditional redistricting criteria); *Miller*, 515 U.S. at 928 (O'Connor, J.,

concurring) (requiring party asserting racial gerrymandering claim to demonstrate "substantial disregard of customary and traditional districting practices").

Appellants barely address the trial court's findings with respect to CD-5 in Plan 8015, much less demonstrate that these findings were clearly erroneous. Instead, they run away from Plan 8015 and insist this Court should focus its attention on the Benchmark Plan instead. *See generally* Sec'y Br. 24-46; Leg. Br. at 47-53. Although this is a creative litigation strategy, focusing on Benchmark CD-5 at this stage makes no sense: As Appellees have already shown, Benchmark CD-5 is no longer in existence, and perhaps as a result, Appellants did not challenge the constitutionality of the Benchmark Plan below. *See supra* Argument II(A); *see also* R. 12185. Even if this Court were to entertain the argument, Appellants can hardly establish that race *predominated* in the drawing of Benchmark CD-5 where the district's primary purpose was to "remed[y] the improper partisan intent found in the prior version of District 5," *LWV II*, 179 So. 3d at 272, and the Florida Supreme Court expressly disavowed the use of any racial targets in approving Benchmark CD-5, *see LWV I*, 172 So. 3d at 405 (rejecting Legislature's contention that they were required to

achieve fixed racial targets for the district). To the extent Appellants contend that the Florida Supreme Court engaged in racial gerrymandering in ordering and approving Benchmark CD-5, it is not for this Court to decide whether binding Florida Supreme Court precedent violates federal law.

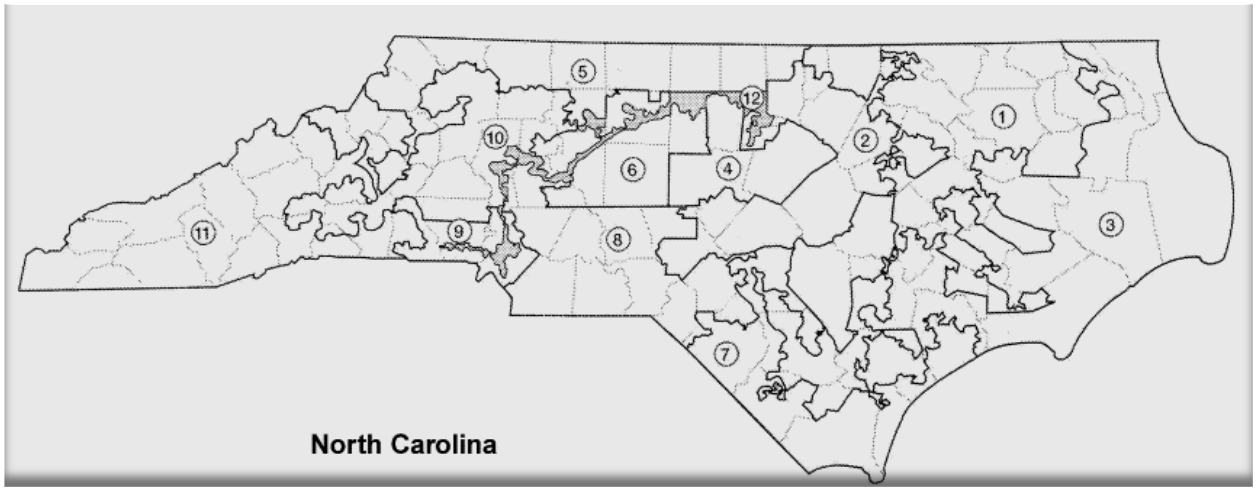
Appellants' last strategy is to insist that any and all versions of an East-West CD-5 would be "egregiously non-compact." Leg. Br. at 48-49; Sec'y Br. at 32. Despite these histrionics, once again, Florida Supreme Court precedent undermines Appellants' assertions. The compactness standard established by the Florida Supreme Court is designed "to ensure that districts are logically drawn and that bizarrely shaped districts are avoided." *Apportionment I*, 83 So. 3d at 636. The Court has repeatedly emphasized that the "Florida Constitution does not mandate . . . that districts . . . achieve the highest mathematical compactness scores." *Id.* at 635. Pursuant to that standard, the trial court properly found that "[t]here is nothing bizarrely shaped" about Plan 8015's CD-5, "and certainly nothing more bizarre than what was already approved by the Florida Supreme Court." R. 12507. Appellants cannot credibly contend that the shape of either Benchmark CD-5 or Plan 8015's CD-5 is "so irrational on

its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." *Shaw I*, 509 U.S. at 658.

Indeed, while Appellants' affirmative defense rests on the federal racial predominance standard, CD-5 simply does not resemble the districts that have been struck down by federal courts as unconstitutional racial gerrymanders. To put CD-5 in appropriate context, Appellees provide a few examples of such districts, as well as districts where courts found that race did not predominate.

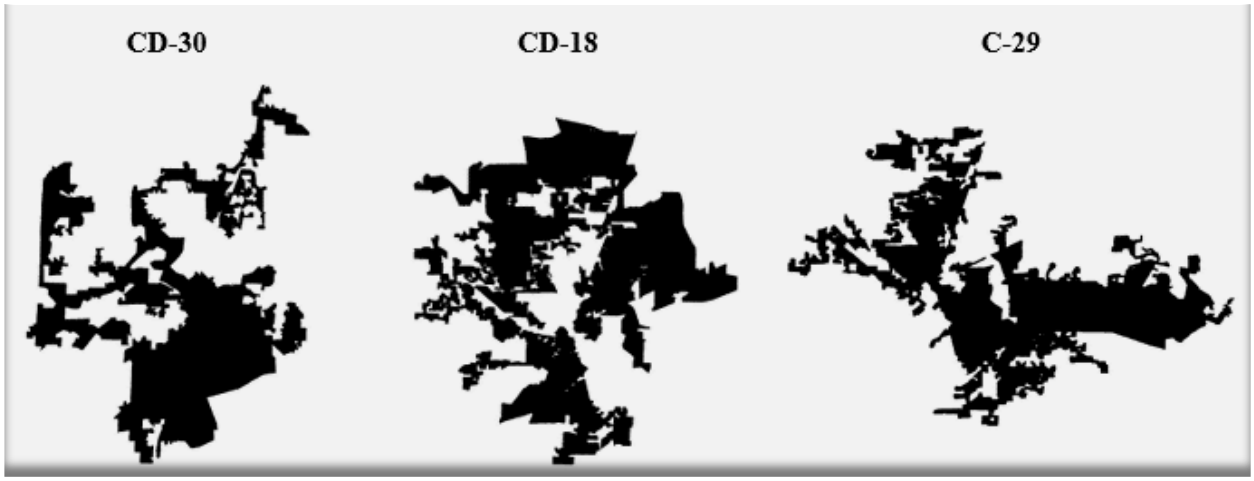
North Carolina's 12th Congressional District (Race Predominates). When Justice O'Connor addressed the compactness of North Carolina's 12th congressional district in *Shaw I*, which Appellants cite as if it were about CD-5 itself, she was referring to the following district:[6]

[6] This image of North Carolina's 12th district appears in Appendix C to the U.S. Supreme Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995), in the official U.S. Reports.



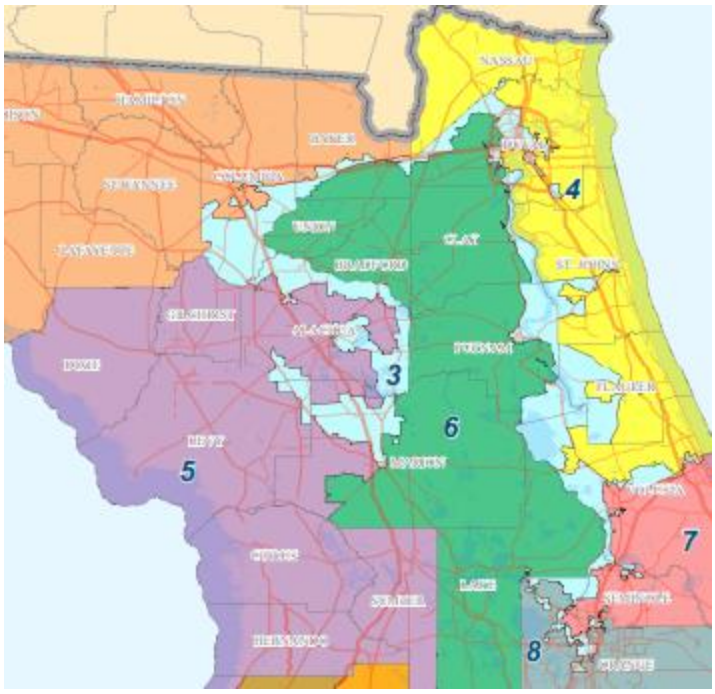
North Carolina's 12th district was "for much of its length, no wider than the I-85 corridor," winding in a "snakelike fashion" to "gobble" Black neighborhoods. *Shaw I*, 509 U.S. at 635-36. "At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them." *Id.* at 636. As Justice O'Connor recounted, "[o]ne state legislator has remarked that '[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" *Id.* (cleaned up).

Texas's 18th, 29th, 30th Congressional Districts (Race Predominates). When the Court spoke about the "bizarrely shaped and far from compact" districts in *Vera*, 517 U.S. at 979, the Court was referring to the three Texas congressional districts shown below from Houston and Dallas:



See *id.* at 986 (Appendices A-C). As the Court wrote in finding that race predominated in the drawing of these districts, these districts were "formed in utter disregard for traditional redistricting criteria." *Id.* at 976. "Campaigners seeking to visit their constituents had to carry a map to identify the district lines, because so often the borders would move from block to block; voters did not know the candidates running for office because they did not know which district they lived in." *Id.* at 974 (cleaned up).

Florida's 3rd Congressional District (Race Predominates). In *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995), a three-judge federal court held that race predominated in the Florida's 3rd congressional district:



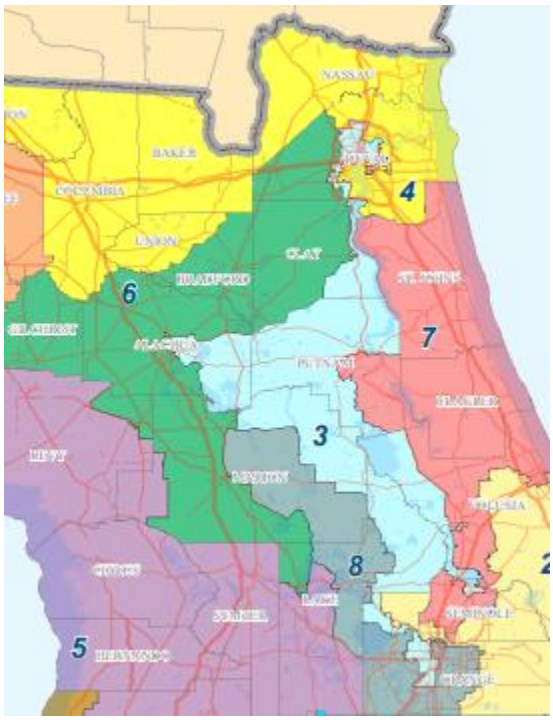
See R. 11658. As the Court wrote:

> The 3rd District is shaped like a gnawed wishbone…some parts of it no wider than 50 yards or the length of a city block. It begins near Orlando and thinly juts out to the edge of the Atlantic Ocean in places, leaving a trail that looks like an elongated Rorschach ink blot as it zigzags all the way up to Jacksonville. Then it meanders down toward the western part of the state, following a path that resembles spilled paint, before bouncing up and trickling into Levy County, which touches the Gulf of Mexico.

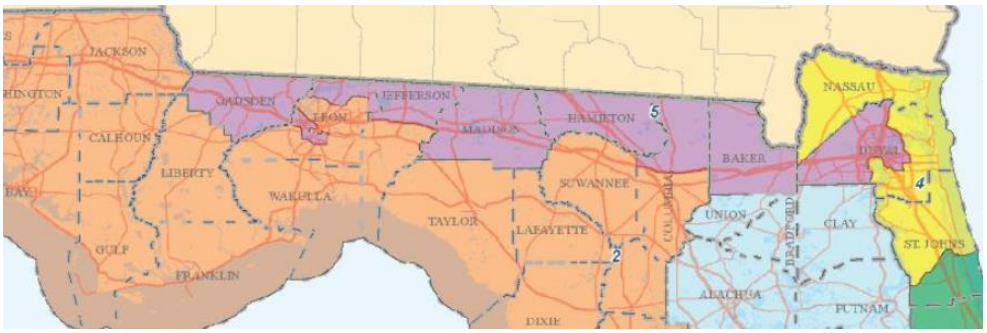
Id. at 1555-56.

Florida's 3rd Congressional District (Race Does Not Predominate). In Florida's following redistricting cycle, although Congressional District 3 was drawn as a district that would perform for a Black candidate of choice, a three-judge court found that race *did not*

predominate in the drawing of the district. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1301 (S.D. Fla. 2002). As the *Martinez* Court wrote, "[r]ace was considered" in the drawing of District 3 but "[t]raditional districting principles were also considered." *Id.* The district from *Martinez*, which was in place in Florida from 2002-2012, appears below. *See* R. 11651.



Plan 8015's CD-5, shown below, *see* R. 8749, is even more visually compact than the district upheld in *Martinez*. And it certainly does not resemble the districts struck down as racial gerrymanders in *Shaw I*, *Vera*, or *Mortham*.



Against this backdrop, the trial court did not clearly err in concluding that race did not predominate in the configuration of CD-5 in Plan 8015. That conclusion was well-supported by both objective criteria and the law.

4. This Court has no basis to conclude there is no other district that could comply with the non-diminishment provision and satisfy the Equal Protection Clause.

Even if this Court were to disagree with the trial court's conclusion that race need not predominate in an East-West configuration of CD-5 and did not predominate in Plan 8015's configuration of CD-5, it would still have no basis to conclude that there is *no possible district* that could remedy the diminishment in the Enacted Plan and comply with the Equal Protection Clause. "To the contrary, in 2022 the Legislature proposed and passed Congressional Plan 8019, which included a Duval County-only district that the Chair of the House Congressional Redistricting Committee described as 'very visually

different than the benchmark district' but 'still a protected black-performing district." R. 12496; *see also* R. 9056 (House Chair stating on that Plan 8019's CD-5 would be a "reliable performing district" even with the district's "reduction in [Black] voting age population"). Although the Governor disagreed with that view, and the Legislature now seems to have adopted the Governor's position, *see* Leg. Br. at 55, whether or not a district will perform for a minority group is an intensely factual question, requiring a consideration of demographics, voter registration information, electoral behavior, and more. *See Apportionment I*, 83 So. 3d at 625-26. Whether or not a district like CD-5 in Plan 8019 would result in diminishment is not a question that was posed to the trial court, nor is it one this Court can answer on a cold record.[7]

D. A district that remedies the diminishment in the Enacted Plan would be narrowly tailored to address a compelling state interest.

[7] Notably, Legislative Appellants' position that Plan 8019 *would not* perform for the minority candidate of choice, and thus would result in diminishment, is based on figures presented in the Legislature's redistricting packet for Plan 8019—the same figures Chair Sirois relied upon in concluding the district *would* "reliably perform" for the Black candidate of choice.

Even if this Court held that race would necessarily predominate in *any* district that would remedy the diminishment in the Enacted Plan, this Court's inquiry would not end there. The Court would then need to decide if the use of race was narrowly tailored to advance a compelling state interest. *Ala. Legis. Black Caucus*, 575 U.S. at 260-61; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018). In continuing to argue that compliance with their own Constitution is not "compelling," Appellants disregard not only the trial court's factual findings but also Florida's well-documented history of voting-related discrimination that led to adoption of the Fair Districts Amendments.

1. Appellees are not state actors and therefore fall outside the ambit of strict scrutiny.

As the trial court recognized, Appellees themselves bear no burden to show a future remedial district would satisfy strict scrutiny. R. 12509-12510. Private citizens are not required to satisfy strict scrutiny. The Fourteenth Amendment only applies to state action, and therefore, only the state actors who *enact* a redistricting plan must meet its standards. *See Fla. High Sch. Activities Ass'n, Inc. v. Thomas ex rel. Thomas*, 434 So. 2d 306, 308 (Fla. 1983) (explaining that "strict scrutiny . . . imposes a heavy burden of justification *upon*

the state and should be applied only to those actions *by the state* which abridge some fundamental right or affect adversely some suspect class of persons" (emphases added)). The trial court thus did not err by declining to impose an obligation on private plaintiffs to show that a future hypothetical remedial district satisfies a test only applicable to state and federal governments.[8]

2. Compliance with the Florida Constitution's non-diminishment provision is a compelling state interest.

As the trial court properly concluded, R. 12510, regardless of who bears the burden, strict scrutiny would be satisfied with respect to a North Florida district that complies with the non-diminishment provision, including either of the versions of CD-5 in Plans 8015 or 8019.

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[8] The Secretary asserts—either boldly or clumsily—that Appellees must "justify Benchmark CD-5's 'race-based sorting of voters'" by showing that the district is narrowly tailored to serve a compelling interest. Sec'y Br. at 35. But Benchmark CD-5's constitutionality is not at issue. *See supra* Argument II. Nor do Appellees have a burden to justify a prior district they did not draw —indeed, which was drawn by the state and approved by the Florida Supreme Court—and has since been replaced.

As the trial court recognized, compliance with the non-diminishment provision of the Florida Constitution *is* a compelling state interest. The Florida Supreme Court has made clear that Florida's non-diminishment provision "follow[s] almost verbatim the requirements embodied in the [federal] Voting Rights Act," and the Court's "interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent." *Apportionment I*, 83 So. 3d at 619-620 (citation omitted and second alteration in original). As Appellants acknowledge, the U.S. Supreme Court has repeatedly—and recently—assumed that compliance with the VRA constitutes a compelling state interest, even in the years after *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).[9] *See, e.g., Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) ("We have assumed that complying with the VRA is a compelling interest."); *Abbott*, 138 S. Ct. at 2315 (same); *Bethune-Hill*, 580 U.S. at 193 (same). Indeed, in *LULAC v. Perry*, 548 U.S. 399 (2006), *eight* justices announced that they agreed—not just assumed—that compliance with Section 5's non-

[9] Although Section 4's coverage formula was struck down, Section 5 of the VRA remains valid federal law. *See Shelby Cnty.*, 570 U.S. at 557 (ruling on the validity of Section 4(b), not Section 5, of the VRA).

diminishment provision is a compelling state interest. *See id.* at 518 (Scalia, J., joined by Roberts, C.J., Thomas & Alito, J.J., concurring) ("I would hold that compliance with § 5 of the Voting Rights Act can be [a compelling state] interest."); *id.* at 475 n.12 (Stevens, J., joined by Breyer, J., concurring) ("Justice Breyer has authorized me to state that he agrees with Justice SCALIA that compliance with § 5 of the Voting Rights Act is also a compelling state interest. . . . I, too, agree with Justice SCALIA on this point."); *id.* at 485 n.2 (Souter, J., joined by Ginsburg, J., concurring) ("Like Justice STEVENS, I agree with Justice SCALIA that compliance with § 5 is a compelling state interest.").

Given the substantive similarity between Section 5 of the VRA and the Florida Constitution's non-diminishment provision, *see Apportionment I*, 83 So. 3d at 620-21, compliance with the latter likewise constitutes a compelling state interest. Appellants' contention that Florida's non-diminishment provision was not enacted to remedy persistent racial discrimination represents a careless—and insulting—summation of Florida's electoral history. Florida has a specific (and recent) history of utilizing discriminatory election practices that have inhibited minority voters from exercising their political

power. That history has been well documented by extensive legal precedent.

Florida maintained an all-white primary system until it was ruled unconstitutional in 1945 in *Davis v. Cromwell*, 23 So. 2d 85, 87 (Fla. 1945), as a direct consequence of the U.S. Supreme Court's ruling in *Smith v. Allwright*, 321 U.S. 649 (1944). After Florida's effort to reinstate white-only primaries failed, its jurisdictions replaced them—for decades—with at-large election schemes and majority-vote requirements. At-large election systems, which courts repeatedly found were designed to ensure minority voters could not effectively exercise political power, were especially pervasive in North Florida. *See, e.g.*, *Solomon v. Liberty Cnty., Fla.*, 899 F.2d 1012 (11th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1023 (1991); *Bradford Cnty. NAACP v. City of Starke*, 712 F. Supp. 1523 (M.D. Fla. 1989); *Tallahassee Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436 (11th Cir. 1987), *cert. denied*, 488 U.S. 960 (1988); *McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037 (5th Cir. 1984); *NAACP v. Gadsden Cnty. Sch. Bd.*, 691 F.2d 978 (11th Cir. 1982).

In 1992, the Northern District of Florida summarized the dire state of electing minorities to office in Florida:

> In the state of Florida, minorities have had very little success in being elected to either the United States Congress or the Florida Legislature. An African-American has not represented Florida in the United States Congress in over a century. In addition, only one Hispanic congressperson serves from Florida. From 1889 until 1968, African-Americans were unable to elect a single representative to the state house. Additionally, African-Americans were unable to elect a representative to the state senate until ten years ago. Until four years ago, no Hispanic state senator had ever been elected in Florida.

DeGrandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). Soon thereafter, then-Chief Justice Shaw remarked on the "substantial inability minorities in Florida have experienced in electing legislators of their choice throughout the past decade." *In re Constitutionality of S. J. Res. 2G, Spec. Apportionment Sess. 1992*, 597 So. 2d 276, 292 (Fla. 1992) (C.J. Shaw, dissenting from Court's resolution approving Florida's 1992 Senate districts).[10]

Problems of racial discrimination in Florida's redistricting plans did not end in 1992, as Appellants seem to suggest. In the 2002

[10] When the Department of Justice later objected to Florida's 1992 redistricting plan, it noted "potential problems with the proposed plan in other areas" than the counties covered under Section 5, including in North Florida, which led the Department of Justice to expressly withhold its overall approval of the proposed plan at issue. *In re Constitutionality of S. J. Res. 2G, Spec. Apportionment Sess. 1992*, 601 So. 2d 543, 547 (Fla. 1992) (C.J. Shaw, concurring).

redistricting cycle, several parties alleged that the Legislature's new redistricting plan discriminated against racial and language minorities. *See In re Constitutionality of H. J. Res. 1987*, 817 So. 2d 819, 828 (Fla. 2002). But the Florida Supreme Court declined to weigh in on challengers' federal VRA claims at the facial review stage, reasoning the Court could only consider claims arising under the U.S. Constitution or Florida Constitution. *Id.* at 825.

Before the next redistricting cycle, Florida voters approved the Fair Districts Amendments to incorporate the VRA standards into the Florida Constitution by an overwhelming majority. As Justice Perry wrote in 2015, "[t]he people of this great state passed a constitutional amendment seeking to address the errors of the past . . . Floridians voted to add these new redistricting mandates, and they 'could not have spoken louder or with more clarity.'" *LWV II*, 179 So. 3d at 300-01 (Perry, J., concurring) (citation omitted). Indeed, Florida's non-diminishment provision was—and still is—necessitated by persistent discrimination and insufficient avenues for legal recourse. The State's refusal to protect the Black-performing CD-5 proves the point.

Appellants ironically contend that Florida's minority-protection provisions are less meaningful than those imposed by the federal

government because states cannot be trusted to protect their citizens from discrimination. *See* Sec'y Br. at 36-37 (arguing that "the U.S. Constitution does not empower States to enforce" the Fourteenth and Fifteenth Amendment); Leg. Br. at 60 (explaining that Congress is "entrust[ed]" to enforce equal protection, but states' power over matters of race is restrained). To the contrary, courts routinely recognize states' power to impose their own solutions to race-based problems. "In any given state, the federal Constitution [] represents the floor for basic freedoms; the state constitution, the ceiling." *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992). The U.S. Supreme Court has explained that its "established practice, rooted in federalism, [is] allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000) (Thomas, J.). In the redistricting context, in particular, the U.S. Supreme Court has long given states *more* leeway to protect racial minorities than what is required under federal law. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[T]he federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's

powers are similarly limited. Quite the opposite is true." (citation omitted)); *Karcher v. Daggett*, 462 U.S. 725, 739 (1983) (acknowledging that "state legislatures could pursue legitimate secondary objectives" such as "protect[ing] the interests of black voters," as long as the resulting districts did not involve impermissible population deviations).

And courts, both state and federal, have not hesitated to uphold state minority-protection provisions similar to those in the Florida Constitution as consistent with the Equal Protection Clause of the U.S. Constitution. For example, federal courts rejected an Equal Protection Clause challenge to the California Voting Rights Act's (CVRA) redistricting-related minority-protection provisions. *Higginson v. Becerra*, 363 F. Supp. 3d 1118, 1128 (S. D. Cal. 2019), *aff'd* 786 Fed. App'x 705 (9th Cir. 2019), cert. denied, 140 S. Ct. 2807 (2020). A state appellate court rejected a similar challenge to the CVRA, emphasizing that "[a] legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word 'race' in an antidiscrimination statute renders the statute racially discriminatory." *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 843 (Cal. Ct. App. 2006); *see also Portugal v. Franklin Cnty.*, 530

P.3d 994, 1011 (Wash. 2023) (en banc) (rejecting racial gerrymandering challenge to the Washington Voting Rights Act where it "mandates *equal* voting opportunities for members of every race, color, and language minority group").

The Florida Constitution's minority-protection provisions are intended to accomplish the same goal. As the Eleventh Circuit explained, "the minority provision does no more than attempt to provide equal opportunity for insular classes of voters." *Brown v. Sec'y of State*, 668 F.3d 1271, 1285 (11th Cir. 2012). In fact, because it "closely tracks long-standing federal requirements . . . , it is hard to see how [the Florida Constitution's] minority provision could have an unlawful impact." *Id.* at 1284-85. And Appellants' repeated invocation of the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard College* ("*SFFA*"), 143 S. Ct. 2141 (2023), an affirmative action case, does nothing to undermine that Court's clear decision in *Allen*, a redistricting case from the same term, which was decided just a few weeks prior. Indeed, in *SFFA* the U.S. Supreme Court confirmed that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is a "compelling interest[] that permit[s] resort to race-based

government action," 143 S. Ct. at 2162 (citing *Shaw II*, 517 U.S. at 909-10); *see also Allen*, 599 U.S. at 41 ("[F]or the last four decades, this Court and the lower federal courts . . ., under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate [the VRA].").

To suggest that Florida cannot act to protect its own voters, who themselves enshrined Article III, Section 20 into their state constitution, is plainly incorrect. Florida is both "empowered" and "entrusted" to enact minority-protection laws, and Appellants are left with nothing to support their efforts to undermine the power of their own constitution.

3. A Black-performing district in North Florida is narrowly tailored to justify the compelling interest in complying with the non-diminishment provision.

Appellants do not argue that a Black-performing district in North Florida would fail the narrow tailoring inquiry. Rightly so. Evaluating "narrow tailoring" in the context of a facial constitutional attack—without a particular district to consider—is illogical. *See, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 656 (3d Cir. 2009)

(cautioning against courts trying to determine narrow tailoring "in the abstract").

In any event, the "narrow tailoring" standard requires only that a map-drawer have "good reasons to believe" that its use of race in drawing a particular district was necessary to comply with the non-diminishment provision. *Bethune-Hill*, 580 U.S. at 182 (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278). Here, Florida Supreme Court precedent not only provides "good reasons to believe" that a Black-performing district in North Florida is necessary to comply with the non-diminishment provision, it compels that finding. *See Apportionment I*, 83 So. 3d at 625-27 (explaining that the non-diminishment provision prohibits "weaken[ing] . . . historically performing minority districts."); *LWV I*, 172 So. 3d at 403 (affirming that the Florida Constitution requires the Legislature to avoid diminishment of Black voters' ability to elect their candidate of choice and ordering adoption of Benchmark CD-5).

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the trial court's decision.

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Respectfully submitted,

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