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

AMENDED[1] NOTICE TO INVOKE DISCRETIONARY JURISIDICTION

NOTICE IS GIVEN that Black Voters Matter Capacity Building Institute, Inc., Equal Ground Education Fund, Inc., League of Women Voters of Florida, Inc., League of Women Voters of Florida Education Fund, Inc., Florida Rising Together, et al., Plaintiffs/Petitioners, under Florida Rules of Appellate Procedure 9.030(a)(2)(A)(ii), (iii), and (iv), invokes the discretionary jurisdiction of the supreme court to review the decision of this court, sitting En

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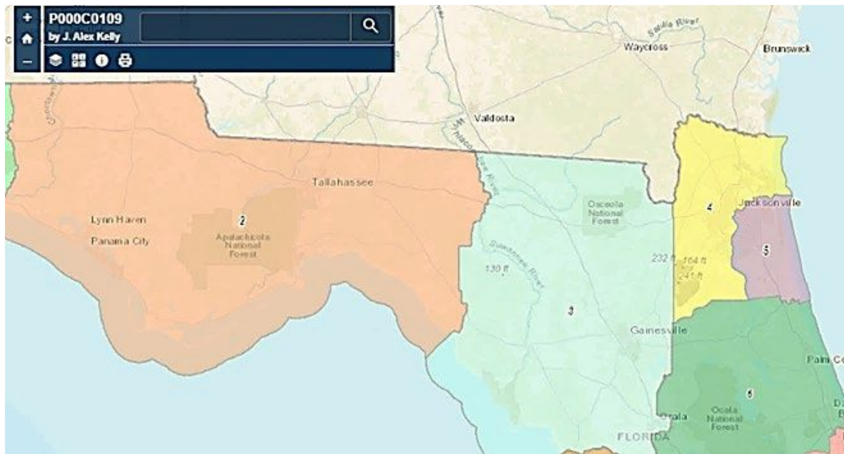

§ 8.002(4), Fla. Stat. ("the enacted districts or the enacted map").

Appellees challenged the elimination of benchmark District 5 in the enacted map, claiming in the amended complaint unconstitutional diminishment of "Black voters' ability to elect their candidates of choice."

<u>Fair Districts Amendments</u>

In 2010, the people of Florida adopted two amendments to the Florida Constitution known as the Fair Districts Amendments. *See* Art. III, §§ 20–21, Fla. Const.; *Apportionment I*, 83 So. 3d at 598. Until the adoption of the Fair Districts Amendments, "Florida's constitutional requirements guiding the Legislature during the apportionment process were 'not more stringent than the requirements under the United States Constitution.'" *Id.* (quoting *In re Constitutionality of House Joint Resol. 1987*, 817 So. 2d 819, 824 (Fla. 2002)).

The amendments "adopted identical standards" for congressional redistricting in section 20 and legislative redistricting under section 21. *Apportionment I*, 83 So. 3d at 598 n.1.[9] Section 20, which is at issue here, stated:

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[9] The majority opinion makes the novel argument that *Apportionment I* and *In re Senate Joint Resolution of Legislative Apportionment 2-B* (*Apportionment II*), 89 So. 3d 872, 889–90 (Fla. 2012), are not binding on this court. This argument was not made by the Appellants. In fact, Appellants repeatedly cited

> In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and 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; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (c) The order in which the standards within subsections (a) and (b) of thi s section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Apportionment I in their initial briefs. The Legislative parties stated in part, "the Florida Supreme Court recognized that new districts may not 'weaken' historically performing districts, 83 So. 3d at 625, and that the non- retrogression standard adopted by Congress, and more recently by Florida, as ks whether the minority population is 'more, less, or just as able to elect a preferred candidate of choice after a change as before. '" The Secretary's initial brief also recognized the precedential importance of Apportionment I, stating that it "dealt with an identically worded constitutional provision for state legislative districting, see Art. III, § 21, Fla. Const., but the case's analysis applies equally to Section 20, see League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135, 139 n.2 (Fla. 2013)." The Florida Supreme Court in both Apportionment VII and Apportionment VIII, involving the review of trial court decisions, cited Apportionment I with approval.

(emphasis added). The standards in section 20(a) are known as tier-one standards, while the standards in section 20(b) are known as tier-two standards. Apportionment I, 83 So. 3d at 615.

The portion of section 20(a) at issue "imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice." Apportionment I, 83 So. 3d at 619. "[B]oth clauses impose a restrictive imperative, each of which must be satisfied. " Id. (quoting Advisory Op. to Att'y Gen. re Standards For Establishing Legis. Dist. Boundaries, 2 So. 3d 175, 189 (Fla. 2009) (plurality opinion)).

The "equal opportunity" clause in section 20(a) is protection against dilution. Apportionment I, 83 So. 3d at 619. This clause "is essentially a restatement of Section 2 of the Voting Rights Act (VRA), which prohibits redistricting plans that afford minorities 'less opportunity than other members of the electorate to participate in the political process.'" Apportionment I, 83 So. 3d at 619 (quoting 42 U.S.C. § 1973(b) (2006)). "A successful vote dilution claim under Section 2 requires a showing that a minority group was denied a majority -minority district that, but for the purported dilution, could have potentially existed." Apportionment I, 83 So. 3d at 622 (emphasis added). A dilution claim was not alleged at trial and is not before us.

The only requirement of section 20(a) asserted at trial below and now before us is the non-diminishment clause. This "reflects the statement codified in Section 5 of the VRA." Apportionment I, 83 So. 3d at 620. "Florida's constitutional provision now embraces the principles enumerated in Sections 2 and 5 of the VRA. Because Sections 2 and 5 raise federal issues, our interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent." Apportionment I, 83 So. 3d at 620. "Section 5 attempts to eradicate impermissible retrogression in a minority group's

ability to elect a candidate of choice." [10] Apportionment I, 83 So. 3d at 620. "[T]he 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 Florida Supreme Court has described as follows the analysis governing the determination of whether diminishment occurred:

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

In re Senate Joint Resol. of Legis. Apportionment 100, 334 So. 3d 1282, 1289 (Fla. 2022) (citing Apportionment I, 83 So. 3d at 625, 627).

A district does not have to be majority-minority to be protected from diminishment, but districts where Black voters or other racial minorities make up the majority of the population are protected. See Apportionment I, 83 So. 3d 625 (citing Texas v. United States, 831 F. Supp. 2d 244, 265–68 (D.D.C. 2011)). The Florida Supreme Court stated that, "in addition to majority-minority districts, coalition or crossover districts that previously provided minority groups with the ability to elect a preferred candidate under the benchmark plan must also be recognized." Id.

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[10] Retrogression and diminishment are synonymous in the context of both Section 5 of the VRA and the Fair Districts Amendments. See Apportionment I , 83 So. 3d at 619–20.

The Parties' Stipulation and Trial Court Proceedings

The parties narrowed the issues for trial and reached a pretrial stipulation. They agreed that in the 2016, 2018, and 2020 general elections, "Black voters were politically cohesive in elections in the district." They agreed that during those three elections "voting was racially polarized in the district" and that the "candidate of choice for Black voters in the district" won each of the three elections. They also agreed that under the enacted map the Black voting age population of the district decreased from 46.2% to 31.7%. Finally, they agreed, "None of the Enacted districts in North Florida are districts in which Black voters have the ability to elect their preferred candidates." [11]

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[11] I respectfully disagree with the majority's contention that the ability of Black voters to "elect the candidate of their choice" is a question of law not controlled by the stipulation of the parties. The law may supply the meaning of the term, but whether a new district diminishes the ability of Black voters to elect a candidate of their choice is based on facts. See Thornburg v. Gingles, 478 U.S. 30, 41 (1986) ("Based on statistical evidence presented by expert witnesses, supplemented to some degree by the testimony of lay witnesses, the [federal district] court found that all of the challenged districts exhibit severe and persistent racially polarized voting."); McMillan v. Escambia Cnty., Fla., 748 F.2d 1037, 1043 (5th Cir. 1984) ("Defendants contend that voting in Escambia County is not polarized. This contention is not supported by the evidence."); Martinez v. Bush, 234 F. Supp. 2d 1275, 1279–80 (S.D. Fla. 2002) ("We present detailed findings of fact comparing voting behavior by race in performing black districts existing before and after the redistricting process at issue in this litigation."). The stipulation of the parties established the facts here and is binding on us. See Troup v. Bird, 53 So. 2d 717, 721 (Fla. 1951). Additionally, the Appellants did not make the argument that the stipulation was insufficient to establish diminishment, so it is not preserved. Citizen of State v. Clark, 48 Fla. L. Weekly S217, S217, 2023 WL 7400723, *2 (Fla. Nov. 9, 2023) (citations omitted) ("The preservation requirement also serves the purpose of treating the parties, the court, and the judicial system fairly."). Nor was the issue even raised in the Appellants' briefs, so it is not a basis to reverse.

In the stipulation, the parties disagreed on whether the diminishment standards in Fair Districts could be applied to the enacted districts. The Appellants claimed as Question 1 for the trial court's determination that the Appellees had to satisfy the precondition requirement under Thornburg v. Gingles, 478 U.S. 30 (1986), before Appellees could state a diminishment claim. But the parties agreed that if Gingles did not apply, diminishment had been proved.[12] The stipulation stated,

> Defendants [Appellants] concede that if the non-diminishment standard applies to North Florida (Question #1), then there is no Black-performing district in North Florida under the Enacted Map. The parties agree that the former congressional district 5 used for the 2016, 2018, and 2020 congressional elections was a Black-performing district.

The trial court found that the benchmark district was the District 5 the Florida Supreme Court approved in 2015; that all the Gingles preconditions did not apply to a diminishment claim; that diminishment had occurred in violation of the Florida Constitution; and that Appellants' Equal Protection arguments were unavailing.

Florida Supreme Court Approved the Benchmark District in 2015

The parties disagree about which benchmark district to use in evaluating the diminishment claim. After redistricting occurred following the 2010 census much litigation ensued. See,

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Rosier v. State, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) (en banc) (citing D.H. v. Adept Cmty. Servs., Inc., 271 So. 3d 870, 888 (Fla. 2018) (Canady, C.J., dissenting)) ("[I]t is not the role of the appellate court to act as standby counsel for the parties.").

[12] Appellants also claimed as Questions 2 and 3 that applying Fair Districts to North Florida congressional redistricting violates Equal Protection and that the non-diminishment provision in Fair Districts was facially unconstitutional. The Equal Protection issue is addressed below.

e.g., Apportionment I; Apportionment VII; Apportionment VIII . Congressional District 5 as well as other congressional and legislative districts were found to violate the Fair Districts Amendments. Apportionment VII, 172 So. 3d at 402– 06. The Florida Supreme Court held that District 5 unconstitutionally favored a political party and had to be redrawn. Id.

There is no requirement in Florida or federal law that a district must have been created as a remedy for a dilution or diminishment for the district to be used as a benchmark district in a later claim of diminishment. Rather, "[r]etrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 478 (1997) (citing Holder v. Hall, 512 U.S. 874, 883 (1994)). "The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment ." United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 161 (1977).

"A plan leads to impermissible retrogression when, compared to the plan currently in effect (typically called a 'benchmark plan'), the new plan diminishes the number of districts in which minority groups can 'elect their preferred candidates of choice' . . . ." Harris v. Arizona Indep. Redistricting Comm'n, 578 U.S. 253, 260 (2016). For diminishment claims "[t]he baseline for comparison is present by definition; it is the existing status. While there m ay be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur." Holder, 512 U.S. at 883– 84 (citing 28 CFR § 51.54(c) (1993)); see also Abrams v. Johnson, 521 U.S. 74, 97 (1997) ("There are sound reasons for requiring benchmarks to be plans that have been in effect; otherwise a myriad of benchmarks would be proposed in every case, with attendant confusion.").

Race was an issue that led to the creation of benchmark District 5. The previous district had favored a political party by packing Black voters into one district, reducing their "influence . . . in surrounding districts. " Apportionment VII, 172 So. at 40 2. The Florida Supreme Court was conscious of diminishment in

deciding how the new District 5 should be drawn to comply with the Fair Districts requirements in the Florida Constitution. Id. at 403–06. "Since the Legislature cannot prove that the North-South configuration is necessary to avoid diminishing the ability of black voters to elect a candidate of their choice, we hold that District 5 must be redrawn in an East-West manner." Id. at 403. The Court further stated, "Accordingly, we reject the Legislature's argument that an East-West version of the district would diminish the ability of black voters to elect a candidate of their choice." Id. at 405. The Court then concluded "District 5 must be redrawn in an East-West orientation." Id. at 406.

After further proceedings, the Legislature approved a redrawn District 5 as complying with the Florida Constitution as the Florida Supreme Court had directed. Apportionment VIII, 179 So. 3d at 271–73. Again, the Florida Supreme Court considered the non-diminishment requirement in the Fair Districts Amendment. Id. at 273. The Court concluded, "Because the proposed district comports with this Court's directions in Apportionment VII and does not diminish the ability of black voters to elect a candidate of choice, the Legislature has met its burden to justify the configuration it selected." Apportionment VIII, 179 So. 3d at 273. The Court therefore approved benchmark District 5. Id. at 271. [13]

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[13] The Court discussed the shape of the district in Apportionment VII in stating, "There is no doubt that an East-West version of District 5 is visually less 'unusual' and 'bizarre' than the meandering North-South version enacted by the Legislature." 179 So. 3d at 406 (citing Apportionment I, 83 So. 3d at 634). Various current districts throughout the State have features much like the benchmark District 5 approved in Apportionment VIII. See Redistricting.Maps.Arcgis.com, https://redistricting.maps.arcgis.com/apps/View/index.html?appid=2c92665fc1d14fc2becb3030e23a4595 (last visited Nov. 17, 2023). The only difference is that the benchmark District 5 spanned multiple counties, just like other north Florida districts, because of the lower population in some of these counties when compared to the rest of Florida. In discussing the shape of a district when faced with a diminishment claim the Court stated, "We recognize that in certain situations, compactness and other redistricting

Applying these cases, the benchmark plan — that is the baseline for comparison in evaluating Appellees' diminishment claim — is the benchmark District 5 that the Florida Supreme Court mandated in Apportionment VII and approved in Apportionment VIII. Nonetheless, Appellants argue that benchmark District 5 is an unconstitutional racial gerrymander and cannot be used as a benchmark district. But a trial court or district court cannot overrule the Florida Supreme Court. See Hoffman v. Jones, 280 So. 2d 431, 433–34 (Fla. 1973) ("To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum. . . .").

And even if we could revisit what the Florida Supreme Court decided in Apportionment VIII, that decision is res judicata between the parties.[14] See In re Senate Joint Resol. of Legis. Apportionment 2-B (Apportionment II), 89 So. 3d 872, 883–85 (Fla. 2012). "Based on principles of res judicata, a judgment on the merits will thus bar 'a subsequent action between the same parties on the same cause of action.'" Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) (quoting Youngblood v. Taylor, 89 So. 2d 503, 505 (Fla. 1956)).

The League of Women Voters of Florida was a party in Apportionment VII and Apportionment VIII and is a party among the Appellees here. The Florida House, Florida Senate, and the Florida Secretary of State were parties in Apportionment VII and Apportionment VIII and are the Appellants here. "Importantly, the doctrine of res judicata not only bars issues that were raised,

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criteria, such as those codified in tier two . . . will be compromised in order to avoid retrogression." Apportionment I, 83 So. 3d at 626.

[14] I do not contend that Appellants could not challenge a subsequent map drawn after court-ordered redistricting. Instead, my contention is that the principle of res judicata requires that the district the Florida Supreme Court approved in Apportionment VIII is locked in as the benchmark district for this case involving the same parties.

but it also precludes consideration of issues that could have been raised but were not raised in the first case."[15] Juliano, 801 So. 2d at 105 (citing Youngblood, 89 So. 2d at 505); see also Apportionment II, 89 So. 3d at 884. Appellants could have claimed racial gerrymandering in opposing District 5 in Apportionment VII and Apportionment VIII, but they did not. Apportionment VIII sets the benchmark District 5 to be used in considering the diminishment claim.

The Majority Opinion Incorrectly Applies Gingles to a Diminishment Claim

The majority opinion holds that despite the undisputed evidence of diminishment in the enacted districts, Appellees have not met their burden of proof because the preconditions from Gingles were not met. The holding in Gingles has "three threshold conditions for proving vote dilution under § 2 of the VRA." Cooper v. Harris, 581 U.S. 285, 301 (2017) (citing Gingles, 478 U.S. at 50–51).[16] The key Gingles precondition, which was not met here, is that "a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." Cooper, 581 U.S. at 301 (quoting Gingles, 478 U.S. at 50).

But Gingles involved Section 2 of the VRA, and its holding does not apply to diminishment claims. The United States Supreme Court recognized this important distinction in stating, "We have, however, 'consistently understood' § 2 to 'combat

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[15] Although not required for res judicata to apply, in Apportionment VII the Appellants here, who were the appellees in that case, raised the issue that "article III, section 20, of the Florida Constitution is invalid because it violates the United States Constitution." Apportionment VII, 172 So. 3d at 372 n.4.

[16] If the preconditions are met in a Section 2 dilution claim, then the plaintiff "must also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." Allen v. Milligan. 599 U.S. 1, 19 (2023) (quoting Gingles, 478 U.S. at 45–46).

different evils and, accordingly, to impose very different duties upon the States.'" Georgia v. Ashcroft, 539 U.S. 461, 478 (2003) (quoting Bossier Parish Sch. Bd., 520 U.S. at 471, 477). The Court in Ashcroft recognized that Gingles did not apply to a diminish ment claim:

> And the § 2 inquiry differs in significant respects from a § 5 inquiry. In contrast to § 5's retrogression standard, the "essence" of a § 2 vote dilution claim is that "a certain electoral law, practice, or structure ... cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); see also id., at 48–50, 106 S.Ct. 2752 (enunciating a three-part test to establish vote dilution); id., at 85–100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment); 42 U.S.C. § 1973(b). Unlike an inquiry under § 2, a retrogression inquiry under § 5, "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." Bossier Parish I, supra, at 478, 117 S.Ct. 1491. While some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections "differ in structure, purpose, and application." Holder v. Hall, 512 U.S. 874, 883, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (plurality opinion).

Ashcroft, 539 U.S. at 478.

Here, we are addressing a benchmark district that already existed until it, or anything resembling it, was written out of existence in 2022. In the redistricting context, diminishment claims are based on a real district that had existed, while dilution claims are based on a potential district that could exist. Compare Bossier Parish Sch. Bd., 520 U.S. at 478 (citing Holder, 512 U.S. at 883) ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan."), with Apportionment I, 83 So. 3d at 622 ("A successful vote dilution claim under Section 2 requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed.") (emphasis added).

A diminishment claim is not based on the number of minority voters in an enacted district. "Section 5 . . . does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. That is precisely what the language of the statute says." Alabama Legis. Black Caucus v. Alabama, 575 U.S. 254, 275 (2015). The Fair District Amendment has the same language protecting from diminishment "racial or language minorities['] . . . ability to elect representatives of their choice." Art. III, § 20(a), Fla. Const.

The best that the majority opinion can argue for the application of Gingles to diminishment claims is to point to a footnote from Apportionment VIII that states, "The Gingles preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis." Apportionment VIII, 179 So. 3d at 286 n.11 (citing Texas, 831 F. Supp. 2d at 262–63). But the Florida Supreme Court did not import all of the Gingles preconditions into a diminishment claim. That footnote pertains to "voting cohesion and polarized racial bloc voting —the establishment of which is the first step in any retrogression analysis." Apportionment VIII, 179 So. 3d at 286.

The Court in Apportionment VIII discussed Gingles and did not require that the minority population constitute a majority of the voting age population in the district. Apportionment VIII, 179 So. 3d at 286 n.11. The footnote in Apportionment VIII discussing the Gingles preconditions was reminding the parties that the "test for retrogression" includes "whether the minority group votes cohesively." Id. This is the same as the second Gingles precondition, which requires that the "minority group must be 'politically cohesive.'" Cooper, 581 U.S. 301–02 (quoting Gingles, 478 U.S. at 51). Cohesion among Black voters and racial polarization in benchmark District 5 was part of the parties' stipulation, was thereby established, was not argued to the contrary by Appellants, and is uncontested here.[17]

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[17] Therefore, as discussed in footnote 11, any claim that the Black voters in benchmark District 5 were not cohesive or polarized in voting, or that there was insufficient proof of Black

Never before in Florida or United States Supreme Court precedent has a proposed majority-minority district been required before a diminishment claim could be considered. Just last year, the Florida Supreme Court noted that Gingles applies to dilution claims and requires a majority-minority district. In re Senate Joint Resol. of Legis. Apportionment 100, 334 So. 3d at 1288 n.5. But the test for diminishment claims was different and did not include this requirement from Gingles. In re Senate Joint Resol. of Legis. Apportionment 100, 334 So. 3d at 1289 (citing Apportionment I, 83 So. 3d at 625). Rather, diminishment claims could apply when a redistricting serves to either "eliminate majority- minority districts or weaken other historically performing minority districts." Id. (quoting Apportionment I, 83 So. 3d at 625) (emphasis added). The consideration for diminishment claims therefore differs from this Gingles precondition. See In re Senate Joint Resol. of Legis. Apportionment 100, 334 So. 3d at 1289 (citing Apportionment I, 83 So. 3d at 625).

By applying the Gingles majority- minority precondition from a dilution claim to a diminishment claim, the majority opinion has imposed a requirement found nowhere in the Florida Constitution, in Florida Supreme Court cases, or United States Supreme Court cases. The majority opinion effectively deletes the diminishment protections in article III, section 20(a) of the Florida Constitution, since diminishment can now only be proven if dilution is present. [18]

The Enacted Districts Diminish Minority Participation

The Legislature's enacted map is initially presumed valid. Apportionment I, 83 So. 3d at 606, 608. The burden was on

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voters being able to elect a candidate of their choice, was unpreserved below and is waived here.

[18] Since article III, section 21(a) on Florida legislative redistricting has the same language, the majority opinion has effectively deleted those protections too, unless a challenger can put forth a dilution claim.

Appellees as challengers of the redistricting plan to show a violation of Fair Districts. The Court in Apportionment VII discussed the heightened judicial scrutiny to be applied in considering "the Legislature's decisions in redistricting." 172 So. 3d at 398 (citing Fla. House of Representatives v. League of Women Voters of Fla., 118 So. 3d 198, 205 (Fla. 2013)). But even without heightened scrutiny, it is clear that the Appellees have shown that the enacted districts violate the non-diminishment provision in Fair Districts.

The trial court's findings of diminishment, which were consistent with the parties' stipulation, are therefore supported by competent, substantial evidence. See Apportionment VIII, 179 So. 3d at 271 (reviewing a trial court's factual findings for competent, substantial evidence). A historically performing benchmark district for Black voters was not just diminished — it was eliminated. This is not like Abrams, cited in the majority opinion, where a 10% minority district was reduced to 9%. 521 U.S. at 97. The change here was not de minimis. A politically cohesive racial minority is now denied the ability to elect a candidate of choice in a racially polarized district, showing that unconstitutional diminishment has occurred. The people of Florida have given us the Fair Districts Amendments, and it is our "duty" to enforce it. Apportionment I, 83 So. 3d at 607.

The Appellants Did Not Carry Their Burden to Prove Their Equal Protection Defense

The final issue for our consideration is the Appellants' Equal Protection defense.[19] As shown above, Appellees proved a diminishment claim in the benchmark district. Appellants contend that Appellees still had the burden to show a remedial map could be drawn without violating the United States

[19] The majority opinion does not decide this issue, but two concurring opinions would reverse based on either the Equal Protection Clause of the United States Constitution or the "equal before the law" provision in article I, section 2 of the Florida Constitution.

Constitution's Equal Protection Clause. [20] U.S. Const. amend. XIV, §1. This is incorrect since Appellants raised the Equal Protection issue as an affirmative defense. [21] The burden of proof was therefore on Appellants to prove that no district could be drawn that both complied with Fair Districts and did not violate Equal Protection. See Custer Med. Cntr. v. United Auto Ins. Co., 62 So. 3d 1086, 1096 (Fla. 2010) ("The defendant has the burden of proving an affirmative defense."); see also Miller v. Johnson, 515 U.S. 900, 916 (1995) (putting the burden on the party claiming an unconstitutional racial gerrymander to show "that race was the predominant factor motivating the legislature's decision"). Appellants did not carry their burden.

Importantly, the trial court did not order the Legislature to draw a specific district map and did not impose a map of its own creation. All the trial court did was enjoin the use of the enacted district map and returned redistricting to the Legislature "to enact a remedial map in compliance with Article III, Section 20 of the Florida Constitution." "[T]he basic unit of analysis for racial

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[20] The Legislative parties cite Apportionment II, 89 So. 3d at 889–90, for this proposition. But the subject district in Apportionment II was being challenged as violating the compactness tier-two standard. See Art. III, §21(b), Fla. Const. The Court in Apportionment II held the alternative plans the challengers provided did not meet their burden of proof because the alternative plans would have "raise[d] concerns" about non-diminishment. 89 So. 3d at 889; see also Art. III, § 21(b), Fla. Const. (establishing compactness as a tier-two standard to be followed "[u]nless compliance with the" tier-two standards "conflicts with the standards in subsection (a) or with federal law"). Likewise, Appellants' reliance on Apportionment I was misplaced because that also involved tier-two standards that had to yield to tier-one standards. 83 So. 3d at 653.

[21] I agree with the Appellants that the public official standing doctrine does not apply in this case, so they could raise affirmative defenses. Still, the trial court analyzed the Appellants' arguments on the merits, so the erroneous application of the doctrine does not provide a basis to reverse.

gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." Bethune-Hill v. Virginia State Bd. of Elections, 580 U.S. 178, 191 (2017); see also Alabama Legis. Black Caucus, 575 U.S. at 262 –63. Since the trial court's order is stayed pending all appellate review, the Legislature has yet to draw a new, compliant district. Without a district for the courts to evaluate, there can be no finding of racial discrimination.

Race can be considered in redistricting so long as race does not predominate. Allen v. Milligan. 599 U.S. 1, 30 (2023); Miller, 515 U.S. at 915–16; see also Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1283 (11th Cir. 2012) ("[I]t must surely be appropriate for a state legislature to take into account the effect that its new districts will have on racial and language minorities.").[22] The Governor correctly recognized this when, in seeking an advisory opinion on how to draw the district, he stated, "I ask for your opinion to help me be sufficiently conscious of race to comply with the Florida Constitution's anti-diminishment provision but avoid being so conscious of race that my actions could violate the U.S. and Florida Constitutions."

If race could not be considered at all, there never could be a dilution or a diminishment claim. See Robinson v. Ardoin, 22-30333, 2023 WL 7711063, at *10 (5th Cir. Nov. 10, 2023) ("Refusing to allow redistricting maps based on race in any respect, though, would require Gingles to be overruled."). However, the United States Supreme Court in Allen recently allowed race conscious redistricting arising out of a dilution claim. 599 U.S. at 30 –31.

[22] "A longstanding general history of official discrimination against minorities has influenced Florida's electoral process." DeGrandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). The Fair Districts Amendments "are not designed to compel electoral outcomes but rather, by their very terms, merely to level the playing field by ensuring equality among all voters and by increasing opportunities for all candidates." Brown, 668 F.3d at 1281.

Unconstitutional racial gerrymandering can occur if race predominates the considerations in redistricting. Id. But Fair Districts provides two other tier-one factors that are as important as the protections against dilution or diminishment — the district cannot be "drawn with the intent to favor or disfavor a political party or incumbent. . . and districts shall consist of contiguous territory." Art. II I, § 20(a), Fla. Const. These tier-one factors are entitled to equal consideration. Art. III, § 20(c), Fla. Const. And the tier-two factors that "districts shall be nearly equal in population as practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries" are to be applied if possible, also showing that race does not have to be predominant in complying with Fair Districts. Art. III, § 20(b), Fla. Const. "Instead, an express racial target is just one consideration in a traditional redistricting analysis" when considering a claim of unconstitutional racial gerrymandering. Robinson, 22-30333, 2023 WL 7711063, at *10 (citing Allen, 599 U.S. at 32).

To the extent that Appellants cou ld argue, despite the application of res judicata to the issue, that the benchmark District 5 that the Florida Supreme Court approved in Apportionment VIII was itself an unconstitutional racial gerrymander, it should be remembered that District 5 was created to remedy a political gerrymander. Apportionment VII, 172 So. 3d at 402–06. Race and non-diminishment of Black voters were permissible considerations in redistricting leading to the establishment of benchmark District 5, but race did not predominate over the other Fair Districts requirements thoroughly considered by the Court. Id.

Finally, even if the burden were shifted and Appellees had to show a map that could be created without violating equal protection, Appellees did so with both the Duval-o nly District 5 and the alternative District 5 that the Legislature approved but was then vetoed. The trial court found that Duval-only District 5 "is extremely compact," and "it complies with basic traditional redistricting criteria such as equal population, contiguity, or adherence to political and geographic boundaries." The trial court's order also carefully analyzed the alternative District 5

and found that the alternative district "performs reasonably well on objective, non-racial traditional redistricting criteria."[23]

Two concurring opinions would have the courts ignore race in considering diminishment of racial minority voting strength stemming from redistricting. The dissent in Allen raised these same concerns in considering dilution claims. 599 U.S. at 45–46. But we cannot overrule Allen and the many other cases that allowed race to be considered in redistricting so long as race did not predominate. See Miller, 515 U.S. at 916; Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."); Shaw v. Reno, 509 U.S. 630, 646 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination."). Ignoring race would go against what the people of Florida have required of us in approving the Fair Districts Amendments. Since no racially discriminatory district has been drawn and since there are districts that do not violate Equal Protection that could replace the enacted, unconstitutional districts, Appellants' Equal Protection defense must fail.

Conclusion

For the above reasons, I would have certified this appeal for immediate resolution by the Florida Supreme Court. Barring that, I would affirm because Appellees have proven unconstitutional diminishment in the benchmark district, and Appellants' Equal Protection Clause defenses are unavailing. Because the en banc majority incorrectly reverses the well-reasoned decision of the trial court, I respectfully dissent.

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[23] The Duval-only District 5 might result in greater diminishment than the alternative District 5. But if Equal Protection is a "tier-zero" consideration, as Appellants argue, that prevents the drawing of an East-West district, then the Duval-only District 5 at least complies somewhat with the non-diminishment protection in Fair Districts while avoiding any possible claim of an Equal Protection violation.

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