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

COMMON CAUSE FLORIDA, FAIRDISTRICTS NOW, FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE BRANCHES, CASSANDRA BROWN, PETER BUTZIN, CHARLIE CLARK, DOROTHY INMAN-JOHNSON, VEATRICE HOLIFIELD FARRELL, BRENDA HOLT, ROSEMARY MCCOY, LEO R. STONEY, MYRNA YOUNG, AND NANCY RATZAN,

Plaintiffs,

v.

CORD BYRD, in his official capacity as Florida Secretary of State,

Defendant.

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

THE SECRETARY'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

As requested by this Court, the Secretary provides proposed findings of fact and conclusions of law.

Introduction

This case isn't about whether Florida's Enacted Congressional Map complies with Article III, § 20(a) of the Florida Constitution—part of the State's Fair Districts Amendments. Nor is it about whether maps from the 1990s, 2000s, or 2010s, or those never enacted, complied with the Fair Districts Amendments or the U.S. Constitution's Equal Protection Clause. The only issue before this Court is whether the Florida House of Representatives *and* the Florida Senate *and* Governor DeSantis passed and approved the Enacted Map with *racially discriminatory intent*, in violation of the U.S. Constitution's Equal Protection Clause and Fifteenth Amendment. Doc.131 ¶¶ 2, 79 (second amended complaint). They didn't.

After a two-week trial, Plaintiffs have failed to marshal the necessary evidence to overcome the presumption of good faith to which the Enacted Map is entitled. There's also no evidence of racial animus. Far from it. The map drawer from the Governor's Office, J. Alex Kelly, drew the congressional districts at issue with compactness and adherence to geographic and political boundaries as his guideposts. Other districts in other parts of the State came from legislative proposals. There's no evidence of racial animus on the part of the Florida Legislature.

The Enacted Map's timing also makes plain that it is the result of compromise, not animus. With the very real threat that either a state or a federal court would step in to resolve an earlier impasse between the political branches, the Florida House, the Florida Senate, and the Governor coalesced around the Enacted Map in a special

legislative session. The result was a race-neutral map that prioritized traditional redistricting criteria like compactness and adherence to geographic and political boundaries. And gone was the district in North Florida where over 80% of the population came from only two counties at the extreme eastern and western edges of the district, separated by hundreds of miles, and connected by a narrow land bridge.

Plaintiffs fault the Enacted Map for its failure to string together faraway population centers. They say that the State's failure to retain such a sprawling district eliminated a "crossover" opportunity for black voters. They contend that had such a North Florida district been retained, then black voters, together with the right white voters, could elect a congressional representative of their choice. Because the Governor wanted to replace this ill-configured racial gerrymander in favor of a race-neutral district, Plaintiffs' theory goes, the Governor acted with racial animus. And because the Florida Legislature went along with the Governor's proposal, this separate branch of government also became tainted with racial animus under a "cat's paw" theory, and this Court must enjoin the Enacted Map. Tr.983:8-21. Plaintiffs are simply wrong.

The record contains no direct or circumstantial evidence of discriminatory intent on the Florida House's, the Florida Senate's, or the Governor's part. Nor can Plaintiffs liken the State's earnest desire for Equal-Protection-Clause compliance—the *un*willingness to retain what it saw as a race-based gerrymander—with the imposition of invidious poll taxes, literacy tests, and anti-miscegenation laws. Not only that, Plaintiffs' "'cat's paw' theory has no application to legislative bodies." *Brnovich v. DNC*,

141 S. Ct. 2321, 2350 (2021). "It is insulting to suggest that" state legislators "are mere dupes or tools," *id.*, or "mindless automatons" of a separate branch of the government. JX50 70:11-25 (House Session) (Apr. 21, 2022) (Rep. Fine).

Taken together, the evidence shows that Plaintiffs have failed to establish their intentional discrimination claims under the Equal Protection Clause or the Fifteenth Amendment. The Governor did not act with racial animus. The Florida Legislature did not act with racial animus (under a cat's paw theory or otherwise). And so judgment is entered in favor of Defendant Secretary Byrd.

Findings of Fact

We first make credibility determinations for Plaintiffs' and the Secretary's trial witnesses. Then we summarize the evidence introduced at trial.

Credibility Determinations

Plaintiffs produced eight witnesses at trial: J. Alex Kelly, the then Deputy (and now current) Chief of Staff to Governor DeSantis; Charlie Clark, an Individual Plaintiff; Dorothy Inman-Johnson, an Individual Plaintiff; Amy Keith, a representative for Organizational Plaintiff Common Cause Florida; Cynthia Slater, a representative for Organizational Plaintiff Florida State Conference of the National Association for the Advancement of Colored People Branches; Florida House Minority Leader Fentrice Driskell, a Democrat and legislative opponent of the Enacted Map; Dr. J. Morgan Kousser, an expert witness and historian; and Dr. Matt Barreto, an expert witness and political scientist.

The Secretary produced three witnesses: Mr. Kelly; Dr. Douglas Johnson, an expert witness and redistricting practitioner; and Dr. Mark Owens, an expert witness and political scientist.

We consider each witness in turn.

J. Alex Kelly. We find Mr. Kelly credible and afford his testimony great weight. He has spent most of his career as a public servant. In particular, he was the staff director for the Florida House Redistricting Committee during the 2012 redistricting cycle, Tr.201:4-16, and was Deputy Chief of Staff to Governor DeSantis during the 2022 redistricting cycle, Tr.39:3-6. He currently serves two functions: Chief of Staff to Governor DeSantis and Secretary of Commerce for the State of Florida.

During his public-service career, Mr. Kelly drew state house, state senate, and congressional maps. *See, e.g.*, Tr.39:7-18; Tr.41:1-9. During the 2022 special legislative session, Republican Senator Rodrigues summarized Mr. Kelly's background nicely:

> Alex Kelly has experience in drawing maps. He was a former staff director for the Florida House of Representatives during the last redistricting cycle. He has the ability to draw maps because the [State] House map that he drew was the only map that survived judicial review during the last redistricting cycle, and the only map that was implemented as it was passed by the Legislature. . . .
>
> He is a qualified staffer who has been through this process post-fair districts amendment, and drawn a map that has survived judicial review.

JX47 59:21 – 61:4 (Senate Session) (Apr. 20, 2022).

During the trial, Mr. Kelly demonstrated that he is knowledgeable about the geographic and political boundaries of the State, adherence to which is required under

Florida law. *E.g.*, Tr.223:2 – 227:14 (explaining Enacted Map district boundaries in North and Central Florida). Knowledge of these boundaries is also critical in the map-drawing process because every map drawer must carefully choose the point at which a particular district's boundaries achieve "zero-pop"—the point at which a district's population (769,221 here in Florida) complies with the federal constitutional requirement that congressional districts contain the same number of people. Tr.222:18 – 227:14 (Kelly). A simple example is CD-1, where a map drawer starts at Florida's extreme western boundary and keeps moving east, across several rural counties, and then picks a line to serve as that district's eastern edge when the district's population is at 769,221 people. *See generally* Tr.223:7-22 (Kelly). To comply with Florida law, however, that eastern line must follow a geographic or political boundary when arriving at the zero-pop point. Tr.223:7-22 (Kelly). Mr. Kelly convincingly discussed the choices made when drawing the lines at issue.

We credit Mr. Kelly's testimony that he drew portions of the Enacted Map for race-neutral reasons: he drew lines to achieve equally populated and compact district shapes, and to respect geographic, county, and municipal boundaries. Tr.210:1 – 213:19.

We also credit his testimony that if he could have drawn a compact district that protected black voters' ability to elect candidates of their choice in North Florida, he would have done so. The following exchange supports that conclusion:

> Judge Jordan: Mr. Kelly, if you had two identical possible maps in terms of compactness and each one of them satisfied every Tier I and Tier II requirement of the Fair Districts [Amendments], one of

> the proposed configurations would preserve Black minority voting power, the other one would not. In your opinion, can the legislature choose the one that preserves Black minority voting power for that reason?
>
> Mr. Kelly: Yes. In that example, Your Honor, the legislature's considering a multitude of factors, and so in that scenario, Your Honor, the legislature wouldn't be just drawing a district for race-based purposes or predominantly race-based purposes. And so, yes, at that point, the legislature would just need to consider the one that was better for Black voters.

Tr.125:12-25. At another point during trial, Mr. Kelly testified that:

> [I]f I could have drawn a functionally performing compact district and obviously not do something tortured to the district around it, but if I could have—if I could have checked all the boxes that would have been the right thing to do. That's what I would have done.

Tr.938:2-6. Indeed, before drawing lines, Mr. Kelly tried to determine the "art of the possible," to see whether he could draw a compact North Florida district that protected black voters' ability to elect candidates of their choice:

> I looked at whether or not there was a way to draw a Jacksonville core district that would extend, perhaps, to places like Gainesville, Palatka, Daytona Beach, whether or not there was a way to draw a more compact seat in that part of the state that still came somewhere close to the Black voting population of the benchmark seat, which I think was in the 44, 45, 46 percent range. I looked to see if that was possible. The communities that were potentially close ultimately didn't work, but I looked to see if Gainesville, Palatka, and/or Daytona Beach, if going to those areas could make it work. Ultimately, it couldn't. I determined there was no way to come close to the benchmark.

Tr.161:6-18. In a similar vein, we credit Mr. Kelly's testimony that he would have informed the Governor if he could have drawn this North Florida district. Mr. Kelly stated that as the Deputy Chief of Staff during the redistricting cycle, he had "an

obligation to advise" the Governor that if "there was a way to address the" Governor's "legal concerns and at the same time sort of" "check all the boxes, so to speak," Mr. Kelly would have informed the Governor. Tr.172:13 – 173:3.

Charlie Clark. We afford Mr. Clark's testimony little weight when it comes to establishing standing. Mr. Clark never produced a voter-ID card, Tr.272:18-20, and his testimony about the districts in which he resides is inconsistent. He states—with certainty—that he resides in Enacted Map CD-2 and used to reside in Benchmark CD-5, Tr.258:1-5, but he doesn't know the Florida House and Florida Senate districts in which he resides. Tr.272:21 – 273:3. He also appeared to suggest that State Senator Ausley currently represents him, though she was voted out of office in 2022. Tr.272:25 – 273:3.

Mr. Clark also has a relationship with former Congressman Lawson, a Democrat who used to represent North Florida in Benchmark CD-5 and was black voters' candidate of choice in prior elections. Tr.265:6 – 266:22 ("I've known him for 40 years."); Tr.270:13-21. Mr. Clark goes to church with former Congressman Lawson, Tr.265:6 – 266:22; Tr.270:13-21, and former Congressman Lawson would benefit if this Court reimposed a district like his old congressional seat in North Florida.

As Ms. Inman-Johnson (the other Individual Plaintiff) testified, many in the community consider Congressman Lawson their "representative" because of his service to the *entire* Tallahassee area, even though Congressman Lawson served as a representative for only a portion of it. Tr.309:4-14; Tr.310:6-14; Tr.311:5-13 (Inman-

Johnson). Ms. Inman-Johnson put it like this: Congressman Lawson "was not in my congressional district, but he was always my representative." Tr.315:17-20.

Again, the introduction into evidence of a simple voter-ID card would have established Mr. Clark's standing to sue. But no such card was provided.

Dorothy Inman-Johnson. We don't find Ms. Inman-Johnson credible, or, in the alternative, we afford her testimony little weight—particularly when it comes to establishing standing. Ms. Inman-Johnson never produced a voter-ID card, and she testified that she never resided in Benchmark CD-5. Tr.309:15-24; Tr.315:9 – 317:4.

We also believe that Ms. Inman-Johnson is biased against the Republican Party and the Enacted Map more generally. Ms. Inman-Johnson is a registered Democrat and favors the Democratic Party. Tr.318:7-19. The Democratic Party would benefit if this Court reimposed a new district in North Florida, as would former Congressman Lawson. Ms. Inman-Johnson has a relationship with him. Tr.309:4-14; Tr.310:6-14; Tr.311:5-13.

Ms. Inman-Johnson's bias takes other forms as well; she called Governor DeSantis, a Republican, "a mix of Hitler and Putin" and a "straight-up dictator." Tr.323:2 – 324:17.

Amy Keith (Common Cause Florida). We afford Ms. Keith's testimony little weight. Plaintiffs attempted to use her testimony to establish organizational standing for Common Cause Florida. Ms. Keith testified that her counsel instructed her to create and review a list of undisclosed organizational members who purportedly reside in

Enacted Map CD-2, CD-3, CD-4, and CD-5. Tr.493:2 – 494:12. Ms. Keith, herself, doesn't reside in those districts; she resides in St. Petersburg, Florida. Tr.490:21-23.

We note that Ms. Keith's membership list was never produced during this litigation, and it was created for litigation in July 2023, *after* discovery closed, which makes it something other than a business record kept in the ordinary life of her organization. Tr.497:14-20; *see also* Doc.159 (discovery deadline was June 30, 2023). Ms. Keith also couldn't confirm whether each undisclosed member intends to vote in the 2024 election. Tr.497:24 – 499:22.

As will be explained below, this is insufficient to satisfy organizational standing.

Cynthia Slater (Florida NAACP). We afford Ms. Slater's testimony little weight. Plaintiffs attempted to use her testimony to establish organizational standing for the Florida NAACP. Ms. Slater testified that she was asked to review a list, made and sent to her by her organization, of undisclosed organizational members who allegedly reside in Enacted Map CD-2, CD-3, CD-4, and CD-5. Tr.618:7-9; Tr.622:23 – 623:16. Ms. Slater, herself, doesn't reside in those districts; she resides in Daytona Beach, Florida. Tr.613:20-21.

We note that Ms. Slater's membership list was never produced during this litigation, and it was created for litigation in July 2023, *after* discovery closed, again making the list something other than a business record kept in the ordinary life of her organization. Tr.623:17-23; *see also* Doc.159 (discovery deadline was June 30, 2023). While she stated that she can "for certain" confirm "whether anyone on that list will

vote in the 2024 election," Ms. Slater can't credibly make such a representation. Tr.624:7 – 625:9; *see also* Tr.618:21 – 620:3 (court sustaining, in part, a hearsay objection).

As will be explained below, this is insufficient to satisfy organizational standing.

Leader Fentrice Driskell. We don't find Leader Driskell credible, or, in the alternative, we afford her testimony little weight. As a matter of law, we must afford her testimony little weight: the "concerns expressed by political opponents during the legislative process are not reliable evidence of legislative intent." *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 940 (11th Cir. 2023) (referencing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976)). Leader Driskell opposed the Enacted Map and her trial testimony—her post-hoc expression of legislative intent—is not helpful in assessing the Florida Legislature's actions.

We also find that Leader Driskell is biased against the Governor and his policy supporters. She stated that the Governor sows "hate and division," Tr.603:10-14, and that his policies are "draconian" and "further[]" the "Nazi" "agenda," Tr.603:20 – 604:19; Tr.605:21 – 607:3. These statements give us considerable hesitancy on crediting Leader Driskell's descriptions of the 2022 redistricting process and Governor DeSantis's involvement in that process.

Leader Driskell's testimony further suggests that she believes that certain standards—transparency, non-partisanship—should apply to Republicans during a redistricting cycle, and that other standards—secrecy, partisan advantage—should apply to Democrats. During her direct examination, Leader Driskell frequently stressed

the need for transparency and non-partisanship in the Republican-controlled 2022 redistricting process. Tr.517:1 – 518:3; Tr.559:4-13; Tr.565:9-22; Tr.565:23 – 566:17; Tr.574:2 – 575:20; Tr.594:22 – 595:4. Yet on cross-examination, she admitted that she personally spoke with the Democratic National Redistricting Committee about redistricting during the redistricting cycle, and she admitted that her Democratic colleagues communicated—on personal email addresses, outside of the sunshine—with political operatives about redistricting. Tr.594:12 – 603:4.

All of this gives us cause to discount Leader Driskell's credibility.

Dr. J. Morgan Kousser. We don't find Dr. Kousser credible, or, in the alternative, we afford his testimony little weight. Several reasons support this conclusion. *First*, we find that Dr. Kousser is biased against the Republican-controlled branches of the Florida government. Dr. Kousser is a registered Democrat, gives money to the Democratic Congressional Campaign Committee, gives money to the Democratic group Act Blue ($5 a month), gave around $15,000 to Democratic-leaning organizations in 2022 alone, and would like to see more Democrats elected in Florida, regardless of whether they are white, black, or brown. Tr.483:10 – 484:20.

Second, we find Dr. Kousser's historical research suspect. Despite providing a lengthy sweep of Florida history, he didn't conduct "independent research" "at the Florida Archives," or "independent research at the Bob Graham Center" for relevant material, especially primary-source material. Tr.437:1-15 ("I did not do any independent research"). Instead, he heavily relied on newspaper articles, including editorials.

Tr.332:22-24; Tr.433:16 – 434:3; 467:18-20. Even that newspaper research was incomplete; he omitted or overlooked relevant newspaper articles about gubernatorial influence in the redistricting process, particularly influence exerted by Governor Graham and Governor Chiles on their redistricting legislatures. Tr.437:16 – 439:19. Our doubts about Dr. Kousser's research are supported by Dr. Owens, who testified that Dr. Kousser's historical analysis was incomplete. Tr.860:15-25; 861:17-21. Dr. Kousser's research process therefore gives us pause.

Third, so do his expert conclusions. Dr. Kousser provided incorrect or incomplete expert testimony at trial. Dr. Kousser opined that a Florida Governor never asked the Florida Supreme Court for an advisory opinion with redistricting plans pending his approval. Tr.422:15-20. That was incorrect. Tr.436:3-17; *see also In re Advisory Opinion to Gov.*, 81 So. 2d 782 (Fla. 1955). Dr. Kousser also stated that Benchmark CD-5 captured the 1860 "Slave Belt" black population. Tr.336:8-21. That too was wrong; a "Slave Belt" district would include Alachua, Jackson, Sumter, and Marion Counties—counties that were never in Benchmark CD-5. Tr.475:15 – 477:5.

And Dr. Kousser opined that Governor DeSantis conducted a secret functional analysis of the Enacted Map, a claim that was never substantiated at trial. Tr.461:8 – 462:19. To be sure, on Dr. Kousser's redirect, Plaintiffs' counsel cited an article in a footnote in Dr. Kousser's expert report that appeared to support his secret functional analysis opinion. Tr.485:20 – 486:3. The cited article was published in January 2022—the month before the Governor sought an advisory opinion request from the state

supreme court, two months before the Governor vetoed the Florida Legislature's maps, two months before Mr. Kelly began working on the Enacted Map, and three months before the special legislative redistricting session. Dr. Kousser's claim remains unsubstantiated (and incorrect).

It also appeared that Dr. Kousser withheld relevant historical facts on direct examination. For example, on direct, Dr. Kousser never mentioned that Governor Collins vetoed redistricting plans. But on cross, he stated that he knew of this relevant historical fact. Tr.434:16-20. Similarly, on direct, Dr. Kousser never mentioned that special redistricting sessions are fairly commonplace in Florida. Yet on cross, he stated that he knew of multiple redistricting special sessions. Tr.434:21 – 436:2.

Withholding this relevant information on direct—only to admit to it on cross—undermines Dr. Kousser's central expert opinion that the 2022 redistricting cycle was "extraordinary" and violated historical norms. Tr.421:25 – 422:10.[1] Dr. Kousser's

[1] Here's the full quotation from Dr. Kousser:

> So the procedure where the Governor intervenes, the Governor proposes plan, the Governor goes to the State Supreme Court for an advisory opinion, the Governor continues to insist on his views, vetoes, has a special session—almost all of these things were extraordinary procedures compared to what had happened in the legislature before when it was considering apportionment. And that—that informed my opinions, and it informed more than just my opinions. What it informed was the facts that I presented that I hoped would allow the Court to conclude whether the redistricting had been done with racially discriminatory purpose or not.

Tr.421:25 – 422:10.

failure to be forthcoming leads us to conclude that his testimony isn't reliable or credible.

And fourth, although a lower-level concern, Dr. Kousser opined on legal arguments throughout his testimony, despite not being an attorney, and despite testifying that he wasn't opining on legal arguments. *See generally* Tr.373:1 – 374:16; Tr.376:17 – 379:15; Tr.381:23 – 383:18; Tr.385:2 – 387:14; Tr.399:11 – 400:21; Tr.404:25 – 405:13; Tr.410:1 – 415:2. We afford this testimony no weight.

Dr. Matt Barreto. We don't find Dr. Barreto credible, or, in the alternative, we afford his testimony little weight. Several reasons support this conclusion. *First*, we find that Dr. Barreto is biased against the Republican-controlled branches of the Florida government. Dr. Barreto is a registered Democrat, and worked for the Democratic National Committee, the Democratic Congressional Campaign Committee (and was paid over $500,000 by it), and the Biden Administration and 2020 presidential campaign. Tr.631:24-25; Tr.632:10-20; Tr.756:6 – 577:22.

Second, Dr. Barreto provided demonstrably incorrect testimony. For example, Dr. Barreto testified that "I believe the Governor had representatives before the legislature describing and participating in debate or Q and A related to the *State legislative maps*," only to completely backtrack this testimony, stating that "I don't recall" if anyone from "the Governor's office" was "talking about the State House or State Senate maps" during "legislative debates." Tr.708:22 – 709:19 (emphasis added). *See also* Tr.710:4-7.

Dr. Barreto also testified that the Enacted Map "cracked in half" the black population in Duval County between CD-4 and CD-5. Tr.700:10 – 701:4. But as his dot maps and Dr. Johnson's heat map show, that is not accurate; there's a larger black community on the west side of the St. Johns River than on the east side. Tr.802:5 – 803:1; Tr.811:19-22 (Johnson); DX111, DX112; Tr.752:25 – 753:4 (Barreto). The black community therefore wasn't "cracked in half."

Dr. Barreto's conclusion that 2014 was an outlier election-turnout year in Florida is also incorrect. 670:11-25; Tr.672:7-11; Tr.672:17 – 674:11; Tr.733:23 – 734:5, Tr.735:22 – 736:1. The 2014 general election had a turnout of 51%, and that rate compared well to other election turnouts in Florida: the 2022 general election had a turnout of 54%, and the 2010 general election had a turnout of 49%. DX127 (Florida Department of State Voter Turnout data); Tr.840:5 – 841:24 (Johnson) (explaining that 2014 wasn't an outlier election in Florida).

Third, Dr. Barreto's other expert opinions give us pause. For instance, Dr. Barreto relies on dot maps to form some expert opinions. Yet Dr. Barreto can't confirm what each dot represents—50 voters or 100 voters or 1,000 voters. 748:6 – 751:1. As Dr. Johnson testified, dot maps, and particularly the colors of the dots on the maps, can mislead. Tr.796:15 – 802:4 (Johnson). By using very dark green dots for black voters and very light pink dots for white voters, Dr. Barreto's dot maps can (and do) give the wrong impression that there's more black voters than white voters in different areas of

his dot maps. Tr.796:15 – 800:19 (Johnson); DX111 (comparison between Dr. Barreto's dot map and Dr. Johnson's color-flipped dot map).

Dr. Barreto's functional analysis is also suspect. A critical part of a functional analysis is determining whether there's racially polarized voting in a district. Tr.723:13-22. But in reviewing whether there's racially polarized voting in *Benchmark CD-5 counties*, Dr. Barreto considered whether there's racially polarized voting in *North Florida as a whole*—considering counties well outside of Benchmark CD-5, i.e., every county from Escambia County in the west to Duval County in the east and south towards Marion County. Tr.653:12 – 654:7; Tr.723:17 – 724:9.

That inherently leads to skewed and inaccurate results. It's undeniable, for instance, that white voters near Florida State University are different and vote differently from white voters in Congressman Gaetz's Enacted Map CD-1 district in Escambia County. Tr.721:21 – 729:4 (Barreto). Considering whether there's racially polarized voting in *North Florida as a whole* doesn't necessarily reflect whether there's racially polarized voting in Benchmark CD-5 counties.

And Dr. Barreto's central expert opinion—that race dictates election outcomes—is far too reductive. Tr.865:8 – 872:24 (Owens). Partisanship and incumbency certainly play roles in election outcomes, and Dr. Barreto failed to untangle or even wrestle with those competing variables. Dr. Barreto could have done so; in Plaintiffs' counsel parlance, he could have "perform[ed] a multivariable regression that would allow" him "to control for race or party" or incumbency. Tr.906:23 – 907:1;

Tr.909:5 – 910:1 (Owens). Dr. Barreto never did that to disentangle race from other factors such as incumbency and partisanship.

Incumbency certainly plays a role in election outcomes. Incumbent politicians have a legislative record, a local connection, and public name recognition. Tr.865:17 – 866:2 (Owens). U.S. Senator Nelson, for example, benefited from incumbency, often earning higher vote totals than other Democratic candidates in Florida. Tr.866:9 – 868:3 (Owens using Barreto's tables).

Partisanship also plays a role, the "overall" "reflection on the policies and ideologies that candidates overwhelmingly support on one side." Tr.868:4-16 (Owens). Mr. Clark and Ms. Inman-Johnson bear this point out: both vote for Democrats, not black candidates. They vote for Democrats because their principles align more with the Democratic Party than the Republican Party. Tr.273:10 – 276:9; Tr.278:7-18 (Clark); Tr.318:7 – 321:12 (Inman-Johnson).

But the critical flaw in Dr. Barreto's race-dictates-elections conclusion is that in Benchmark CD-5, with a black voting age population of under 50%, white Democratic voters needed to—and did—crossover to assist black Democratic voters to elect Congressman Lawson, the black candidate of choice. In the district most central to this case, considering race alone doesn't explain election outcomes.

Dr. Doug Johnson. We credit Dr. Johnson's testimony and afford it great weight. Dr. Johnson is an experienced map maker and redistricting expert; he recently drew city council lines for the City of Jacksonville. Tr.784:22 – 795:5. In this case, Dr.

Johnson provided helpful testimony on Jacksonville geography and demographics, and on the distinctions between heat maps and dot maps.

Dr. Mark Owens. We also credit Dr. Owens's testimony and afford it great weight. Dr. Owens is a qualified expert, Tr.851:18 – 856:11, and provided helpful opinions on "critical juncture" years in Florida history and gave helpful context to Dr. Barreto's functional analysis.

Statement of Facts

Below is a recitation of the evidence adduced at trial, beginning with Florida's racial history after the Civil War, then moving to racial and redistricting history in the nineteenth and twentieth centuries, and concluding with this century's redistricting cycles, with a principal focus on 2022 congressional redistricting.

1865-1954. Florida, like every other State, had issues with race. Following the Civil War, Florida passed several race-based laws, including literacy tests, poll taxes, and anti-miscegenation laws. Tr.335:3 – 336:3; Tr.340:17 – 343:11; Tr.345:25 – 347:19; Tr.365:12 – 366:23; Tr.479:20 – 480:16 (Kousser). Those laws are, of course, no longer on the books and are irrelevant to the 2022 redistricting cycle.

1955. As background, under the then-operative 1885 Florida Constitution, redistricting took place "the fifth year following each federal census." DX104 at typed p.4 (Florida House of Representatives Reapportionment Packet) (Jan. 1991). And before the 1960s, the U.S. Supreme Court didn't mandate equally populated districts,

so state and congressional districts could be, and often were, malapportioned. *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

All that said, in 1955, the Democratic-controlled Florida Legislature failed to pass state house and state senate maps in its regular legislative session. *See In re Advisory Opinion to Gov.*, 81 So. 2d at 784. Democratic Governor Collins then called the Florida Legislature into an "extraordinary" session, where the legislature passed a state house map and (eventually) a state senate map. *Id.*

Governor Collins took issue with the maps; in particular, he considered the senate map to be malapportioned. *Id.* at 784-85. That objection made sense for Governor Collins: he "campaigned for governor on a platform that emphasized fair legislative representation," and once he "was in office, reapportionment reform became a cause that affected virtually every issue of the day." DX104 at typed p.4. But influential legislators came from malapportioned rural districts and carried outsized legislative power; they opposed the reforms. *Id.* at typed p.4-5. Those legislators "accused the governor of disrupting the low temperature bargaining approach traditionally employed between the executive and legislature," making "clear that no movement on reapportionment would ever occur in such an atmosphere." *Id.* at typed p.5.

With this state of play, Governor Collins asked the Florida Supreme Court for an advisory opinion: given his malapportionment concerns, he asked the court whether he could veto a pending legislative map or whether the map would go into effect as a matter of law without gubernatorial consent. *In re Advisory Opinion to Gov.*, 81 So. 2d at

785. The court answered that under the 1885 Florida Constitution, a governor could veto a legislative map—the "legislative process requires the combined action of the Legislature and the Governor." *Id.* at 786.[2] So he did; Governor Collins vetoed both maps. DX104 at typed p.5; Tr.434:16-20 (Kousser) (acknowledging this fact, for the first time on cross-examination).

The result of Governor Collins's veto "was a protracted stalemate which lasted throughout Collins's term. The bitterness reached extraordinary heights in the" subsequent legislative sessions, where "the fate of practically all legislation seemed to rest entirely on where sponsors stood on apportionment." DX104 at typed p.5.

The 1955 redistricting cycle is relevant to the 2022 redistricting cycle for only this reason: it shows that special redistricting sessions, advisory opinion requests with maps pending gubernatorial approval, vetoes, and gubernatorial involvement in the redistricting process happen. None of these things is unprecedented or extraordinary.

1956-1965. There were more special redistricting sessions following the 1955 redistricting cycle. Between 1957 and 1965, six special sessions were held: in 1957, in 1962 (twice), in 1963, and in 1965 (twice). DX104 at typed p.25-27; *see also* Tr.434:21 – 436:2 (Kousser) (acknowledging, for the first time on cross-examination, that there "were lots of special sessions during" Governor Collins's tenure and afterward).

[2] This is different from the current Florida Constitution, where the Governor can't veto state legislative maps. Fla. Const. art. III, § 16. The current constitution still allows him to veto congressional maps. Fla. Const. art. III, §§ 7-8.

The year 1965 is a critical year for voting-rights purposes. It was then that the federal Voting Rights Act was signed into law. The law was an "extraordinary" race-based remedy to resolve record-backed and pernicious race-based problems in several jurisdictions. *Shelby County v. Holder*, 570 U.S. 529, 534 (2013); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 307-15 (1966) (detailing the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution").

The following southern states were put under § 5 preclearance in 1965: Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. Tr.469:16 – 470:3 (Kousser); Tr.877:17 – 878:3 (Owens). Florida wasn't. Five Florida counties—Collier, Hardee, Hendry, Hillsborough, and Monroe—were subject to preclearance a decade later for language-based reasons, not race. Tr.471:19-22 (Kousser). None of these counties are in North Florida.

1966-1992. The ensuing decades brought more special redistricting sessions and gubernatorial involvement in the redistricting process. Between 1966 and 1982, ten more special redistricting sessions were held: in 1966, in 1967 (four times), in 1968, and in 1982 (four times). DX104 at typed p.25-27.

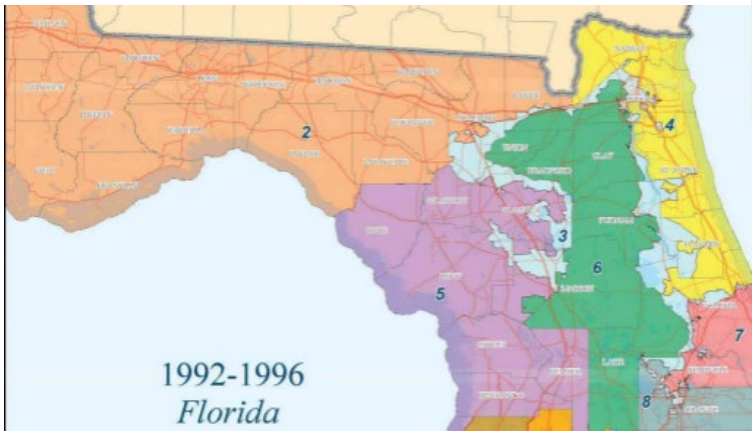
Governors continued to involve themselves in the redistricting process. *See generally* Tr.439: 15-17 (Kousser) ("I don't consider it odd to think that the Governor would lobby on legislative redistricting plans at all."). Democratic Governor Graham played a role in brokering redistricting compromises with a Democratic-controlled

Florida Legislature, and Democratic Governor Chiles "exert[ed] pressure on the Florida Legislature when it" came "to drawing congressional districts." Tr.437:4 – 439:19 (Kousser). It "would be fair to say" governors "strongarmed the legislature to whatever their particular issue of the day was," including redistricting. Tr.250:1-24 (Kelly). "They exerted their will on the legislature." Tr.250:1-24 (Kelly).

The year 1992 was also critical, in two respects. *First*, "Florida amended its constitution to enact" "eight-year" "term limits for" "State legislators." Tr.859:12-16 (Owens). That amendment had a practical effect on redistricting: the vast majority of state legislators coming into a redistricting cycle likely wouldn't have redistricting experience. Tr.859:17-22 (Owens).

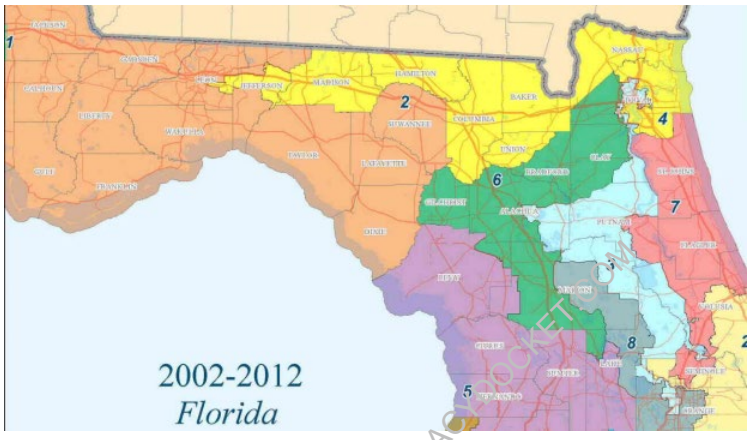
And second, Florida elected three black congresspeople in the 1992 election: Congresswoman Brown, Congressman Hastings, and Congresswoman Meek. Tr.859:1-11 (Owens). Congresswoman Brown was elected in CD-3, a horseshoe-like district in North and Central Florida (shaded in blue below).

PX4557: 1992-1996 Congressional Districts



1993-2009. Congresswoman Brown continued to be elected in bizarrely shaped North Florida districts. Following the 2002 redistricting cycle, Congresswoman Brown's CD-3 (shaded in blue below) was redrawn but was nevertheless not a model of compactness.

PX7223: 2002-2012 Congressional Districts



At the time, nothing in the Florida Constitution prevented those oddly drawn districts. Districts could be drawn for practically any reason—for partisan or incumbency-protection purposes, or to keep communities of interest together. Tr.440:22 – 442:11 (Kousser); Tr.860:4-14 (Owens).

2010. All that changed in 2010, when Florida voters approved the Fair Districts Amendments through the citizen-initiative process to amend the Florida Constitution. Tr.859:23 – 860:14 (Owens). The amendments made it improper to draw squiggly lines for partisan favor, protect incumbents, or combine communities of interest; however, race could still be considered under the new amendments.

The amendments are codified in Article III, §§ 20-21 of the Florida Constitution, and prescribe the same "package deal" of redistricting standards for state legislative and congressional maps. Under the Fair Districts Amendments, there are "tier 1" and "tier 2" standards.

Tier 1 prevents districts from being drawn for partisan purposes or to protect incumbents. Fla. Const. art. III, §§ 20(a), 21(a). Contiguous districts are required under tier 1. Fla. Const. art. III, §§ 20(a), 21(a).

Tier 1 also mandates express race-based protections in the redistricting process:

> **[**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**]**

Fla. Const. art. III, §§ 20(a), 21(a). The first bracketed clause contains the "non-dilution" provision, and the second bracketed clause contains the "non-diminishment" provision. *In re Sen. J. Res. of Leg. Apportionment 1176*, 83 So. 3d 597, 619-21 (Fla. 2012) ("*Apportionment I*").

These race-related tier-1 requirements were modeled on § 2 and § 5 of the Voting Rights Act. *Id.* Even so, the non-dilution and non-diminishment provisions aren't carbon copies of § 2 and § 5 of the Voting Rights Act, and aren't interpreted *exactly* like their federal counterparts. *Id.* at 620-21.

For example, § 5 of the Voting Rights Act considers diminishment on a statewide basis—whether a "new plan diminishes *the number of districts* in which minority groups

can elect their preferred candidates of choice" from the preexisting or "benchmark" map. *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 260 (2016) (cleaned up, emphasis added).[3] The Florida Supreme Court, in interpreting the Fair Districts Amendments' non-diminishment provision, seemingly adopted a different approach. It focused more on a district-specific analysis—whether a benchmark district protected minority voters' ability to elect their preferred candidates, and whether a new map retains that district. *E.g.*, *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 401-06 (Fla. 2015) ("*Apportionment VII*"); *see also In re Sen. J. Res. of Apportionment 2-B*, 89 So. 3d 872, 889 n.21 (Fla. 2012) ("*Apportionment II*") (comparing alleged diminishment between a new district and benchmark district).

Regardless, non-diminishment—under § 5 of the Voting Rights Act or the Fair Districts Amendments—still requires a *valid* benchmark district (or map as a whole); it would make little sense to protect a legally invalid district (or map as a whole). *See generally Edge v. Sumter Cnty. Sch. Dist.*, 775 F.2d 1509, 1511 (11th Cir. 1985) (noting that the last *legally valid* plan would serve as the benchmark); *Apportionment VIII*, 172 So. 3d

[3] To illustrate, consider a map that contains two minority-protected districts: one in the northern part of the State and one in the central part of the State. In a redistricting cycle, the legislature eliminates the northern district, keeps the central district, but creates a new minority-protected district in the southern part of the State. Under this scenario, there's no diminishment under § 5: the number of protected districts—two—remains the same under the benchmark map and new map.

at 371 (considering whether the challengers alleged, as a means of invalidating the whole map, that the benchmark map was drawn with impermissible partisan intent).

The Fair Districts Amendments' non-diminishment provision warrants further discussion, given its role in this case. The state-constitutional text prohibits the drawing of districts "to diminish [minority groups'] ability to elect representatives of their choice." Fla. Const. art. III, §§ 20(a), 21(a). It doesn't protect districts that *function* or *perform* for minority groups, and it doesn't require that a particular *voting age population* be maintained. *Diminishment* is the concern, and to "diminish" is to "make less or cause to appear less." *Apportionment I*, 83 So. 3d at 702 (Canady, C.J., concurring in part and dissenting in part) (referencing a dictionary definition).

To gauge diminishment, under existing Florida Supreme Court precedent, the results of a functional analysis of the enacted district must be compared to the benchmark district. The functional analysis considers (1) the voting age populations in the benchmark district and the new district, (2) the voting registration data in the benchmark district and the new district, and (3) election *performance* data. *Id.* at 627, 656-57. An example best illustrates how this works: if based on the functional analysis an enacted district goes from performing, i.e., electing a minority group's preferred candidate of choice, in fourteen of fourteen test elections to only performing in ten of fourteen test elections, then there has been diminishment compared to the baseline and a violation of the Florida Constitution. *Id.*; *see also Apportionment II*, 89 So. 3d at 882 n.6 (discussing data sets); *Apportionment VII*, 172 So. 3d at 402-06 (rejecting the Florida

Legislature's argument that a drop in black voting age population from 48.11% to 45.12% resulted in diminishment).

Turning to tier 2 of the State Constitution, it prescribes traditional districting criteria for state legislative and congressional districts: compact districts, districts with equal populations, and drawing lines that respect geographic and political boundaries. Fla. Const. art. III, §§ 20(b), 21(b).

Under the Fair Districts Amendments, the "order in which the standards within" each tier "shall not be read to establish any priority of one standard over the other within that" tier, Fla. Const. art. III, §§ 20(c), 21(c), and tier-1 standards trump tier-2 standards, Fla. Const. art. III, §§ 20(b), 21(b). To emphasize this point, under the Fair Districts Amendments, compactness and respect for geographic and political boundaries will be subordinated to the race-based non-diminishment provision.

A few more observations on compactness and the Fair Districts Amendments: the federal Voting Rights Act, which the Fair Districts Amendments borrow from, likewise require compactness. In cases under § 2 of the Voting Rights Act, districts must also be reasonably compact; "there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires." *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399, 433-34 (2006); *see also Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The same is true for § 5 of the Voting Rights Act. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (cited in *Apportionment I*, 83 So. 3d at 619).

And race cannot predominate in forming those districts under either § 2 or § 5 of the Voting Rights Act. *See Shaw v. Reno*, 500 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995). Thus, in practice, compactness is not merely a tier-2 standard. It is implicit in the tier-1 standards, to the extent they borrow from federal law, and federal law itself—the "supreme law of the Land." U.S. Const. art. VI, cl. 2.

Finally, we emphasize that the Fair Districts Amendments were passed through the citizen-initiative process—a referendum process. Although the amendments contain express race-based provisions (the non-dilution and non-diminishment provisions), the amendments weren't submitted to Florida voters with a detailed, enumerated record of racial discrimination in Florida. Tr.388:18-22 (Kousser). This stands in stark contrast to how the Voting Rights Act was passed in 1965, with a detailed congressional record of race-based discrimination in specific jurisdictions—such as the State of Mississippi's abysmal 6.4% registration rate for black individuals of voting age. *Katzenbach*, 383 U.S. at 307-14. While the Florida Supreme Court reviewed the Fair Districts Amendments for ballot compliance, *Advisory Opinion to the AG re: Standards for Establishing Leg. Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009), the court didn't consider any Equal Protection Clause issues, and no record of race-based discrimination was submitted for review.

During trial, however, Dr. Kousser testified that Florida voters approved the Fair Districts Amendments to impose racial protections in redistricting. Tr.359:11 – 362:13. We don't credit that testimony. The Fair Districts Amendments were a package deal of

redistricting standards that included more than just race-based standards; partisanship, incumbency, compactness, and adherence to geographic and political boundaries were all part of that package. What motivated one voter to vote in favor of the Fair Districts Amendments may not have motivated another; some voters may have been motivated by just one of the tier-1 or tier-2 standards, while others may have been motivated by a combination thereof (or for other reasons entirely).

On the record before us, we also cannot glean whether the purpose (predominant or otherwise) of the Fair Districts Amendments was to impose racial protections in redistricting. To reach a contrary conclusion, Dr. Kousser relied on a few statements from the Florida NAACP (a Plaintiff here), Common Cause Florida (a Plaintiff here), and a single editorial from a newspaper (a slanted perspective). Tr.360:25 – 362:13; Tr.464:7 – 465:17; Tr.466:10 – 468:12. We don't find this testimony persuasive for these obvious reasons.

2011-2015. The Fair Districts Amendments were applied for the first time in the 2012 redistricting cycle. State legislative maps and the congressional map were challenged in state court. Both cases wound their way up to the Florida Supreme Court. The first two supreme court cases—*Apportionment I*, 83 So. 3d at 597, and *Apportionment II*, 89 So. 3d at 872—concern the state legislative maps, and the last two cases—*Apportionment VII*, 172 So. 3d at 363, and *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015) ("*Apportionment VIII*")—concern the congressional map.

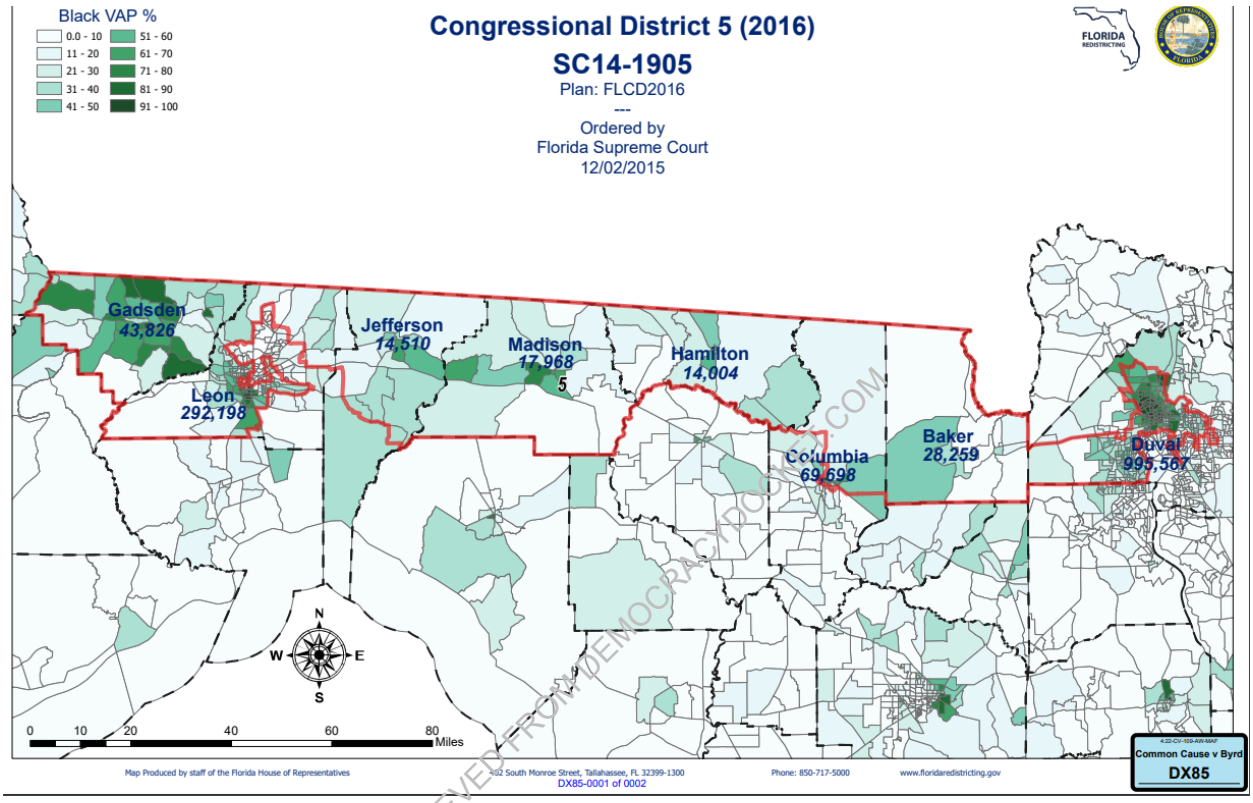
Because of the litigation, the Florida Legislature found itself in several special redistricting sessions. *See, e.g.*, *Apportionment II*, 89 So. 3d at 877 (noting the special session to remedy state legislative maps); *Apportionment VIII*, 179 So. 3d at 261 (noting the special session to remedy the congressional map).

We begin our discussion of the 2012 cycle with how the Florida Legislature originally drew Congresswoman Brown's North Florida district. The legislature drew the district, now numbered CD-5, in a north-south configuration, spanning from Duval County to Orange County. *Apportionment VII*, 172 So. 3d at 394. Like her other districts, it was a bizarrely shaped district, but it was a district the Florida Legislature believed prevented the diminishment of black voters' ability to elect candidates of their choice—as required under the Fair Districts Amendments. *Id.* at 401-06.

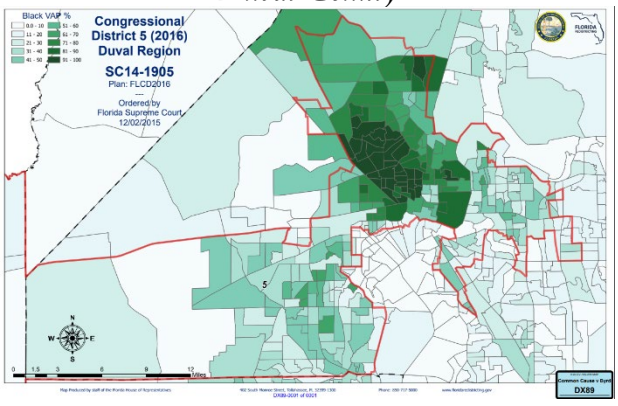
In reviewing the congressional map, the Florida Supreme Court determined that the map was impermissibly drawn for *partisan* purposes and ordered certain districts to be redrawn. *Id.* at 401-02. CD-5 was one of them. Adopting the Florida Legislature's non-diminishment rationale for a race-based district in North Florida, the Florida Supreme Court determined that the only way to further that rationale was to draw CD-5 in an east-west configuration, from Gadsden and Leon Counties to Duval County. *Id.* at 401-06. That east-west configuration captured—with surgical precision—the only pockets of black voters in North Florida, as the following heat maps make abundantly clear. Tr.800:2-12; Tr.801:11 – 802:4 (Johnson) (concluding that Benchmark CD-5 is a racial gerrymander). *See also* Tr.244:11 – 249:23 (Kelly) (opining on the heat maps). Even

with line drawing with surgical precision, the black voting age population in Benchmark CD-5 was under 50%. JX70 at 2 (Benchmark Map legislative packet).

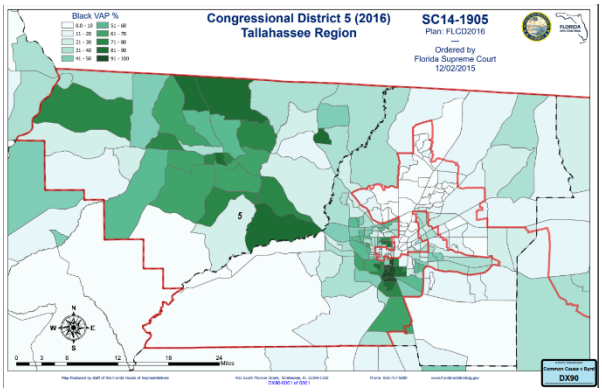
DX85: Heat Map of Benchmark CD-5



DX89: Heat Map of Benchmark CD-5 in Duval County



DX90: Heat Map of Benchmark CD-5 in Leon County



Plaintiffs agree that Benchmark CD-5 was drawn "for race-based reasons":

> Judge Winsor: But you don't dispute it [Benchmark CD-5] was drawn for race-based purposes, right?
>
> Plaintiffs' Counsel: All of these [North Florida districts, from 1992 to 2016] were. Yes, Your Honor. I don't want to get into arguing about predominance or consideration. That's an issue, but—yes, it [Benchmark CD-5] was drawn for race-based reasons, just like all five of these districts were. . . .

Tr.944:6-14.

So does Dr. Kousser, as the following exchange with the Secretary's counsel makes clear:

> Q. So you would then agree that race explains the squiggly lines in Congressional District 5 in the benchmark map?
>
> A. The area of Duval is certainly—it was included in District 5 because they wanted to allow Blacks to elect candidates of their choice. I agree with that.
>
> Q. Would you also agree with me for the South side of Tallahassee, that spot that –
>
> A. I'm less familiar with that demography, but I believe that is the case.

Tr.445:16-24.

The squiggly lines didn't help CD-5's compactness. The Florida Supreme Court, in fact, never stated that it was a compact district. Instead, it stated that the district was more compact than the north-south configuration and earlier versions of Congresswoman Brown's district. *Apportionment VII*, 172 So. 3d at 406 ("neither the North-South nor the East-West version of the district is a 'model of compactness'"); *Apportionment VIII*, 179 So. 3d at 272 ("The new District 5 . . . is more visually and

statistically compact than both the 2012 enacted district that was previously invalidated and the Legislature's 2014 remedial plan.").

The Florida Supreme Court's congressional-map opinions during this redistricting cycle are noteworthy for other reasons. For one, the court never wrestled with or considered whether the Fair Districts Amendments' express race-based provisions conflicted with the U.S. Constitution's Equal Protection Clause. That issue was never brought up by the litigation parties, and the court never considered it. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *Atl. C. L. R. Co. v. Baynard*, 151 So. 5, 6 (Fla. 1933) (same).

The Florida Supreme Court also incorrectly stated that Mr. Kelly drew the east-west configuration of CD-5. The court stated that "legislative staffer Alex Kelly initially drew an East-West version of the district." *Apportionment VII*, 172 So. 3d at 403-04. Mr. Kelly testified that wasn't the case, and we credit his testimony:

> [The Florida Legislature's redistricting staff] hosted 26 meetings around the state in the summer of 2011, so [as] staff director, I was orchestrating, organizing that process, delegating duties to my staff to oversee every aspect of that process. . . .
>
> We had 26 meetings where we would take citizen testimony, get public input on the maps and to take testimony the citizens might give that might be very narrow in some cases, very broad in other cases, but to get public input and to essentially listen, start the process by listening. It was pretty normal for a person to come to a meeting, and if they spoke at the meeting, oftentimes they would hand us maps. . . .

> A gentleman came to see us, I believe at our Broward County public meeting. It was the day we were in Palm Beach and Broward. I think this meeting was Broward. A gentleman came to see us, had drawn a map, a crayon-drawn map on just a white blank piece of paper. It was a crayon-drawn map. He presented that map to the members of the legislature who came to that public meeting, and then he provided us that crayon-drawn map to our staff. . . .
>
> [W]e tried to draw a map similar to what that member of the public gave us. Because it wasn't in a—it wasn't in a—most people gave us maps in format using our application. That didn't happen every time, and so if somebody gave us a map that was, in this case, just on a piece of paper, we tried to draw something as similar as possible so that the members of the committee could have it and so that it could be on our website. So as I said before, I don't know this is literally exactly, but we did try to draw something like this.

Tr.202:18 – 205:6; *see also* Tr.203:21-23 (Q. "Someone gave you a map and you tried to put it on the application the legislature uses?" A. "Yes."); Tr.60:17-25 (Kelly) (providing similar testimony); Tr.207:8-11 (Kelly) (same).

* * *

Before continuing our march to the 2022 redistricting cycle, we briefly digress and consider whether Benchmark CD-5 united a "community of interest" in North Florida. Some federal cases have recognized that uniting a "community of interest" is a traditional districting criterion. *E.g.*, *Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality). Even so, the term is imprecise and can lead to mischief. Dr. Johnson explained:

> ["Community of interest" is] a term of art in the redistricting world, used all the time but not always defined. Generally speaking, it means a geographic or socioeconomic or policy-interested group that share a—some kind of common interest or characteristic. Usually it's in the context of discussion that that area should be kept together in a district, but not

> always. And it—it's a very flexible term. Unfortunately, it's often abused nowadays. [If] I was looking for a Ph.D. dissertation to write today, I think, looking at the abuse of communities of interest as a smokescreen for some other partisan or other nontraditional principle. That would be an interesting topic.

Tr.793:5-18.

Crucially, uniting a "community of interest" isn't a redistricting standard under the Fair Districts Amendments. Under Article III, § 20(a) of the Florida Constitution, the "community of interest" standard cannot displace the need for compactness and adherence to geographic and political boundaries. *Apportionment I*, 83 So. 3d at 673 ("[M]aintaining communities of interest is not required by the constitution, and comporting with such a principle must not come at the expense of complying with constitutional imperatives.").

Indeed, in its two congressional-map opinions, the Florida Supreme Court adopted the east-west configuration of CD-5 for race-based reasons, not community-of-interest-based reasons. It made no mention of "communities of interest" for CD-5.

Still, we heard testimony from Dr. Kousser, Dr. Barreto, Leader Driskell, Mr. Clark, and Ms. Inman-Johnson about how Benchmark CD-5 united a community of interest in North Florida. We don't find any of these arguments persuasive.

Dr. Kousser testified that CD-5 overlapped with the 1860s "Slave Belt," purportedly uniting that community of interest. *E.g.*, Tr.336:8-21. We don't credit this testimony. The "Slave Belt" map he relied on during his testimony came from MCI Maps, a company run by Matt Isbell, a Democratic map maker. Tr.472:8 – 473:1

(Kousser). Dr. Kousser testified that he couldn't tell, based on the map, what the slave and non-slave populations were—he couldn't tell, for example, whether "the population of Marion County is ten people and six of them are slaves." Tr.473:5-10 (Kousser). And he testified that counties within the "Slave Belt" with "high percentages of slaves" were never in Benchmark CD-5—Marion, Jackson, Sumter, and Alachua Counties. Tr.473:20 – 475:1; 475:15 – 477:5 (Kousser). Duval County had fewer slaves than these counties but was part of Benchmark CD-5. Tr.475:2-7 (Kousser). Dr. Kousser also admitted that "population shifts" happen, so the 1860s "Slave Belt" population might no longer be in North Florida in 2022. Tr.476:4-10. To be sure, Dr. Kousser testified that he "verified the accuracy of the" MCI "map by comparing it against Library of Congress data," Tr.486:15-17, but his 1860s "Slave Belt" testimony doesn't provide any relevant information to the 2022 North Florida population or the 2022 redistricting process.

Later during trial, Dr. Barreto testified that voters within Benchmark CD-5 have similar ages, household incomes, education, and other demographic data points. Tr.656:13 – 658:8. He relied on the following chart for this conclusion:

PX5042-18: Demographic Information of Benchmark CD-5

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

This chart isn't very helpful, and it's limited in a few respects. It shows demographic information for North Florida voters—and North Florida voters only. It doesn't compare that information to other voters in the State. It doesn't, for example, show whether voters in Orange County share similar age, income, or educational traits with voters in North Florida. Based on the lack of comparators, we can't determine whether North Florida voters have unique demographic characteristics, or whether they simply share demographic characteristics with voters in other congressional districts throughout the State.

Dr. Barreto's chart is also limited in the respect that it doesn't tell us whether Benchmark CD-5 actually captures a community of interest. In *Bush v. Vera*, the U.S.

Supreme Court noted examples of communities of interest: communities with "shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches." 517 U.S. at 964. Dr. Barreto's chart captures none of that information or information like it; the chart doesn't tell us whether North Florida voters are in rural or urban areas, whether they have access to high-speed internet, whether they support FSU or UF on Saturdays, or whether they read the *Tallahassee Democrat* or the *Florida Times Union*. Dr. Barreto's testimony and chart are thus of limited value.

So are Leader Driskell's, Mr. Clark's, and Ms. Inman-Johnson's testimony that North Florida voters "share common interests." Tr.560:3-14 (Driskell); Tr.262:15 – 263:3 (Clark); Tr.308:19 – 309:3 (Inman-Johnson). Leader Driskell's testimony is of little use, because she represents and resides in a district in Tampa, not North Florida. Tr.509:7-12.[4]

And Mr. Clark and Ms. Inman-Johnson live in Leon County, not Duval County. Tr.256:15-19 (Clark); Tr.301:7-10 (Inman-Johnson). Granted, Mr. Clark testified that he frequently visited Duval County and was familiar with the area. Tr.261:22 – 263:3. Even assuming his testimony is credible on this point and should be afforded weight, this lay, anecdotal, and limited testimony (he only testified about one or two shared

[4] On the legislative record, Democratic Senator Gibson made remarks similar to Leader Driskell's. JX46 89:5-12 (Senate Committee on Reapportionment) (Apr. 19, 2022). But Senator Gibson represented and resided only in Jacksonville; she therefore can't speak for Gadsden or Leon County voters or communities.

interests) doesn't go far enough, and it's unclear whether Benchmark CD-5 united the specific areas within Duval County that Mr. Clark contended share common interests with areas in Leon County.

All of this is to say that Benchmark CD-5 doesn't appear to unite a community of interest in North Florida—even if that was a permissible reason to depart from the Florida Constitution. The Florida Supreme Court didn't cite that as their motivation in adopting the district's east-west configuration (the court's motivation was race), and Plaintiffs' witnesses didn't offer a contrary conclusion.

2016-2022. The period between 2016 to 2021 didn't involve any redistricting-related procedures. But the period provides some insight into how state government works. During trial, Mr. Kelly testified about his state-government experience (some of which admittedly took place outside of the 2016-2022 window), and Leader Driskell testified about her time in the Florida House since 2018. Tr.581:1-3 (Driskell) (stating that she served in the Florida House since 2018).

Both Mr. Kelly and Leader Driskell testified that governors involve themselves in the legislative process. Mr. Kelly testified that in working on "more than a thousand" bills, there's gubernatorial involvement on "more than half," Tr.199:21 – 200:2, particularly on "bills that take on a prominent level of public importance," Tr.200:3-15. *See also* Tr.582:23-25 (Driskell) (agreeing that "redistricting is of statewide importance"). Leader Driskell admitted that the Governor and his staff propose legislation. Tr.582:3-19.

Both Mr. Kelly and Leader Driskell have seen governors veto legislation. Tr.200:16-23 (Kelly) (five to ten vetoes a year); Tr.581:12-19 (Driskell) (seen Governor DeSantis veto legislation since 2018). Both have seen special legislative sessions convened. Tr.200:24 – 201:3 (Kelly) (one or two special legislative sessions a year); Tr.581:20-22 (Driskell) (seen Governor DeSantis convene special legislative sessions since 2018). Leader Driskell even testified that she has seen legislation pass on party-line votes. Tr.582:20-22.

It's also notable that Governor DeSantis sought an advisory opinion request (and received one) from the Florida Supreme Court in 2019—a request to interpret a felon-voting provision in the Florida Constitution. *Advisory Opinion to the Gov. Re: Implementation of Amend. 4, the Voting Restoration Amend.*, 288 So. 3d 1070 (Fla. 2019). That shows that the advisory-opinion process is a tool in a governor's toolbox, one used outside (and inside) the redistricting context.

Between 2016 to 2022, federal redistricting case law was also evolving. Two cases stand out: *Cooper v. Harris*, 581 U.S. at 285, and *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022) (per curiam). *Cooper* reaffirmed that race cannot be "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 581 U.S. at 291 (quoting *Miller*, 515 U.S. at 916). Race predominates when racial considerations "subordinate[]" traditional districting criteria—"compactness, respect for political subdivisions," for instance. *Id.* When race predominates, said *Cooper*, strict scrutiny must

be satisfied—the race-based sorting of voters must be backed by a compelling governmental interest and must be narrowly tailored. *Id.* at 291-92. And the Supreme Court has only ever assumed, and never decided, that compliance with the federal Voting Rights Act would be such a compelling interest. *See id.* at 301.

Wisconsin Elections Commission is also notable; it involved a situation where a state supreme court required an additional majority-minority district because it believed it was required under the federal Voting Rights Act. 142 S. Ct. at 1247. The U.S. Supreme Court nevertheless held that the state supreme court failed to apply strict scrutiny to justify that race-based district. *Id.* at 1248-51. *Wisconsin Elections Commissions* showed that state-court decisions aren't immune from federal-law scrutiny.

2022 Redistricting Cycle. The 2022 redistricting cycle was the second cycle where the Fair Districts Amendments imposed redistricting standards. Due to term limits, the vast majority of state legislators weren't part of the 2012 redistricting cycle.

In early 2022, at the beginning of the congressional redistricting cycle, the Florida Legislature intended to preserve Benchmark CD-5, the east-west, Gadsden-to-Duval district in North Florida. Tr.73:21 – 74:1 (Kelly); *see also* JX52 at 1 (advisory opinion request) (Feb. 1, 2022) ("All maps that have been published by the Legislature and are currently under consideration retain, for the most part, the current Congressional District 5.").

Governor DeSantis, however, maintained that this district configuration was unconstitutional under the U.S. Constitution's Equal Protection Clause. Tr.55:10-25;

Tr.72:11-14 (Kelly). He stated that the Florida Supreme Court adopted Benchmark CD-5 *predominately* for race-based reasons, albeit race-based reasons to comply with the Fair Districts Amendments' express, race-based, non-diminishment provision. Tr.55:10-25; Tr.72:11-14 (Kelly). This wasn't an objection to having a North Florida district that elected a black congressperson to office, or a North Florida district that protected black voters' ability to elect candidates of their choice. Tr.55:10-25; Tr.72:11-14 (Kelly). Instead, the Governor objected to a district that was drawn *predominately* for race-based reasons and that flouted traditional districting criteria in the process.

Put differently, the Governor based these objections not on the Fair Districts Amendments but on the U.S. Constitution's Equal Protection Clause. As noted above, under the U.S. Constitution's Supremacy Clause, state-constitutional provisions must be subordinated to federal-constitutional provisions where the two conflict. *See generally* U.S. Const. art. VI, cl. 2.

Given his concerns, the Governor proposed a congressional map that he believed was constitutional—one that was drawn for race-neutral reasons. That map didn't contain a district like Benchmark CD-5. *See also* Tr.82:17-20 (Kelly).

PX5053: The Governor's First Proposed Map

When the Florida Legislature didn't advance this map, the Governor asked the Florida Supreme Court for an advisory opinion request interpreting the Fair Districts Amendments' race-based provisions, principally the non-diminishment provision. The Governor asked the court to resolve the following questions:

> whether Article III, Section 20(a) of the Florida Constitution [part of the Fair Districts Amendments] requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations (either in Leon and Gadsden Counties or outside of Orlando) to ensure sufficient voting strength, even if not a majority, to elect a candidate of their choice. . . .
>
> Specifically, I ask whether the Florida Constitution's non-diminishment standard mandates a sprawling congressional district in northern Florida that stretches hundreds of miles from East to West *solely* to connect black voters in Jacksonville with black voters in Gadsden and Leon Counties (with few in between) so that they may elect candidates of their choice, even without a majority. This Court has previously suggested that the answer is "yes."

JX52 at 2, 4 (emphasis added). Plaintiffs seize on the last sentence—"[t]his Court has previously suggested that the answer is 'yes,'" *e.g.*, Tr.11:1-11—but take it out of context. As explained above, the Florida Supreme Court in its *Apportionment I-VIII* opinions never considered potential Equal Protection Clause issues with the Fair Districts Amendments.

The Governor's request continued:

> Relatedly, to make sense of the non-diminishment standard, I ask for clarification from this Court on what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice has been diminished. This Court has said that the existing plan of a covered jurisdiction serves as the benchmark against which the effect of voting changes is measured. But is that so even if the district in the existing

> plan was designed solely to cobble together enough minority voters from distant and distinct geographic areas to elect candidates of their choice despite not constituting a majority? Or must the benchmark be confined to the minority population in a reasonably cohesive geographic area?

JX52 at 5 (cleaned up); *see also* JX53 (Governor's advisory opinion brief) (Feb. 7, 2022). Even at this early stage of redistricting, the Governor believed that Benchmark CD-5 was an invalid, race-based benchmark district.

Ultimately, the Florida Supreme Court declined to issue an opinion; it believed that it would be better served to resolve these issues with more factual development and with a clear record. *Advisory Opinion to the Gov.*, 333 So. 3d 1106, 1108 (Fla. 2022). When the court facially reviewed state legislative maps a month later, it stated that "[o]ur decision today [in reviewing the state legislative maps] should not be taken as expressing any views on the questions raised in the Governor's request." *In re Sen. J. Res. of Leg. Apportionment 100*, 334 So. 3d 1282, 1289 n.7 (Fla. 2022).

The Governor's advisory opinion request briefly paused the congressional redistricting process, Tr.553:4-9 (Driskell), but it resumed once the court declined to issue an opinion. The Governor thereafter proposed another map. This one, like his other map, didn't have a district like Benchmark CD-5. *See also* Tr.96:8-18 (Kelly).

PX5054: The Governor's Second Proposed Map

The Florida Legislature still sought to maintain a district like Benchmark CD-5 in North Florida, all to comply with the Fair Districts Amendments' non-diminishment provision.[5] In mid-February 2022, the Florida House Congressional Redistricting Subcommittee considered a congressional map that contained the basic configuration

[5] This sentiment echoed throughout the redistricting cycle. JX37 68:16-21 (House Congressional Redistricting Subcommittee) (Feb. 18, 2022) (House Staffer Leida Kelly) (an east-west configuration would have "Tier 1 protections. Gadsden County is Florida's only majority-minority black county in the entire state, which goes into part of that Tier 1 consideration, which, again, outranks compactness as a Tier 2 requirement."); JX37 83:23-84:7 (Rep. Tuck) (inquiring whether "going from the current [Benchmark] CD 5" configuration to a different configuration would "diminish the ability" of black voters "to elect" candidates of their choice); JX38 45:22-24 (House Redistricting Committee) (Feb. 25, 2022) (Rep. Sirois) (a district like Benchmark CD-5 would "remain[] a protected black district"); JX38 24:16-24 (Rep. Leek) (maintaining a district like Benchmark CD-5 would be an "attempt at continuing to protect the minority group's ability to elect a candidate of their choice"); JX40 9:9-15 (Senate Session) (Mar. 4, 2022) (Sen. Ausley) (a district like Benchmark CD-5 "unifies" "black communities" "into one district"); JX47 25:21 – 26:4 (Senate Session) (Apr. 20, 2022) (Sen. Ausley) ("black voters" "in Duval[]," "in Tallahassee," and "in any points in between" should have a "minority access" "district that represents them"); JX48 85:11-19 (House Session) (Apr. 20, 2022) (Rep. Eskamani) (arguing that there should be a "minority access" district like Benchmark "CD 5" in the Enacted Map).

of Benchmark CD-5. JX37 6:1-13 (House Congressional Redistricting Subcommittee) (Feb. 18, 2022) (stating that the committee was considering Plan 8011).

DX97: Compilation of Legislatively Drawn Congressional District Maps, Plan 8011

In response, the Governor's General Counsel, Ryan Newman, provided a legal memorandum to the subcommittee that highlighted the Governor's legal objections to the North Florida district. JX56 (Newman memorandum to House subcommittee) (Feb. 18, 2022). Mr. Newman stated that the district:

> [I]s not compact and does not otherwise conform to usual political or geographic boundaries. Instead, it appears to be drawn *solely* to combine separate minority populations from different regions of northern Florida in a less than majority-minority district so that together they may have an opportunity to elect a candidate of their choice. . . . it is evident that non-racial grounds cannot explain [the] proposed Congressional District []. . . . [I]t is obvious, given the location of minority neighborhoods and precincts, that district lines in both Jacksonville and Tallahassee were drawn specifically to capture minority populations and to combine them into one district.

JX56 at 1, 3 (emphasis added).

The Governor also asked Robert Popper, namesake of the Polsby-Popper district-compactness measure, to opine on the configuration. Mr. Popper provided a

letter to the subcommittee, JX57, and provided oral testimony, JX37 72:16 – 77:4. In short, Mr. Popper believed that the North Florida district:

> [W]ill be vulnerable to a serious—and probably a winning—[racial gerrymandering] claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the *predominant* consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.

JX57 at 5 (emphasis added); *see also* JX37 72:16 – 77:4 (Mr. Popper's oral testimony).[6]

A few weeks after Mr. Popper's testimony, the Florida Legislature passed a two-map congressional redistricting package. The primary map, Plan 8019, didn't contain a district like Benchmark CD-5, but it contained a Duval-County-only district in North Florida. The Florida Legislature believed that this configuration might satisfy the Governor's legal position and contain a North Florida district that would *perform* for black voters (which is different from *not diminishing* their ability to elect) under the Fair Districts Amendments' non-diminishment provision. JX38 23:6-15 (House Redistricting Committee) (Feb. 25, 2022) (Rep. Leek) (opining on another Duval-only district). Indeed, the Florida House's redistricting chair called a Duval-only district the

[6] During his question-and-answer with the subcommittee, Mr. Popper stated that "complying with the Florida constitution" "absolutely can be a compelling state interest." JX37 101:1-10.

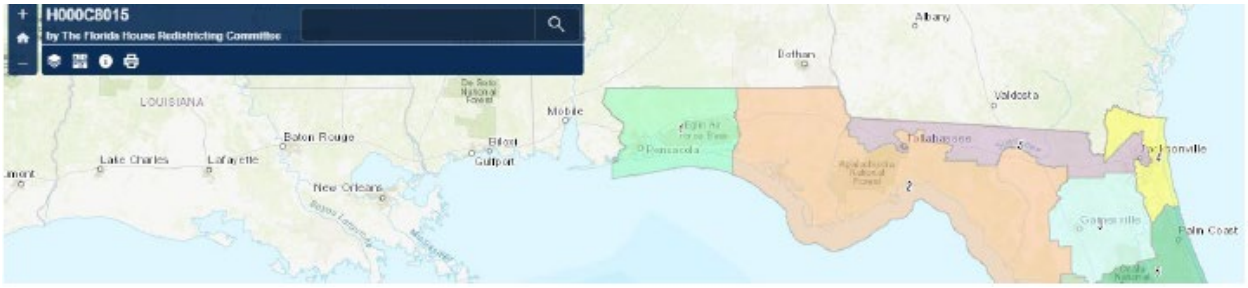
"singular exception to the diminishment standard" as applied by the Florida Legislature throughout the 2022 state and congressional redistricting process. JX38 23:14-15.

Should Plan 8019 be struck down, a secondary map, Plan 8015, would go into effect. This map contained a district like Benchmark CD-5. JX37 24:6-15 (Rep. Leek) (Plan 8015 contained a North Florida "district" whose "configuration" was "similar to the benchmark district"). *See also* 747:2-20 (Barreto) (agreeing that Plan 8015 CD-5 and Benchmark CD-5 are similarly configured).

Put differently, the Florida Legislature presented the Governor with two maps, both of which were drawn to satisfy the Fair Districts Amendments' express, race-based non-diminishment provision.

DX97: Compilation of Legislatively Drawn Congressional District Maps, Plan 8019

DX97: Compilation of Legislatively Drawn Congressional District Maps, Plan 8015



On March 4, 2022, Plan 8019 and Plan 8015 passed the Florida Legislature. Tr.180:3-5 (Kelly). But both maps received bipartisan criticism. Democrats objected to Plan 8019 and claimed that it violated the Fair Districts Amendments' non-diminishment provision. The black voting age population in Benchmark CD-5 was 46.20%, JX70 at 2 (Benchmark Map legislative packet), while the black voting age population in Plan 8019 CD-5 was 35.32%, DX98 at 2 (Plan 8019 legislative packet). That was an 11% drop. Benchmark CD-5 also performed for black voters in fourteen out of fourteen test elections, JX70 at 8, while Plan 8019 CD-5 performed in only nine out of fourteen test elections, DX98 at 3. That was more than a 33% drop, which constitutes diminishment for purposes of the Florida Constitution.

Democratic Representative Geller, for example, took issue with the test-election drop in Plan 8019 CD-5—the functional analysis for the Duval-only district:

> Isn't it so that, in the analysis that's actually released to us, that very limited analysis that we've gotten to look at, that instead of performing in 14 out of 14 test elections under the old configuration, under the new configuration, approximately one-third of those same test elections, it does not perform to allow minorities to elect the candidate of their choice?

JX38 63:18 – 64:1. That caused Representative Geller to oppose the Duval-only district on state constitutional grounds:

> I don't believe that the change in the proposed minority district contained wholly within Duval County is constitutionally compliant [under the Fair Districts Amendments] in that I think that it represents a substantial dilution or diminishment of the minorities' ability to elect representatives of that community's own choice. In that sense, I believe that proposed map is constitutionally deficient. . . .

> But regardless of whether I have the information to determine if that secondary map [Plan 8015] is or is not constitutionally compliant, I think it is abundantly clear that that so-called primary map [Plan 8019] is not constitutionally compliant.

JX38: 134:22 – 138:16. Democratic Representative Skidmore shared Representative Geller's diminishment concerns:

> [W]hen I'm looking at the primary map [Plan 8019] and we are talking about performance, in more than one-third of the time that districts did not elect the candidate of its choice. But in the secondary map [Plan 8015, which has a district like Benchmark CD-5], 100 percent of the time they did. So can you explain, again, for me how that's not diminishment under the definition, as I understand it?

JX38 75:24 – 76:10. For that reason, Representative Skidmore opposed the Duval-only district in Plan 8019 on state constitutional grounds:

> I am very concerned about the primary map [Plan 8019] District 5 because it does seem to me, based on language that the House actually used, that it does reflect diminishment.

JX38 145:17-23. Even Democratic Representative Driskell expressed concerns with the Duval-only district:

> I have real concerns about how it's drawn in the primary map [Plan 8019]. And while it's capable of—it appears under this analysis of being drawn wholly within Duval County, you know, I think about those voters in Tallahassee and Gadsden and other places who would be perhaps losing their ability to elect the candidate of their choice.

JX38 150:8-16. Like Representative Geller and Representative Skidmore, Representative Driskell voted against the two-map bill.

On the other side of the aisle, then-Representative Byrd opposed Plan 8019 *and* Plan 8015 as racial gerrymanders. According to Representative Byrd, while Plan 8019

"address[ed] the compactness issue," its Duval-only CD-5 was drawn to satisfy the Fair Districts Amendments' express, race-based non-diminishment provision and was therefore "still a racial[] gerrymander," "a district drawn upon a racial basis that violates the 14th amendment." JX38 159:17-22. Representative Byrd explained that Plan 8015 CD-5 was also a racial gerrymander that "flagrantly violated" "compactness and following existing boundaries." JX38 151:21 – 160:21.

On March 29, 2022, the Governor vetoed the two-map package. In his veto message, he stated that:

> As presented in both the primary [Plan 8019] and secondary [Plan 8015] maps enacted by the Legislature, Congressional District 5 violates the Equal Protection Clause. . . . Although I understand the Legislature's desire to comply with the Florida Constitution, the Legislature is not absolved of its duty to comply with the U.S. Constitution. Where the U.S. and Florida Constitutions conflict, the U.S. Constitution must prevail.

JX54 (veto message) (Mar. 29, 2022). The Governor attached a memorandum from Mr. Newman that explained his reasoning: both maps "assign[] voters primarily on the basis of race but [are] not narrowly tailored to achieve a compelling state interest." JX55 at 1 (Newman veto memorandum) (Mar. 29, 2022). As to Plan 8019 CD-5, Mr. Newman concluded that it was still drawn for race-based reasons:

> Th[e] configuration of the district is more compact [than Benchmark CD-5] but has caused the adjacent district—District 4—to take on a bizarre doughnut shape that almost completely surrounds District 5. The reason for this unusual configuration is the Legislature's desire to maximize the black voting age population in District 5. The Chair of the House Redistricting Committee confirmed this motivation when he explained that the new District 5 was drawn to protect a black minority seat in north Florida. . . .

> Despite the Legislature's attempt to address the federal constitutional concerns by drawing a more compact district, the constitutional defect nevertheless persists. . . .
>
> Specifically, according to the House Redistricting Chair, the primary map's version of District 5 is the House's attempt at continuing to protect the minority group's ability to elect a candidate of their choice.

JX55 3-4 (cleaned up). Mr. Newman then explained that Plan 8019 CD-5 may violate the Fair Districts Amendments' non-diminishment provision:

> [T]here is no good reason to believe that District 5, as presented in the primary map [Plan 8019], complies with the Florida Constitution's non-diminishment requirement. The benchmark district contains a black voting age population of 46.20%, whereas the black voting age population of District 5 in the primary map is only 35.32%. . . .
>
> This nearly eleven percentage point drop is more than slight, and while the House [ ] represented that the black population of the district could still elect a candidate of choice . . . there appears to be little dispute that the ability of the black population to elect such a candidate had nevertheless been reduced.

JX55 at 6 (cleaned up). Mr. Newman also concluded that Plan 8015 CD-5—which mirrored Benchmark CD-5—was an unconstitutional racial gerrymander:

> In the secondary map [Plan 8015] . . . District 5 is a sprawling district that stretches approximately 200 miles from East to West and cuts across eight counties to connect a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact, does not conform to usual political or geographic boundaries, and is bizarrely shaped to include minority populations in western Leon County and Gadsden County while excluding non-minority populations in eastern Leon County. Because this version of District 5 plainly subordinates traditional districting criteria to avoid diminishment of minority voting age population, there is no question that race was the predominant factor motivating the legislature's decision to draw this district.

JX55 at 2 (cleaned up). Outside counsel for the Florida Senate considered the Governor's legal arguments "worthy of careful consideration," given "the absence of controlling judicial precedent contrary to the Governor's position" and "[i]ntervening judicial precedent from the United States Supreme Court following the 2022 Regular Session." PX3014 at 2-3 (Nordby memorandum) (Apr. 14, 2022).

Without a congressional map in place in late March 2022, two impasse cases were filed, one in state court, *Arteaga v. Lee*, No. 2022-CA-398 (Fla. 2d Cir. Ct.), and one in federal court, *Common Cause v. Lee*, 4:22-cv-109, Doc.1 (N.D. Fla. 2022) (three-judge court). In both cases, the plaintiffs asked courts to draw a congressional map in time for the 2022 election. That didn't happen.

The Governor called a special redistricting session for April 19 to April 22.[7] And during that session, the Florida House, the Florida Senate, and the Governor agreed upon a congressional plan, the Enacted Map. It was a compromise plan. Both Mr. Kelly, Tr.217:8 – 220:23, and state legislators viewed it that way. Senator Rodrigues explained the compromise:

> Ten of the districts that are on the bill that is before us are districts that we [the Florida Senate] drew, Southeast Florida and the panhandle. I believe I heard that up to 12 of those districts were districts that were on

[7] Throughout trial, Plaintiffs suggested that the Governor selected the April 19 to 22 date for the special legislative session because there was an upcoming hearing in this case. Plaintiffs, however, produced no evidence that backs up this suggestion. *See* Tr.179:24 – 180:3 (Kelly) (Q. "And can we agree that the Governor had carefully timed that session to take place right before a hearing scheduled before this Court?" A. "No." Q. "No.?"); Tr.180:23 (Kelly) (explaining that in the lead-up to the special legislative session the Governor's office was "negotiating with the House and the Senate").

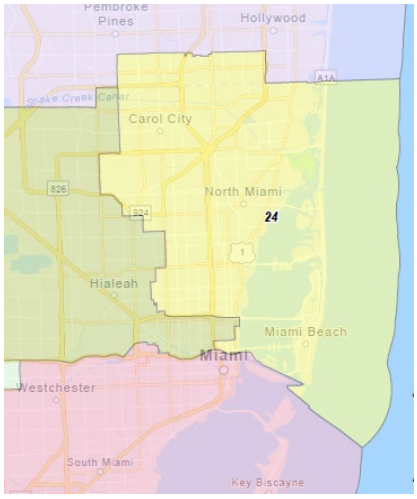
> a House map. So southeast Florida is largely the portion of the state we drew. Central Florida is largely the portion of the state that the House drew. And Northeast Florida is largely the portion of the map that the [ ] Executive Office of the Governor drew. So what we have is a map which is a compilation of maps that have passed and been presented in both chambers and lines that had been drawn by the Governor's staff building off of what we have done.

JX45 65:15 – 66:7 (Senate Session) (Apr. 19, 2022); *see also* JX45 96:15-17 (Sen. Rodrigues) (called the Enacted Map a "compromise map").

Republican Senator Burgess considered the Enacted Map a compromise as well: "this map before us does incorporate input from all branches of government here." JX47 40:25 – 41:1 (Senate Session) (Apr. 20, 2022).

As Senator Rodrigues noted, the Florida Senate drew lines in Southeast Florida, including CD-24. This district was a racially protected district, with a black voting age population of 42.17%. DX128 at 2 (Enacted Map legislative packet). But it still adhered to traditional districting criteria. Mr. Kelly testified about Southeast Florida districts, including CD-24: "I knew that these districts complied with a number of other tenets of traditional redistricting principles: Compactness, adherence to city and county lines, adherence to other well-recognized political and geographical boundaries." Tr.165:1-23; *see also* Tr.168:18-22; Tr.193:21 – 196:23 (Kelly).

DX93: Enacted Map Images



Mr. Kelly focused mostly on districts for Northeast Florida. Race didn't dictate how he drew his district lines. Instead, he drew lines to ensure equal-population, compactness, and respect for geographic and political boundaries. Tr.210:1 – 213:19 (Kelly). As we explained above, race was considered when Mr. Kelly tried to figure out "the art of the possible," whether there could be a compact district in North Florida that respected geographic and political boundaries and that protected minority voters' ability to elect candidates of their choice (much like CD-24) before he drew district lines. Tr.161:6-18 (Kelly).

Regarding North Florida, Mr. Kelly told the Florida Legislature that he wanted to see if he could draw a district that "checked all the boxes"—a district that was compact, respected geographic and political boundaries, and didn't diminish. JX46 33:19-24. He couldn't:

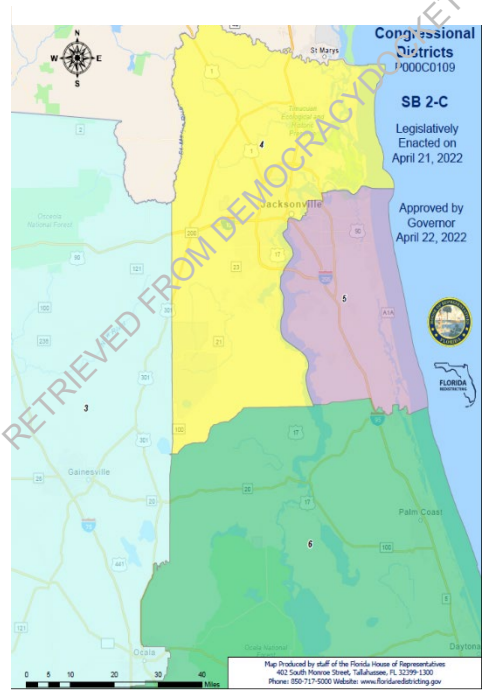
> The reality through analysis of that district, including just observing the Legislature's process, there was not a way to draw a compact, politically

> effective, minority district and check all the boxes, so to speak, without violating some manner of law.

JX46 33:19-24.

Mr. Kelly didn't use the heat-map feature from the state redistricting website (he couldn't figure out how to use it). Tr.911:3-6 (Kelly); *see also* Tr.802:13-17 (Johnson) (opining that "making heat maps" on the redistricting website is "a real pain"). So Mr. Kelly engaged in the "painstaking process" of running black voting age population reports. Tr.911:7 – 912:5.

DX93: Enacted Map Images



When Mr. Kelly realized that it was impossible to draw a compact, non-diminishing North Florida district with compact surrounding districts, he proceeded to draw race-neutral lines, again, seeking to achieve compact shapes and seeking to respect

geographic and political boundaries. The result was Enacted Map CD-4 and CD-5. Tr.225:14-20; Tr.229:13 – 232:24 (Kelly). Mr. Kelly had to split Duval County, given that the county has a larger population than the required congressional-district population size; so, he split the county primarily along the St. Johns River, a prominent geographic feature in the region. Tr.119:15-24; Tr.225:14-20. Dr. Johnson, who provided redistricting services to the City of Jacksonville, confirmed that the river is an often-used redistricting boundary. Tr.803:2 – 804:19.

CD-4 bears emphasis. It has a black voting age population of 31.66%. DX128 at 2. Dr. Kousser tried to resist the conclusion that "a map drawer intent on excluding African Americans from Congress" would "be doing a pretty bad job drawing a district with a Black voting age population of 30 percent." Tr.458:6 – 461:7. After all, Dr. Kousser's "rule of thumb" was that protected districts have a black voting age population of at least 30%. Tr.451:16-24.[8]

[8] To the extent that it's relevant, in the 2022 state house maps, some districts had under 40% black voting age population and still, according to the Florida Legislature, performed for black voters. Plaintiffs introduced PX4034-456, which was part of the Florida Legislature's appendix when it submitted its 2022 state legislative maps for Florida Supreme Court review. (PX4034 is the whole appendix, and the whole appendix wasn't submitted into evidence. Tr.683:4-15). PX4043-456 is a chart that lists black voting age population numbers for black performing districts. According to the chart, HD-21, for example, has a black voting age population of 29.03%, and HD-117 has a black voting age population of 28.93%. That said, the chart doesn't include a full functional analysis—it doesn't include test elections, for example—and Dr. Barreto didn't conduct a functional analysis for the state maps. Tr.679:5 – 680:23 (Barreto).

As a result of the back-and-forth between the branches of government, the Enacted Map became a better congressional plan. Tr.214:20 – 217:7 (Kelly). The Enacted Map split either fewer or the same number of counties and cities than Plan 8019 and Plan 8015, and North Florida under the Enacted Map contained more compact districts. DX128; DX98; Tr.214:20 – 217:7 (Kelly) (explaining the improvements in the Enacted Map). *See also* Tr.216:4 – 217:7 (Kelly) (explaining the error in how the Florida Legislature calculated city splits).

Unlike Plan 8019, North Florida doesn't have a tortured, Pac-Man-modeled district in the Enacted Map. Tr.122:6-14; Tr.124:8 – 125:11; Tr.168:14-17; Tr.183:4-8 (Kelly). Unlike both Plan 8019 and Plan 8015, the Enacted Map doesn't have North Florida districts that were drawn solely based on race.

No functional analyses were performed on the Enacted Map's North Florida districts and Plaintiffs failed to produce one at trial. Notably, the Enacted Map legislative packet doesn't contain that analysis. DX128. Mr. Kelly stated that he wasn't aware of a functional analysis performed by the Florida House or the Florida Senate for the Enacted Map's North Florida districts. Tr.917:14-19. Senator Rodrigues, in fielding questions on the Senate floor about the Enacted Map, stated that he didn't "know" whether CD-4 and CD-5 perform "because a functional analysis was not performed on

those districts." JX45 120:21 – 121:5.[9] Mr. Kelly and the Executive Office of the Governor didn't perform that analysis, either. Tr.918:2-8. The reason why was because:

> [A] functional analysis . . . would be looking at a tandem of both political data and race or ethnicity data. It would be a combination of doing both of those. And typically a functional analysis like that's done by a statistician through pretty significant analysis determining probability of an electoral result.
>
> And so absent that case where we took—I took a look at Northeast Florida, we otherwise completely stayed away from any kind of partisan or electoral data, so we didn't venture down that path.

Tr.919:6-21. In other words, Mr. Kelly didn't want to see racial data that was funneled through a functional analysis; his line drawing would remain race neutral.

During the special legislative redistricting session, Mr. Kelly defended the Enacted Map before the Florida House and the Florida Senate. Doc.191 (providing this Court with video links and transcripts of Mr. Kelly's legislative testimony). Mr. Newman also provided legislative testimony, explaining the state of redistricting law and

[9] Plaintiffs may point to a comment from Representative Leek during the special legislative redistricting session. He was asked by a fellow representative if Enacted Map CD-4 and CD-5 perform for black voters; Representative Leek stated that his staff performed a functional analysis and concluded that they didn't perform. JX48 34:1 – 35:3. But when the exchange is read in its entirety, it's not clear whether the staff relied on a functional analysis for "prior maps" to come to that conclusion, or whether the staff performed a fresh analysis on the Enacted Map's North Florida districts.

In any event, Plaintiffs haven't produced this functional analysis, and Mr. Kelly testified that he wasn't aware of this analysis. Tr.927:20 – 928:8. Even if there was a functional analysis, if legislators *had to ask* whether a functional analysis was performed on Enacted Map CD-4 and CD-5 during the special session, right before voting on the Enacted Map, it's fair to say that they probably didn't consider it when voting on the Enacted Map.

explaining the Governor's legal objections to the earlier maps. JX44 63:20 – 69:17 (House Congressional Redistricting Subcommittee) (Apr. 19, 2022).

On April 21, 2022, the Florida Legislature passed the Enacted Map, and on April 22, 2022, the Governor signed it into law. Even though some state legislators weren't initially persuaded by the Governor's legal arguments and by his initially proposed maps, a majority of state legislators approved the Enacted Map. The vote serves as the best evidence of legislative intent. Tr.861:12-16 (Owens).

Legislators also stated on the record that they thought the Enacted Map was constitutional. Republican Senator Stargel said so:

> So as I stand here before you today, I believe these maps are constitutional. I wouldn't vote for them if I didn't. . . . These are constitutional maps. I think they're very thoughtful. I don't think any of us who vote for them today are racist or following the direct will of the Governor. We're doing our constitutional requirement of drawing maps, submitting maps, discussing maps, working together with our branches of government and making sure we have a constitutional map. And I'd ask for you to please vote for them today.

JX47 33:9 – 34:1. Senator Burgess echoed the sentiment: "I am very proud of what we've been able to do in the State of Florida." JX47 41:17-20. Republican Representative Fine, in approving the Enacted Map, stated that "we" are "do[ing] this because we think it is right." JX50 70:22-25. And Republican Representative Latvala commented that:

> [The Enacted Map] is a good map. I will be supporting it. I will have no regrets, and I think history will judge me just fine, as it will everyone else that votes yes.

JX44 (House Congressional Redistricting Subcommittee) (Apr. 19, 2022) 156:12-15.

The legislative record further reflects a certain legislative motivation to pass a map so a state or federal court wouldn't draw one, as had occurred in the 2012 redistricting cycle. Senator Rodrigues summed up the concern:

> [I]n the last redistricting cycle the court tossed . . . the congressional map, and the court drew [] districts. . . .
>
> [T]he choice before us is: do we pass a map that fulfills our constitutional responsibility, or do we declare an impasse and leave it up to the courts for them to draw our map again? Well, in this case it would be they would draw our congressional map again. I think we should fulfill our duty and pass a map. . . .
>
> We would abdicate our responsibility if we failed to pass a map and allowed the courts to do it.

JX47 58:4 – 59:13. Other legislators expressed a desire for the elected branches of government to draw the congressional map and noted that courts redrew district lines in the 2012 redistricting cycle. JX47 32:7-15 (Sen. Stargel); JX47 41:9-16 (Sen. Burgess); JX47 45:14 – 47:3 (Sen. Hudson).

Moreover, the legislative record reveals that legislators weren't bothered by Governor DeSantis's role in the redistricting process. Far from it. They considered his involvement part of the process. Senator Burgess said that it "takes three to tango." JX47 40:24-25. Senator Rodrigues stated that:

> The Governor has always had a role in redistricting, not just Governor DeSantis, but every Governor of the State of Florida. Because no reapportionment plan is complete—or a congressional map—until the Governor has signed it. Which means if a Governor does not sign that map, it does not take effect.

JX47 59:14-25. Representative Leek contended that:

> [T]he Governor's always had a role in it [the redistricting process] from day [one]. And this narrative that we are somehow abdicating our responsibility because the Governor had no role in it is just plainly false. So the Governor always had the opportunity to draw a map, just like the ACLU, just like the League of Women Voters, just like, you know, the hundreds of citizens who drew maps. Looking at their maps, even taking up their maps is not an abdication of our responsibility, nor is it a violation of separation of powers. It's just simply part of the process that is permissible.

JX48 (House Session) (Apr. 20, 2022) 79:20 – 80:6. Representative Fine shared the sentiment:

> [The Governor is] a citizen of the state of Florida. And he submitted a map the same way any other citizen did in addition he does have the right to veto whatever we pass. And frankly if you don't talk to the governor's office when you're running any bill in the process to make sure you're getting their opinion as you move through the process, then you're not doing a good job of being a bill sponsor because he does have that right. We sometimes assume if you get a bill through the House and Senate, he's just automatically going to sign it. I think some of you have experienced that that is not necessarily the case.

JX38 161:6-21. More colorfully, Representative Fine stated that "[w]e" legislators "are not mindless automatons. We don't do this because we are bullied. We do this because we think it is right." JX50 70:22-25.

Democratic Senator Rouson, who is black, provided a notable comment during the special session. Although he opposed the Enacted Map, he stated that:

> I don't believe the Governor is a racist. Why would a racist appoint Shawn Hamilton at DEP [Department of Environmental Protection], or John Davis at the lottery [Department of the Lottery], or Shevaun Harris at

> DCF [Department of Children and Families], or Simone Marstiller at AHCA [Agency for Health Care Administration]? I will never judge a man's heart.

JX47 42:24 – 43:4.

Although not reflected in the legislative record, some legislators *might* have been motivated by their own political aspirations. Leader Driskell testified that it "was the worst kept secret in Tallahassee that" Governor DeSantis "wanted to run for President someday, that he had higher ambitions." Tr.556:1-3. Some legislators, according to Leader Driskell, wanted to "go[] along with the Governor" and agree to the Enacted Map "because" the Governor "seemed to be somewhat of a rising star in his party." Tr.556:4-7. But political advancement isn't the same as racial animus.

In the end, the Enacted Map was used in the 2022 election, and under the map, four black congresspeople were elected: Congressman Frost (CD-10), Congressman Donalds (CD-19), Congresswoman Cherfilus-McCormick (CD-20), and Congresswoman Wilson (CD-24).

Florida's redistricting process mirrored, in certain respects, other States' redistricting cycles in 2022. During the cycle, governors in Kansas, Kentucky, Louisiana, Pennsylvania, and New Hampshire vetoed maps passed by their state legislatures. Tr.863:14-20 (Owens). The vetoes remained in effect for Pennsylvania and New Hampshire. Tr.863:25 – 864:2 (Owens). And in New Hampshire, the Republican governor vetoed a map passed by a Republican-controlled state legislature. Tr.864:7-10.

Conclusions of Law

Next, we address whether this three-judge district court must follow Eleventh Circuit precedent. Then we analyze the facts under the *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252 (1977), framework, and we discuss the applicability (if any) of *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality). We conclude by evaluating standing.

Precedent for Three-Judge District Courts

We must first decide whether Eleventh Circuit precedent binds this three-judge district court. Other three-judge district courts in this circuit have concluded that Eleventh Circuit precedent binds our decisions. *Ga. State Conf. of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1278-79 (N.D. Ga. 2017) (three-judge court) ("We do not write on a clean slate, and we are bound by Eleventh Circuit precedent."); *Ala. Leg. Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1305 (M.D. Ala. 2013) (three-judge court) ("It is well settled that we are bound by Eleventh Circuit precedent when we sit as a three-judge district court." (citing additional Eleventh Circuit and old-Fifth Circuit cases)). The *Georgia State Conference of the NAACP v. Georgia* three-judge district court applied Eleventh Circuit precedent, while acknowledging that this quirky and "odd[]" area of "federal jurisprudence" may "not" entirely "make sense." 269 F. Supp. 3d at 1278 n.7. Legal scholars have also provided thoughts on this area of law. *See, e.g.*, Michael Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 Geo. L.J. 699 (2020); Joshua

Douglas & Michael Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 Geo. L.J. 413 (2019).

As a practical matter, the result is the same whether or not we are bound by Eleventh Circuit precedent. The *Arlington Heights* framework and its application are clear enough based on U.S. Supreme Court precedent. And even if Eleventh Circuit cases aren't binding, cases like *Greater Birmingham Ministries v. Secretary of Alabama*, 992 F.3d 1299 (11th Cir. 2021) ("*GBM*"), and *League of Women Voters of Florida v. Florida Secretary of State*, 66 F.4th 905 (11th Cir. 2023) ("*LWVFL*"), are persuasive.

The only addition the Eleventh Circuit has made to the prevailing *Arlington Heights* framework is the addition of three factors: foreseeability of a disparate impact, knowledge of the impact, and availability of less discriminatory alternatives. *GBM*, 992 F.3d at 1322 (citing *Jean v. Nelson*, 711 F.2d 1455, 1486 (11th Cir. 1983)). *But see Arlington Heights*, 429 U.S. at 268 (noting that its list isn't exhaustive). Whether we consider these factors or not, they do not alter our ultimate conclusions. We consider all factors, including the three added in the Eleventh Circuit, while also ultimately relying on U.S. Supreme Court precedents.

Types of Redistricting Cases

Before continuing, we again emphasize that this case is solely about whether the Enacted Map was passed with invidious racially discriminatory intent and effect, in violation of the Equal Protection Clause and Fifteenth Amendment. To gauge intent and effect, we consider *Arlington Heights* factors. 429 U.S. at 252.

True, there are other tests and analyses that apply in the redistricting context. There's the *Shaw v. Reno*, 509 U.S. 630 (1993), test to determine whether a State drew a racial gerrymander, in violation of the Equal Protection Clause. For that test, a court determines whether race predominated in drawing a district—whether race subordinated traditional districting criteria, like compactness and respect for geographic and political boundaries. *Miller v. Johnson*, 515 U.S. 900, 915 (1995). That test was used in *Cooper v. Harris*, 581 U.S. 285, 299 (2017). It's relevant here only to the extent the Governor of Florida based his concerns with Benchmark CD-5, and district configurations like it, on this line of cases.

A similar test was used for partisan gerrymandering claims under the Equal Protection Clause, but in *Common Cause v. Rucho*, 139 S. Ct. 2484 (2019), the U.S. Supreme Court held that that claim was nonjusticiable under federal law. This isn't a partisan gerrymandering case.

Another test informs whether a *new* district needs to be drawn under § 2 of the Voting Rights Act. For that test, a plaintiff has the burden of establishing that (1) a racial group is sufficiently large and geographically compact, (2) the minority group is politically cohesive, and (3) the majority group votes as a bloc to defeat the minority group's candidate of choice. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Then the plaintiff must show, under the totality of the circumstances, that the political process is not equally open to minority voters. *Id.* That test isn't relevant here, either.

And under § 5 of the Voting Rights Act, a plaintiff can allege that a new districting map diminishes a minority group's ability to elect candidates of its choice in a covered jurisdiction. *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 260 (2016). This isn't a case under § 5 of the Voting Rights Act.

A plaintiff could bring state-redistricting claims as well. In Florida, a plaintiff can challenge a legislative map or congressional map under the Fair Districts Amendments—and contend that a map was drawn, for example, for partisan purposes, to protect incumbents, or for insufficient race-based reasons. Fla. Const. art. III, § 20-21. A plaintiff could also challenge a map for not being contiguous, for not respecting geographic and political boundaries, and for not being compact. Fla. Const. art. III, §§ 20-21. No such state-law claims are before this Court.

All of this is to say that this case is *only* about intentional racial discrimination. The *Arlington Heights* framework is what's relevant here. We use that framework below.

Arlington Heights Analysis

Plaintiffs' Equal Protection Clause and Fifteenth Amendment claims undergo the same analysis, which consists of two prongs. *See GBM*, 992 F.3d at 1321; *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1187-88 & n.9 (11th Cir. 1999) (citing U.S. Supreme Court case law). Under the first prong, Plaintiffs have the burden of proving that the challenged State "decision or act had a discriminatory" intent "and effect." *GBM*, 992 F.3d at 1321. To prove discriminatory intent, Plaintiffs must establish that

the challenged State decision or act was passed "because of," and not merely "in spite of," its unconstitutional effects. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Under *Arlington Heights*, several factors are used to determine racially discriminatory intent and effect: direct evidence of discriminatory intent, the impact of the law, historical background, legislative history, departures from usual procedure, and statements from key legislators. 429 U.S. at 265-68. Foreseeability of a disparate impact, knowledge of the impact, and the availability of less discriminatory alternatives are also relevant. *GBM*, 992 F.3d at 1322.

Assuming Plaintiffs establish discriminatory intent *and* effect, the burden would then shift to the Secretary to prove that, absent discriminatory motives, the Enacted Map would have been passed anyway. *Hunter*, 471 U.S. 222, 228 (1985).

We note from the outset that Plaintiffs must prove that the Governor *and* the Florida Legislature acted with racial animus in passing and approving the Enacted Map. Plaintiffs concede this point. Tr.981:21 – 983:19 (Plaintiffs' counsel: "I'm contending that the legislature, by passing [the Enacted Map], bears responsibility for the racial animus that [was] motivated, in part, [by] the Governor."). In trying to establish animus, Plaintiffs focus almost exclusively on the Governor's statements and actions. *E.g.*, Tr.7:6-12 (Plaintiffs' counsel: "We will show that the—that Governor DeSantis sought to destroy CD-5. . . . We will prove the Governor's intent."). Then, as an afterthought, Plaintiffs contend that the Governor's statements and actions can be imputed on the Florida Legislature. *E.g.*, Tr.7:6-12.

Plaintiffs don't "level[]" any race-based "accusation against any legislator." Tr.983:5-7; *see also* Tr.982:24 – 983:4 (Judge Winsor: "But the racial animus, you're saying, that was the Governor's racial animus, not any legislator's racial animus." Plaintiffs' counsel: "Yes. We're accusing Governor Ron DeSantis of acting with racial animus, at least in part, throughout this period from January till April."). But Plaintiffs argue, under a "cat's paw" theory, that state legislators were mere dupes of or tools for the Governor's allegedly improper aims. Tr.981:21 – 982:7.

Plaintiffs get things badly wrong. They can't impute the Governor's statements and actions to the Florida Legislature. The State executive and legislative branches are two separate governmental entities that are accountable to different constituencies, have different duties, have different functions, and are differently constituted. If, under *Arlington Heights* case law, the statements of a *legislative* bill sponsor can't be imputed on his fellow *legislators*, *LWVFL*, 66 F.4th at 932, then surely an *executive* official's statements can't be imputed on the *entire legislative branch*.

Nor can Plaintiffs proceed under a "cat's paw" theory to establish the Florida Legislature's purported discriminatory animus. That theory is used in employment-discrimination cases: a "'cat's paw' is a dupe who is used by another to accomplish his purposes," and a "plaintiff in a 'cat's paw' case typically seeks to hold the plaintiff's employer liable for the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision." *Brnovich v. DNC*, 141 S. Ct. 2321, 2350 (2021). This theory:

> [H]as no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools.

Id. The Governor and individual legislators don't have an agency relationship, either, making the "cat's paw" theory inapplicable in this case.

Taking stock, Plaintiffs can't impute the Governor's statements and actions to the Florida Legislature and can't proceed under a "cat's paw" theory. And Plaintiffs don't accuse any individual legislator of racial animus. This means that Plaintiffs have failed to establish that the Florida Legislature passed the Enacted Map with racial animus. That's fatal to their Equal Protection Clause and Fifteenth Amendment claims—where "[p]roof of racially discriminatory intent or purpose is required." *Arlington Heights*, 429 U.S. at 265; *Feeney*, 442 U.S. at 279 (requiring plaintiffs to establish that the government acted "because of," and not merely "in spite of," unconstitutional effects).

We should end our analysis here. But for the sake of completeness, we will proceed with the *Arlington Heights* analysis, and we will proceed with our *Bartlett* and standing discussions.

Presumption of Good Faith. This Court must apply the presumption of good faith. *LWVFL*, 66 F.4th at 923; *GBM*, 992 F.3d at 1325. It's a mandatory presumption. *Miller*, 515 U.S. at 915 (The "good faith" "*must* be presumed." (emphasis added)); *see*

also Abbott v. Perez, 138 S. Ct. 2305, 2324-25 (2018) (discussing presumption of good faith); *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (stay panel) (same); *NAACP v. City of Jacksonville*, 2023 WL 119425, at *11-24 (11th Cir. Jan. 6, 2023) (stay panel) (Newsom, J., dissenting) (same).

The presumption of good faith means that the parties don't start out with scales in equipoise. That makes sense: at the end of the day, redistricting is a "complex" and "most difficult" endeavor, where tradeoffs, policy judgments, and compromises are part of the process. *Miller*, 515 U.S. at 915-16. Elected officials should be presumed to be acting in public confidence for constitutional results. To overcome the presumption, "only the clearest proof will suffice." *Smith v. Doe*, 538 U.S. 84, 92 (2003); *see also United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (demanding clear evidence to overcome presumption of regularity). Indeed, the U.S. Supreme Court has reversed discriminatory intent findings in the redistricting context even when they were supported by "a modicum of evidence." *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

Chief Justice Marshall put it best: holding that a governmental official had improper intent is "a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v. Peck*, 10 U.S. 87, 128 (1810). This isn't a doubtful case: Plaintiffs nowhere approach the evidence needed to overcome that presumption.

Direct Evidence. On this record, there's no direct evidence of discriminatory intent—on the Florida House's part, the Florida Senate's part, or the Governor's part.

The product of their actions, the Enacted Map's statutory language, contains no reference to race. Ch. 2022-265, Laws of Fla.

Nor are there any "loose lips" statements from the Florida Legislature or the Governor. We have reviewed the legislative record and find no comments from any state legislator that suggests that he or she voted for the Enacted Map because of racial animus. Nor have Plaintiffs identified any.

We similarly don't find any statements from Governor DeSantis that demonstrate any racial animus. Quite the opposite. Throughout the redistricting cycle, he sought to undo what he maintained was an unconstitutional racial gerrymander in North Florida; he intended to *prevent* race-based line drawing. *See, e.g.*, JX52 (advisory opinion request) (Feb. 1, 2022); JX53 (advisory opinion brief) (Feb. 7, 2022); JX54 (Newman veto memorandum) (Mar. 29, 2022). And he did so to comply with the Equal Protection Clause's race-neutral dictates. *See Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2161 (2023). As noted in the introduction, whether the Governor is right on the merits is a question for another court; however, his stated rationale negates any claim of animus.

It's been contended that because the Governor's statements and concerns touch on race, racial animus must be at play. Not true. It's a *racial* gerrymander that the Governor is trying to prevent. His statements and concerns don't establish racial animus any more so than a statement that "women should receive fair opportunities in the

workforce" establishes sex-based discrimination. Speaking out and acting out against race-based and sex-based discrimination doesn't establish discriminatory animus.

As such, there's no direct evidence of racial animus. Circumstantial evidence is needed, judged against the *Arlington Heights* factors.

Impact. We now consider the Enacted Map's impact. On the one hand, the Enacted Map no longer has a black performing district in North Florida, though the number of black congressmembers remains relatively steady at four (even though the black voting age population has slightly declined over the past few years). Tr.712:14 – 713:11 (Barreto). On the other hand, the Enacted Map no longer has (what many have claimed to be) a racially gerrymandered district, one that sorts voters purely on the basis of race. As such, we conclude that this factor doesn't favor Plaintiffs. Even if it did, "impact alone is not determinative." *Arlington Heights*, 429 U.S. at 266.

Historical Background. Next, we consider history. Plaintiffs relied on Dr. Kousser to opine on Florida's racial and redistricting history. For the reasons expressed above, we don't credit Dr. Kousser's testimony; our concerns over his bias, research methods, and expert conclusions are too great.

Even if we credit his testimony, his testimony doesn't assist Plaintiffs. According to Dr. Kousser, the 1887 annual registration act, the nineteenth century eight box law and poll taxes, the 1920 Ocoee riots, the 1920 assassination of Harry T. Moore, at-large school board elections in the 1940s, and anti-miscegenation laws all inform the 2022

redistricting cycle. Tr.335:3 – 336:3; Tr.340:17 – 343:11; Tr.344:10 – 347:19; Tr.365:12 – 366:23; Tr.477:7 – 483:9. That can't be right.

Arlington Heights doesn't permit an "unlimited look-back to past discrimination." *GBM*, 992 F.3d at 1325 (citing *Arlington Heights*, 429 U.S. at 267). Evidence of "a racist past" is not "evidence of current intent." *LWVFL*, 66 F.4th at 923. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality).

Only historical facts "reasonably contemporaneous" to the Enacted Map's passage should be considered; "[a]lthough the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987); *see also Arlington Heights*, 429 U.S. at 260, 269 (considering only a little over a decades-worth of historical background); *see also GBM*, 992 F.3d at 1322 n.35 & 1323 (suggesting that statements made decades ago aren't "contemporaneous[]" statements); *LWVFL*, 66 F.4th at 922-23 (finding error in the consideration of events in the immediate aftermath of the Civil War). The more limited historical assessment makes sense. The *Arlington Heights* factors are intended to assist courts in determining whether a law was enacted with discriminatory intent; what happened many decades prior to the passage of a legislative enactment has little to no bearing on what a legislature intended when it enacted a law.

Dr. Kousser concluded otherwise. Consider this exchange with the Secretary's counsel:

Q. Doctor, in the 1880s, you talked about literacy tests. They are, borrowing your phrase, "small steps" that inform what's happening in 2022, correct?

A. Those were larger steps. The first steps are the smaller steps, and you get to the larger steps by making the smaller steps first.

Q. But they still inform what happened in 2022, from your perspective, right?

A. They're part of using election law to discriminate against Blacks, yes.

. . . .

Q. Understood. So it's post-Civil War all the way through now affects what happened in the 2022 redistricting cycle? Do I understand that right?

A. All of it has an effect, but some of it has more of an effect than others. And if you look at what happened after 1965, that clearly has more of an effect than what happened before 1965, but it is all of a piece in that election laws were being used to discriminate.

This was one of the first tools, and it—that people wanted to discriminate grabbed on to, and they continue to use it, and they've continued to use it since 1965. If you want to understand the events of 2022, the more recent events have more bearing, but all of the events are relevant.

Tr.479:10 – 481:16.

We decline to take such an expansive historical perspective. And we note that it ignores other facets of Florida's racial history, which tells a more complicated tale. For example, in looking at more recent history, Florida wasn't put under § 5 preclearance in 1965. Tr.469:16 – 470:3; Tr.471:4-12 (Kousser); Tr.877:17 – 878:3 (Owens). Five

counties were later put under preclearance for language-minority-based reasons. Tr.471:19-22 (Kousser). None of those counties was in North Florida.

Decades afterward, in 1992, Florida elected three black congresspeople, Tr.859:1-11 (Owens), and since that time, black voices have been routinely sent to Congress from Florida, DX110 (Kousser corrected table) (listing black elected officials).

And in reviewing the same historical record that Dr. Kousser reviewed, the Eleventh Circuit concluded that "Florida's more recent history does not support a finding of discriminatory intent." *LWVFL*, 66 F.4th at 923-24. The court found a lack of judicial opinions since 2000 where the State of Florida was found to have acted with discriminatory intent: "[i]n none of the cases from this century" "did a court determine that a challenged Florida election law resulted from intentional discrimination." *Id.* at 922-24.

We find the same. This factor doesn't assist Plaintiffs.

Legislative History. *Arlington Heights* asks us to consider the Enacted Map's legislative history. Its legislative history, as documented in legislative transcripts and Florida Channel videos, speaks for itself. Again, we don't credit Dr. Kousser's or Dr. Barreto's gloss on history. No expert can get inside the head of another person. Dr. Kousser and Dr. Barreto are particularly ill-suited to the task, given our concerns with their bias, research methodologies, and conclusions.

At base, the legislative history reveals that the Enacted Map was the product of garden-variety lawmaking. It's a "ping-pong match against a guy with a veto pen."

Tr.977:21-23 (Plaintiffs' counsel at closing argument). Two branches of government initially staked different positions, and in time, and under a deadline, both sides reached a compromise legislative product. All of this is unremarkable. "Redistricting," like lawmaking in general, "is never easy." *Abbott*, 138 S. Ct. at 2314. It wasn't easy in 1955 with Governor Collins fighting his malapportioned Florida Legislature. It isn't any easier now.

As we stated above, the legislative history doesn't evidence any "loose lips" comments or statements of racial animus. And while Republican legislators supported the Enacted Map, and Democratic legislators opposed it, partisanship can't be conflated with race, and partisan motivation can't be conflated with racial animus. *Brnovich*, 141 S. Ct. at 2349-50; *LWVFL*, 66 F.4th at 924.

This factor, like historical background, doesn't favor Plaintiffs.

Procedural & Substantive Departures. We now consider whether the Florida Legislature or the Governor departed procedurally or substantively from governmental practices or "usual" lawmaking when passing and approving the Enacted Map. *Arlington Heights*, 429 U.S. at 269.

It's beyond contention that the Florida Constitution either mandated or allowed every action performed by the Florida Legislature and the Governor during the 2022 redistricting cycle. (And as explained below, there are good reasons for the State to believe that the Fair Districts Amendments' non-diminishment provision didn't apply in North Florida.) That's what this *Arlington Heights* factor gauges: whether

governmental actors played within constitutional hashmarks. *See id.* at 269 ("The rezoning request progressed according to the usual procedures."); *Hall v. Holder*, 117 F.3d 1222, 1230 (11th Cir. 1997) ("Appellants also point to no procedural departures from the ordinary policy-making process in the decision to maintain the system; that is, they do not argue that the referendum was somehow deficient.").

The Florida Constitution requires legislation—including congressional maps—to be approved by the Florida House, the Florida Senate, and the Governor. Fla. Const. art. III, §§ 6-8. The Florida Constitution allows the Governor to propose legislation, Fla. Const. art. IV, § 1(e), and the Florida Constitution allows the Governor to veto legislation, Fla. Const. art. III, § 8. It also allows him to seek advisory opinion requests from the Florida Supreme Court, Fla. Const. art. IV, § 1(c), and to call special sessions, Fla. Const. art. III, § 3(c).

In other words, all the actions Plaintiffs complain about—the advisory opinion request, the veto, the special session, gubernatorial involvement—are either mandated under or allowed by the Florida Constitution.

Those actions occurred in previous redistricting cycles as well. In 1955, Governor Collins sought an advisory opinion request with maps pending his approval, and he vetoed maps his own party members supported. *See In re Advisory Opinion to Gov.*, 81 So. 2d 782, 784 (Fla. 1955); DX104 at typed p.4 (Florida House of Representatives Reapportionment Packet) (Jan. 1991). Between 1955 and 1982, over fifteen special redistricting legislative sessions were called. DX104 at typed p.25-27; *see also* Tr.434:21

– 436:2 (Kousser) (acknowledging, for the first time on cross-examination, that there "were lots of special sessions during" Governor Collins's tenure and afterward). The 2012 redistricting cycle featured special sessions, too. *See, e.g.*, *In re Sen. J. Res. of Apportionment 2-B*, 89 So. 3d 872, 877 (Fla. 2012) ("*Apportionment II*") (noting the special session to remedy state legislative maps); *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258, 261 (Fla. 2015) ("*Apportionment VIII*") (noting the special session to remedy the congressional map).

And governors were regularly involved in the redistricting process. *See generally* Tr.439: 15-17 (Kousser) ("I don't consider it odd to think that the Governor would lobby on legislative redistricting plans at all."). Democratic Governor Graham played a role in brokering redistricting compromises with a Democratic-controlled Florida Legislature, and Democratic Governor Chiles "exert[ed] pressure on the Florida Legislature when it" came "to drawing congressional districts." Tr.437:4 –439:19 (Kousser). It "would be fair to say" governors "strongarmed the legislature to whatever their particular issue of the day was," including redistricting. Tr.250:1-24 (Kelly). "They exerted their will on the legislature." Tr.250:1-24 (Kelly). So did other State governors during the 2022 redistricting cycle; six governors vetoed maps approved by their state legislatures, and in New Hampshire, the Republican governor vetoed a map passed by the Republican-controlled state legislature. Tr.863:14 – 864:2 (Owens).

Advisory opinion requests, vetoes, special sessions, gubernatorial involvement in the legislative process—those actions occur regularly for non-redistricting matters, too.

Both Mr. Kelly and Leader Driskell testified that Florida governors involve themselves in the legislative process. Mr. Kelly testified that in working on "more than a thousand" bills, there's gubernatorial involvement on "more than half," Tr.199:21 – 200:2, particularly on "bills that take on a prominent level of public importance," Tr.200:3-15. *See also* Tr.582:23-25 (Driskell) (agreeing that "redistricting is of statewide importance"). Leader Driskell admitted that the Governor and his staff propose legislation. Tr.582:3-19. Not only that, both Mr. Kelly and Leader Driskell have seen governors veto legislation. Tr.200:16-23 (Kelly) (five to ten vetoes a year); Tr.581:12-19 (Driskell) (seen Governor DeSantis veto legislation since 2018). Both have seen governors convene special legislative sessions. Tr.200:24 – 201:3 (Kelly) (one or two special legislative sessions a year); Tr.581:20-22 (Driskell) (seen Governor DeSantis convene special legislative sessions since 2018). Leader Driskell even testified that she has seen legislation pass on party-line votes. Tr.582:20-22.

True, during the 2022 regular session, the Florida Legislature passed a two-map bill, with Plan 8019 and Plan 8015. We don't believe the Florida Legislature passed a two-map plan in previous redistricting cycles, even though there's nothing in the Florida Constitution that prevents this kind of fallback legislation. But we don't conclude that this two-map package evidences discriminatory animus for the Florida Legislature. Plaintiffs don't, either: they believe that Plan 8019 CD-5 is a constitutional alternative configuration for a North Florida district, and they believe that Plan 8015 CD-5 (or a

district like Benchmark CD-5) should be imposed as a remedy to their racial discrimination claims.

Also true: the Governor proposed congressional maps to the Florida Legislature. But the fact remains that the Florida Constitution allows him to do so; he can propose legislation. Fla. Const. art. IV, § 1(e). It makes sense for him to do so; redistricting is of statewide importance. Tr.582:23-25 (Driskell) (agreeing that "redistricting is of statewide importance"). Again, this doesn't prove racial animus, and Governor DeSantis's involvement should be placed in context, as Senator Rodrigues explained:

> Now, this Governor has been more active than some which begs the question, what is unique here? And what I would submit is this. This Governor actually has people on staff who have experience in drawing maps. The person that drew the map that is before us—which is a compromise map, including districts that we drew, that our staff drew, districts that were drawn in the House, and districts that they drew themselves—is Alex Kelly, who is the Deputy Chief of Staff. That's on the record.
>
> But what hasn't been elaborated on is that Alex Kelly has experience in drawing maps. He was a former staff director for the Florida House of Representatives during the last redistricting cycle. He has the ability to draw maps because the [State] House map that he drew was the only map that survived judicial review during the last redistricting cycle, and the only map that was implemented as it was passed by the Legislature. And then finally, he's qualified.
>
> So what I would say is this. It's not like the Governor put—or had his staff put a map of Florida on the board and just randomly put districts together. He is a qualified staffer who has been through this process post-fair districts amendment, and drawn a map that has survived judicial review. And the Governor gave instructions that he felt our map did not resolve a conflict between the Florida Constitution and fair districts and the U.S. Constitution on the equal rights—equal protection clause of the

> 14th Amendment. And he directed his staff to go draw a map that reconciled that difference, and that's what we have here before us.

JX47 59:21 – 61:4 (Senate Session) (Apr. 20, 2022). All that said, we find that the only extraordinary aspects of the 2022 congressional redistricting cycle were that:

> [T]he Governor did sign the bill into law on April 22, 2022. It was a Friday. He's right-handed. He was the captain of the Yale baseball team. The fact that these things were the first time that this confluence of events happened doesn't make it so that the *Arlington Heights* factors are violated. It doesn't make it unprecedented in an unconstitutional manner. They do not show discriminatory intent.

Tr.23:24 – 24:6. In sum, this *Arlington Heights* factor doesn't favor Plaintiffs.

Contemporary Statements of Key Legislators. Under *Arlington Heights*, we also consider contemporary statements of key legislators. The only legislator who testified at trial was Leader Driskell. But "the concerns expressed by political opponents during the legislative process are not reliable evidence of legislative intent." *LWVFL*, 66 F.4th at 940 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976)). That makes sense, especially here. An opponent of the Enacted Map can't provide reliable evidence of why her colleagues supported it—especially when the opponent stated that the Enacted Map's principal sponsor sows "hate and division" and whose policies are "draconian" and "further[s] the Nazi agenda." Tr.603:10 – 607:4 (Driskell). To the extent Plaintiffs rely on statements from Enacted Map opponents, we similarly consider the statements to be unreliable evidence of legislative intent. Even if we considered them, a handful of claims of racial bias don't lead to the conclusion that "the legislature as a whole was imbued with racial motives." *Brnovich*, 141 S. Ct. at 2349-50.

Contemporary statements from Enacted Map supporters are more relevant. Again, there weren't any "loose lips" statements of racial animus. And as detailed above, supporters considered the Enacted Map:

1. To be constitutional and valid. JX44 156:12-15 (House Congressional Redistricting Subcommittee) (Apr. 19, 2022) (Rep. Latvala); JX47 33:9 – 34:1 (Sen. Stargel); JX47 41:17-20 (Sen. Burgess); JX50 70:22-25 (House Session) (Apr. 21, 2022) (Rep. Fine).
2. To be a compromise plan. JX45 65:15 – 66:7 (Senate Session) (Apr. 19, 2022) (Sen. Rodrigues); JX45 96:15-17 (Sen. Rodrigues); JX47 40:25 – 41:1 (Sen. Burgess).
3. To be a means of preventing courts from drawing lines in North Florida. JX47 58:4 – 59:13 (Sen. Rodrigues); JX47 32:7-15 (Sen. Stargel); JX47 41:9-6 (Sen. Burgess); JX47 45:14 – 47:3 (Sen. Hudson).

Supporters also:

4. Felt that the Florida Legislature *and* the Governor were fulfilling their constitutional duties. JX38 160:25 – 162:1 (House Redistricting Committee) (Feb. 25, 2022) (Rep. Fine); JX47 40:24-25 (Sen. Burgess); JX47 59:14-25 (Sen. Rodrigues); JX48 79:20 – 80:6 (House Session) (Apr. 20, 2022) (Rep. Leek).

Putting aside statements on the legislative record, we further conclude that a bill's vote total is the best means of assessing legislative intent. Tr.861:12-16 (Owens); *see also*

LWVFL, 66 F.4th 932; *GBM*, 992 F.3d at 1324. Here, a majority of the Florida House and a majority of the Florida Senate approved the Enacted Map.

To be sure, many of the Enacted Map's legislative proponents were also proponents of Plan 8019 and Plan 8015. But their support of Plan 8019 and 8015 doesn't demonstrate that they supported the Enacted Map *because of* racial animus.

All told, "Plaintiffs cannot point to evidence—not a single comment made by any sitting" Florida "legislator in reference to" the Enacted Map—"to support their argument that the" Enacted Map "was intended to discriminate against black" voters. *GBM*, 992 F.3d at 1325.

Foreseeability & Knowledge of Disparate Impact. These factors come to us under Eleventh Circuit precedent, not U.S. Supreme Court precedent. Even though redistricting legislatures have access to racial-demographic data, *Miller*, 515 U.S. at 916, neither Mr. Kelly, the Executive Office of the Governor, the Florida House, nor the Florida Senate performed a functional analysis on North Florida districts in the Enacted Map. Tr.917:14-19; Tr.918:2-8 (Kelly); JX45 120:21 – 121:5 (Sen. Rodrigues) (stating that he doesn't "know" whether CD-4 and CD-5 perform "because a functional analysis was not performed on those districts"); DX128 (Enacted Map legislative packet).

Plaintiffs point to a single comment from Representative Leek near the end of the special legislative redistricting session for the proposition that the Florida House conducted a functional analysis. Specifically, Representative Leek was asked by a fellow representative if Enacted Map CD-4 and CD-5 perform for black voters;

Representative Leek stated that Florida House staff performed a functional analysis and concluded that they didn't perform. JX48 34:1 – 35:3. But when the exchange is read in its entirety, it's not clear whether the staff relied on a functional analysis for "prior maps" to come to that conclusion, or whether the staff performed a fresh analysis on the Enacted Map's North Florida districts.

In any event, Plaintiffs haven't produced this functional analysis, and Mr. Kelly testified that he wasn't aware of this analysis. Tr.927:20 – 928:8. Senator Rodrigues said that there was no functional analysis. JX45 120:21 – 121:5. Leader Driskell also testified that legislators deferred to staff on issues, such as whether a functional analysis was performed. Tr.528:14 – 529:13; 553:25 – 554:5. These analyses were ordinarily presented during legislative committee meetings, and the legislative record does not include any such analysis. The simpler explanation is that: Representative Leek misspoke or momentarily confused terms of art like "functioning" and "diminishing."

Even if there was a functional analysis, if legislators *had to ask* whether a functional analysis was performed on Enacted Map CD-4 and CD-5 during the special session, right before voting on the Enacted Map, it's fair to say that they probably didn't consider it when voting on the Enacted Map. The vote before them was whether to adopt a map in North Florida that had more compact districts following existing boundaries, such as county lines or streets.

For Mr. Kelly's part, the reason why the Executive Office of the Governor didn't conduct a functional analysis for North Florida was that:

> [A] functional analysis . . . would be looking at a tandem of both political data and race or ethnicity data. It would be a combination of doing both of those. And typically a functional analysis like that's done by a statistician through pretty significant analysis determining probability of an electoral result.
>
> And so absent that case where we took—I took a look at Northeast Florida, we otherwise completely stayed away from any kind of partisan or electoral data, so we didn't venture down that path.

Tr.919:6-21. In other words, Mr. Kelly didn't want to consider North Florida's partisan and racial data funneled through a functional analysis, particularly when partisan gerrymandering was the basis to throw out maps during the 2012 redistricting cycle.

True, one could argue that it *might be* foreseeable that removing a district like Benchmark CD-5 *might* disparately impact black voters in North Florida. But that is Plaintiffs' burden to prove, and they have not done so. The evidence shows that Mr. Kelly did not consider that data. The evidence shows that the Enacted Map contained a district, CD-4, where the black voting age population was greater than 30%, tracking the "rule of thumb" that Dr. Kousser himself uses. Tr.451:16-24; DX128 at 2.

Another point about the functional analysis. It cannot be dispositive in a racial animus claim. The Supreme Court has said that race consciousness—though *not* racial predominance—is okay in the redistricting context. *Allen v. Milligan*, 143 S. Ct. 1487, 1510-11 (2023). Functional analyses are how one becomes race conscious, though they are not in themselves evidence of racial predominance. *See id.* Absent Plaintiffs presenting some evidence linking the functional analysis to an impermissible use, and negating all other permissible uses, this Court cannot tether awareness to animus. *Id.*;

Easley v. Cromartie, 532 U.S. 234, 242 (2001) ("[T]he burden of proof on the plaintiffs (who attack the district) is a demanding one" and requires them to show "that a facially neutral law is unexplainable on grounds other than race." (citations and quotations omitted)).

Availability of Less Discriminatory Alternatives. Finally, we consider the availability of less discriminatory alternatives. Like foreseeability and knowledge, this factor comes from Eleventh Circuit precedent, not U.S. Supreme Court precedent.

At trial, Plaintiffs identified two alternative North Florida configurations: Plan 8019 CD-5 and State Senate SD-5. Both configurations contain a district purely within Duval County.

DX98: Plan 8019

PX7064: 2022 Florida Senate Districts

Neither of these plans can be considered less discriminatory alternatives. Plan 8019 CD-5 can't be considered a less discriminatory alternative; the Governor objected to the district as a discriminatorily drawn district. From the Governor's perspective, Plan 8019 CD-5 was expressly drawn to comply with the Fair Districts Amendments' race-based non-diminishment provision. Representative Leek, in supporting a Duval-only district, stated that the district would "protect[] a black minority seat in North Florida," and was drawn as an "attempt at continuing to protect the minority group's ability to elect a candidate of their choice." *E.g.*, JX38 23:6-24 (Rep. Leek)

In his memorandum that accompanied Governor DeSantis's veto, Mr. Newman argued that Plan 8019 CD-5 was an impermissible racial gerrymander:

> Th[e] configuration of the district is more compact [than Benchmark CD-5] but has caused the adjacent district—District 4—to take on a bizarre doughnut shape that almost completely surrounds District 5. The reason for this unusual configuration is the Legislature's desire to maximize the black voting age population in District 5. The Chair of the House Redistricting Committee confirmed this motivation when he explained that the new District 5 was drawn to protect a black minority seat in north Florida. . . .
>
> Despite the Legislature's attempt to address the federal constitutional concerns by drawing a more compact district, the constitutional defect nevertheless persists. . . .
>
> Specifically, according to the House Redistricting Chair, the primary map's version of District 5 is the House's attempt at continuing to protect the minority group's ability to elect a candidate of their choice.

JX55 3-4 (cleaned up). If race predominated in the drawing of Plan 8019 CD-5, as the Governor thought, then it can't be considered a less discriminatory alternative.

It bears noting that Plan 8019 was not a standalone map; it was always tied to Plan 8015—the secondary map that contained a non-compact, racially gerrymandered district like Benchmark CD-5 in North Florida. Plan 8019 and Plan 8015 were thus a package deal. Even if Plan 8019 was a less discriminatory alternative under the Equal Protection Clause, Plan 8015 always lurked in the background. There was a very real possibility that Plan 8019 might be struck down under the Fair Districts Amendments' non-diminishment provision (Representative Geller and Representative Skidmore made this case), which would have put Plan 8015 into place.[10]

Plaintiffs also pointed to State Senate SD-5. This isn't a proper comparator. *First*, state senate districts are smaller than congressional districts; so Plaintiffs don't present an apples-to-apples comparison. *Second*, Plaintiffs consider this district in a vacuum. The Governor objected to Plan 8019 CD-5 because, based on the legislative record, he maintained that the district was drawn for race-based reasons. Plaintiffs don't explain how or why SD-5 was drawn. As Mr. Kelly explained at trial:

[10] To reiterate: the Governor maintained that the non-diminishment provision did not apply to Benchmark CD-5 from 2016 because retaining its basic configuration would violate federal law. *See Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023); *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1267 (11th Cir. 2002); *NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1247-71 (M.D. Fla. 2022). But if the Florida Legislature's initial position was correct, and the non-diminishment standard did apply to Benchmark CD-5, then the Florida Legislature's Duval-only configuration would still have violated existing Florida Supreme Court precedent, because the district went from performing in fourteen-of-fourteen test elections to performing in only nine of those elections. *See supra*. Either way, the Governor maintained that he could not sign the package deal into law.

> Q: Senate 5 is wholly contained or seems to be wholly contained within CD-5.
>
> A. Right. . . .
>
> I don't know what the record in the Senate was, in the legislature was, regarding the Senate district. The record in the legislature regarding the congressional district there, it just impugns the constitutionality of it. The record and testimony was that it was drawn for race-based purposes, and the record of that congressional district shows that it dropped its Black voting age population by double digits significantly. So the legislature essentially failed on both sides of its own argument. I don't know what the Black voting age population of that Senate district was. I don't know what other factors the legislature discussed. I didn't follow their discussion of the Senate map.

Tr.130:25 – 131:23.

In sum, neither Plan 8019 CD-5 nor State Senate SD-5 are less discriminatory available alternatives. This factor doesn't favor Plaintiffs.

Pretext. Pretext isn't an express *Arlington Heights* factor, though *Arlington Heights* cases have touched on the asserted justifications for governmental actions. *See, e.g.*, *Arlington Heights*, 429 U.S. at 258, 268-69; *GBM*, 992 F.3d at 1326. We note that our task is solely to determine whether the Florida Legislature and the Governor passed and adopted the Enacted Map because of racial animus, in violation of the Equal Protection Clause and Fifteenth Amendment. Our task isn't to determine whether Benchmark CD-5 is a constitutional benchmark, or whether Plan 8019 CD-5 violates the Fair Districts Amendments' non-diminishment provision. Those questions are beyond our purview, and we are aware that state courts are currently resolving some of those issues.

Still, the Governor and the Secretary have asserted several justifications for their actions, which ultimately resulted in the passage of the Enacted Map. Plaintiffs claim that these justifications are pretext for racial discrimination.

At the outset, we note that the presumption of good faith attaches to each of these justifications. And we review these justifications not to assess whether they are affirmatively right or wrong because that's a job for the state courts where these issues are being tried. Rather, we assess these justifications to see whether, as Plaintiffs argue, each is so very wrong—so baseless—that it is evidence of pretext. More specifically, we review in turn whether it is baseless for one to conclude that (1) the Florida Supreme Court's adoption of Benchmark CD-5 *isn't* insulated from federal scrutiny, (2) Benchmark CD-5 was an unconstitutional racial gerrymander under the Equal Protection Clause, (3) Plan 8015 CD-5 was an unconstitutional racial gerrymander under the Equal Protection Clause, (4) Plan 8019 CD-5 was an unconstitutional racial gerrymander under the Equal Protection Clause and violated the Fair Districts Amendments' non-diminishment provision, and (5) Mr. Kelly was concerned with traditional districting criteria during his line drawing.[11]

[11] We briefly address one of Plaintiffs' other pretext arguments. Plaintiffs questioned why the Governor didn't object to state legislative maps during the 2022 redistricting cycle, despite his strong positions in the congressional-districting process. The reasons are simple. Unlike the congressional-redistricting process, the Governor can't approve or veto state legislative maps. Fla. Const. art. III, § 16. And once the state legislative maps were in effect, he couldn't challenge them; that would violate the public official standing doctrine under Florida law. *Atl. C. L. R. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922); *State Dep't of Transp. v. Miami-Dade Cnty. Expressway Auth.*, 316 So.

The Florida Supreme Court's Benchmark CD-5. It's been suggested that *because* the Florida Supreme Court adopted Benchmark CD-5, all 200 miles of it together with its tentacles in Leon and Duval Counties, the district is insulated from federal scrutiny. That simply isn't true.

We start with the recent U.S. Supreme Court case, *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022) (per curiam). There, the Wisconsin Supreme Court imposed maps that it believed "complied with the State Constitution, the Federal Constitution, and the Voting Rights Act." *Id.* at 1247. The U.S. Supreme Court nevertheless held that the state supreme court committed several "legal error[s]" in construing and applying federal law, and the Court reversed and remanded the case back to state court. *Id.* at 1248. This U.S. Supreme Court case shows that just because a state court of last resort drew a map—even one that "complied with the State Constitution"—that map can still violate federal law. That's true for the Wisconsin Supreme Court, as well as the Florida Supreme Court. *Wisconsin Elections Commissions* shows that *Apportionment I-VIII* aren't insulated from federal scrutiny.

We also reject the view that the Florida Supreme Court considered or resolved any Equal Protection Clause issues when it adopted Benchmark CD-5. Nowhere in its opinions is there any discussion of or reference to the Equal Protection Clause. That

3d 388 (Fla. 1st DCA 2021). Plus, as a practical matter, the Governor only has "a finite amount of political capital" he can use at a given time. Tr.1010:4-13.

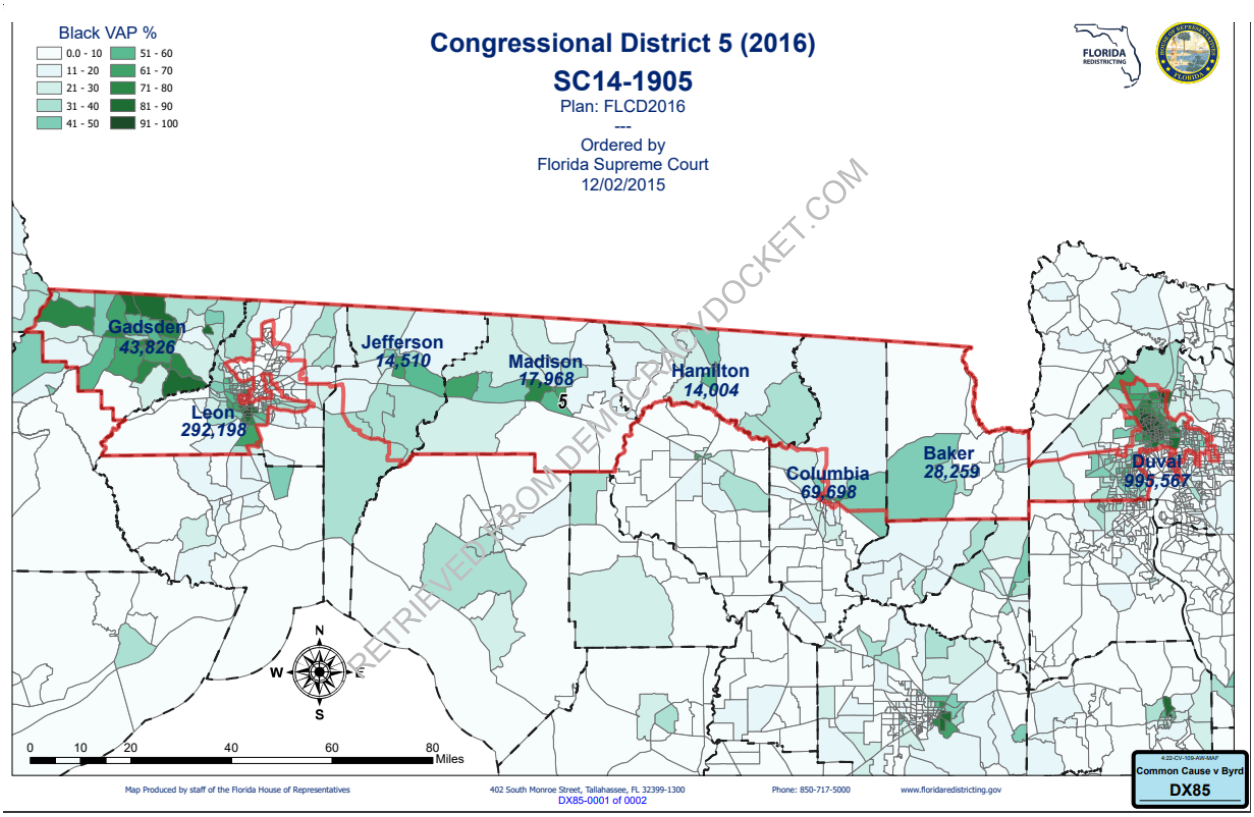
makes sense: the parties never raised it, and the court never considered it sua sponte. Thus, the question of Benchmark CD-5's compliance with the Equal Protection Clause "mere[ly] lurks" in the background of *Apportionment VII*. *Webster v. Fall*, 266 U.S. 507, 511 (1925). Such questions "are not to be considered as having been so decided as to constitute precedents." *Id.*; *Atl. C. L. R. Co. v. Baynard*, 151 So. 5, 6 (Fla. 1933) (same).

Benchmark CD-5. The Governor contended that Benchmark CD-5 was an unconstitutional benchmark district, a racial gerrymander that violated the Equal Protection Clause. As noted above, the Equal Protection Clause prevents the State from using race as the "predominant factor motivating" its "decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 915-16. Race predominates when it subordinates traditional districting criteria like compactness and respect for geographic and political boundaries. *Id.* If race predominates, then strict scrutiny must be met: there must be a compelling governmental interest backing the race-based sorting of voters and narrow tailoring to achieve that interest. *Cooper*, 581 U.S. at 292.

Here, there is merit to the argument that Benchmark CD-5 was a racial gerrymander. The Florida Supreme Court adopted the east-west configuration of Benchmark CD-5 for predominately race-based reasons—the odd shapes at either end of Benchmark CD-5 can only be explained through race and not other reasons like partisanship or incumbency. *Apportionment VII*, 172 So. 3d at 401-06. Respect for geographic and political boundaries weren't a concern; the squiggly lines that track black

census blocks in Leon and Duval Counties make that clear. DX85 (North Florida heat map); JX70 (Benchmark Map legislative packet); Tr.800:2-12; Tr.801:11 – 802:4 (Johnson) (concluding that Benchmark CD-5 is a racial gerrymander). *See also* Tr.244:11 – 249:23 (Kelly) (opining on the heat maps).

DX85: Heat Map of Benchmark CD-5



The Florida Supreme Court minimized the compactness concerns as well. It said: "[t]he reality is that . . . the East-West version of the district is [not] a 'model of compactness' . . . . Other factors account for this phenomenon . . . such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language

minorities to participate in the political process or diminish their ability to elect representatives of their choice." *Apportionment VII*, 172 So. 3d at 406.

Plaintiffs and Dr. Kousser even agree that Benchmark CD-5 can only be explained by race. Tr.944:6-14 (Plaintiffs' counsel); Tr.445:16-24 (Dr. Kousser). That point is beyond contention. While pre-Fair Districts Amendments district shapes could be explained by partisanship or incumbency protections or race, the Fair Districts Amendments prohibit those considerations entirely—except for race. Racial considerations are mandated under the state constitution, and they motivated Benchmark CD-5's lines.

Given that race predominated, strict scrutiny must be met—there must be a compelling governmental interest and narrow tailoring. There are good reasons to believe that no compelling governmental interest could justify Benchmark CD-5. There are good reasons to believe that narrow tailoring would not be met, either.

Complying with a state-constitutional provision *alone* likely doesn't satisfy strict scrutiny. No court has ever made that determination, and concluding that a state constitutional provision *alone* can satisfy the Equal Protection Clause flips the Civil War Amendments on their heads: the Civil War Amendments were enacted to *prevent* States from engaging in race-based action, not *permitting* such action. A State can't point to its anti-miscegenation provision, Fla. Const. art. XVI, § 24 (1885) (an anti-miscegenation law), and argue that it complies with *Loving v. Virginia*, 388 U.S. 1 (1967) ("There can be

no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

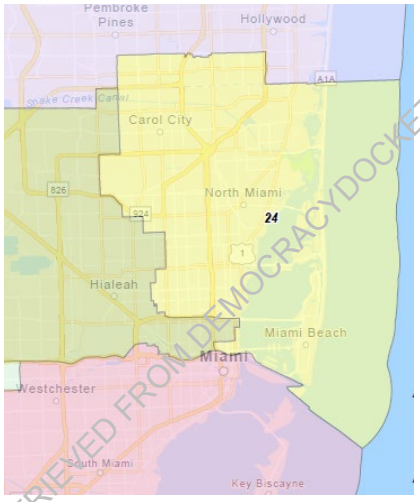
But note we said complying with a state-constitutional provision *alone*. Throughout the redistricting cycle, Mr. Newman, Mr. Popper, and Mr. Kelly agreed on this proposition: complying with the non-diminishment provision *plus* some other interest *might* be a compelling governmental interest. Mr. Newman provided the following oral testimony to the Florida Legislature during the special session:

> So the only—the only question then is whether or not mere compliance with the Florida Constitution alone by itself is a compelling interest to justify a race-based district. And in this context, where you're having to ignore all traditional districting criteria, which is what the federal courts look at to determine whether or not, you know, the district is necessary, it cannot be a compelling interest, for the same reason that we would never say that, if Florida had a law segregating the schools, that that would somehow trump the Equal Protection Clause. Why?
>
> Because, you know, the Florida Constitution says so. The only point—my only point is mere reliance on the Florida Constitution cannot by itself be enough. Now, don't get me wrong. That's not to say that there are other applications of the Florida Constitution's non-diminishment standard that could be or that could survive strict scrutiny.
>
> One example would be if you had a sufficiently compact African American community, right, in a district. You can't necessarily just carve up that district. That perhaps—that perhaps could satisfy strict scrutiny.
>
> But what does not and cannot satisfy strict scrutiny is trying to cobble together disparate minority communities from across Northern Florida to cobble together a district that might perform for the minority community.
>
> And I think that—that's where District 5 goes wrong because it's clearly cobbled together. It's clearly a gerrymander, not unlike the preceding district that went from Jacksonville down to Orlando, you know, as a salamander-type district that went from Jacksonville down to Orlando.

JX44 67:9 – 68:18.

In other words, complying with the non-diminishment provision *and traditional districting criteria* might satisfy strict scrutiny. Mr. Popper appeared to echo these sentiments during the 2022 regular session, when he testified before the Florida Legislature. JX37 101:1-10 ("complying with the Florida constitution" "absolutely *can* be a compelling state interest" (emphasis added)).

DX93: Enacted Map Images



So too said Mr. Kelly. When Plaintiffs' counsel asked him why there may be a compelling governmental interest in drawing CD-24, but not drawing Plan 8019 CD-5, the Duval-only district, Mr. Kelly provided the following response:

> Q: Do you think it's constitutional? I realize you're not an attorney, but you're agreeing, are you not, that there is a compelling state interest in the Fair Districts Amendment compliance in CD24?
>
> A. To my knowledge, yes.
>
> Q. Okay. But I'm trying to understand, then, what the problem is with the Duval map [in Plan 8019]. . . . And CD24 [in the Enacted Map]

> is compact. It respects political boundaries. CD5 on the primary map [Plan 8019] is compact and reflects political boundaries. Both had race considered in the drawing. Both are supported by the Fair Districts Amendment. And you just said there's a compelling state interest in the Fair Districts Amendment down here in 24, but seemingly not over here in the primary map 5 [Plan 8019 CD-5]. Why is that?
>
> A. [Plan 8019 CD-5] creates a district drawn for a race-based reasons, creates noncompact district around it, and also fails its own diminishment test that the legislature testified to. So it creates a series of problems.
>
> District 24 [in the Enacted Map]. . . is a compact district that follows city and county lines. This district would be a good district in probably any other way and doesn't create any kind of tension for the districts around it. So you can't just look at a district in isolation unto itself. When you look at the districts below 24, above 24, 24 creates nice, clean breaks along county and city lines, doesn't create any problems for the districts to the North or South or West of it. It's just a good district all around.

Tr.167:25 – 169:1. Again, according to Mr. Newman, Mr. Popper, and Mr. Kelly, complying with the non-diminishment provision *and traditional districting criteria* such as compactness and adherence to geographic and political boundaries would satisfy strict scrutiny. *See supra.*

This is all to say that Benchmark CD-5 doesn't do that. It *purely* seeks to satisfy the non-diminishment provision's race-based mandate while *violating* traditional districting criteria like compactness and adherence to geographic and political boundaries. The clearest proof of this fact is that 82.77% of the population of CD-5

came from two counties (Leon and Duval) separated by hundreds of miles.[12] The row of counties in the middle served only as a land-bridge, connecting the black populations, selected with precision, to create a racial gerrymander. DX85 (Benchmark CD-5 heat map). That is so, even though the northeast portion of the State contains more than enough people to create two congressional districts, as the Enacted Map shows.

Nor does it matter that the Fair Districts Amendments' non-dilution and non-diminishment provisions were modeled on the Voting Rights Act. The state-law provisions impose different requirements and were backed by different purposes. The Voting Rights Act was passed under Congress's ability to take race-based action under the Civil War Amendments. *Shelby County v. Holder*, 570 U.S. 529, 536-37 (2013); *South Carolina v. Katzenbach*, 383 U.S. 301, 307-15 (1966). The Fair Districts Amendments weren't. The Voting Rights Act contains a voluminous record of race-based discrimination. *Katzenbach*, 383 U.S. at 307-15. The Fair Districts Amendments, as a referendum, don't.

[12] Here's how we get to 82.77%. We first consider the Benchmark CD-5 populations in Leon County, in Duval County, and Benchmark CD-5 as a whole. All of these numbers are based on 2020 data. Leon County's population in CD-5 is 166,477. JX70 at 3 (Benchmark Map legislative packet). Duval County's population in CD-5 is 453,367. JX70 at 3. And Benchmark CD-5's population is 748,910. JX68 (Benchmark Map VAP report).

Next, we calculate the combined Leon and Duval County populations in Benchmark CD-5: 166,477 + 453,367 = 619,844.

Then we divide that number by Benchmark CD-5's population: 619,844 / 748,910 = 82.77%.

In fact, following *Shelby County v. Holder*, the U.S. Supreme Court hasn't decided whether compliance with § 5 of the Voting Rights Act (which the non-diminishment provision is modeled off of) is a compelling governmental interest. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015) ("[W]e do not here decide whether, given *Shelby County v. Holder*, 570 U.S. 529 (2013), continued compliance with §5 remains a compelling interest."); *see also Harris*, 578 U.S. at 258.

Turning to narrow tailoring (and using the Voting Rights Act as a narrowly tailored comparator), § 5 of the Voting Rights Act applied to specific jurisdictions, and never Florida statewide. *See supra*. The Fair Districts Amendments, by contrast, impose a preclearance-like regime for Florida in its entirety. *In re Sen. J. Res. of Leg. Apportionment 1176*, 83 So. 3d 597, 624 (Fla. 2012) ("*Apportionment I*") ("Florida's new constitutional provision, however, codified the non-retrogression principle of Section 5 and has now extended it statewide. In other words, Florida now has a statewide non-retrogression requirement independent of Section 5."). The Voting Rights Act contained expiration dates (which were always extended). *E.g.*, *Shelby County*, 570 U.S. at 538. The Fair Districts Amendments have no expiration date. *See Students for Fair Admissions*, 143 S. Ct. at 2174 (holding that race-based governmental action must be temporary).

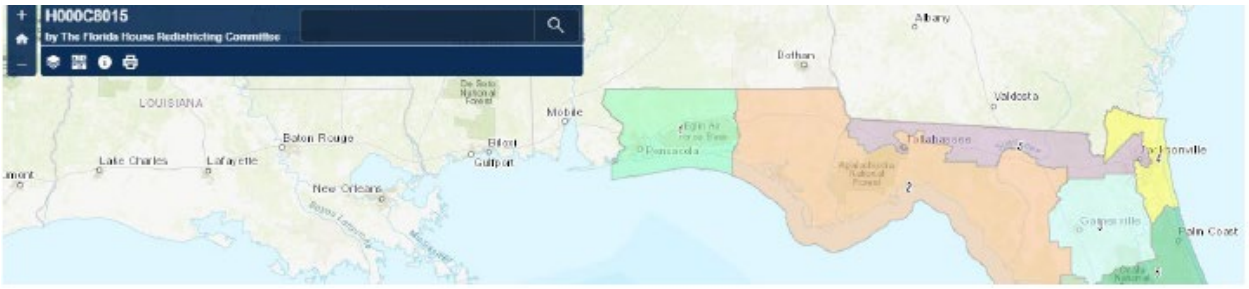
In sum, we conclude that one could make good faith arguments that Benchmark CD-5 was a racial gerrymander; it was drawn for predominantly race-based reasons, and its race-based purpose doesn't satisfy strict scrutiny.

Plan 8015 CD-5. Next, we consider whether 8015 CD-5 would carry over Benchmark CD-5's constitutional issues because it retains the same general configuration that connects two far-flung population centers with high concentrations of black voters. It would. Remedying a racial gerrymander through retention of the same basic core—the same race-based sorting of voters that connects two black population centers—is no remedy at all. Consider the Eleventh Circuit's decision in *Clark v. Putnam County*, 293 F.3d 1261, 1267 (11th Cir. 2002), and the Middle District of Florida's decision in *NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1247-71 (M.D. Fla. 2022). Both cases rejected the government's defense about core retention, because in both cases it was undisputed that the government retained the existing districts in pursuit of race-based goals. In *Clark*, the Eleventh Circuit rejected the county's conceded goal of maintaining existing lines to maximize black voting strength. 293 F.3d at 1267. Likewise, the district court in *City of Jacksonville* rejected a municipality's attempt to retain the core of city-council districts that had been previously drawn for race-based reasons, based on substantial evidence that the districts had been maintained for race-based reasons. *See* 635 F. Supp. 3d at 1247-71 (recounting historical backdrop); *id.* at 1282-96 (rejecting core retention rationale).

Retaining existing district lines for race-based reasons is unconstitutional, just as drawing a sprawling district for race-based reasons is unconstitutional. And Plan 8015 CD-5 carries over Benchmark CD-5's black cores in Gadsden and Leon Counties and

Duval County *because of race*. 747:2-20 (Barreto) (agreeing that Plan 8015 CD-5 and Benchmark CD-5 are similarly configured).

DX97: Compilation of Legislatively Drawn Congressional District Maps, Plan 8015



Even if Benchmark CD-5 was a proper benchmark, we believe that there are good reasons to believe that the Florida Legislature, in approving Plan 8015, would have done so for predominantly race-based reasons. This record confirms that the Florida Legislature sought to comply with the Fair Districts Amendments' express, race-based non-diminishment provision. Legislators and staff made this desire perfectly known on the floors of the Florida Legislature.[13] *Cf. Cooper*, 581 U.S. at 299-300 (relying on similar direct evidence from "the State's mapmakers" for racial predominance).

[13] JX37 68:16-21 (House Congressional Redistricting Subcommittee) (Feb. 18, 2022) (House Staffer Leida Kelly) (an east-west configuration would have "Tier 1 protections. Gadsden County is Florida's only majority-minority black county in the entire state, which goes into part of that Tier 1 consideration, which, again, outranks compactness as a Tier 2 requirement."); JX37 83:23-84:7 (Rep. Tuck) (inquiring whether "going from the current [Benchmark] CD 5" configuration to a different configuration would "diminish the ability" of black voters "to elect" candidates of their choice); JX38 45:22-24 (House Redistricting Committee) (Feb. 25, 2022) (Rep. Sirois) (a district like Benchmark CD-5 would "remain[] a protected black district"); JX38 24:16-24 (Rep. Leek) (maintaining a district like Benchmark CD-5 would be an "attempt at continuing

Given that race predominated in the decision to retain Benchmark CD-5 in Plan 8015 (and other plans like it, DX97 (compilation of legislatively drawn districts, all but two have east-west, Benchmark CD-5-like districts)), we believe that one could reasonably maintain that Plan 8015 CD-5 violated the Equal Protection Clause.

Plan 8019 CD-5. We now turn to 8019 CD-5, and we consider whether this district could also violate the Equal Protection Clause. Based on this legislative record, we believe that the Florida Legislature drew this district predominately for race-based reasons. As Representative Leek stated, a Duval-only district would "protect[] a black minority seat in North Florida." *E.g.*, JX38 23:6-15. The district was drawn as an attempt at continuing to protect the minority group's ability to elect a candidate of their choice. JX38 23:6-15 (Rep. Leek) (opining on a Duval-only district). Like Plan 8015 CD-5, the Governor takes the reasonable position that the Florida Legislature's decision was still predominantly race based. *Cf. Cooper*, 581 U.S. at 299-300.

Without this race-based motivation, we don't believe that Plan 8019 CD-5 or CD-4 would have been created. To be sure, Plan 8019 CD-5 is more compact than Plan 8015 CD-5. But Plan 8019 CD-5's shape makes CD-4 less compact and oddly shaped.

---

to protect the minority group's ability to elect a candidate of their choice"); JX40 9:9-15 (Senate Session) (Mar. 4, 2022) (Sen. Ausley) (a district like Benchmark CD-5 "unifies" "black communities" "into one district"); JX47 25:21 – 26:4 (Senate Session) (Apr. 20, 2022) (Sen. Ausley) ("black voters" "in Duval[]," "in Tallahassee," and "in any points in between" should have a "minority access" "district that represents them"); JX48 85:11-19 (House Session) (Apr. 20, 2022) (Rep. Eskamani) (arguing that there should be a "minority access" district like Benchmark "CD 5" in the Enacted Map).

CD-4 has a .17 on the Polsby-Popper scale, which is far from 1 and thus indicates that the district is not compact. DX98 at 3 (Plan 8019 legislative packet). As Mr. Kelly testified, "I believe you" have to "make sure that the effects of the decision in one district don't have some unnecessarily negative effect on the districts next to them." Tr.222:3-7. That's the issue with Plan 8019 CD-5 (in addition to its improper race-based justifications): it made CD-4 non-compact.

DX97: Compilation of Legislatively Drawn Congressional District Maps, Plan 8019

As noted above, one could also argue, as the Governor did there, that Plan 8019 CD-5 violated the Fair Districts Amendments' non-diminishment provision *even if* the provision applied to CD-5. Plan 8019 CD-5 drops the black voting age population by 11% and reduces the black performance in a third of test elections. *See supra*. These are more than "slight" changes, and the changes result in the diminishment of black voters' ability to elect candidates of their choice. Even Representative Geller and

Representative Skidmore agree with Mr. Newman that these diminishment concerns are legitimate.[14]

True, Mr. Newman raised this non-diminishment argument in his veto memorandum, even though the Enacted Map contains no black district in North Florida. But this goes back to whether Benchmark CD-5 was a proper benchmark district; if there isn't a proper benchmark district, there can't be diminishment. *See generally Clark*, 293 F.3d at 1261; *City of Jacksonville*, 635 F. Supp. 3d at 1229. And it goes

[14] As we noted above, the Fair Districts Amendments' non-diminishment provision doesn't solely gauge, like § 5 of the Voting Rights Act, whether "new plan diminishes *the number of districts* in which minority groups can elect their preferred candidates of choice." *Harris*, 578 U.S. at 260 (emphasis added). The Florida Supreme Court has undergone more of a district-by-district analysis. Either way, under § 5 of the Voting Rights Act and the Fair Districts Amendments, non-diminishment still requires a *legally valid* benchmark district (or map as a whole). Benchmark CD-5 isn't that.

Nor is this case like *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015), which Plaintiffs' counsel referenced at closing argument. Tr.965:23 – 966:12. Plaintiffs counsel used that case for the proposition that the Voting Rights Act "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." 575 U.S. at 275. The Florida Supreme Court agrees with the proposition when it comes to the Fair Districts Amendments' non-diminishment provision. *Apportionment I*, 83 So. 3d at 626-27.

But *Alabama Legislative Black Caucus* says nothing about more than "slight" drops in black voting age populations. In the case, the State of Alabama tried to keep "roughly the same black population percentage in existing *majority-minority districts*." 575 U.S. at 259-60 (emphasis added). That policy was pronounced for "District 26," whose black voting age population was "72.75%." *Id.*

That case has no applicability here. Benchmark CD-5 was never a majority-black district. And a drop from 72.75% black voting age population to, say, 52.75% in a majority-black district is different in kind from a drop from 46.20% to 35.32% in cross-over district.

to whether Plan 8019 CD-5 actually complied with the Fair District Amendments' non-diminishment provision.

All told, we believe that the Governor had sound arguments for why Plan 8019 CD-5 was constitutionally deficient.

Mr. Kelly's Concern for Traditional Districting Criteria. Finally, we consider whether Mr. Kelly truly wanted to comply with traditional districting criteria when drawing district lines. We conclude that he did. Again, we note that we find Mr. Kelly credible. We find that he had an earnest desire to comply with the Equal Protection Clause.

Plaintiffs argue that Mr. Kelly's concern for traditional districting criteria is a pretextual basis to eliminate Benchmark CD-5. For example, Plaintiffs state that the Governor objected to Benchmark CD-5 being over 200-miles long, yet Enacted Map CD-2 is 200-miles long. We don't find this argument convincing. Mr. Kelly explained that the Florida Legislature drew CD-1, Tr.223:7-12, the northwestern-most district in the Enacted Map, and CD-2 had to be made of:

> [P]redominantly rural counties. Leon and Bay Counties are moderately-sized counties, but predominantly, these are rural counties.
>
> If any map drawer is simply just simply adopting sort of a sort of square and circle method of just adopting clearly compact shapes, the Florida panhandle, especially for a congressional district, especially in rural counties, doesn't leave you many options. And so the only way to draw those districts in a clear fashion is chunk, chunk, like that. The district lines, though, are extremely adherent to county boundaries. These are mostly whole counties that are included in District 2 and District 1 and 3 as well. I believe you always have to look at the districts that are adjacent to the one that you're asking about and make sure that the effects of the

> decision in one district don't have some unnecessarily negative effect on the districts next to them.

Tr.221:12 – 222:7. In short, Enacted Map CD-2 may be long, like Benchmark CD-5, but it is visually and statistically compact, unlike Benchmark CD-5. *Compare* DX128 at 2 (Enacted Map CD-2 compactness scores), *with* JX70 at 2 (Benchmark CD-5 compactness scores). Nor is it bizarrely shaped, like Benchmark CD-5.

Plaintiffs also argue that Enacted Map CD-24 protects racial minorities, so Mr. Kelly should have protected racial minorities in North Florida. The problem with this argument is twofold. *First*, CD-24 isn't like Benchmark CD-5, or Plan 8015 CD-5, or Plan 8019 CD-5. Race was considered at the forefront for those districts. Race wasn't considered at the forefront of CD-24. As Mr. Kelly explains:

> District 24 . . . is a compact district that follows city and county lines. This district would be a good district in probably any other way and doesn't create any kind of tension for the districts around it. So you can't just look at a district in isolation unto itself. When you look at the districts below 24, above 24, 24 creates nice, clean breaks along county and city lines, doesn't create any problems for the districts to the North or South or West of it. It's just a good district all around.

Tr.168:18 – 169:1. *Second*, Mr. Kelly tried to see whether he could draw a compact district in North Florida that would allow black voters to elect candidates of their choice:

> I looked at whether or not there was a way to draw a Jacksonville core district that would extend, perhaps, to places like Gainesville, Palatka, Daytona Beach, whether or not there was a way to draw a more compact seat in that part of the state that still came somewhere close to the Black voting population of the benchmark seat, which I think was in the 44, 45, 46 percent range. I looked to see if that was possible. The communities

that were potentially close ultimately didn't work, but I looked to see if Gainesville, Palatka, and/or Daytona Beach, if going to those areas could make it work. Ultimately, it couldn't. I determined there was no way to come close to the benchmark.

Tr.161:6-18. Again, we credit this testimony.

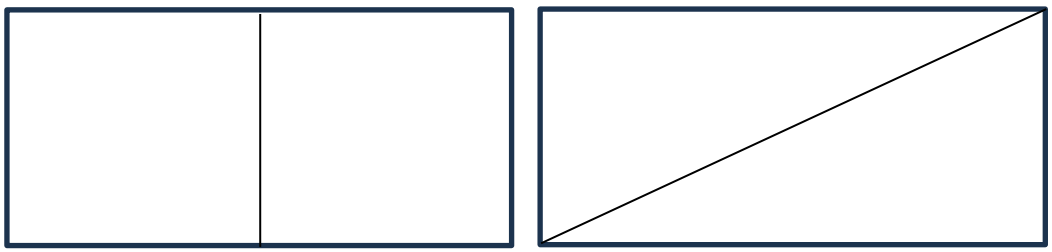
If that weren't enough, we find this exchange between Judge Jordan and Mr. Kelly particularly persuasive:

Judge Jordan: [As a hypothetical] you have two districts. Okay? So this is a rectangle. You have to split this rectangle into two districts. Okay? You can go down the middle, 50/50. In that alternative, you are going to diminish Black voting—and by the way, this was an old 1 district, so you're now splitting it because of new population changes, and you have to do that.

In this alternative, you are diminishing Black voting age population by 20 percent. Okay?

Other possibility satisfies everything else. You split it up like this into two triangles. Okay? You meet all the other traditional districting criteria. They're compact; they follow boundaries; they follow everything else. This alternative, the triangle alternative, diminishes Black voting age population in one of the districts only by 5 percent.

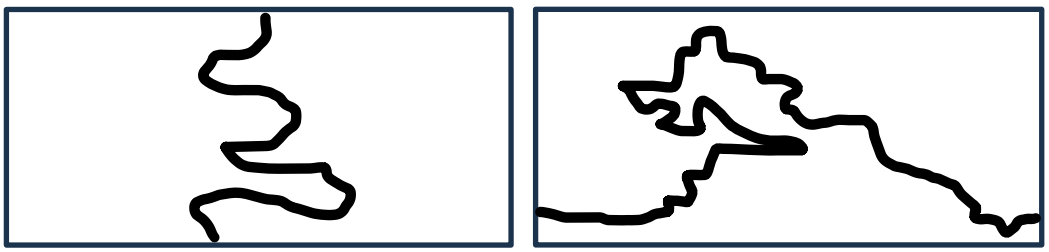
Do you take into account the nondiminishment criteria, then, in choosing which alternative to follow?



Mr. Kelly: In that scenario, Your Honor, I would attempt to draw the district that minimizes the diminishment. So I would attempt in that triangle scenario, if the district still diminished the Black voting age

> population by 5 percent, that could be a tough call. There may still be an opponent who may still object and say it diminished, and ultimately you'd want to do at that point a full functional analysis to attempt to see if, statistically speaking, that 5 percent in the overall Black voting age population made an actual difference. It may or may not. But if you got that far and you had, you know, an otherwise fairly compact-looking district that, as you said, followed city and county lines, a 5 percent drop, that would at least probably take you to where you would want to do something of a functional analysis and determine whether or not that slightly less compact shape is otherwise, you know, a reasonable attempt.
>
> The ultimate answer would lie in a combination of what your alternatives were and whether or not that functional analysis showed that you made a reasonable decision.
>
> You mentioned population earlier too. Population might force your hand. That does happen in the mapmaking process.
>
> So all those things could be reasonable factors to defend such a district.

Tr.923:18 – 925:8. In short, Mr. Kelly stated that if compactness, equal-population, respect for geographic and political boundaries, and other traditional districting criteria were met, he would try to prevent diminishment. Of course, when Mr. Kelly was trying to ascertain the "art of the possible," and trying to see if he could draw a compact North Florida district that protected black voters' ability to elect candidates of their choice, he couldn't draw a neat, compact district. It might have instead looked like the following:



Therein lies the problem, as Mr. Kelly explained:

> In the case that I looked at, I was drawing a district that ended up looking more tortured, less compact, less respectful of state and county lines, less—and very—a very—at that point it would have certainly created less compact districts around it.

Tr.925:23 – 926:5.

All told, we disagree with Plaintiffs, and we don't find that Mr. Kelly's concern for traditional districting criteria was pretext for race-based discrimination. And overall, for the five matters we considered, we don't find pretext on this record.

The Enacted Map Would Have Been Passed Regardless. Assuming for the sake of argument that Plaintiffs carried their burden (which they didn't), it's clear that, absent an alleged racial motivation, the Enacted Map would have been passed anyway. *GBM*, 992 F.3d at 1321. It's easy to see why.

With two pending impasse cases, the Florida House, the Florida Senate, and the Governor wanted the elected branches of government, and not state or federal courts, to draw a map. JX47 58:4 – 59:13 (Sen. Rodrigues); JX47 32:7-15 (Sen. Stargel); JX47 41:9-16 (Sen. Burgess); JX47 45:14 – 47:3 (Sen. Hudson). So they needed to coalesce around a compromise map. The Enacted Map fit that bill.

It was a better congressional district map. Compared to other maps, it split fewer counties, split fewer municipalities, respected geographic and political boundaries, and contained compact North Florida districts. DX128; DX98; Tr.213:20 – 217:7 (Kelly) (explaining the improvements in the Enacted Map). None of those considerations are

race based. We find that, under the circumstances and during the special session, the Enacted Map would have been passed—regardless of any alleged racial motivation.

* * *

To sum, we have considered the *Arlington Heights* factors. Taking those factors together, we find that there is no evidence of discriminatory intent in the passage of the Enacted Map. Plaintiffs failed to prove that the Governor acted with racial animus, and Plaintiffs failed to argue that any legislator (or the Florida Legislature as a whole) acted with discriminatory intent. On this record, we don't find this to be a close case. But even if it were, the presumption of good faith would break the tie in favor of the State. And even if that weren't enough, we find that the Enacted Map would have been passed, even without the alleged racial intent.

Bartlett v. Strickland Analysis

Bartlett v. Strickland doesn't counsel a different result. As they did in their complaint, Plaintiffs rely on the following language from the case: "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24. The problems with relying on this quote alone are threefold.

First, it's dicta from Justice Kennedy's plurality opinion, which Chief Justice Roberts and Justice Alito joined. The plurality opinion's "holding recognizes only that

there is no support for the claim that § 2 [of the Voting Rights Act] can require the creation of crossover districts in the first instance." 566 U.S. at 24. Nothing more.

Second, the quote is taken out of context. The Court said that "States that wish to draw crossover districts are free to do so where no other prohibition exists." *Id.* Nothing in *Bartlett* suspends the Equal Protection Clause. Just the opposite, that "prohibition" continues to exist. Nothing in *Bartlett* or the federal constitution gives the State of Florida carte blanche to draw districts that brazenly violate traditional districting criteria and purposely sort voters on the basis of their race.

Third, *Bartlett* doesn't change the rules required for proving that Equal Protection Clause claim. Plaintiffs must prove intent, and they have not done so here. *Bartlett*'s statement stands for the unremarkable premise that if a State draws or eliminates a district *for the purpose of discriminating* against a minority group, that would raise serious constitutional problems. *See* 556 U.S. at 24 (citing both *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997), and the United States's amicus brief, which both touch on that uncontroversial point). But as established above, the Florida House, the Florida Senate, and the Governor did exactly the opposite here—they engaged in race-blind districting. *Bartlett* does not forbid the State from refusing to discriminate on the basis of race.

* * *

In sum, we find that Plaintiffs failed to establish any *Bartlett* claim. Having failed to establish this claim and their *Arlington Heights* claim, we conclude that the State didn't violate the Equal Protection Clause or Fifteenth Amendment.

Standing

Finally, we consider standing. Even if Plaintiffs could establish their Equal Protection Clause and Fifteenth Amendment claims, they haven't convincingly proven that any Plaintiff resides in North Florida. Plaintiffs have the burden of establishing standing; they failed to meet that burden.

Standing is an irreducible constitutional minimum. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must prove that he has suffered an injury in fact, that the injury is fairly traceable to the defendant's actions, and that the injury is likely to be redressed by a favorable court decision. *City of S. Miami v. Gov. of Fla.*, 65 F.4th 631, 636 (11th Cir. 2023). In particular, he must "demonstrate standing" "for each form of relief" sought, *Davis v. FEC*, 554 U.S. 724, 734 (2008), with the relief being "limited to the inadequacy that produced [his] injury in fact," *Lewis v. Casey*, 518 U.S. 343, 357 (1996). *See also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

Here, the Organizational Plaintiffs didn't establish that any of their members reside in North Florida. Ms. Keith, who testified on behalf of Common Cause Florida, resides in St. Petersburg, Florida. Tr.490:21-23. Ms. Slater, who testified on behalf of the Florida NAACP, resides in Daytona Beach, Florida. Tr.613:20-21. And neither Ms. Keith nor Ms. Slater, and neither Common Cause Florida nor the Florida NAACP, produced any credible evidence that there are organizational members who reside in North Florida. Referring to a list of members, that was created after discovery and for litigation purposes, and that was never shared with the Secretary or introduced into

evidence, is insufficient to establish standing. Tr.493:2 – 494:12; Tr.497:14-20; Tr.497:24 – 499:22 (Keith); Tr.618:7-9; Tr.622:23 – 623:16; Tr.624:7 – 625:9 (Slater).

Ms. Inman-Johnson, an Individual Plaintiff, and Mr. Clark, an Individual Plaintiff, never produced a voter-ID card. It's therefore unclear whether they actually reside in North Florida. And given our concerns with their bias, Plaintiffs fail to meet their standing burden.

Conclusion

For the reasons expressed above, we enter judgment in favor of the Secretary.

Dated: November 3, 2023

Respectfully submitted by,

Bradley R. McVay (FBN 79034)
Deputy Secretary of State
Joseph S. Van de Bogart (FBN 84764)
General Counsel
Ashley Davis (FBN 48032)
Chief Deputy General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough Street
Tallahassee, Florida 32399
Brad.mcvay@dos.myflorida.com
Joseph.vandebogart@dos.myflorida.com
Ashley.davis@dos.myflorida.com
Telephone: (850) 245-6536

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)
Gary V. Perko (FBN 855898)
Michael Beato (FBN 1017715)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK
119 S. Monroe Street, Suite 500
Tallahassee, Florida 32301

mjazil@holtzmanvogel.com
gperko@holtzmanvogel.com
mbeato@holtzmanvogel.com
Telephone: (850) 274-1690

Jason Torchinsky (Va. BN 478481) (D.C. BN 976033)
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK
2300 N Street NW, Suite 643A
Washington, D.C. 20037
jtorchinsky@holtzmanvogel.com
Telephone: (202) 737-8808

Taylor A.R. Meehan (IL BN 6343481) (Va. BN 97358)
Cameron T. Norris (TN BN 33467) (Va. BN 91624)*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
taylor@consovoymccarthy.com
cam@consovoymccarthy.com
Telephone: (703) 243-9423

Counsel for Secretary Byrd

*Admitted *Pro hac vice*

CERTIFICATE OF SERVICE

I certify that on November 3, 2023, the foregoing was filed using this Court's CM/ECF system, which will serve a copy to all counsel of record.

/s/ Mohammad O. Jazil
Mohammad O. Jazil