IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al., Plaintiffs, v. CORD BYRD, in his official capacity as Florida Secretary of State, et al., Defendants.	Case No. 2022-ca-000666

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants do not dispute that the Enacted Map diminishes the electoral power of Black voters in North Florida, who were previously able to elect their candidates of choice under last decade's Benchmark Map in Congressional District 5. Under binding Florida Supreme Court precedent, that alone is sufficient to prove a diminishment claim under Article III, Section 20(a) of the Florida Constitution and entitles Plaintiffs to summary judgment.

Defendants' arguments in opposition are nothing more than misdirection. They repeatedly attempt to manufacture material factual disputes to avoid summary judgment, but the arguments they raise are properly understood as *legal* disagreements, and on each, Plaintiffs have the better of the argument. For example, Defendants repeatedly misstate Florida's non-diminishment standard, inviting this Court to adopt a standard that is contrary to binding precedent, and that is even contrary to the positions recently taken by two of the *Defendants* (the Florida House and Florida Senate) about what this standard requires. Similarly, Defendants continually ask this Court to assume that the Benchmark Map or Fair Districts Amendments themselves are unconstitutional, something this Court has no power to find under existing Florida Supreme Court precedent.

Finally, Defendants confuse the liability and remedial stages of this litigation, invoking multiple questions that are not before this Court.

Ultimately, Defendants' arguments are nothing more than an attempt to muddy the waters of a straightforward constitutional challenge. The Enacted Map indisputably diminishes Black voters' electoral power in violation of the Florida Constitution. Accordingly, for the reasons stated below and in their opening brief, Plaintiffs respectfully request that the Court grant their motion for summary judgment.

ARGUMENT

I. Defendants fail to establish any genuine issue of material fact.

Plaintiffs emphatically disagree that the Parties have a "factual disagreement" about whether Black voters in North Florida are subject to the Florida Constitution's non-diminishment standard. Sec'y's Resp. at 2. To the contrary, the Parties apparently have a *legal* disagreement about (1) Florida's non-diminishment standard and its requirements, and (2) whether Benchmark CD-5 can serve as the benchmark to measure diminishment. On both of these questions, Defendants' arguments are squarely foreclosed by binding precedent. And the few factual disagreements that Defendants do raise are not material to the questions presently before the Court.

A. Black voters are subject to the Florida Constitution's non-diminishment standard.

The Defendants' proffered interpretation of the non-diminishment provision is squarely at odds with binding Florida Supreme Court precedent and guiding federal case law. At least two of the Defendants know this: as recently as February 2022, the Florida House and Senate advocated *against* the interpretation of the non-diminishment provision that the Secretary, now joined by the House and Senate, seeks to advance here. Because Defendants' interpretation of the non-

diminishment provision is erroneous, the Court should find that there is no genuine factual dispute that would preclude summary judgment for Plaintiffs on their diminishment claim.

1. Non-diminishment and non-dilution are distinct standards with distinct requirements.

Defendants' novel interpretation of Florida's non-diminishment provision erroneously conflates that provision with the Fair Districts Amendments' non-dilution standard. The Florida Constitution imposes two *distinct* imperatives for the protection of minority voting rights in redistricting. First, it prohibits districts drawn "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process…" Art. III, § 20(a), Fla. Const. (non-dilution standard). Second, it prohibits districts drawn with the intent or result "to diminish [minorities'] ability to elect representatives of their choice." *Id*. (non-diminishment standard). Defendants nonetheless argue that because these two provisions are "textually linked"—in other words, because they are found in the same sentence—they must have virtually identical standards and requirements. *See* Sec'y's Resp. at 4–6.

Defendants' novel argument is foreclosed by binding Florida Supreme Court precedent. In *In re S. J. Res. of Legis. Apportionment 1176* ("*Apportionment I*"), 83 So. 3d 597 (Fla. 2012), the Court engaged in an exacting analysis of this constitutional text.[1] It concluded that the minority voting provision of the Fair Districts Amendments "imposes two requirements that plainly serve to protect racial and language minority voters in Florida: prevention of impermissible vote dilution *and* prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice." *Id.* at 619 (emphasis added). Defendants' attempt to collapse these "dual constitutional

[1] The Fair Districts Amendments provide "identical standards for congressional redistricting" under Article III, Section 20 and state legislative redistricting under Article III, Section 21. *Apportionment I*, 83 So. 3d at 598 n.1). The Florida Supreme Court has indicated that the same substantive standards apply to each section. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 373–74 (Fla. 2015) ("*LWV I*") (applying standards articulated in state legislative redistricting case to congressional redistricting case).

imperatives" into a single standard thus has already been considered—and *rejected*—by the Florida Supreme Court. *Id.*[2]

Nor can Defendants' argument be reconciled with federal precedent, which also construes non-dilution and non-diminishment to impose different requirements. As Defendants correctly acknowledge, Florida's non-vote-dilution standard "is essentially a restatement of Section 2 of the Voting Rights Act," Sec'y's Resp. at 3 (citing *Apportionment I*, 83 So. 3d at 619), while the non-diminishment/retrogression provision reflects Section 5 of the Voting Rights Act (VRA), *see id.* (citing *Apportionment I*, 83 So. 3d at 620).[3] As the Florida Supreme Court has explained, because the Fair Districts Amendments' minority voting protections "follow almost verbatim the requirements embodied in the Federal Voting Rights Act," "our interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent." *Apportionment I*, 83 So. 3d at 619-20. The United States Supreme Court has in turn explained that "we have consistently understood [Section 2 and Section 5] to combat different evils and, accordingly, to impose very different duties upon the States." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 477 (1997); *see also Holder v. Hall*, 512 U.S. 874, 883 (1994) (explaining that Section 2 and Section 5 of the VRA "differ in structure, purpose, and application").

In short, Section 2 of the VRA guards against vote dilution in redistricting plans under certain conditions; a successful claim "requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed."

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[2] Beyond this precedent, reading Florida's non-dilution and non-diminishment provisions as Defendants suggest would render the non-diminishment provision superfluous. But just as "words in a statute should not be construed as mere surplusage," *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009), this Court must assume that the non-diminishment provision has independent meaning in Florida's Constitution.

[3] Florida courts use the terms "diminishment" and "retrogression" interchangeably. *See Apportionment I*, 83 So. 3d at 625 ("[B]y including the 'diminish' language of recently amended Section 5, Florida has now adopted the retrogression principle as intended by Congress in the 2006 amendment.").

Apportionment I, 83 So. 3d at 622. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court identified three "necessary preconditions" or "*Gingles* factors" for a Section 2 vote dilution claim: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50–51. As relevant here, the first *Gingles* precondition requires the minority group to constitute at least 50% of the voting age population of the district, *Bartlett v. Strickland*, 556 U.S. 1, 18–20 (2009), and to do so within a geographically compact area. Significantly, a successful Section 2 vote dilution claim requires the creation of a *new* minority district in the relevant jurisdiction. *See, e.g.*, *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *3 (N.D. Ala. Jan. 24, 2022) (where plaintiffs established likelihood of success on Section 2 claim, "the appropriate remedy is a congressional redistricting plan" that includes an "additional district" in which Black voters have an opportunity to elect their preferred candidates), *aff'd sub nom. Allen v. Milligan*, 143 S. Ct. 1487 (2023).

Section 5, by contrast, does not require states to affirmatively create *new* minority districts; it simply protects against backsliding in *existing* districts where a minority group has had the ability to elect a candidate of their choice. *See Apportionment I*, 83 So. 3d at 619–20. Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015). Instead, Section 5 requires the state to "maintain a minority's ability to elect a preferred candidate of choice" in any new redistricting plan, which the state should accomplish by conducting "a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 275-76 (citing Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471

(2011)). In determining whether a previously-existing district "performs" for the minority group's candidate of choice—and is therefore protected from diminishment in the new map—one considers (1) "whether the minority group votes cohesively," (2) "whether the minority candidate of choice is likely to prevail in the relevant contested party primary," and (3) "whether that candidate is likely to prevail in the general election." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 287 n. 11 (Fla. 2015) ("*LWV II")*.

2. The three *Gingles* preconditions do not apply to diminishment claims.

Despite a long line of cases treating the Section 2 (non-dilution) and Section 5 (non-diminishment) standards differently, Defendants now assert that a minority group must establish the three *Gingles* preconditions to warrant protection under the non-diminishment standard. *See* Sec'y's Statement ¶¶ 1–2; Sec'y's Resp. at 2–6. Notably, Defendants do not cite a *single case*—from Florida or any federal court—applying their proposed legal standard to a diminishment claim.

Instead, Defendants' argument relies on (1) the unremarkable observation that both the non-dilution provision and non-diminishment provision appear in the same sentence of the Florida Constitution, and (2) a single footnote from the Florida Supreme Court in which it stated that the *Gingles* preconditions are "relevant" to a Section 5 analysis. *See LWV II,* 179 So. 3d at 287 n.11. The former is easily dispensed with by the Florida Supreme Court's textual analysis of this single sentence to impose "dual constitutional imperatives." *Apportionment I*, 83 So. 3d at 619. And when read in full, Footnote 11 in *LWV II* makes clear that while minority cohesion and polarization are relevant to a Section 5 analysis, Section 5 claims are not subject to all three of the *Gingles* preconditions for a Section 2 claim, which also include an affirmative showing of numerosity (more than 50%) and compactness.

Defendants Florida House and Florida Senate are well aware that these *Gingles* preconditions do not apply to the non-diminishment standard. Just last year in a brief to the Florida

Supreme Court, the Florida House explicitly advanced *the exact opposite position* that it does now, explaining that reading Footnote 11 "to suggest that the non-diminishment standard incorporates . . . the *Gingles* prerequisites" would directly conflict with U.S. Supreme Court precedent and would eliminate "the line between vote dilution (section 2) and non-diminishment (section 5)." **Ex. 1**, Brief of the Florida House of Representatives at 27 n. 10, *In re J. Res.. of Legis. Apportionment*, No. SC22-131 (Feb. 19, 2022); *see id.* at 18–27 (not addressing or applying *Gingles* factors when discussing its compliance with the non-diminishment provision in drawing state legislative districts); *see also* **Ex. 2**, Brief of the Florida Senate Supporting the Validity of the Apportionment at 34–38, *In re J. Res. of Legis. Apportionment*, No. SC22-131 (Feb. 19, 2022) (same).

Defendants' insistence that this Court be the first to apply the *Gingles* preconditions to a diminishment claim is thus belied by the constitutional text, the case law, and *Defendants' own submissions and statements* to the Florida Supreme Court.[4] To the extent any doubt remains, the Florida Supreme Court's actual application of the non-diminishment provision—both in the last redistricting cycle and in the current cycle—confirms that the *Gingles* factors are not prerequisites for a diminishment claim, as Plaintiffs demonstrate below:

Numerosity (*Gingles* 1). Unlike Section 2 (non-dilution) claims, diminishment claims do not require that the relevant minority group constitute 50% of the voting age population of the district at issue. Instead, under Florida's non-diminishment provision, a map drawer "cannot eliminate majority-minority districts or weaken ***other historically performing minority districts*** where doing so would actually diminish a minority group's ability to elect its preferred

[4] Because the Florida House and Florida Senate prevailed on these arguments before the Florida Supreme Court—that is, the Court did not require either chamber to satisfy the *Gingles* criteria for the districts each chamber maintained was required under Florida's non-diminishment provision—both chambers should be estopped from making any such arguments now. *See Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001); *see also* Fla. Stat. § 57.105(1)(b) (permitting sanctions where parties "knew or should have known" that a defense "presented to the court" "would not be supported by" existing law).

candidates." *Apportionment I*, 83 So. 3d at 625. Because a "majority-minority" district is, by definition, a district in which a minority group comprises a numerical majority (50%) of the district's voting age population, *see id.* at 622–23, "other historically performing minority districts" necessarily refers to districts in which the minority group does *not* comprise 50% of the district.

Both the Florida Supreme Court's and the Florida Legislature's applications of the non-diminishment provision confirm that the non-diminishment standard protects districts with less than a 50% Black voting age population (BVAP). In the last redistricting cycle, when the Florida Supreme Court adopted the Benchmark CD-5 to remedy partisan intent violations, the Court carefully considered the fact that Benchmark CD-5's predecessor—with a BVAP of 46.9%—was a Black ability-to-elect district and that any remedial district would need to continue to elect Black voters' candidate of choice. *See LWV I*, 172 So. 3d at 403–05; *see also* Plfs.' Stmt. Undisputed Material Facts ("SUMF") ¶ 28 (Florida Supreme Court later adopting Benchmark CD-5 with BVAP of 45.12%).

The Legislature took the same approach to the non-diminishment standard when seeking the Florida Supreme Court's approval of its state legislative districts just last year. *See* Ex. 1 at 20–21 (Defendant Florida House explaining that "the text [of the Florida Constitution] does not limit the non-diminishment standard to majority-minority districts" and that "[a]ny district in which a minority group has sufficient effective control over both primary and general elections to elect its preferred candidates is entitled to protection"); *see also id.* (Defendant Florida House explaining that eleven House districts with BVAPs under 50% were protected by the non-diminishment standard); *see also* Ex. 2 at 33 (Defendant Florida Senate explaining that four Senate districts with BVAPs under 50% were protected by the diminishment standard). In approving the Legislature's

districts, the Florida Supreme Court held that both chambers complied with the state's non-diminishment provision. *See In re S. J. Res. of Legis. Apportionment 100,* 334 So. 3d 1282, 1289-90 (Fla. 2022). Once again, Defendants advanced—and prevailed upon—an argument before the Florida Supreme Court that directly contradicts the argument they now advance before this Court. *See supra* at 6–7 & n.4.

For all of these reasons, it is irrelevant that "no one minority group makes up a majority of the citizen voting age population" in CD-5. Sec'y's Resp. at 5. This factor cannot preclude summary judgment for Plaintiffs on Count 1.

Compactness (*Gingles* 1). Unlike Section 2 claims, diminishment claims do not require plaintiffs to make an affirmative showing that the relevant minority group be in a "geographically compact" area, *Gingles*, 478 U.S. at 49. As the Florida Supreme Court recognized in the last redistricting cycle, "in certain situations, compactness and other redistricting criteria, such as those codified in tier two of article III, section 21, of the Florida Constitution, will be compromised in order to avoid retrogression." *Apportionment I*, 83 So. 3d at 626. In approving the Benchmark CD-5, the Court explicitly acknowledged that it was not a "model of compactness," but that other compelling considerations—including complying with the non-diminishment standard—justified such a result. *LWV I*, 172 So. 3d at 406. Therefore, it is not true that "compactness presents a question of fact for this Court to decide after trial." Sec'y's Resp. at 6.[5] This factor similarly cannot preclude summary judgment for Plaintiffs on Count 1.

[5] As Defendants argued earlier in this litigation, "[t]he Florida Constitution does not require that districts be as compact as possible." 2022 09-20 Defs' Resp. to Mot. to Deny or Defer Consideration of Defs' Partial Mot. for Summary Judgment at 3. In fact, Defendants specifically advocated that compactness determinations could be resolved on summary judgment—that is, not at trial. *See generally* 2022 09-20 Defs' Resp. to Mot. to Deny or Defer Consideration of Defs' Partial Mot. for Summary Judgment.

Cohesion and Polarization (*Gingles* 2 and 3). The second and third *Gingles* factors ask whether the relevant minority group votes cohesively and whether white voters in the district vote sufficiently as a bloc to defeat the minority group's preferred candidate. *See Gingles*, 478 U.S. at 50-51. In stating that the *Gingles* preconditions were "relevant" to a Section 5 retrogression analysis, the Florida Supreme Court referred to the cohesiveness factor specifically—but not to any numerosity or compactness requirement. *See LWV II,* 179 So. 3d at 287 n. 11 (affirming that "whether the minority group votes cohesively" is one the three prongs in the Court's test for retrogression). Plaintiffs agree that whether the relevant minority group votes cohesively is relevant to the non-diminishment standard. Courts and litigants should not assume that all members of a specific minority group share the same political preferences. *See, e.g.*, *Texas v. U.S.*, 831 F. Supp. 2d 244, 262 (D.D.C 2011) (cautioning that race alone "does not constitute a simple proxy for partisan preference in gauging ability to elect"). Instead, one must actually analyze the voting patterns of that minority group—here, of Black voters—to determine that community's preferences. *See id.* In other words, knowing whether the Black community votes cohesively is relevant to determining whether Black voters *have* a "representative[] of their choice" in the first place, Art. III, § 20(a), Fla. Const. If Black voters do not cohesively support the same candidates, the analysis can end, and the diminishment standard does not apply. *See, e.g.*, *LWV II*, 179 So. 3d at 287 (holding that Hispanic-performing district was not required by non-diminishment provision because the Hispanic voting community did not vote cohesively).

The existence of "polarized racial bloc voting" can also be relevant to the Section 5 analysis. *Id.* at 286; *see Texas*, 831 F. Supp. 2d at 262. This term simply means that "black voters and white voters vote differently." *Gingles,* 478 U.S. at 54 n. 21. In practice, if voting is highly racially polarized (meaning a significant divergence in the preferences of Black and white voters),

then the BVAP will need to be high to account for the fact that few white voters will support the Black-preferred candidate. If voting is only moderately racially polarized, the BVAP may be lower, because some white voters will cross over to support Black voters' candidate of choice. In other words, the degree of racially polarized voting dictates whether a decrease in a minority group's voting age population would, in fact, diminish that group's ability to elect its candidate of choice.

These two factors—cohesion and polarization—are captured in the functional analysis that courts require when considering a diminishment claim. *See, e.g.*, *Texas*, 831 F. Supp. 2d at 262. As Plaintiffs' motion for summary judgment explained, Plaintiffs' expert Dr. Ansolabehere performed such an analysis, finding that Black voters in Benchmark CD-5 voted cohesively and in opposition to the candidates preferred by white voters. *See* Mot. at 12; SUMF ¶¶ 58–64.

There is thus no disagreement among the parties that cohesion and polarization are relevant to the legal standard for Plaintiffs' diminishment claim. Defendants' attempt to tack on all three *Gingles* preconditions to Plaintiffs' diminishment claim, however, is unfounded and unprecedented. The Court should reject Defendants' invitation to misapply well-established law.

3. Defendants' disputes about cohesion and polarization are immaterial.

While the cohesion and polarization factors are relevant to a non-diminishment analysis, Defendants have not shown a genuine dispute of material fact as to Plaintiffs' cohesion and polarization analyses that would preclude summary judgment for Plaintiffs. First, Defendants do not question whether Black voters vote cohesively, only whether *all minorities* vote cohesively in North Florida. *See* Sec'y's Statement ¶ 5 (citing Dr. Johnson Report ¶¶ 36–42). Setting aside the fact that Dr. Johnson did not conduct his own analysis on this topic, *see* SUMF ¶¶ 58, 119, the relevant legal question for a Black ability-to-elect district is whether Black voters vote cohesively. This is an unremarkable proposition. *See, e.g.*, *LWV II*, 179 So. 3d at 286 (considering whether

Hispanic voters voted cohesively for claimed Hispanic ability-to-elect district); *LWV I*, 172 So. 3d at 404–05 (considering Black voting patterns for CD-5). There is simply no indication the Florida Supreme Court relied upon Hispanic or other minority voting preferences in concluding that Benchmark CD-5 allowed Black voters to elect their candidates of choice.

Second, while Defendants say their expert Dr. Owens will testify as to whether Black voters' political preferences are motivated by the race or party of the candidate, *see* Sec'y's Resp. at 6, this too is irrelevant to a functional analysis of Black voters' ability to elect candidates of their choice. This is because the analysis of whether a minority group is able to elect its preferred candidate does not depend on "the race of the candidate," but rather "the *status* of the candidate as the *chosen representative of a particular racial group*." *Gingles*, 478 U.S. at 68 (plurality opinion); *see id.* at 63 (holding "the reasons [B]lack and white voters vote differently have no relevance" to racial polarization inquiry); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1302 (N.D. Ga. 2022) (rejecting as a matter of law the defendants' argument that the court must determine whether party or race is the cause of voters' preferences in VRA claims); *see also id.* at 1306–07 (citing many VRA cases rejecting similar arguments).

In sum, Defendants' "disputed facts" on cohesion and polarization are not material to Plaintiffs' diminishment claim, *see* Sec'y's Statement at 2–3, and the Court should not consider them in resolving Plaintiffs' motion for summary judgment.

B. There is no genuine dispute that the 2015 version of CD-5 is the appropriate benchmark.

Defendants' argument that Benchmark CD-5 cannot serve as the benchmark to measure diminishment is also wrong as a matter of law. First, Defendants wrongly conflate two distinct questions: (1) whether Benchmark CD-5 is an appropriate benchmark and (2) whether a district that looks like Benchmark CD-5 is an appropriate remedy. *See* Sec'y's Resp. at 8 (citing two

cases—*Allen v. Milligan*, 143 S. Ct. 1487 (2023), and *NAACP v. City of Jacksonville*, No. 3:22-cv-493-MMH-LLL, 2022 WL 7089087 (M.D. Fla. Oct. 12, 2022)—that do not involve diminishment claims or the use of benchmark districts); *id.* at 9 (arguing that Plaintiffs' Demonstration CD-5, which is not at issue at this stage, would run afoul of *Allen* and *NAACP*). At this stage in the litigation, the Court need only address the first question, to which the answer is decidedly "yes."

"As a general premise, the benchmark plan for purposes of measuring retrogression is the last 'legally enforceable' plan used in the jurisdiction." *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 644 (D.S.C. 2002), opinion clarified (Apr. 18, 2002) (citing 28 C.F.R. § 51.54(b)(1) and *Holder v. Hall*, 512 U.S. 874, 883–884 (1994)); *see also LWV I*, 172 So. 3d at 404-05 (in challenge to 2012 enacted plan, considering the 2002 plan—the last legally enforceable plan—as the benchmark plan for measuring retrogression). The benchmark plan can be a court-adopted plan. *See, e.g.*, *Texas*, 831 F. Supp. 2d at 255–56 & n. 9 (using court-adopted plan as benchmark); *Markham v. Fulton Cty. Bd. of Registrations & Elections*, No. Civ.A.1:02-CV1111WB, 2002 WL 32587313, at *6 (N.D. Ga. May 29, 2002) (same). And although Defendants now assert that Benchmark CD-5 is an unconstitutional gerrymander, no party made such a challenge while Benchmark CD-5 was in effect. Rather, Benchmark CD-5 was "drawn by legislative staff [and] passed by both the House and the Senate," and "none of the parties in th[e] case"—including all three Defendants here—"object[ed] to" it. *LWV II*, 179 So. 3d at 272–73; *see also id.* at 273 (concluding that Benchmark CD-5 "comport[ed] with th[e] Court's directions . . . and d[id] not diminish the ability of black voters to elect a candidate of choice"). Indeed, both the House and the Senate considered Benchmark CD-5 to be the benchmark for purposes of analyzing compliance with the Fair Districts Amendments during the 2021 redistricting cycle. *See* Mot. at 6.

Defendants offer no basis for this Court to revisit—let alone upend—the fundamental premise of both the Florida Supreme Court's and the Florida Legislature's approach to evaluating diminishment.

Because courts presume the previous map is the appropriate benchmark unless the district has been "formally declared" unconstitutional, which it has not, Benchmark CD-5 remains a valid benchmark today. *McConnell*, 201 F. Supp. 2d at 644. Indeed, to undertake the inquiry Defendants now invite "would unnecessarily embroil this court in extended mini-trials over the moot issue of whether [the Benchmark district] is constitutionally infirm. . . ." *Id.* at 644–45. Benchmark CD-5 is the appropriate starting point for the non-diminishment inquiry that is the subject of this summary judgment motion. *See* Am. Compl. at 33 (Count I). Although this Court may consider the constitutionality of any remedial district at a later stage of the litigation, that question is not before the Court today. *See McConnell*, 201 F. Supp. 2d at 645.

C. Defendants' other scattershot factual disputes are immaterial.

Defendants' experts could have conducted their own alternative functional analyses of Benchmark CD-5 and the Enacted Map's North Florida districts; neither did. *See* Mot. at 12; SUMF ¶¶ 39, 109. Therefore, all functional analyses in this case—including those conducted by the Florida House and Florida Senate—support a finding of diminishment. *See* Mot. at 5, 7; SUMF ¶¶ 38, 106. Defendants' alleged factual disputes simply concern some of the data sources that Plaintiffs' expert used, *see* Sec'y's Statement ¶¶ 15–17, none of which were central to Plaintiffs' expert's findings. Neither dispute should preclude summary judgment because neither are material to Plaintiffs' diminishment claim, nor are they based on anything more than mere conjecture that Dr. Ansolabehere's analysis might change if a different method were applied. *See, e.g.*, *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993) (holding that a party cannot defeat summary

judgment solely by presenting an expert where that expert offers no more than conclusory opinions).

Citizen Voting Age Population (CVAP) Data. Dr. Ansolabehere reported both Voting Age Population (VAP) and Citizen Voting Age Population (CVAP) data. *See* Ansolabehere Report ¶ 38. As Dr. Ansolabehere correctly explains, and as Dr. Johnson does not dispute, "Florida Supreme Court decisions regarding the Benchmark Map relied on VAP as a standard for determining minority representation." *Id.*; *see also LWV I*, 172 So. 3d at 405–06, 435–36 (utilizing Black VAP, not CVAP); *LWV II*, 179 So. 3d at 271 (same); *In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d at 1288–89 (same). Dr. Johnson's sole disagreement is with Dr. Ansolabehere's specific method of estimating CVAP data, which Dr. Ansolabehere provided only because CVAP data is commonly used "[i]n other contexts and in academic research"—in other words, to belt and suspender his findings from VAP data. Defendants have not contested Dr. Ansolabehere's findings based on VAP data; expert squabbles about CVAP methodology are thus a sideshow.

Elections Data. Dr. Johnson also criticizes Dr. Ansolabehere's inclusion of election data from the University of Florida's Voting and Election Science Team (VEST). But Dr. Johnson does not explain how the use of this data would affect Dr. Ansolabehere's underlying conclusions. *See* Sec'y's Statement, Ex. 1 ¶ 55; *see also Hayes*, 8 F.3d at 91–92 (holding conclusory expert opinions are insufficient to defeat summary judgment). In any event, Dr. Johnson does not dispute that Dr. Ansolabehere's election data is also compiled from the Florida Redistricting Website (the same elections data the Florida Legislature uses) as well as directly from the Florida Department of State, Division of Elections. *See* Ansolabehere Report ¶ 33.

In the end, neither of Defendants' "data disputes" has any bearing on the conclusion that the Enacted Map diminishes Black voters' ability to elect candidates of their choice in North

Florida—which is dispositive. The Court need not take Plaintiffs' expert's word for it; as Plaintiffs set forth in their opening motion, Defendants' *own* analyses support the exact same conclusion. SUMF ¶¶ 33–36, 38, 105–07; 133–36. Defendants' experts cannot dispute a fact that Defendants themselves do not dispute. Nor can Defendants preclude summary judgment by baldly alleging "there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That is all Defendants have done.

II. Defendants' affirmative defenses do not stand in the way of summary judgment.

Defendants' affirmative defenses should not preclude summary judgment on Plaintiffs' diminishment claim. Defendants' Equal Protection Clause affirmative defense fails as a matter of law and presupposes a remedy that is not before the Court at this time. Defendants' non-justiciability defense also fails: both the Legislature and the Florida Supreme Court have shown that the minority voting provision is justiciable, having applied it numerous times over the past decade.

A. Defendants' Equal Protection Clause affirmative defense does not bar summary judgment for Plaintiffs.

1. Defendants' Equal Protection Clause affirmative defense is not properly before the Court.

Defendants' attempt to invoke their affirmative defense that the non-diminishment provision violates the federal Equal Protection Clause is procedurally improper. First, only the Secretary of State briefed this affirmative defense—but this Court has held that the Secretary lacks standing to assert it, subject only to a timeliness concern that Plaintiffs have since rectified. *See*

Ex. A. to Plfs.' Mot. for Judgment on the Pleadings, Hearing Tr. 62:23–63:10; *see also* Plfs.' Mot. for Judgment on the Pleadings at 11.[6]

Second, the only question raised in Plaintiffs' motion for summary judgment is whether the Enacted Map violates the Florida Constitution's non-diminishment provision; it does not seek imposition of a remedy for that constitutional violation, let alone a determination as to whether a hypothetical remedial district is itself constitutional. *See* Am. Compl. at 33 (Count I). Defendants' affirmative defense, by contrast, presupposes that Plaintiffs have *already* established a non-diminishment violation *and* that the Court will have adopted Plaintiffs' proposed remedial map. *See* Sec'y's Resp. at 9 (arguing that non-diminishment provision violates the Equal Protection Clause *if* it "require[s] the kind of sprawling, race-conscious district that Plaintiffs seek"). Defendants' argument that their affirmative defense precludes summary judgment on Plaintiffs' diminishment claim thus puts the cart before the horse. Only *if* Plaintiffs prevail on Count I, and only *if* the Court then orders a specific remedy that is not to Defendants' liking, does the Court *then* have reason to entertain Defendants' affirmative defense that that remedy is itself a constitutional violation. *See Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1398 (E.D. Wash. 2014) (explaining that concerns about "the appropriate remedy for a violation of" an anti-discrimination law "are not especially germane at [the summary judgment] stage of the proceedings" because "the singular focus of the instant cross-motions for summary judgment is whether Plaintiffs can establish a [VRA] violation in the first instance"). Defendants' affirmative defense is thus not properly before the Court.

[6] Notably, the Florida Senate did not assert an Equal Protection Clause affirmative defense at all, *see generally* 2023 02-27 Fla. Senate Answer to Am. Compl., and Plaintiffs have preserved for appeal the issue of the Florida House's standing to assert this defense. *See* 2023 06-16 Plfs.' Mot. for Judgment on the Pleadings at 2.

2. Defendants' Equal Protection Clause affirmative defense fails as a matter of law.

Defendants contend that if the Court determines that Plaintiffs have established their diminishment claim under the Florida Constitution, then instead of granting Plaintiffs' motion for summary judgment, this Court should take it upon itself to strike down Article III, § 20(a) of the Florida Constitution—the same provision upheld by the Florida Supreme Court and 11th Circuit against Defendants' previous challenges and applied by the Florida Supreme Court in evaluating both legislative and congressional redistricting plans.[7] Defendants' argument fails at every level.

Defendants' contention that the non-diminishment provision of the Florida Constitution *necessarily* requires racial gerrymandering in violation of the U.S. Constitution relies on a series of mistaken assumptions and misunderstandings of the law. Just last month, the U.S. Supreme Court rejected the assumption Defendants advance here that race-based redistricting necessarily violates the Equal Protection Clause. *Allen*, 143 S. Ct. at 1516–17. Defendants' claim that anything other than a "race-neutral" map is unconstitutional under federal law, *see* Sec'y's Resp. at 10, 13–14, thus rings hollow.

Instead, to prove that the Fair Districts Amendments require Florida to engage in unconstitutional racial gerrymandering, Defendants must show that the Amendments *require* (1) that race "predominate" over all other considerations in the drawing of district lines, and (2) that it does so in a way that is not "narrowly tailored to serve a compelling state interest." *Ala. Legis. Black Caucus*, 575 U.S. at 260–61 (citations omitted). The Florida Constitution's non-diminishment provision does neither.

[7] *See Brown v. Sec'y of State of Fla.*, 668 F.3d 1271 (11th Cir. 2012) (affirming constitutionality of Fair Districts Amendments); *LWV II*, 179 So. 3d 258 (evaluating congressional plan compliance with non-diminishment provision); *Apportionment I*, 83 So. 3d 597 (evaluating legislative plan compliance with non-diminishment provision).

With respect to the first, the plain text of the Fair Districts Amendments' non-diminishment provision requires only that districts retain racial or language minorities' ability to elect representatives of their choice—not that race predominate to achieve that result. *See* Art. III, § 20(a). Like Section 5 of the VRA, the non-diminishment provision decidedly "does not require [Florida] to maintain a particular numerical minority percentage" because there is no "mechanically numerical view as to what counts as forbidden retrogression." *Ala. Legis. Black Caucus*, 575 U.S. at 277. While the non-diminishment provision may require Florida to give *some* consideration to race, the U.S. Supreme Court "never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). "Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw*, 509 U.S. at 646.

Given the U.S. Supreme Court's consistent distinction between racial *consciousness* and racial *predominance*, Defendants' invocation of racial-gerrymandering precedent is misplaced. Consideration of race in the context of non-diminishment does not raise the same pernicious stereotyping concerns that motivate racial-gerrymandering claims—a racist *assumption* that members of a minority group "share the same political interests, and will prefer the same candidates at the polls," *id.* at 647—because non-diminishment plaintiffs will necessarily have *proved* such cohesion, as Plaintiffs have done here. *See supra* at 11.

Moreover, as to the second requirement, even if the non-diminishment provision necessitated that racial considerations predominate in the drawing of districts, the use of race in this context would be "narrowly tailored to serve a compelling state interest." *Ala. Legis. Black Caucus*, 575 U.S. at 260–61; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2309 (2018).

First, compliance with the non-diminishment provision of the Florida Constitution is a compelling state interest. As the Florida Supreme Court has explained, Florida's non-diminishment provision "follow[s] almost verbatim the requirements embodied in the [Federal] Voting Rights Act." *Apportionment I*, 83 So. 3d at 619 (citation omitted and second alteration in original). And the U.S. Supreme Court has repeatedly assumed that compliance with the VRA constitutes a compelling state interest, even in the years after *Alabama Legislative Black Caucus*, which Defendants inaptly cite to undermine Section 5, Sec'y's Resp. at 11.[8] *See, e.g.*, *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) ("We have assumed that complying with the VRA is a compelling interest."); *Abbott*, 138 S. Ct. at 2315 ("In technical terms, we have assumed that complying with the VRA is a compelling state interest." (citations omitted)); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017) ("[T]he Court assumes, without deciding, that the State's interest in complying with [§ 5 of] the Voting Rights Act was compelling."); *LULAC v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) ("I would hold that compliance with § 5 of the Voting Rights Act can be" a compelling state interest). Given the substantive similarity between Section 5 of the VRA and the Fair Districts Amendments' non-diminishment provision, compliance with the latter likewise constitutes a compelling state interest. Indeed, Defendant Florida Senate asserted as much last year when defending its state legislative districts. *See* Ex. 2 at 38 ("[T]he Senate has also presumed—consistent with Supreme Court precedent as to the federal Voting Rights Act—that

[8] Although Section 4's coverage formula was struck down, Section 5 of the VRA remains valid federal law. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (ruling on the validity of Section 4(b), not Section 5, of the VRA).

compliance with the Florida Constitution's analogous protections for racial and language minorities represents a 'compelling interest' justifying the consideration of race.").[9]

Relatedly, so long as Florida has good reasons to believe that its use of race in drawing a particular district was necessary to comply with the non-diminishment provision, the district in question would be narrowly tailored to address a compelling interest. *See Bethune-Hill*, 580 U.S. at 193 ("'[T]he narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made[,]' . . . [which] exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act, 'even if a court does not find that the actions were necessary for statutory compliance.'" (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278); *see also Abbott*, 138 S. Ct. at 2332 (upholding district against racial gerrymandering challenge because "Legislature had 'good reasons' to believe that the district at issue . . . was a viable Latino opportunity district"). Defendants have not and cannot demonstrate that every potential district that complies with the non-diminishment provision would fail this test, particularly when the Florida Constitution itself categorizes non-diminishment as a "Tier One" standard for which other redistricting criteria must give way. *See* Fla. Const. Art. III, § 20; *Apportionment I*, 83 So. 3d at 615.

Defendants' as-applied challenge to a hypothetical remedial district, *see* Sec'y's Resp. at 11-14, fares no better. As an initial matter, Defendants' as-applied challenge could only be applied if and once a specific remedial district is actually ordered by this Court. Until then, both the

[9] Defendants' argument that allowing compliance with the Florida Constitution to justify race-based redistricting would invite "all manner of sin" is plainly misleading. *See* Sec'y's Resp. at 10. The federal supremacy clause expressly precludes compliance with state laws that directly conflict with federal law. U.S. Const. Art. VI, cl. 2. But that is not the case here, where courts can apply Florida's non-diminishment provision consistent with the U.S. Constitution. *See Allen*, 143 S. Ct. at 1516–1517 (explaining that "under certain circumstances, [courts] have authorized race-based redistricting as a remedy for state districting maps that violate [anti-discrimination laws]").

remedial district under attack and Defendants' equal protection claim remain entirely hypothetical. *See supra* at 16–17.

This is not just a procedural defect in Defendants' argument but a logical one. For example, Defendants have not presented *any* evidence of racial predominance in the drawing of the hypothetical remedial district, as would be their burden to defeat summary judgment on that basis. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (holding that, to avoid summary judgment, the opposing party must "go beyond the pleadings and . . . designate specific facts showing there is a genuine issue for trial") (cleaned up); *Montes*, 40 F. Supp. 3d at 1409 ("Defendants cannot avoid summary judgment by vaguely asserting that they have additional unspecified evidence to present at trial."). Instead, they simply contend that "any district like benchmark CD-5" would necessarily be the result of racial predominance. Sec'y's Resp. at 12. But this blanket assertion defies the federal constitutional standard for their equal protection claim, which makes clear that "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill*, 580 U.S. at 191; *see also Ala. Legis. Black Caucus*, 575 U.S. at 262–63 ("We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of *one or more specific electoral districts*." (emphasis added)). Indeed, the U.S. Supreme Court has explained that "courts [must] exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race" in part because of the "evidentiary difficulty" of proving such a claim. *Miller*, 515 U.S. at 916. Defendants have not and cannot point to record evidence of racial predominance in a district that has not yet been drawn or adopted.

B. Defendants' non-justiciability affirmative defense is unavailing.

Finally, Defendants' argument that the non-diminishment provision is non-justiciable is foreclosed by the Florida Supreme Court's own application of the same provision, which

Defendants Florida House and Florida Senate advocated for just last year. *See In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d at 1290 (evaluating functional analyses to conclude that "2022 [state legislative] plans do not diminish minority voters' ability to elect representatives of their choice"); *see also LWV I*, 172 So. 3d at 402–06 (discussing CD-5's compliance with non-diminishment provision). It is audacious for Defendants to contend that Florida courts are somehow suddenly incapable of doing what they have done multiple times over the last eleven years, including at Defendants' behest.

Likewise, this Court may easily reject Defendants' crabbed argument that Plaintiffs are using the non-diminishment standard to circumvent other provisions of the Fair Districts Amendments. As an initial matter, Plaintiffs' requested remedy is not before the Court at this stage; nor are Plaintiffs in a position to "usurp the Florida Legislature's redistricting power," Sec'y's Resp. at 16. This Court—not Plaintiffs—will issue any remedy. And Defendants' concern about the compactness of any remedial district is a red herring: the Florida Constitution explicitly prioritizes non-diminishment over compactness, such that any conflict between compactness and non-diminishment is not a conflict at all. *See* Fla. Const. Art. III, § 20; *Apportionment I*, 83 So. 3d at 615.

Defendants' last remaining argument on this score is the most nonsensical of all. In arguing that any remedial CD-5 would intentionally favor one political party and a specific incumbent, Defendants would render *all* minority ability-to-elect congressional districts invalid. As Defendants themselves explain, "Plaintiffs ask this Court to draw a north-Florida district . . . [so that] black voters in north Florida can elect a candidate of their choice." Sec'y's Resp. at 15. To the extent that district "favors the Democratic Party" and "favors (then) incumbent Al Lawson," those are necessarily accidental byproducts—not intentional features of the district. *Id.* The same

is conceivably true for the Hispanic ability-to-elect congressional districts in South Florida, each of which favors Republican candidates and incumbents. *See, e.g.*, Ex. 7 to Plfs.' Mot., Florida House Feb. 18, 2022 Meeting Packet at 18 (Legislature identifying Congressional Districts 26, 27, and 28 as Hispanic ability-to-elect districts that are likely to perform for Republican candidates).

CONCLUSION

Ultimately, the only question before this Court is whether Defendants have offered specific facts establishing a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324. They have not. Notably missing from Defendants' response is *any* dispute that (1) Benchmark CD-5 allowed Black voters the ability to elect the candidates of their choice, *see* Mot. at 12–13; SUMF ¶ 38, and (2) Black voters in North Florida do *not* have the ability to elect their candidates of choice under the Enacted Map, *see* Mot. at 13–15; SUMF ¶ 110.[10] Those undisputed facts are all that Plaintiffs must establish to prevail on their diminishment claim. *Apportionment I*, 83 So. 3d at 624–25.

For the foregoing reasons, and those set forth in their opening brief, Plaintiffs respectfully request that this Court enter summary judgment on their claim that the Enacted Map results in diminishment in contravention of Article III, Section 20(a) of the Florida Constitution.

[10] Defendants apparently take no issue with about half of Plaintiffs' material facts. Indeed, none of Defendants' alleged "disputes" directly refutes *any* of Plaintiffs' material facts; they simply raise legal arguments and tangential, nonspecific concerns.

Dated: July 26, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 26, 2023, I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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EXHIBIT 1

SUPREME COURT OF FLORIDA

No. SC22-131

IN RE: JOINT RESOLUTION OF
LEGISLATIVE APPORTIONMENT

BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES

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PRELIMINARY STATEMENT

In this brief, "App." refers to the appendix to this brief, and "Pet. App." refers to the appendix to the Attorney General's Petition for Declaratory Judgment, dated February 9, 2022.

"House Map" refers to the House districts in Senate Joint Resolution 100, and "Benchmark Map" refers to the predecessor House districts established in 2012 and approved by this Court in *Apportionment I*.

"*Apportionment I*" refers to *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012). "*Apportionment III*" refers to *Florida House of Representatives v. League of Women Voters of Florida*, 118 So. 3d 198 (Fla. 2013).

"BVAP" refers to Black voting-age population, or the percentage of the 18-and-above population that is Black, and "HVAP" refers to Hispanic voting-age population, or the percentage of the 18-and-above population that is Hispanic.

Finally, "VRA" refers to the federal Voting Rights Act of 1965, 52 U.S.C. §§ 10301 to 10702.

STATEMENT OF THE CASE

On February 9, 2022, Attorney General Moody initiated this original proceeding pursuant to article III, section 16(c), Florida Constitution. The Attorney General's petition seeks a declaratory judgment determining the validity of Senate Joint Resolution 100, which creates new state legislative districts for the State of Florida.

The deadline for parties opposing the validity of the Joint Resolution to file their briefs or comments was February 14, 2022. No opposition briefs or comments were submitted. To assist the Court in fulfilling its constitutional charge to determine the validity of the apportionment, the Florida House of Representatives submits this brief in support of the validity of the unchallenged House Map.

STATEMENT OF FACTS

The Florida Constitution requires state legislative districts to be redrawn in the second year after each decennial census. Art. III, § 16(a), Fla. Const. In September 2021, well after its statutory deadline and one month after an initial release of the raw format data, the United States Census Bureau released the official 2020

population counts that States need in order to redraw their state legislative districts.[1]

The census data highlighted Florida's significant growth and confirmed Florida's ranking as the Nation's third most populous State. The State's total population grew nearly 15 percent over the last decade, from 18,801,310 to 21,538,187 people. App. 6–9. The ideal population for House districts increased in proportion, from 156,678 to 179,485. *Id.*[2] The growth was not evenly distributed, however, as some districts grew substantially while others declined in population. App. 8–9. To comply with the one-person, one-vote requirement, Florida's House districts required substantial revision.

Although the Legislature could not enact a new redistricting plan before its 2022 regular session, *see* Art. III, § 16(a), Fla.

[1] *See* 13 U.S.C. § 141(c); *Census Bureau Delivers 2020 Census Redistricting Data in Easier-to-Use Format*, U.S. CENSUS BUREAU (Sept. 16, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-census-redistricting-data-easier-to-use-format.html; *2020 Census Redistricting Data Files Press Kit*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/newsroom/press-kits/2021/2020-census-redistricting.html.

[2] The ideal (or average) district population is the total population of the State (21,538,187) divided by the number of districts (120).

Const., it began its redistricting process much earlier. Months before session began, the House formed a redistricting committee and separate subcommittees for congressional and state legislative redistricting. *See* Florida House of Representatives Committees, https://www.myfloridahouse.gov/sections/committees/committees.aspx (last visited Feb. 15, 2022). Collectively, the membership of the redistricting committee and two subcommittees included 62 members—a majority of the chamber's membership. *Id.*

The House's redistricting committee and state legislative subcommittee conducted eight interim meetings in 2021 and four more meetings once the session began—all with notice and open to the public. The House and Senate jointly created a redistricting website that provided the public with current information about redistricting. *See* https://www.floridaredistricting.gov. The website provided the public with access to the same web-based map-drawing application used by the Legislature, including all elections data needed to perform functional analyses of minority districts. It also offered portals for the public to submit comments and maps and displayed those maps and associated data alongside maps prepared by legislative committee staff for legislative consideration.

Members of the public availed themselves of the online portal to submit no fewer than 97 congressional and state legislative maps. *Id.*

Once it convened in regular session, the Legislature acted promptly to advance the redistricting process. The Senate passed the Joint Resolution on January 20, 2022. Fla. S. Jour. 215 (Reg. Sess. 2022). The House then added the proposed House districts and passed the bill, 77 to 39, on February 2, 2022. Fla. H.R. Jour. 543–44 (Reg. Sess. 2022). The next day, the Senate passed the amended bill unanimously, 37 to zero. Fla. S. Jour. 325 (Reg. Sess. 2022).

SUMMARY OF ARGUMENT

The House Map is valid. It complies with every federal and state standard governing apportionment. It protects minority voting strength from diminishment, as required by the tier-one standards in article III, section 21, while making minority districts more compact and more faithful to political and geographical boundaries.

The House Map is equally true to article III, section 21's tier-two standards. It carefully assimilates and balances compactness, adherence to political and geographical boundaries, and population

equality. The result is a map with compact, understandable shapes and clear constitutional justifications for any population deviations.

The House assiduously followed the law. Its strict compliance with all governing standards demonstrates that the House Map was not drawn with any improper intent to favor or disfavor political parties or incumbents. The House lived up to its constitutional obligation and drew districts without intentional political favoritism.

No party has appeared to dispute the validity of the House Map, and indeed none could sustain the heavy burden to prove that the presumptively valid House Map is invalid. This Court should accord great deference to the legislative determinations represented in the House Map and declare it valid. As importantly, it should declare that its judgment is in fact "binding upon all the citizens of the state," Art. III, § 16(d), Fla. Const., precluding further challenge.

ARGUMENT

The House Map satisfies every requirement of federal law and the Florida Constitution. The House Map demonstrates complete constitutional compliance and even an improvement over the Benchmark Map, which this Court approved unanimously a decade ago.

As discussed more fully below, the House Map:

- Protects minority voting rights by:
    - Establishing 18 districts that perform for Black voters and 12 districts that perform for Hispanic voters; and
    - Protecting from diminishment the ability of minorities in those 30 districts to elect their preferred candidates;
- Keeps 36 counties whole—only two fewer than the theoretical maximum based on county populations;
- Splits only 53 of Florida's 412 municipalities—a full 22 fewer than the Benchmark Map did when drawn in 2012 and 48 fewer than the Benchmark Map did by decade's end;
- Establishes visually compact districts with higher mean and median compactness scores than the Benchmark Map, and even improves the compactness of districts drawn to preserve minority voting strength; and
- Provides substantially equal populations in all districts, with each deviation from exact equality justified by the House's efforts to utilize political and geographical boundaries and to comply with other constitutional standards.

Perhaps most importantly, the House Map's strict adherence to all tier-two requirements proves that it was drawn without any intent to favor or disfavor political parties or incumbents.

I. THE HOUSE MAP WAS DRAWN TO COMPLY WITH ALL CONSTITUTIONAL REQUIREMENTS.

A. Standard of Review.

This Court's function in this time-limited proceeding is to enter a "declaratory judgment determining the validity" of the state legislative districts adopted for the State of Florida. Art. III, § 16(c), Fla. Const. This Court's role is not to select the "best plan." *Apportionment I*, 83 So. 3d at 608, 669. "By their very nature," the constitutional standards "permit a range of choice by the Legislature in drawing district boundaries." *Id.* at 698 (Canady, C.J., concurring in part and dissenting in part). The Court's focus, moreover, is on "objective data" and other "objective evidence," *id.* at 612, 617—not internal legislative procedures or the mechanics of the legislative process, *Fla. Senate v. Fla. Pub. Emps. Council 79*, 784 So. 2d 404, 408 (Fla. 2001) ("Where the Legislature is concerned, it is only the final product of the legislative process that is subject to judicial review . . . ."); *Moffitt v. Willis*, 459 So. 2d 1018, 1021 (Fla. 1984) ("It is the final product of the legislature that is subject to review by the courts, not the internal procedures.").

Like all legislative acts, the House Map is presumed valid. Last decade, while this Court recognized that a presumption of validity applies, it declined to apply a corollary of that presumption: that any invalidity must appear beyond a reasonable doubt. *Apportionment I*, 83 So. 3d at 606–08. But if the presumption of validity means anything, it means that reasonable doubts must be resolved in favor of validity. This Court applied this time-tested principle in its first 30-day review of legislative districts, *see In re Apportionment Law Senate Joint Resol. No. 1305*, 263 So. 2d 797, 805–06 (Fla. 1972), and has continued to apply it in other contexts, *see*, *e.g.*, *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1111 (Fla. 2021). In fact, since *Apportionment I* was decided, this Court has squarely reaffirmed that "in *all* constitutional challenges, . . . all reasonable doubts about the statute's validity are to be resolved in favor of constitutionality." *Fla. Dep't of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 911 (Fla. 2016) (emphasis added).

For the reasons expressed by Chief Justice Canady in *Apportionment I*, 83 So. 3d at 695–99—including the inherent structural limitations of this original proceeding and the Court's sensitivity "to the complex interplay of forces that enter a

legislature's redistricting calculus," *id.* at 639 (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995))—this Court should apply an unimpaired presumption of validity and resolve any reasonable doubts in *favor* of—and not against—the Joint Resolution's validity.

B. The House Map's Methodology Demonstrates Its Adherence to All Standards.

The House began by considering the many legal principles that would guide its task. Article III, section 21 sets forth two tiers of standards. The first tier protects the rights of minority voters, prohibits intentional partisan or incumbent favoritism, and requires contiguity. The second tier requires districts to be compact and as nearly equal in population as practicable and, where feasible, to utilize political and geographical boundaries. Tier-two standards yield to tier-one standards to the extent they conflict. *Apportionment I*, 83 So. 3d at 640. Within each tier, none of the criteria has priority over the others, and each is subject to legislative balancing. Art. III, § 21(c), Fla. Const.

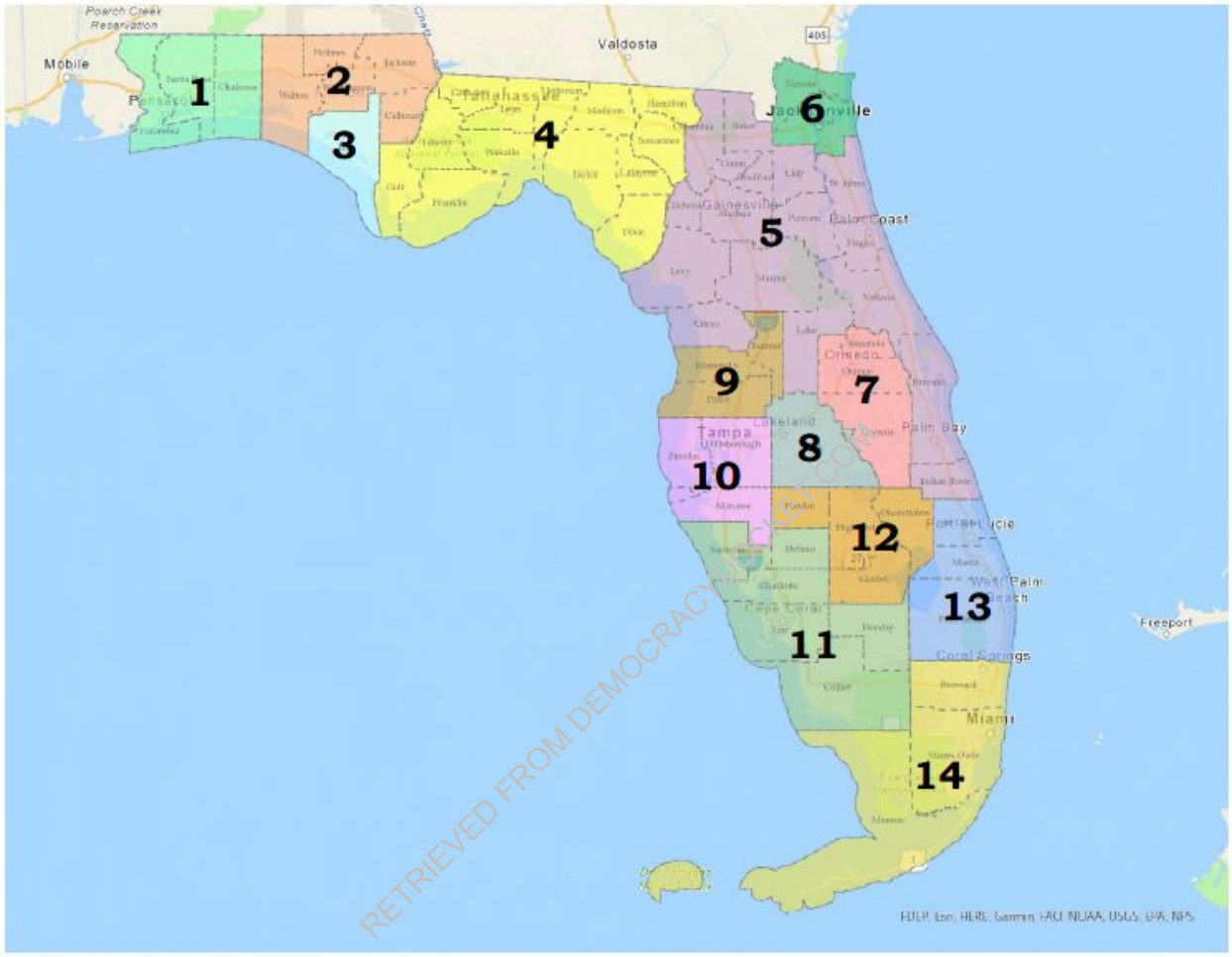
To comply with these standards, the House considered an appropriate balance of population equality, compactness, and adherence to well-known boundaries. Ultimately, it emphasized

county integrity, while fully adhering to other second-tier principles. When possible, the House sought to keep counties whole within districts, or to locate districts wholly within counties, depending on county populations. Where not feasible, the House sought to "anchor" districts within a county, tying the geography representing a majority or plurality of the district's residents to a single county.

To this end, the House used census data to identify regions of the State consisting of one or more whole counties capable of forming one or more whole districts without any remainder population. It called these regions "sandboxes." For example, the House found that the combined population of Seminole, Orange, and Osceola Counties could be divided evenly into 13 districts with an average population of 176,109. The House therefore drew 13 whole districts entirely within this three-county combination; no district crosses the outer perimeter formed by these three counties. Within each region, the House minimized, to the extent possible, the number of districts that crossed from one county into another.

With this regional "sandbox" approach, the House was better able to respect county boundaries, keep municipalities whole within districts, and create more visually compact districts. In all, the

State was divided into 14 whole-county regions depicted below, each of which was capable of forming a whole number of districts:



The requirement that districts be equally populated largely dictated the choice of county combinations. To form a whole number of districts within a region, the region's population, when divided by a whole number, must yield approximately the ideal population of a district. For example, the population of Seminole, Orange, and Osceola Counties (2,289,420), when divided by 13,

yields 176,109, which is 1.88 percent below the ideal population of a district (179,485). *See* App. 7, 9. The table below identifies each region depicted above, the number of counties and districts in each region, each region's population, the ideal population of districts in the region, and the difference between the ideal population of a district in the region and the ideal population of a district statewide:

Region	**Number of Counties**	**Number of Districts**	**Total Regional Population**	**Regional Ideal District Population**	**Deviation from Statewide Ideal District Population**
1	3	4	721,573	180,393	0.51%
2	5	1	181,243	181,243	0.98%
3	1	1	175,216	175,216	-2.38%
4	13	3	541,142	180,381	0.50%
5	17	19	3,395,673	178,720	-0.43%
6	2	6	1,085,919	180,987	0.84%
7	3	13	2,289,420	176,109	-1.88%
8	1	4	725,046	181,262	0.99%
9	3	5	886,158	177,232	-1.26%
10	3	16	2,818,579	176,161	-1.85%
11	6	10	1,831,022	183,102	2.02%
12	4	1	178,332	178,332	-0.64%
13	3	11	1,979,848	179,986	0.28%
14	3	26	4,729,016	181,885	1.34%
Statewide	**67**	**120**	**21,538,187**	**179,485**	**N/A**

See App. 7, 9.

The House emphasized county boundaries because, in its legislative judgment, counties tend to be compact and functional, and their boundaries stable and well understood. All told, the House was able to keep 36 counties whole and 84 districts wholly within single counties. App. 11; Pet. App. 463. Within each county, the House sought to keep municipalities whole. In addition to their own local governments, residents of a municipality often have shared interests and a sense of community that benefit from being kept intact within a single district. *Cf. Apportionment I*, 83 So. 3d at 636 (noting that tier two creates a "community-based standard" for drawing districts (quoting *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 187 (Fla. 2009) (plurality opinion))). Where county and municipal boundaries could not serve as district lines, the House relied on geographical boundaries such as rivers, railways, interstates, and state roads. As it did ten years ago, the House resolved to draw districts with understandable shapes, and without bizarre fingers or appendages.

The House was also mindful of its tier-one obligations to protect minority voters. The tier-one minority protections include two distinct requirements. One—the non-diminishment standard—

prohibits drawing districts that "diminish" the "ability" of minority voters "to elect representatives of their choice," imposing a statewide ban on retrogression in minority voting ability. To avoid diminishment, the House reviewed the Benchmark Map and identified the districts in which minorities were historically able to elect representatives of their choice—*i.e.*, the performing districts. Then, in drawing the House Map, the House ensured that it neither reduced the number of performing districts nor weakened the ability of minorities in those districts to elect representatives of their choice. Consistent with this Court's precedents, the House conducted the necessary functional analysis to assure compliance and protected *all* performing districts from diminishment, even if minorities did not comprise a majority of the voting-age population.

Second, the minority protections require that districts not deny or abridge the equal opportunity for minorities to participate in the political process. This provision prohibits "vote dilution," which can occur when the State could draw a majority-minority district for a reasonably compact, politically cohesive minority population, but instead draws a district in which racially polarized voting will usually defeat the minority population's preferred

candidate. Where majority-minority districts could be drawn and the other *Gingles* prerequisites were satisfied,[3] the House made certain to draw performing minority districts and to avoid drawing districts in which the minority-preferred candidate would usually be defeated.

II. THE HOUSE MAP COMPLIES WITH ALL TIER-ONE STANDARDS.

A. The House Map Protects Minority Voting Rights.

The Florida Constitution provides two distinct protections for minority voters: a prohibition against vote dilution and a prohibition against diminishment, or retrogression. Art. III, § 21(a), Fla. Const. These protections are patterned after section 2 of the VRA, which prohibits vote dilution, and section 5 of the VRA, which prohibited retrogression before it became inoperative in 2013. *Apportionment I*, 83 So. 3d at 619–20. In interpreting these provisions, this Court is guided by—but not tethered to—the United States Supreme Court's interpretations of section 2 and section 5 of the VRA. *Id.* at 620–21.

[3] The prerequisites to a vote-dilution claim articulated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), are discussed in Part II.A.2. below.

This Court has an independent obligation to interpret Florida's provisions, notwithstanding their parallels in federal law. *Id.* at 621.

Importantly, sections 2 and 5 are two separate and distinct provisions that "impose very different duties." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997). They "combat different evils," *Apportionment I*, 83 So. 3d at 621 (quoting *Reno*, 520 U.S. at 477)—vote dilution and retrogression—and "differ in structure, purpose, and application," *id.* (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003)); *accord Reno*, 520 U.S. at 488 (concluding that section 2's incorporation into section 5 would be "unsatisfactory no matter how it is packaged"). To avoid confusion in their implementation, it is essential to maintain a clear distinction between these inquiries.

In evaluating compliance with tier-one minority protections, a measure of deference to the legislative judgment is especially important. The standards are unavoidably imprecise and often fail to generate consensus, even among experts. *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015) (explaining that section 5's standards are "complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and . . . judges may disagree about the proper outcome").

The minority protections also compete with other standards: they *require* the consideration of race while equal protection *limits* the consideration of race, *id.*, and permit deviations from Florida's tier-two standards, "but only to the extent necessary," *Apportionment I*, 83 So. 3d at 640. "The law cannot," therefore, "insist that a state legislature, when redistricting, determine *precisely* what percent of minority population" each district must include. *Ala. Legislative Black Caucus*, 575 U.S. at 278 (emphasis in original). Rather, the law must afford "breathing room" between the "competing hazards of liability" and uphold the legislative judgment if "good reasons" support it. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 802 (2017). Without some measure of deference to the legislative judgment on points that are fairly debatable, *any* redistricting plan the Legislature could enact would be in serious, continual jeopardy.

1. The House Map Does Not Diminish Minorities' Ability to Elect Representatives of Their Choice.

Districts may not be drawn to "diminish" the "ability" of minority voters to "elect representatives of their choice." Art. III, § 21(a), Fla. Const. The House Map complies with the non-diminishment standard because it neither reduces the number of

districts that perform for minority voters nor weakens the ability of minority voters in those districts to elect their preferred candidates.

The non-diminishment standard requires a comparison between the existing redistricting plan—the Benchmark Map—and the new districts. *Apportionment I*, 83 So. 3d at 624.[4] Under that standard, the Legislature "may not eliminate majority-minority districts or weaken other performing districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625.[5] To assure compliance, the Legislature must perform a "functional analysis" of voting behavior. *Id.* at 625–26. This analysis begins with census population data but also considers election data—registration and turnout data and election results—to assess the ability of minorities to elect their preferred candidates. *Id.* Population data alone is insufficient; a minority

[4] In assessing districts for diminishment, the "most current population data" are applied to *both* maps—the Benchmark Map and the House Map. *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7,470, 7,472 (Feb. 9, 2011).

[5] A majority-minority district is a district in which a minority group comprises a numerical majority of the district's voting-age population. *Apportionment I*, 83 So. 3d at 622–23.

group might, for example, comprise a substantial part of a district's population, but, because of low registration or turnout rates, lack the ability to elect.[6]

The text of the non-diminishment standard reveals several important guideposts. *First*, non-diminishment protects only existing performing districts—districts in which minority voters are already able to elect their preferred candidates in the Benchmark Map. It does not compel the creation of new, performing districts. Thus, the House began by reviewing the Benchmark Map to identify existing districts that perform for minority voters. *Second*, the text does not limit the non-diminishment standard to majority-minority districts. *Id.* at 625. Any district in which a minority group has sufficient effective control over both primary and general elections

[6] District 109 is a good example. It has an HVAP of 58.4 percent and a BVAP of 40.1 percent, but performs for Black rather than Hispanic voters. Pet. App. 450. At least one reason is that Hispanics, though a majority of the district's voting-age population, were only 38.7 percent of the district's registered voters and only 40.3 percent of the district's general-election voters in 2020, while Blacks were 49.9 percent of the district's registered voters and 49.0 percent of the district's general-election voters in 2020. Pet. App. 450–51.

to elect its preferred candidates is entitled to protection. *Id.* at 625, 667.

Third, on its face, the non-diminishment standard protects against *any diminishment*—not merely against a *total elimination* of the ability to elect. To "diminish" means "to make less or cause to appear less." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 634 (1993), *quoted in Apportionment I*, 83 So. 3d at 702 (Canady, C.J., concurring in part and dissenting in part). Thus, in *Apportionment I*, this Court recognized that new districts may not "weaken" historically performing districts, 83 So. 3d at 625, and that the non-retrogression standard adopted by Congress, and more recently by Florida, asks whether the minority population is "more, less, or just as able to elect a preferred candidate of choice after a change as before," *id.* at 624–25 (quoting H.R. REP. NO. 109-487, at 46 (2006)); *see also id.* at 655 (concluding that the Senate's newly enacted minority districts maintain "commensurate voting ability").

Logically, if a performing district loses substantial minority population, then the remaining minority voters' ability to elect their preferred candidates is diminished. They might retain some ability, but they have *less*. The non-diminishment standard therefore

recognizes that the ability to elect "is a matter of degree." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 243 (2007). "Diminishing a district's ability to elect does not necessarily mean reducing it from a safe district to a hopeless district . . . . It could mean reducing a safe district to a competitive district, or a competitive district to a hopeless district or any downward shifts along that very wide spectrum." *Id.* at 244. As Chief Justice Canady noted in *Apportionment I*, even small declines in voting ability can change election outcomes: "the differences are at the margins where many elections are decided." 83 So. 3d at 702.

Of course, it does not follow that a district's minority voting-age population may never decrease, no matter how slightly. *Id.* at 625. After all, the population percentage is only one indicator of minority voting ability, *id.* at 625–26, and sometimes a district that is under-populated and must add new population cannot maintain the same percentage of minority residents. But this Court clearly cautioned that any such reductions should be "slight." *Id.* at 625 (explaining that, because voting ability depends on more than mere population data, a "slight change in percentage of the minority group's population in a given district does not necessarily have a

cognizable effect on a minority group's ability to elect"). Similarly, the Supreme Court has explained that a reduction in a district's BVAP from 70 to 65 percent might not diminish the ability to elect, *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. at 277, but that a reduction below 55 percent might, *Bethune-Hill*, 137 S. Ct. at 802.

As one commentator aptly explained, Black voters rarely have the ability to elect when a district's BVAP is much below 30 percent, while a BVAP above 60 percent virtually guarantees an ability to elect. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. at 245 & n.252. It is between these points that the ability to elect is most sensitive to reductions in BVAP. *Id.*

Section 5's history confirms this plain-language reading. In *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003), the Court interpreted section 5 to permit States to weaken "safe" minority districts in order to create "influence or coalition districts." In 2006, Congress amended section 5 to abrogate the Court's interpretation, adding an express prohibition against "diminishing" the ability to elect. 52 U.S.C. § 10304(b). It thus prohibited any voting changes that "leave a minority group less able to elect a preferred candidate of choice."

Apportionment I, 83 So. 3d at 625 (quoting H.R. REP. NO. 109-487, at 46).[7]

Applying these principles, the House determined that, under the Benchmark Map, Black voters had the ability to elect their preferred candidates in 18 districts: ten in Broward and Miami-Dade Counties, two in Duval County, two in Orange County, two in Pinellas and Hillsborough Counties, one in Gadsden and Leon Counties, and one in Alachua and Marion Counties. Pet. App. 477. The House Map preserves these districts. Pet. App. 450. The BVAPs in these 18 districts range from 28.9 percent in District 117 to 57.9 percent in District 97. *Id.* As in the Benchmark Map, seven of the 18 districts that perform for Black voters are majority-Black districts. Pet. App. 450, 477. A functional analysis of all 18 districts

[7] Section 5 differed from Florida's standard in two important ways. First, it applied only to select jurisdictions (in Florida, to five counties). *Apportionment I*, 83 So. 3d at 623–24. Second, it required federal preapproval—or "preclearance"—before any changes to voting procedures could take effect in the covered jurisdictions. *Id.* In *Shelby County v. Holder*, 570 U.S. 529 (2013), the Court held that the formula by which jurisdictions were selected for coverage was outdated and could no longer be applied. Since then, section 5 has been defunct, but Florida's counterpart to section 5 applies statewide and continues in effect. *Apportionment I*, 83 So. 3d at 624.

reveals that Black voters in these districts will be no less able to elect representatives of their choice than in the Benchmark Map.

The House also determined that, under the Benchmark Map, Hispanic voters were able to elect representatives of their choice in twelve districts: two in Orange and Osceola Counties, and nine exclusively and one predominantly in Miami-Dade County. Pet. App. 477. The House Map likewise contains twelve districts that enable Hispanic voters to elect representatives of their choice: three in Orange and Osceola Counties and nine in Miami-Dade County. Pet. App. 450.[8] As in the Benchmark Map, each of the twelve Hispanic-performing districts is majority Hispanic. Pet. App. 450, 477. The House performed a functional analysis to confirm that

[8] Population shifts account for the loss of a district in Miami-Dade County. Miami-Dade County's population equated to 15.93 districts in 2010, but only 15.05 in 2020. *See* App. 7. When shifts in population prevent the maintenance of a performing district, the non-diminishment standard does not require the impossible. *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. at 7,472 (recognizing that shifts in population might render it impossible to maintain a performing district); *cf*. *Apportionment I*, 83 So. 3d at 677 ("We note that the non-diminishment standard does not prohibit any change to existing boundaries . . . ."). Here, a large increase in Hispanic population in Orange and Osceola Counties enabled the House to establish a new performing Hispanic district in Central Florida and to maintain the statewide number of performing Hispanic districts.

Hispanic voters in these districts will have at least the same ability to elect representatives of their choice as in the Benchmark Map.

In conducting a functional analysis on these districts, the House followed the exact methodology prescribed by this Court in *Apportionment I*. It began with minority voting-age population as the "important starting point" of the analysis. *Apportionment I*, 83 So. 3d at 625 (quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. at 7,471). It then reviewed election results, registration data, and turnout data—just as this Court did, *see id.* at 667–68—with its principal focus on:

- The results of presidential and gubernatorial contests;
- The minority group's share of the relevant political party's electorate at primary and general elections;
- The minority group's share of the relevant political party's registered voters;
- That political party's share of all registered voters and of the minority group's registered voters; and
- That political party's share of the entire electorate and of the minority group's electorate at general elections.

In assessing each minority district, the House reviewed these data separately for each statewide election in 2012, 2014, 2016, 2018,

and 2020.[9] It then relied on these data to reach conclusions about the voting behavior of minority voters and to draw districts that do not diminish their ability to elect the candidates of their choice.[10]

Because it neither reduces the number of performing districts nor weakens the ability of minorities in those districts to elect representatives of their choice, the House Map complies with the non-diminishment standard.

2. The House Map Does Not Deny or Abridge Minorities' Equal Opportunity to Participate in the Political Process.

The tier-one requirement that districts "not be drawn with the intent or result of denying or abridging the equal opportunity of

[9] These data are provided in the Attorney General's appendix. Pet. App. 450–62, 477–89.

[10] Footnote 11 of this Court's opinion in *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015), could be read to suggest that the non-diminishment standard incorporates the elements of a section 2 claim—*i.e.*, the *Gingles* prerequisites. The Supreme Court has never even implied that the *Gingles* prerequisites govern the retrogression standard under section 5. This reading conflicts with *Reno* and muddies—or eliminates—the line between vote dilution (section 2) and non-diminishment (section 5). *See supra* p. 17. While some of the same evidence might, as a *factual* matter, be relevant to both analyses, this Court should make clear that footnote 11 did not rewrite the non-diminishment standard set forth in *Apportionment I* and import the elements of a section 2 claim into the non-diminishment standard.

racial or language minorities to participate in the political process" prohibits vote dilution in the same manner as section 2 of the VRA. Art. III, § 21(a), Fla. Const.; *Apportionment I*, 83 So. 3d at 619–23.

Vote dilution can be established only by evidence that the Legislature could have drawn a performing majority-minority district for a reasonably compact, politically cohesive minority population, but instead drew a district in which racially polarized voting will usually defeat the minority population's preferred candidate. More specifically, the following factors, often called the "*Gingles* prerequisites," must be established: (1) the minority group is sufficiently large and geographically compact to comprise a majority of the district's voting-age population;[11] (2) the minority group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidates. *Apportionment I*, 83 So. 3d at 622 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)); *see also Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion) (explaining that

[11] Section 2 does not apply if the potential majority-minority district would not perform for minority voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018).

vote dilution requires minorities to "make up more than 50 percent of the voting-age population in the relevant geographic area"). Once these prerequisites are established, it must be shown that, under the totality of circumstances, members of the minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b); *accord Apportionment I*, 83 So. 3d at 621–22.[12]

Cooper v. Harris, 137 S. Ct. 1455 (2017), illustrates the vote-dilution standard. There, a congressional district's BVAP had hovered between 46 and 48 percent for nearly 20 years. *Id.* at 1470. While it was possible to draw a geographically compact majority-minority district, the Court concluded that section 2 did not require it. The 46- to 48-percent district was an "extraordinarily safe district" for minority-preferred candidates, who had consistently

[12] In *Apportionment I*, this Court declined to "rule out the potential" that, even where majority-minority districts cannot be created, Florida's vote-dilution provision might sometimes require the creation of minority districts in some form. 83 So. 3d at 645, 655. For the same reasons that the Supreme Court ruled out that potential in *Bartlett*—including the "serious constitutional concerns" that it would raise, 556 U.S. at 21 (plurality opinion)—this Court should rule out that potential under Florida's analogous provision.

prevailed by large margins. *Id.* The evidence did not therefore establish the third *Gingles* prerequisite: that the candidate preferred by minorities would usually be defeated in the district "as actually drawn." *Id.* (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

There can be no serious claim that the House Map violates the vote-dilution standard—and no party suggests that it does. Quite simply, the House did not draw any non-performing districts where it could have drawn a performing majority-minority district.[13]

Sometimes, an additional majority-minority district can be created by deconstructing a district with a supermajority-minority population. *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1016 (8th Cir. 2006) (concluding that two majority-minority districts could have been drawn where a 90-percent minority district abutted a 30-percent minority district); *Apportionment I*, 83 So. 3d at 622. Here, none of the majority-Black districts exceeds even 57.9 percent BVAP. Pet. App. 450. And while some performing districts contain

[13] While Districts 13 and 40, with BVAPs of 48.5 and 48.0 percent respectively, could have been drawn as majority-minority districts, a functional analysis confirms that, like the district in *Cooper*, these districts will be safe districts for candidates preferred by minority voters.

large Hispanic populations, these percentages are "explained by the fact that the Hispanic population in Miami-Dade County, where these districts are located, is densely populated" by Hispanic voters, *Apportionment I*, 83 So. 3d at 645—to say nothing of the remaining *Gingles* prerequisites. As it did last decade, *id.*, this Court should find that the House Map does not violate the vote-dilution standard.

B. The House Map Satisfies the Contiguity Requirement.

Another tier-one standard requires that districts "consist of contiguous territory." Art. III, § 21(a), Fla. Const. A contiguity requirement has long appeared in article III, section 16(a), and the well-established meaning of that provision governs the contiguity standard in article III, section 21. *Apportionment I*, 83 So. 3d at 628.

A district is non-contiguous "when a part is isolated from the rest by the territory of another district or when lands mutually touch only at a common corner or right angle." *Id.* (quoting *In re Constitutionality of House Joint Resol. 1987*, 817 So. 2d 819, 827 (Fla. 2002)). However, the "presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district,"

does not violate the contiguity requirement. *In re Senate Joint Resol. 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 280 (Fla. 1992). Florida's islands are also considered contiguous. *Id.* at 279.

As is clear on the face of the House Map, each new district is contiguous.

C. The House Map Is Devoid of Any Political Intent.

Florida's tier-one standards also prohibit an apportionment plan or district from being "drawn with the intent to favor or disfavor a political party or an incumbent." Art. III, § 21(a), Fla. Const. The House Map scrupulously complies with this standard.

By its plain language, this provision against partisan and incumbent favoritism "prohibits intent, not effect." *Apportionment I*, 83 So. 3d at 617. As this Court recognized, a political effect is unavoidable: "any redrawing of lines, regardless of intent, will inevitably have an effect on the political composition of a district." *Id.*

A partisan imbalance in a redistricting plan does not prove improper intent. *Id.* at 641–43. This is so because causes other than impermissible intent can produce partisan imbalance. *Id.* For example, the creation of minority districts in compliance with state

or federal law might have the effect of placing disproportionate numbers of voters affiliated with one political party into a small number of districts. *Id.* at 643. Similarly, heavy concentrations of Democratic voters clustered in urban areas—compared to smaller majorities of Republican voters distributed more evenly across other regions of the State—may, without any improper intent, cause Democratic voters to be drawn into a small number of districts. *Id.* at 642–43.

This Court correctly held—and should reaffirm—that the intent standard "does not require the affirmative creation of a fair plan, but rather a neutral one in which no improper intent was involved." *Id.* at 643. The intent standard is, so to speak, a *negative* injunction that banishes partisan intent from the redistricting process, and not an affirmative mandate to manufacture an ideal partisan balance. In fact, any effort to rebalance a map politically—and to tilt its partisan composition in favor of the political party that is disadvantaged by the absence of partisan intent—would itself reflect an intent to favor a political party, inject partisanship into the redistricting process, and violate the Constitution's plain terms.

The House Map was not drawn with impermissible intent. The House did not consider incumbent addresses in drawing districts, so the effect on incumbents—whatever it is—is the natural result of a process devoid of any intent to favor or disfavor incumbents or political parties. Nor did the House employ political data to assess the partisan composition of the map, but only to assure compliance with minority voting protections. *See Apportionment I*, 83 So. 3d at 619 ("[M]ere access to political data cannot presumptively demonstrate prohibited intent because such data is a necessary component of evaluating whether a minority group has the ability to elect representatives of its choice . . . .").

On its face, the House Map repels any suspicion of improper intent. This Court has recognized that tier-two standards "restrict the Legislature's discretion in drawing irregularly shaped districts" and that strict compliance with those standards can therefore "undercut or defeat any assertion of improper intent." *Id.* at 618; *accord id.* at 645 (noting that tier-two compliance makes "improper intent less likely"). Last decade, the Court found that the House's close adherence to tier-two principles tended to disprove claims of improper intent in the House Map. *Id.* at 645. The same is true

here. As explained below, the House not only adhered to the same tier-two principles this decade, but also notably improved its map according to key measures of tier-two compliance. *See infra* Part III.

Finally, although not part of this record, news outlets have reported that as many as seven seats might swing from Republican to Democratic under the House Map, and that no fewer than 19 incumbents find themselves in a districts with another incumbent—often within their own political parties.[14] The House Map was drawn with no intent to favor or disfavor political parties or incumbents.

III. THE HOUSE MAP COMPLIES WITH ALL TIER-TWO STANDARDS.

A. The House Map Satisfies the Boundaries Standard.

The House Map complies with the Constitution's requirement that "districts shall, where feasible, utilize existing political and geographical boundaries." Art. III, § 21(b), Fla. Const. As explained

[14] Jacob Ogles, *Civil War: Likely Florida House Map to Pit 19 Incumbents Against House Colleague*, FLORIDA POLITICS (Jan. 29, 2021) ("An investigation by Florida Politics finds the current cartography . . . could pit at least 19 sitting representatives against one another . . . ."); Mary Ellen Klas, *House Advances First Redistricting Map, But Democrats Have Many Questions*, MIAMI HERALD (Jan. 23, 2021) ("Democrats could gain as many as seven seats . . . under a redistricting map approved Friday . . . .").

below, the House Map faithfully follows political and geographical boundaries throughout the State and makes notable gains in the number of municipalities that are kept intact within single districts.

This Court has defined "political . . . boundaries" to mean county and municipal boundaries, and "geographical boundaries" to refer to geographical demarcations that are "easily ascertainable and commonly understood, such as rivers, railways, interstates, and state roads." *Apportionment I*, 83 So. 3d at 638 (internal marks omitted). The phrase "where feasible" introduces "flexibility," *id.* at 636, and recognizes that district boundaries cannot always follow political and geographical boundaries, and that all political and geographical boundaries cannot be utilized in drawing districts, *id.* at 638 ("There will be times when districts cannot be drawn to follow county lines or to include the entire municipalities within a district.").

The House Map is replete with examples of respect for county boundaries. Three districts—Districts 5, 6, and 83—consist exclusively of one or more whole counties, while the remainder of the districts are all nested within single counties or regional county combinations. *See supra* pp. 11–13. For example, Escambia, Santa

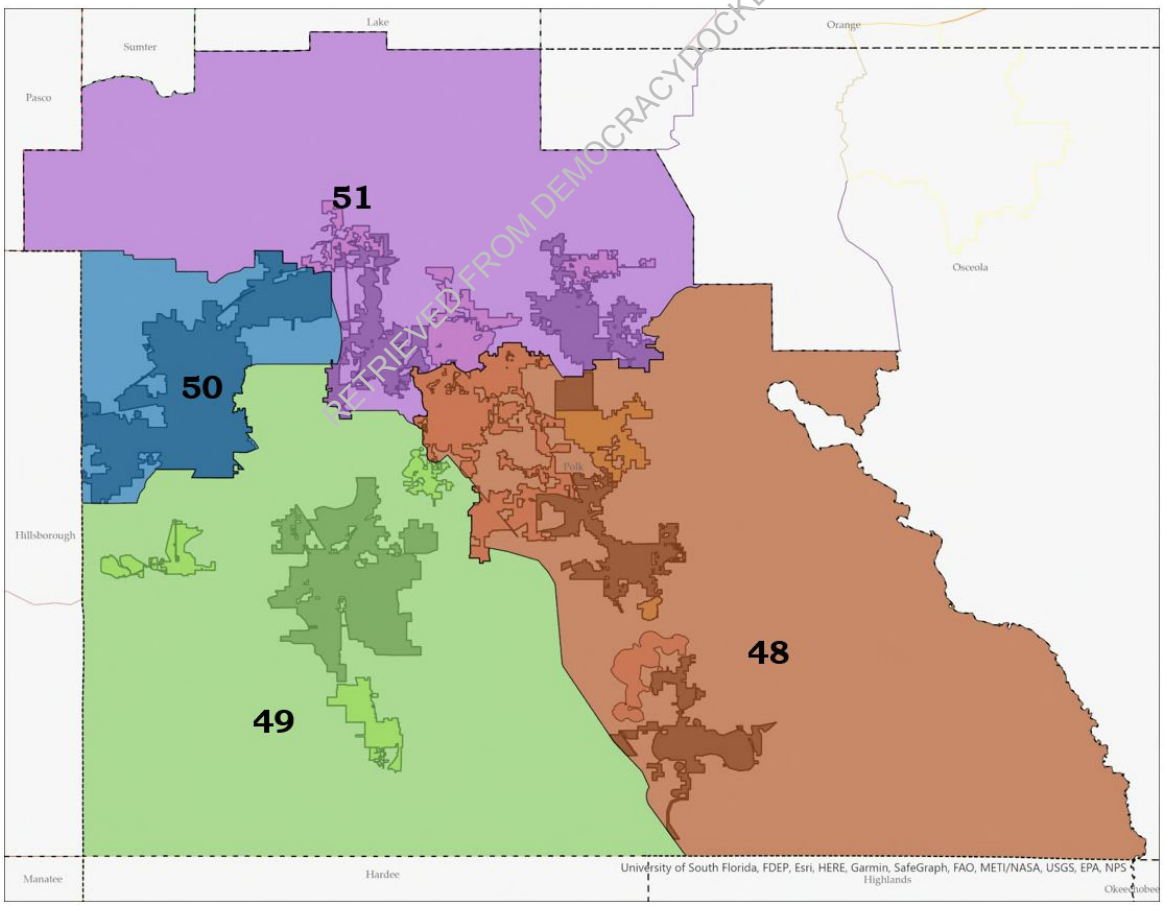
Rosa, and Okaloosa Counties comprise exactly four districts; Duval and Nassau Counties comprise exactly six districts; Sumter, Hernando, and Pasco Counties comprise exactly five districts; and St. Lucie, Martin, and Palm Beach Counties comprise exactly eleven districts. *Id.*

This subdivision of the State into regional whole-county combinations that encompass whole numbers of districts ensures consistent respect for county boundaries throughout the State. Of the 38 counties in Florida with populations less than the ideal population of a district—*i.e.*, the counties that could theoretically have been kept whole—the House Maps splits only two (Martin and Jefferson). *See* App. 7. Only two districts (Districts 20 and 27) split more than two counties, while more than two-thirds of the districts (84 of 120) are wholly within single counties. App. 11. No less impressively, more than 37 percent of the length of the average district's perimeter adheres to county boundaries. Pet. App. 471.

The House Map shows similar respect for municipal boundaries. It decreases the number of split municipalities from 75 when the Benchmark Map was drawn in 2012 to a mere 53—a 29-percent reduction—and from 101 in the Benchmark Map at the

end of the decade, according to 2020 Census geography. Pet App. 448, 475.

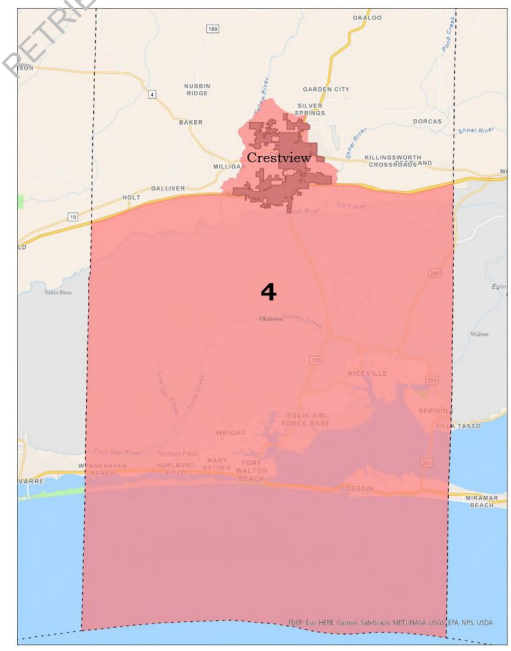
Polk County strikingly illustrates the House Map's respect for county and municipal boundaries. With a population of 725,046 people, App. 7, Polk County was evenly divisible by four districts. As the following image shows, the House nested four compact districts wholly within Polk County, without splitting any of the county's 17 municipalities, Pet. App. 464–70:



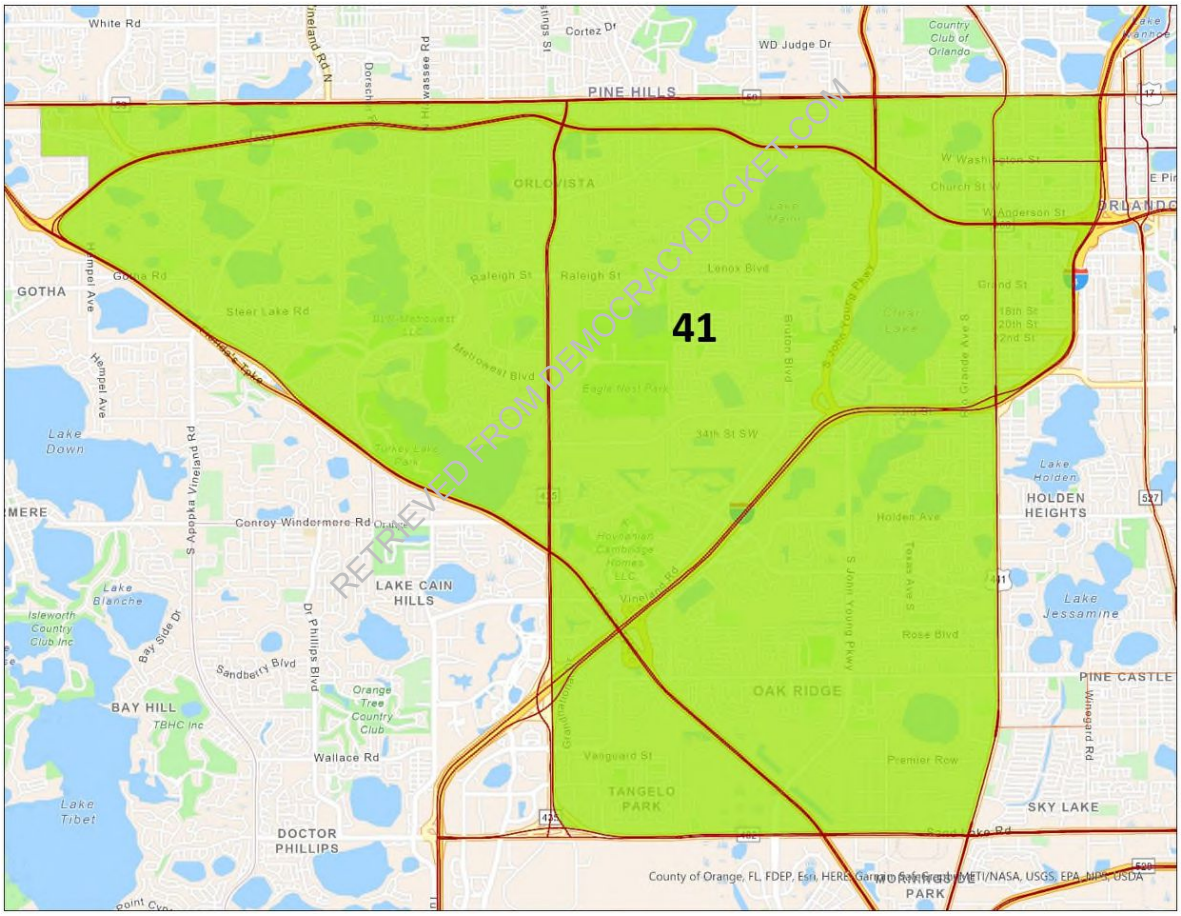
A legislative decision to prioritize the integrity of counties and municipalities is one sensible way to implement the boundaries standard. Last decade, this Court quoted with approval the House's explanation of its decision to prioritize county integrity, commending the House's "reasoned approach" to "balancing the tier-two standards." *Apportionment I*, 83 So. 3d at 637, 646–47. The House explained that county boundaries "are the most readily understood, consistently compact, functional, and stable" of Florida's political and geographical boundaries, and that the preservation of whole counties preserved the municipalities within those counties and assisted in the creation of compact districts. *Id.* Municipalities in turn have their own local governments and often shared interests and a sense of community that counsel for unity in representation.

This is not to say that the Constitution prioritizes political over geographical boundaries, or that the House's methodology is the only appropriate one. The Constitution does not, after all, directly require that counties and municipalities be kept whole, but rather that their boundaries, as well as geographical boundaries, be utilized where feasible. Thus, political and geographical boundaries

constitute a preexisting network of potential boundaries—the raw materials from which new districts may be fabricated. Thus, a legislative decision to follow a highway that bisects a city is no less permissible than a legislative choice to follow a city boundary that crosses a highway. *Apportionment I*, 83 So. 3d at 705 (Canady, C.J., concurring in part and dissenting in part) ("Any suggestion that the use of geographical boundaries is somehow less acceptable than the use of political boundaries is totally at odds with the text . . . ."). In District 4, for example, the House could have constitutionally followed I-10 through the City of Crestview, which lies on both sides of the interstate, but instead deviated from the interstate to follow the municipal boundaries and keep Crestview wholly in the district:

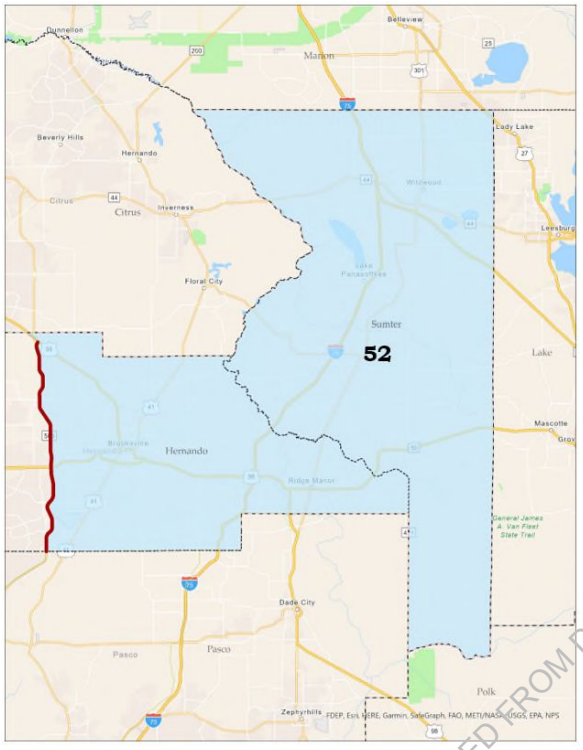


Indeed, as it does along District 4's northern boundary, the House Map extensively utilizes geographical boundaries, including countless miles of rivers, railways, interstates, and state roads. District 41—a district in which Black voters are able to elect representatives of their choice—is constructed almost entirely of highways and state roads, including I-4 and the Florida Turnpike:

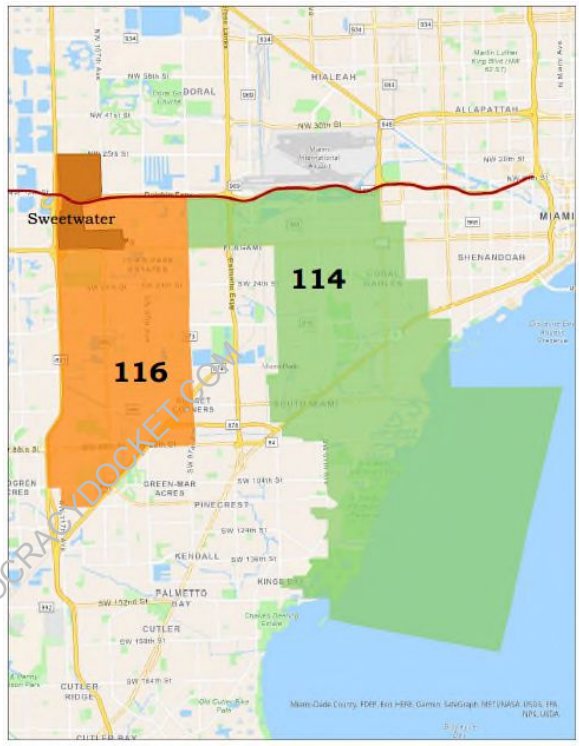


Likewise, District 52 consists of Sumter County and eastern Hernando County to the Suncoast Parkway, which separates Districts 52 and 53, while the Dolphin Expressway in Miami-Dade

County forms the northern boundary of District 114, which was designed to keep the City of Coral Gables whole, and District 116, except where District 116 extends north to keep Sweetwater whole:

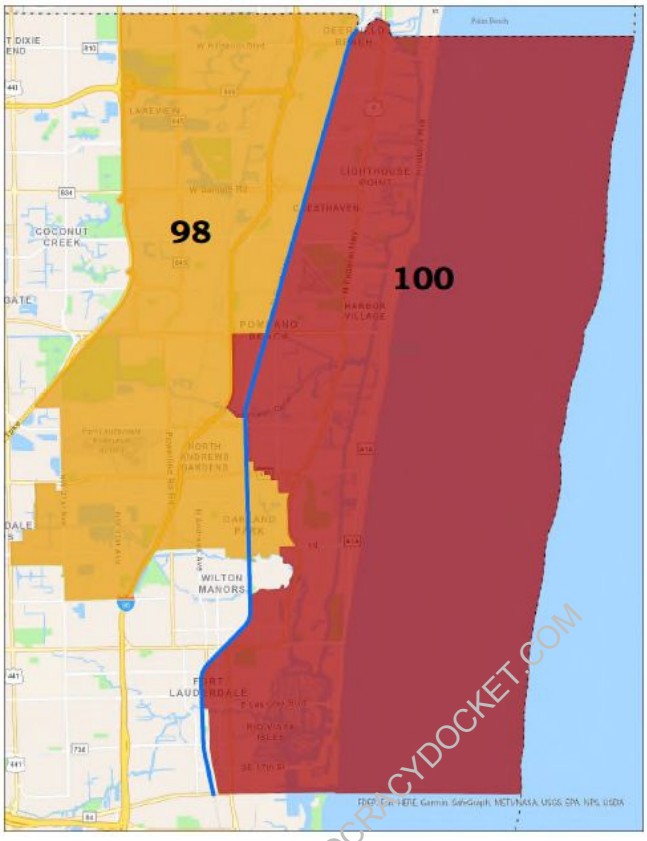


District 52



Districts 114 and 116

The House Map also utilizes railways where appropriate. Districts 98 and 100 follow the Florida East Coast Railway along most of their shared boundary, from Deerfield Beach to Pompano Beach:



The House Map's full compliance with the boundaries standard is confirmed by the Legislature's "boundary analysis," which calculates the percentage of each district's boundary that consists of political and geographical boundaries. This analysis utilizes the Census Bureau's geographic information and thus the Census Bureau's designation of primary and secondary roads, railways, and significant water bodies of at least ten acres. Pet. App. 384, 388 nn.8–9. By this measure, the average district in the House Map follows political and geographical boundaries along 82.7 percent of its perimeter, including county boundaries along 37.1 of

its perimeter, municipal boundaries along 21.3 percent of its perimeter, primary and secondary roads along 21.8 percent of its perimeter, and significant water bodies along 28.8 percent of its perimeter. Pet. App. 471.[15] These figures are especially notable because the comparatively small size of House districts can limit the number of political and geographical boundaries that are within a district's reach, and which may serve as potential boundaries for the district.

The boundary analysis reveals, for example, that District 117—which is the House Map's least compact district, and which, with a BVAP of 28.9 percent, was drawn to avoid diminishment—nevertheless follows political and geographical boundaries along 85 percent of its boundary, an increase from 57 percent in the Benchmark Map. Pet. App. 449, 473, 501. The district's eastern and western boundaries consist primarily of the Florida Turnpike and U.S. 1, while Florida City is kept whole at the southern end of the district.

[15] The aggregate of these numbers exceeds 100 percent because the same boundary may be classified in more than one way. For example, the Suwannee River is not only a river, but also a county boundary.

The House consistently sought to utilize political and geographical boundaries where feasible in the construction of new districts and faithfully complied with this constitutional standard.

B. The House Map Satisfies the Compactness Standard.

The Constitution also provides that "districts shall be compact." Art. III, § 21(b), Fla. Const. Compactness is a "geographical concept" and is assessed, first and foremost, "by looking at the shape of a district." *Apportionment I*, 83 So. 3d at 634 (internal marks omitted). A compact district "should not have an unusual shape, a bizarre design, or an unnecessary appendage." *Id.* The Constitution does not require districts to be as compact as possible—only that they be compact. *Id.* at 635.

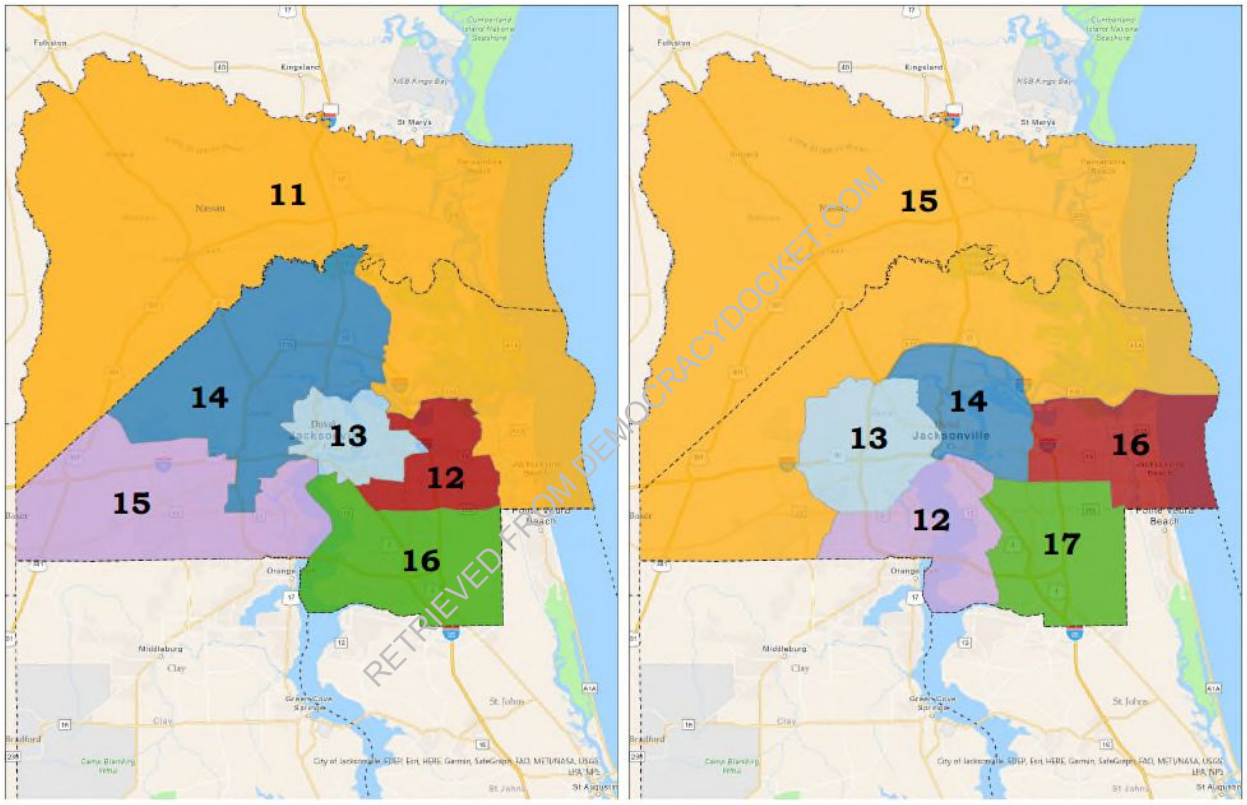
The compactness inquiry can be a complicated one, calling for sensitivity to the many forces that can impact a district's overall shape. For example, the Constitution expressly permits deviations from compactness to the extent necessary to comply with tier-one standards. Art. III, § 21(c), Fla. Const.; *Apportionment I*, 83 So. 3d at 626, 636. Drawing districts that do not diminish the ability of minority voters to elect representatives of their choice sometimes

requires deviations from compactness. *Apportionment I*, 83 So. 3d at at 635, 640.

Similarly, the Constitution recognizes that coequal tier-two standards may exert pressure on each other, Art. III, § 21(c), Fla. Const., and therefore leaves to the Legislature the task of "balancing the tier-two standards together in order to strike a constitutional result," *Apportionment I*, 83 So. 3d at 639. A decision to keep cities and counties whole in a district, or in adjacent districts—or to follow rivers or municipal boundaries, some of which are notoriously irregular—can affect a district's compactness, as can Florida's peninsular geography and the interplay between residential patterns and the equal-population mandate. *Id.* at 635. Compactness can even be affected by oddities in the geographical units created by the Census Bureau, which serve as the building blocks for state legislative districts.[16] Bay and Citrus Counties, for example, appear to contain "fingers" over the waters of the Gulf of Mexico, but only because the Census Bureau's geography does.

[16] The Census Bureau's 2020 geography divides Florida into 390,066 blocks, 13,388 block groups (which are aggregations of blocks), and 5,160 tracts (which are aggregations of block groups). Districts are constructed from combinations of census geography.

A visual examination of the House Map reveals a strong adherence to compactness and an appropriate reconciliation of competing standards. Consider this arrangement of districts in Duval and Nassau Counties, and the improvement in compactness over the Benchmark Map:

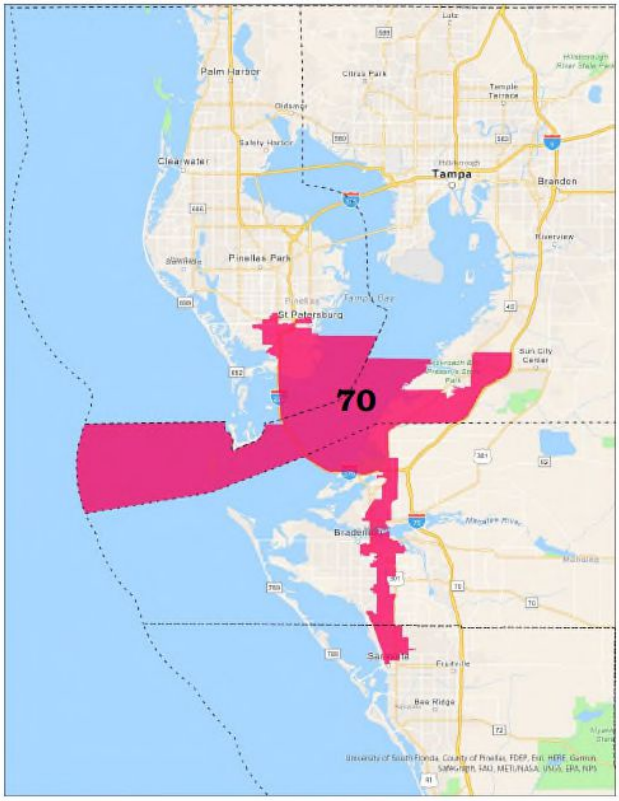


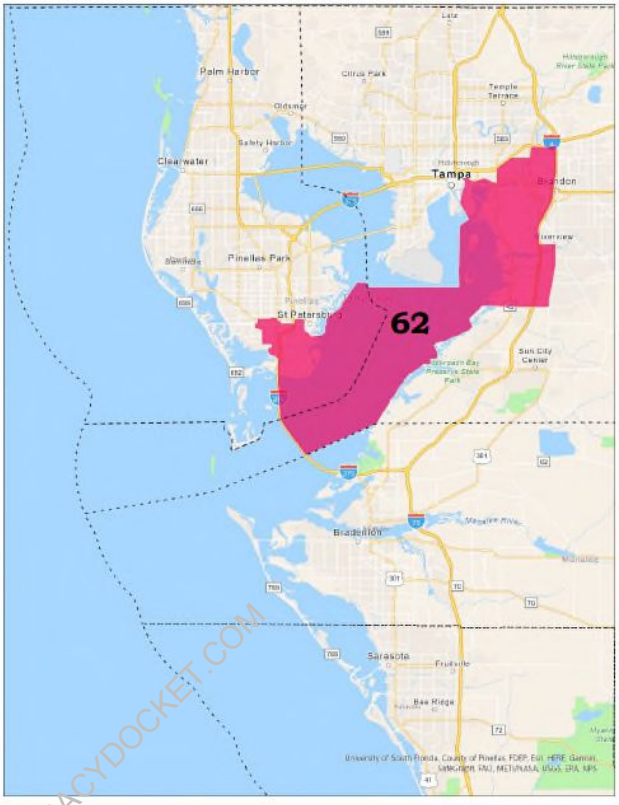
2012 Districts **2022 Districts**

These six districts are all compact, while Districts 13 and 14 avoid diminishment in minority voting ability. The six districts are wholly located within the perimeter formed by the two counties and make extensive use of geographical boundaries: District 14 follows the

I-295 beltway along much of its northern and eastern boundary, while the St. Johns River and Beach Boulevard—a major, six-lane state road and federal highway in southern Duval County—form the northern boundaries of Districts 16 and 17 respectively. These districts simultaneously satisfy all tier-one and tier-two standards.

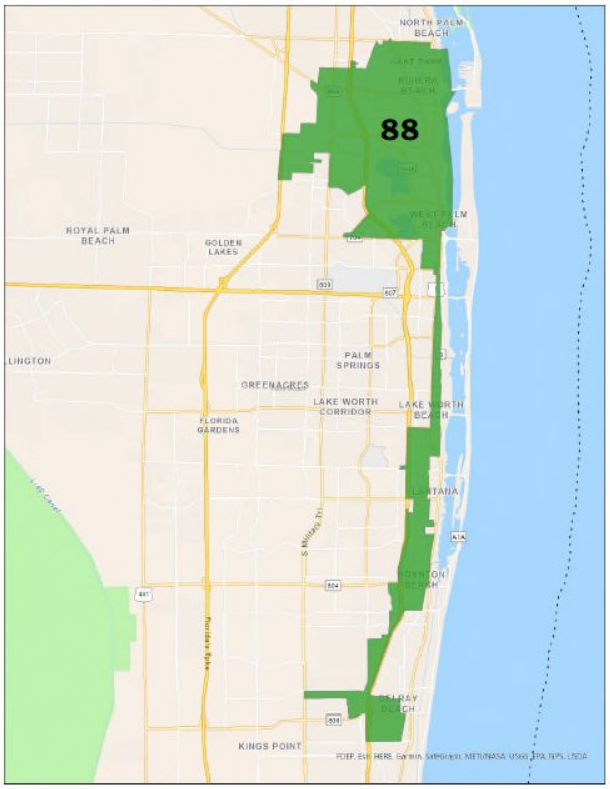
The House Map properly balances compactness with tier-one protections for minority voters. Districts 62, 88, and 117 are among the House Map's less compact districts, but the House performed a functional analysis of minority voting behavior and determined that these district configurations were necessary to avoid diminishment. At the same time, the House markedly improved the compactness of Districts 62 and 88 over their predecessors in the Benchmark Map. District 62's predecessor—Benchmark District 70—not only crossed Tampa Bay, but also extended south into even Manatee and Sarasota Counties. As redrawn, the district protects minority voting ability from diminishment without entering Manatee and Sarasota Counties, resulting in a far more visually compact configuration:



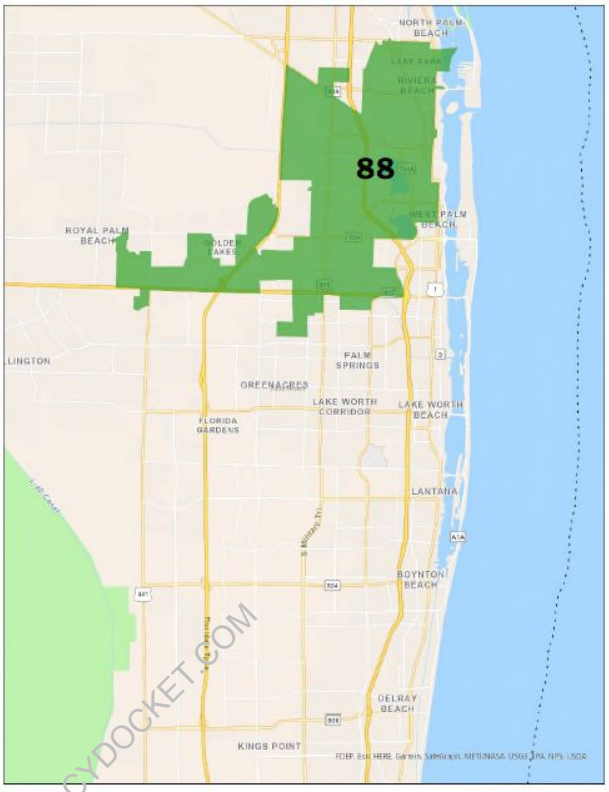


Benchmark District 70 **New District 62**

Likewise, Benchmark District 88 featured a long and narrow tail that extended 20 miles to the south through Palm Beach County. The redrawn district eliminates the tail and instead avoids diminishment by adding population from the west, enhancing the visual compactness of the district and indeed the entire region:



Benchmark District 88



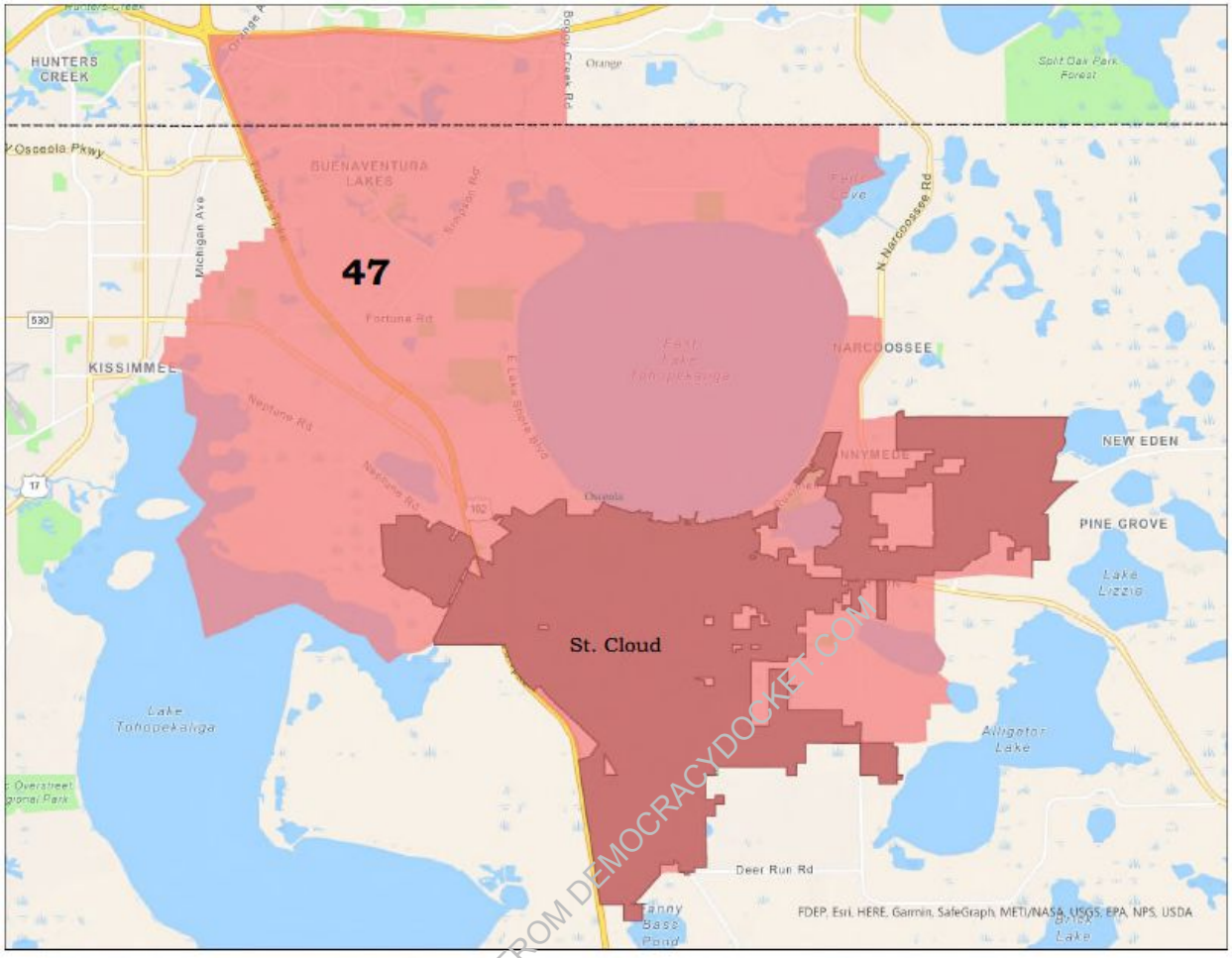
New District 88

The House Map therefore substantially improves the compactness of two districts that, on minority-protection grounds, this Court unanimously upheld against compactness challenges ten years ago. *Apportionment I*, 83 So. 3d at 647–50. These examples demonstrate the House's commitment to minimizing deviations from visual compactness to the extent possible, without compromising tier-one priorities.

Many of the House Map's protected minority districts are not only compact, but *highly* compact. Districts 13 and 14 in Duval

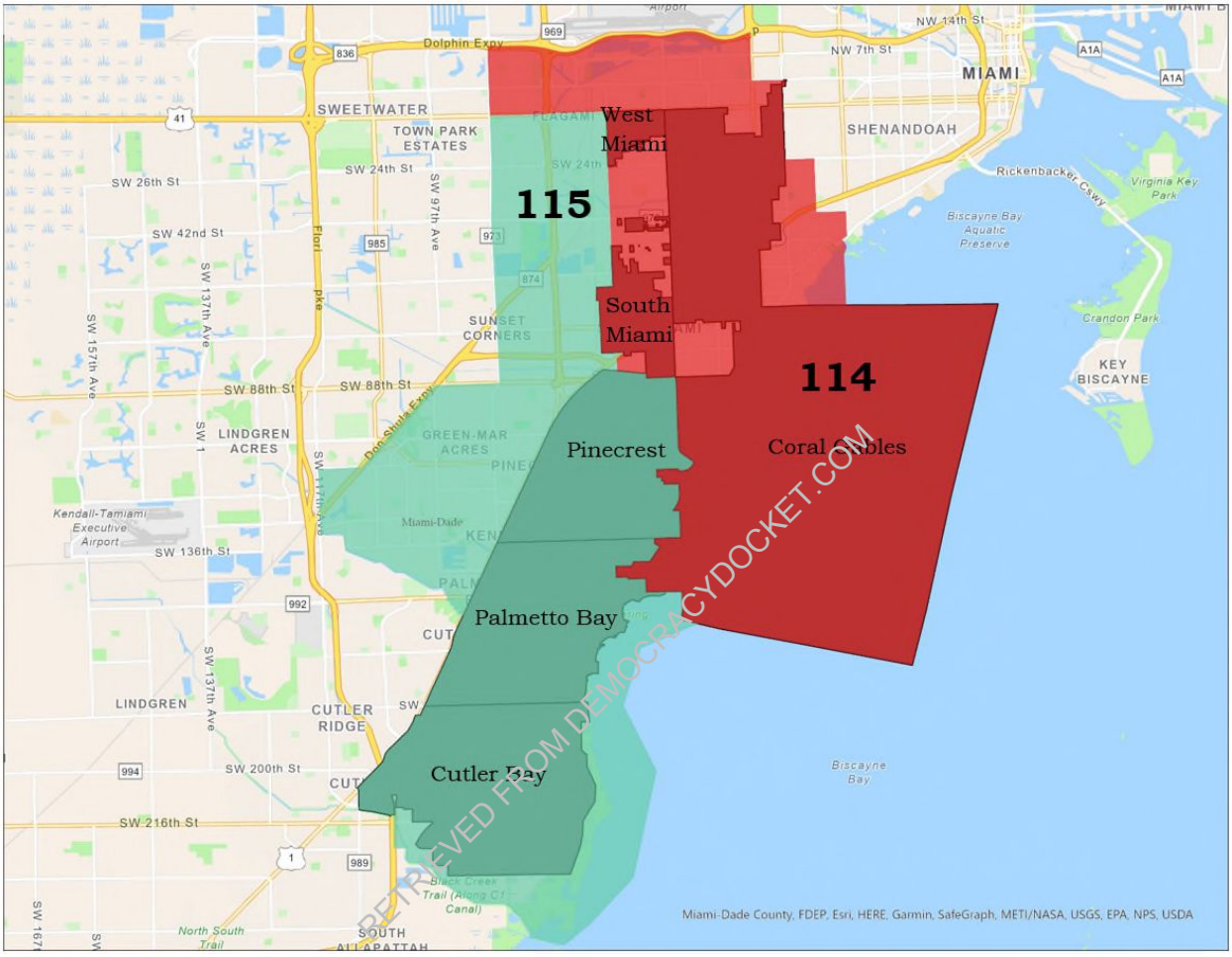
County; District 21 in Alachua and Marion Counties; Districts 40 and 41 in Orange County; District 63 in Hillsborough County; Districts 97, 98, 99, 104, and 105 in Broward County; and Districts 107, 108, and 109 in Miami-Dade County all maintain the voting ability of Black voters in minority districts that have historically performed. These districts are all highly compact, without fingers or bizarre shapes, implementing both tier-one and tier-two standards.

The House also struck a constitutional balance between compactness and faithful adherence to political boundaries. District 47, for example, maintains a compact shape while it accommodates St. Cloud's city boundaries. *Apportionment I*, 83 So. 3d at 635–36 (explaining that a "desire to keep municipalities wholly intact" may detract from compactness but "serve to justify the shape of the district"). The city remains intact, wholly within the district. District 47 also affords Hispanic voters the ability to elect representatives of their choice. In doing so, it increases from two to three the number of performing Hispanic districts in Central Florida and compensates for the loss of a performing district in South Florida, *see supra* note 8:

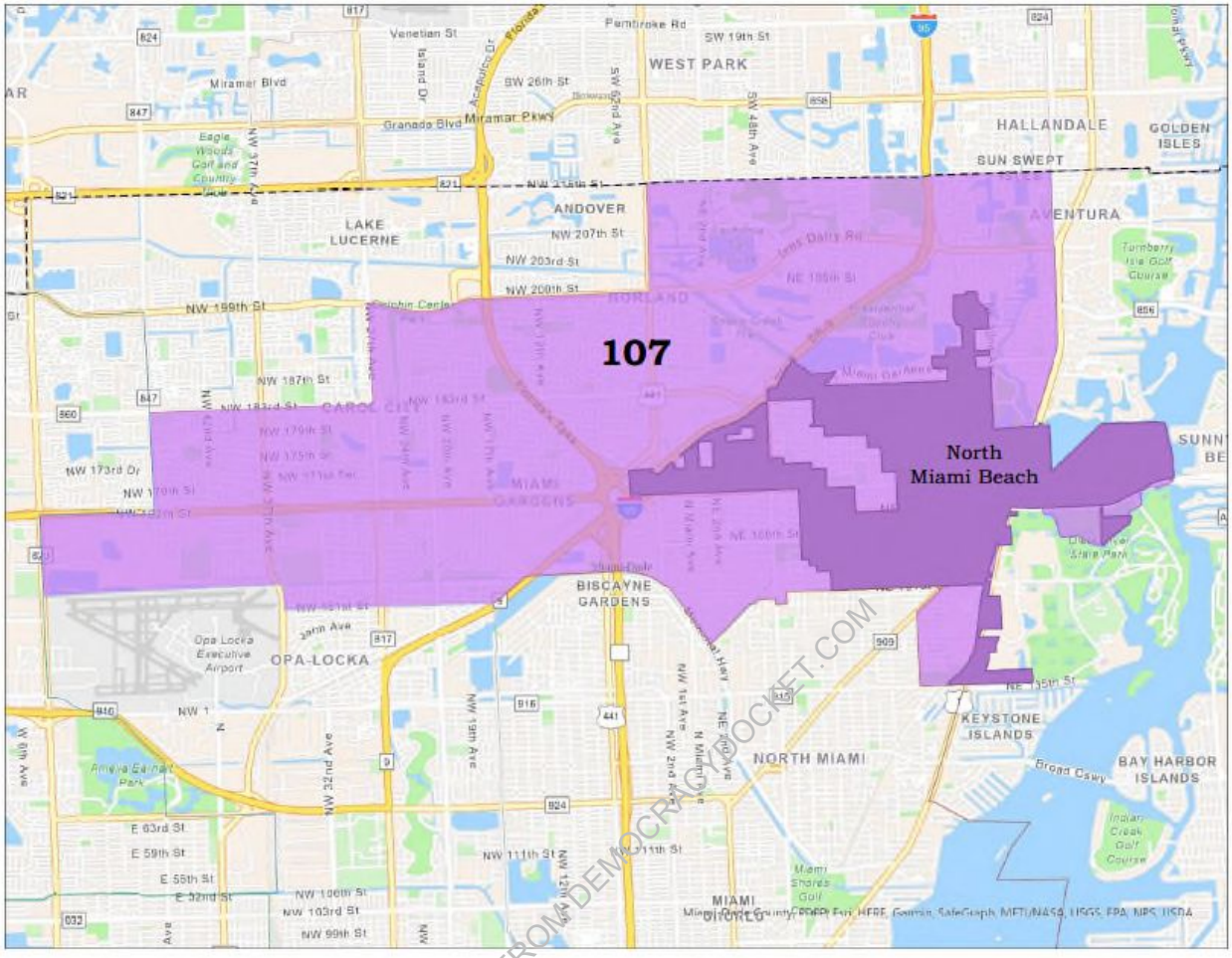


Districts 114 and 115 are compact districts shaped largely by the municipalities they encompass. District 114 is constructed around Coral Gables, which runs vertically through the district, and includes West Miami and South Miami to the west of Coral Gables. District 115 keeps Pinecrest, Palmetto Bay, and Cutler Bay whole; its shape is also impacted by neighboring District 117, a protected district that has historically performed for Black voters.

Districts 114 and 115 themselves were drawn to maintain the ability of Hispanic voters to elect the representatives of their choice:



District 107—a performing minority district that is bordered by five performing minority districts—furnishes another example of a constitutional reconciliation of tier-two considerations. While a small part of the district's eastern boundary appears to be slightly irregular, the Legislature's desire to keep the City of North Miami Beach whole within the district fully explains the district's contours:



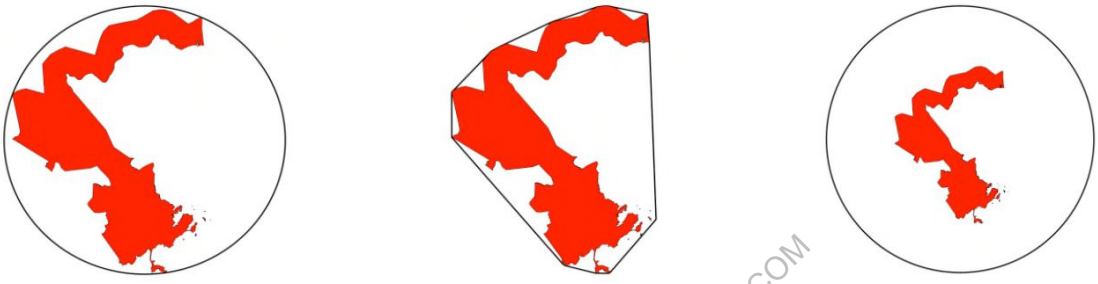
Small adjustments such as these along a district's perimeter to accommodate a municipality do not violate compactness, which concerns the district's overall shape—not the specific path of each distinct boundary segment. *Apportionment I*, 83 So. 3d at 638 ("In a compactness analysis, we are reviewing the general shape of a district; if a district has a small area where minor adjustments are made to follow either a municipal boundary or a river, this would

not violate compactness."). As they did last decade, the districts in the House Map easily satisfy a visual assessment of compactness.

In addition to a visual examination, quantitative measures sometimes assist courts in their evaluation of compactness. *Id.* at 635. Three common measures of compactness are the Reock, Convex Hull, and Polsby-Popper measures. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 283 nn.6–8 (Fla. 2015). Each generates a score between 0 and 1 that represents the ratio between the district's area and the area of another geometric shape. *Id.* The closer the score approaches to 1, the more compact the district is presumed to be.

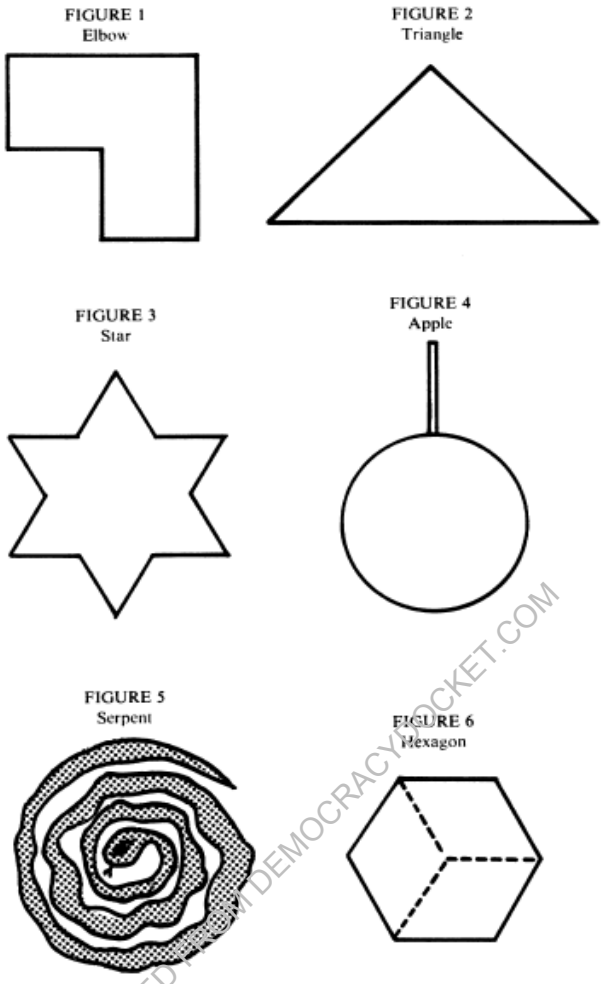
The Reock score compares the district's area to the area of the smallest circle that can circumscribe the district. *Id.* at 283 n.6. A Reock score of 0.45 means, for example, that the district's area covers 45 percent of the circle's area. In theory, the more nearly a district's shape resembles a perfect circle, the higher its Reock score will be. Similarly, the Convex Hull score indicates the ratio of the district's area to the area of the smallest convex polygon that can enclose the district (imagine a taut rubber band encompassing the district). *Id.* at 283 n.7. And the Polsby-Popper score compares

the district's area to the area of a circle with a perimeter of the same length as the district's. *Id.* at 283 n.8. The following diagram illustrates these compactness measures as applied to a hypothetical district:

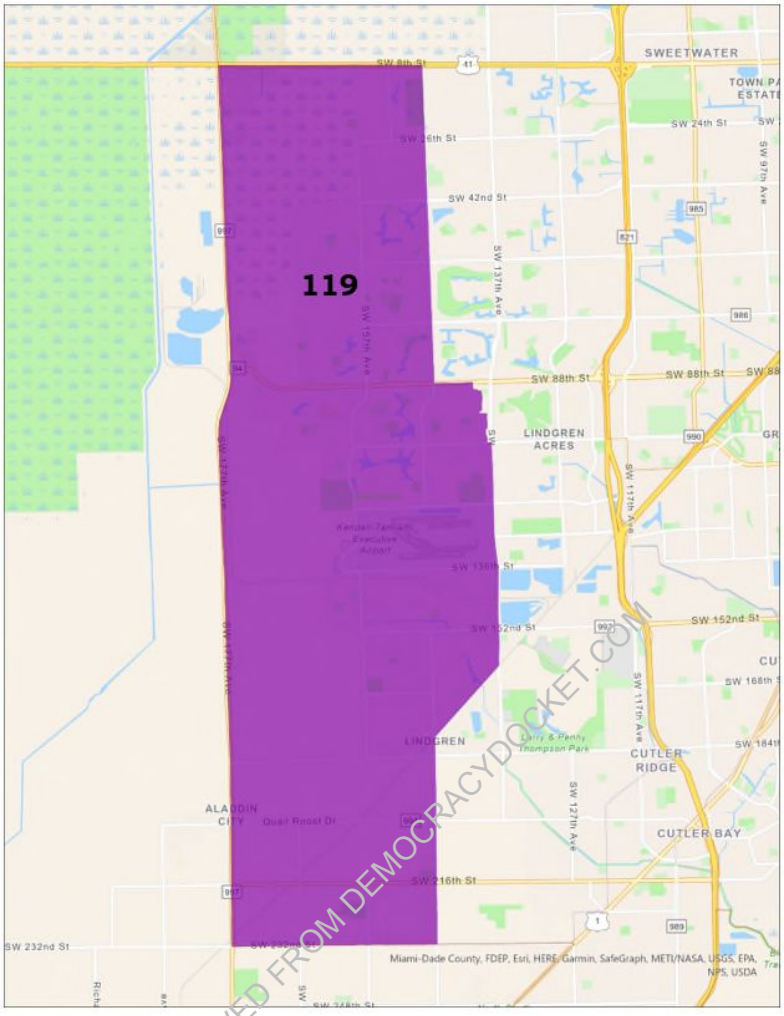


Reock **Convex Hull** **Polsby-Popper**

Though favorable to the House Map, these mathematical measures are only guides, and are not dispositive. *Apportionment I*, 83 So. 3d at 635 (explaining that the Constitution does not require districts to "achieve the highest compactness scores"). Each is computed differently; their results often diverge from each other, and sometimes from common sense. *See* H.P. Young, *Measuring the Compactness of Legislative Districts*, Legislative Studies Quarterly, Vol. 13, No. 1 (Feb. 1988). To illustrate, under the Reock test, the *least* compact of the six shapes shown below is the simple triangle, while a square (not pictured) is less compact than the coiled snake. *Id.* at 106.



District 119 is a real-life example of divergence among compactness scores. It has the seventh *lowest* Reock score (0.28) but the eleventh *highest* Convex Hull score (0.92), while its Polsby-Popper score (0.47) is above the mean and median. Pet. App. 449. A visual inspection reveals that the rectangular district is highly regular in its overall shape and not even slightly bizarre, unusual, or tortured:



Despite the imperfections inherent in any mathematical compactness measure, the scores support what is obvious from a visual inspection—that the House Map satisfies the constitutional standard of compactness. The mean and median compactness scores in the House Map are all greater than the mean and median compactness scores in the Benchmark Map that this Court upheld:

	Mean Score		Median Score	
	2012	**2022**	**2012**	**2022**
Reock	0.43	0.45	0.44	0.46
Convex Hull	0.80	0.82	0.81	0.83
Polsby-Popper	0.43	0.45	0.44	0.45

Pet. App. 448, 475.

Compactness scores also confirm visual improvements in individual districts. District 88—a majority-minority district in Palm Beach County—had the lowest Reock (0.08), Convex Hull (0.34), and Polsby-Popper (0.08) scores in the Benchmark Map. Pet. App. 476. By removing the district's 20-mile extension and instead drawing the district wholly in the northern part of the county, the House significantly improved the district's Reock (0.30), Convex Hull (0.57), and Polsby-Popper (0.12) scores, Pet. App. 449, while performing a functional analysis to avoid diminishment in the voting ability of minority voters. District 88's redesign also allowed the House to draw the entire region in a more compact fashion, without the long coastal district that, in the Benchmark Map, was set to the east of District 88.

Last decade, this Court identified three House districts that it concluded had "significantly low compactness scores": Districts

88, 117, and 120. *Apportionment I*, 83 So. 3d at 646. Each of these districts had a Reock score of 0.20 or less and a Convex Hull score of 0.53 or less. Pet. App. 476.[17] Still, the Court upheld all three districts. It noted that Districts 88 and 117 were properly drawn to protect minority voting rights, *Apportionment I*, 83 So. 3d at 648–50, 653, while District 120's shape was heavily impacted by the "unusual geography of the Florida Keys," *id.* at 646. This decade, only one district falls within the same range of compactness scores: District 117, which recreates Benchmark District 117 to avoid diminishment in the voting ability of minority voters, and which should be upheld for the same reasons once again. Pet. App. 449.

C. The House Map Satisfies the Equal-Population Standard.

The Constitution's tier-two standards also require that districts "be as nearly equal in population as is practicable." Art. III, § 21(b), Fla. Const.

[17] This Court did not reference Polsby-Popper scores in *Apportionment I*.

This requirement is not new. The United States Supreme Court has long interpreted equal protection to require population equality among state legislative districts. *See Reynolds v. Sims*, 377 U.S. 533 (1964). That standard does not require "mathematical perfection." *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 258 (2016). Rather, it requires States to make an "honest and good faith effort" to equalize district populations, *id.* (quoting *Reynolds*, 377 U.S. at 577), while permitting deviations that further "legitimate considerations incident to the effectuation of a rational state policy," *id.* (quoting *Reynolds*, 377 U.S. at 579). When the combined deviation between the most and least populous districts is less than 10 percent, a challenge "will succeed only rarely." *Id.* at 259.

In *Apportionment I*, this Court imbued Florida's tier-two standard with the same meaning, with one caveat. Like the federal standard, Florida's standard permits deviations from "strict and unbending adherence to the equal population requirement." 83 So. 3d at 630. Under Florida's standard, however, deviations must be justified by efforts to comply with "other constitutional standards," rather than by state policies not enshrined in the Constitution. *Id.*

The House Map complies with this standard. According to the 2020 census, the State's population is 21,538,187. Pet. App. 448. The ideal district population is therefore 179,485. *Id.* The most populous district is District 4, with a population of 183,737—2.37 percent above the ideal. Pet. App. 448–49. The least populous district is District 6, with a population of 175,216—2.38 percent below the ideal. *Id.*[18] The House Map's overall range is therefore 4.75 percent—well below the 10-percent threshold that usually marks the outer limits of constitutional compliance. Pet. App. 448.

The deviations in the House Map are justified by the House's efforts to comply with other constitutional standards. Districts 4 and 6 illustrate the point well. District 6 consists of a single, whole county (Bay County). District 4 is contained wholly within Okaloosa County and follows the county boundary along 69 percent of its perimeter. Pet. App. 471. It then follows a prominent geographical boundary—I-10—except where necessary to keep Crestview whole.

[18] Population deviations are calculated by subtracting the ideal district population from the total population of the district and dividing the difference by the ideal district population, as follows:

$$(175{,}216 - 179{,}485) \div 179{,}485 = -.0238$$

Adherence to existing boundaries—a constitutional standard—dictated the shapes and therefore the populations of both districts.

The House Map's more minor deviations were also necessary to achieve objectives rooted in Florida's constitutional standards. As explained above, to better respect county boundaries, the House divided the entire State into 14 regions, or "sandboxes," each consisting of one or more whole counties capable of forming one or more whole districts. Each region's ideal district population was a little above or a little below the ideal population of districts statewide. For example, when the population of Seminole, Orange, and Osceola Counties was divided among 13 whole districts, the ideal population of those 13 districts was 1.88 percent less than the statewide ideal district population. *See supra* p. 13. These 13 districts are slightly under-populated (though well within constitutional bounds) for the simple reason that the House sought to preserve county boundaries where feasible. The same division of the State into county-based regions dictated the minor population deviations of the other districts.

IV. THIS COURT'S JUDGMENT IS BINDING ON ALL CITIZENS—AND PRECLUDES FURTHER LITIGATION.

In entering a declaratory judgment determining the House Map's validity, this Court should make explicit what that means. It should recede from *Apportionment III*, give effect to the plain language of the Florida Constitution, and declare that the Court's declaratory judgment is binding and precludes future challenges.

The Constitution requires this Court to enter a "declaratory judgment determining the validity of the apportionment," and declares that judgment to be "binding upon all the citizens of the state." Art. III, § 16(c), (d), Fla. Const. In *Apportionment III*, this Court held that its judgment is binding as to the apportionment's "facial validity," but *not binding* as to "fact-based challenges." 118 So. 3d at 209.

The Constitution, however, makes no such distinction. As the dissent correctly explained, "there is nothing in the text of the Florida Constitution suggesting that as-applied challenges under Florida law somehow escape the rule in section 16(d)." *Id.* at 216. Instead, article III, section 16(d) "unambiguously precludes" further challenges to redistricting plans that this Court declares to be valid.

Id. at 214. "If the citizens of the state are bound by a judgment of validity, they are necessarily precluded from challenging the validity of the redistricting plan in subsequent litigation." *Id.* at 215.

Indeed, in *Apportionment I*, this Court recognized that article III, section 16 was created to secure finality and avoid litigation. From 1962 to 1968, redistricting litigation had "proliferated," and in some cases "literally spanned a period of several years, infusing the apportionment and the electoral process with uncertainty." 83 So. 3d at 601 (collecting cases). This period of instability featured alternating court battles and special sessions, four redistricting plans in five years, court-imposed districts, and even court-ordered elections.[19] This Court's review proceeding was proposed as the cure—as an "attempt to avoid further apportionment litigation." *Id.*

This Court also recognized that, to await challenges to "work their way up to this Court would itself be an endless task," *id.* at 617, and "create uncertainty" for voters and candidates, *id.* at 609. The Constitution therefore gave this Court "jurisdiction to resolve

[19] *See generally* Pet. for Writ of Prohibition or for Constitutional Writ to the Circuit Court of the Second Judicial Circuit at 13–15, *Apportionment III* (No. SC13-252).

all issues" related to state legislative districts, *id.* at 600 (quoting *In re Apportionment Law*, 414 So. 2d 1040, 1045 (Fla. 1982)), and declared the Court's judgment "binding," Art. III, § 16(d), Fla. Const.

The *Apportionment III* dissent correctly concluded that this "unique constitutional proceeding" was established to "conclusively determine and settle once for all the validity of a redistricting plan under state law," 118 So. 3d at 215–16, and that, to that end, article III, section 16(d) imposes an "unconditional and unequivocal rule of preclusion" that precludes future challenges, *id.* at 218. In contrast, the holding of *Apportionment III* accords no practical effect to the plain and unambiguous language of article III, section 16(d). This Court should make clear that its declaratory judgment is not a preliminary indication of validity, but rather a *binding judgment* that averts "unending litigation" over state legislative districts, *id.* at 218 (Canady, J., dissenting), and guarantees finality to all citizens of the State—just as the Constitution says, and was intended to do.

CONCLUSION

The House Map is valid. This Court should enter a binding declaratory judgment upholding the unchallenged House Map.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is filed in Bookman Old Style 14-point font and contains 11,143 words, as determined by the word-processing system used to prepare this document, and therefore complies with the applicable font and word-count limit requirements in Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

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CERTIFICATE OF SERVICE

I certify that, on February 19, 2022, the foregoing document was furnished by email on all individuals identified on the service list that follows.

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EXHIBIT 2

Case No. SC22-131

IN THE SUPREME COURT OF FLORIDA

IN RE: JOINT RESOLUTION OF LEGISLATIVE APPORTIONMENT

BRIEF OF THE FLORIDA SENATE SUPPORTING THE VALIDITY OF THE APPORTIONMENT

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INTRODUCTION

On February 3, 2022, the Florida Senate unanimously voted to adopt CS/SJR 100, a joint resolution apportioning the state into 40 senatorial districts and 120 representative districts in accordance with the Florida Constitution. The Senate files this brief supporting the validity of the senatorial districts contained in Section 3 of CS/SJR 100 (the "Senate Plan").

The Senate Plan is valid. Both the Senate Plan as a whole, and every district within the Senate Plan, were drawn to comply with the Florida Constitution's prohibition on intentionally favoring or disfavoring a political party or an incumbent. The Senate Plan and its districts do not diminish or dilute the voting rights of racial or language minorities. The Senate districts consist of contiguous territory and appropriately balance the co-equal constitutional standards of compactness, population equality, and use of existing political and geographical boundaries.

No adversary interests have filed briefs or comments in opposition to the validity of the apportionment. This Court should issue a declaratory judgment, binding on all the citizens of the state, determining the apportionment to be valid.

STATEMENT OF THE CASE AND FACTS

I. THE CASE

On February 9, 2022, Attorney General Moody petitioned this Court for a declaratory judgment determining the validity of the legislative apportionment reflected in CS/SJR 100. Art. III, § 16(c), Fla. Const. The Attorney General's petition included an appendix containing additional information as specified in the Court's January 31 scheduling order.

Under the scheduling order, parties opposing the validity of the apportionment were required to file their briefs or comments by 11:59 p.m. on February 14, 2022. No briefs or comments opposing the validity of the apportionment were filed.

The Senate submits this brief supporting the validity of the senatorial districts.[1]

II. THE FACTS

A. The 2020 Census Data.

The Florida Constitution requires the Legislature to reapportion the state's senatorial and representative districts in the

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[1] The Florida House of Representatives will file a separate brief supporting the validity of the representative districts.

second year following each decennial census. Art. III, § 16(a), Fla. Const. For various reasons, including the COVID-19 pandemic, the Census Bureau's official release of the full redistricting data toolkit to the states was delayed from April 2021 until September 16, 2021.[2] (SA.38).[3]

The census data reflected Florida's substantial growth over the past decade. Florida's statewide population grew by more than 14% over the last decade, from 18,801,310 to 21,538,187. (SA.46). The ideal population for each of Florida's 40 senatorial districts therefore grew at the same rate, from 470,033 to 538,455. *Id.*

The population growth was not evenly distributed, however, as the population of some Senate districts grew substantially, while others decreased in population. For example, the census data showed that Senate District 15 was overpopulated by more than 32% (175,492 people) relative to the ideal population, while Senate District 3 was underpopulated by nearly 10% (52,124 people)

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[2] Florida received redistricting data as "legacy format" summary files (tabular data) on August 12, 2021.
[3] Citations to the Senate Appendix will appear as "(SA.##)." Citations to the Appendix will appear as "(A.##)."

relative to the ideal population. (SA.1136). Notably, nearly every district south of Tampa Bay was underpopulated and would need to gain population.[4] *Id.*

To comply with the one-person, one-vote principle, the existing Senate district lines required substantial revisions.

B. Senators appointed to Senate Committee on Reapportionment, Select Subcommittee on Legislative Reapportionment.

Following receipt of the census data, Senate President Wilton Simpson appointed twelve senators to the Committee on Reapportionment, chaired by Senator Rodrigues. (SA.1019-20). President Simpson also established a Select Subcommittee on Legislative Reapportionment, chaired by Senator Burgess, to work in an advisory capacity to the standing committee. *Id.*

C. Committee on Reapportionment holds meetings to receive information, provide directives to professional staff on the drawing of Senate maps.

The Committee on Reapportionment held three initial meetings during the Legislature's interim committee weeks in late summer

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[4] Notable exceptions were benchmark Senate Districts 27 and 28 in Southwest Florida, each of which was overpopulated relative to the ideal population. *Id.*

and autumn of 2021. During the first two meetings, on September 20 and October 11, the Committee received informational briefings from professional staff and counsel on the census data, the legal requirements governing the redistricting process, and an overview of the information available on the Legislature's joint redistricting website, www.floridaredistricting.gov. (SA.5-122).

The Committee also received information about the Legislature's 2022 web-based redistricting application. (SA.53). The presentation included an explanation of the application's data sources and reporting functions allowing users to analyze a plan or district's compliance with legal standards. (SA.105-22).

The Committee was specifically advised of the application's ability to run a detailed boundary analysis report—a reporting function not available in the Legislature's 2012 redistricting applications. (SA.105-07). The boundary analysis report calculates the coincidence of district boundaries with readily identifiable and easily ascertainable political or geographic boundaries. *Id.*

At its third meeting, on October 18, 2021, the Committee unanimously adopted a series of directives establishing priorities

and standards that would govern the actual drawing of Senate district maps by professional staff. (SA.126, 1024-26).

D. Select Subcommittee on Legislative Reapportionment holds meetings to workshop staff-drawn Senate maps, provide recommendations to Committee on Reapportionment.

The Select Subcommittee on Legislative Reapportionment held three meetings to workshop staff-drawn State Senate maps. The initial four draft maps were released on November 10, for discussion at the Subcommittee meeting on November 17. (SA.1032-33). A second set of four draft maps was released on November 24 for discussion at the Subcommittee meeting on November 29. (SA.1035). At each Subcommittee meeting, Senators were presented information regarding different iterations and approaches for achieving compliance with legal and constitutional standards. (SA.132-170, 218-37). At the conclusion of each Subcommittee meeting, staff were directed to continue to look for improvements and consistency in the application of the various trade-offs presented in the maps. *Id.*

A final set of four draft Senate maps was released on January 5, for discussion at the Subcommittee's meeting on January 10,

2022. (SA.276-331). The maps contained additional iterative improvements to Tier-Two metrics and further ensured consistent application of the Committee Directives. *Id.* Professional staff provided a report demonstrating the iterative improvements in Tier-Two metrics over the course of the three workshops. (SA.298-99).

Following public comment and debate, the Select Subcommittee on Legislative Reapportionment recommended that the Committee consider either plan S8046 or plan S8050 as the substance of an amendment to SJR 100. (SA.1043).

E. Committee on Reapportionment adopts Committee Substitute for SJR 100.

The Senate Committee on Reapportionment held its final meeting on January 13, 2022. The Committee considered SJR 100, a joint resolution providing for the apportionment of the House of Representatives and the Senate. (SA.464-582). Chair Rodrigues offered an amendment incorporating the geographical boundaries contained in plan S8046, which contained slightly higher compactness and boundary-usage scores than plan S8050. *Id.*

The Committee rejected a proposed amendment that would have adopted an earlier, less compact staff-drawn configuration of

the Senate districts located in Duval and Nassau Counties. (SA.583-685, 1007). The Committee adopted an amendment by Chair Rodrigues that would keep five additional cities[5] wholly within a district without reducing the plan's compactness or boundary usage metrics. (SA.686-791, 1007)

After the Committee dispensed with these two amendments, a public random drawing was held to assign an "odd" or "even" status to each Senate district. (SA.905-06). The Committee then adopted a substitute amendment (S8058) assigning new district numbers in accordance with the random drawing. (SA.907-84, 1008).

Following public comment, the Committee favorably reported CS/SJR 100 by a vote of 10-2. (SA.1008).

F. Florida Legislature adopts CS/SJR 100.

The Legislature acted promptly to complete the apportionment process. The full Senate passed CS/SJR 100 on January 20, 2022. Fla. S. Jour. 215 (Reg. Sess. 2022). The House adopted an

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[5] The five cities were Laurel Hill, Holly Hill, Titusville, Winter Haven, and Pembroke Pines, each of which contained a population split involving less than 1000 people in draft S8046. *Compare* SA.311 *with* A.434.

amendment to add the representative districts to the joint resolution, passed CS/SJR 100 (as amended), and immediately certified the resolution to the Senate. Fla. H.R. Jour. 480-530, 543-544 (Reg. Sess. 2022).

The Senate took up CS/SJR 100 for final passage on February 3, 2022 and, without objection, concurred in the House amendment adding the representative districts. Fla. S. Jour. 325 (Reg. Sess. 2022). The Senate then passed CS/SJR 100 by a vote of 37-0. *Id.* The joint resolution was ordered engrossed, enrolled, and was filed with the Secretary of State.

SUMMARY OF ARGUMENT

The Senate Plan is valid. This Court should apply the deferential standard of review historically applied in its review of legislative apportionment, but the Senate Plan would satisfy any standard of review. The Senate's procedures and standards governing the drawing of district lines ensured compliance with all constitutional requirements.

The Senate Plan complies with every constitutional standard governing apportionment, including the standards established in Article III, Section 21. The Senate Plan was not drawn with the

intent to favor or disfavor a political party or incumbent. It does not deny or abridge the equal opportunity of racial or language minorities to participate in the political process, and does not diminish their ability to elect representatives of their choice. The Senate Plan's districts consist of contiguous territory and satisfy the Florida Constitution's population-equality, compactness, and boundary usage standards. The individual Senate districts likewise comply with each of these requirements.

The Senate's methodology for assigning numbers to senatorial districts complies with the Florida Constitution, but this Court should nevertheless recede from precedent holding that Article III, section 21 addresses criteria other than the manner in which "legislative district boundaries" are "drawn."

Because the Senate Plan complies with all constitutional criteria, this Court should issue a declaratory judgment declaring the apportionment to be constitutionally valid. Finally, the Court should reassess its prior precedent and confirm, consistent with the unambiguous language of the Florida Constitution, that the Court's judgment of validity will be "binding upon all the citizens of the state."

ARGUMENT

I. A DEFERENTIAL STANDARD OF REVIEW APPLIES TO THIS COURT'S JUDICIAL REVIEW OF LEGISLATIVE APPORTIONMENT.

When reviewing a joint resolution of apportionment, this Court historically applied the deferential standard of review that applies to other types of legislation. Under this standard, legislative enactments are "presumed constitutional" and a challenging party has the burden to establish invalidity "beyond a reasonable doubt." *Fla. Dep't of Health v. Florigrown, LLC*, 317 So.3d 1101, 1111 (Fla. 2021).

This Court applied the presumption of constitutionality in its first decision reviewing the validity of a legislative apportionment under Article III, Section 16. *See In re Apportionment Law Sen. Jt. Res. No. 1305, 1972 Reg. Sess.* ("*In re Apportionment—1972*"), 263 So.2d 797) (Fla. 1972). There, the Court acknowledged that the redistricting process is "primarily a matter for legislative consideration and determination." *Id.* at 799-800; *see also id.* at 805-806 (stating that legislative enactment should not be declared unconstitutional "'unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the

statute, it is in positive conflict with some identified or designated provision of constitutional law'" (quoting *City of Jacksonville v. Bowden*, 64 So. 769, 772 (Fla. 1914))).

During the last redistricting cycle, this Court confirmed that the adoption of additional substantive requirements in Article III, section 21, did not remove "the initial presumption of validity" applied by this Court. *In re Sen. Jt. Res. of Leg. Apportionment 1176* ("*Apportionment I*"), 83 So.3d 597, 606 (Fla. 2012). The majority opinion in *Apportionment I* stated that the Court would "defer to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements." *Id.* at 608. Finally, the *Apportionment I* decision acknowledged that the Court's duty "'is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.'" *Id.* (quoting *In re Sen. Jt. Res. 2G, Special Apportionment Sess. 1992* ("*In re Apportionment—1992*"), 597 So.2d 276, 285 (Fla. 1992)).

Notwithstanding these statements professing deference, *Apportionment I* diverged from the Court's precedent as to the application of the "beyond a reasonable doubt standard." *See Apportionment I*, 83 So.3d at 607-10 (concluding prior standard of

review was "ill-suited" for the Court's review of apportionment following the adoption of new substantive standards in Article III, Section 21, and advances in "technology").

The dissent disagreed with the majority's treatment of the standard of review. *Id.* at 695-96 (Canady, C.J., concurring in part and dissenting in part). Concluding that the majority "effectively abrogate[d]" the Court's precedents on deference, the dissent offers a thorough defense of the court's historical justification for the rule of deference based upon justiciability and separation-of-powers concerns. *Id.* at 696-99. The Court's failure to apply the proper standard of review, in the dissenting justices' view, "creates the risk of having our decisions adjudicating the validity of redistricting plans decline into a species of 'it-is-so-because-we-say-so jurisprudence.'" *Id.* at 699 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part)).

Although the Senate Plan is valid under *any* standard of review, the Senate respectfully requests that this Court recede from *Apportionment I* and restore the traditional standard of review that this Court applied in reviewing legislative apportionment during the

prior four decades. The dissent in *Apportionment I* is more faithful to the text and precedent governing the constitutional review process and accurately determined that it was "unwarranted to conclude that section 21 implicitly altered the structure or nature of the existing constitutional review process." 83 So.3d at 696.

While this Court has "acknowledged the importance of *stare decisis*, it has [also] been willing to correct its mistakes." *State v. Poole*, 297 So.3d 487, 506 (Fla. 2020). The approach to *stare decisis* is "straightforward":

> In a case where we are bound by a higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court—our job is to apply that law correctly to the case before us. When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield.

Id.; *see also Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002) ("The doctrine of stare decisis bends . . . where there has been an error in legal analysis."). After the Court has "chosen to reassess a precedent" and has concluded "that it is clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent." *Poole*, 297 So.3d at 507.

At that point, "[t]he critical consideration ordinarily will be reliance." *Id.* Reliance interests are "at their acme in cases involving property and contract rights" and "lowest in cases . . . involving procedural and evidentiary rules." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)) (internal quotation marks omitted); *see also Alleyne v. United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

The interpretation of a constitutional provision arguably ranks even lower than procedural and evidentiary rules. *See*, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (receding from precedent in redistricting case involving "an interpretation of the Constitution" because "the claims of *stare decisis* are at their weakest in that field, where our mistakes cannot be corrected by Congress.").

This case presents none of the traditional factors cited as justifications for adherence to erroneous precedent. The Court's statement of the standard of review in apportionment cases does not involve property or contract rights, does not govern "primary conduct," and does not implicate the sort of reliance interests that

stare decisis is intended to protect. *See id.* at 306 (receding from precedent and noting, with respect to reliance interests, that it "is hard to imagine how any action taken in reliance upon [case law governing standards of constitutional interpretation] could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant."). Instead, the precedent at issue here addresses matters of procedure and constitutional interpretation—both matters where reliance interests and the claims of *stare decisis* are at their weakest.

This Court should recede from *Apportionment I* to the extent that decision itself departed from longstanding precedent on the deferential standard to be applied in the review of legislative apportionment under Article III, section 16.

II. THE SENATE'S PROCEDURES AND STANDARDS FOR DRAWING THE SENATE PLAN ENSURED COMPLIANCE WITH ALL CONSTITUTIONAL REQUIREMENTS.

Mindful of the circumstances that led to the invalidation of senatorial and congressional districts during the last redistricting cycle, the Senate adopted procedures and standards early in its process to guard against a similar result. An explanation of the Senate's procedures and standards follows to assist the Court in

evaluating the validity of the final product of the redistricting process—the joint resolution.

On October 18, 2021, the Senate Committee on Reapportionment unanimously adopted a series of directives (the "Committee Directives") establishing priorities that would govern the actual drawing of district lines by the Committee's professional staff. (SA.126). The Committee Directives were published in a memorandum from Chair Rodrigues to Staff Director Jay Ferrin. (SA.1024-26). As described below, the Committee Directives instructed the map drawers to comply with applicable provisions of state and federal law and existing judicial precedent. *Id.*

A. Procedures and Standards Ensuring Compliance with Tier-One Requirements.

The Tier-One standards, *see* Art. III, § 21(a), Fla. Const., prohibit intentional political discrimination, protect racial and language minorities from vote dilution and retrogression, and require contiguity.

1. Intent to favor or disfavor a political party or an incumbent.

The Tier-One standard prohibiting intentional political discrimination provides that "[n]o apportionment plan or district

shall be drawn with the intent to favor or disfavor a political party or an incumbent." *Id.*

To comply with this standard, the Committee Directives instructed professional staff to draw districts "without reviewing political data other than where a review of political data is required to perform an appropriate functional analysis to evaluate whether a minority group has the ability to elect representatives of choice." (SA.1024-26). The Committee Directives also instructed professional staff to "draw districts without the use of any residence information of any sitting member of the Florida Legislature or Congress and to draw districts without regard to the preservation of existing district boundaries." *Id.*

The Committee took other steps to guard against improper political influence on the apportionment process. The map drawers were instructed that if they received "any suggestion that a plan be drafted or changed with the intent to favor or disfavor any incumbent or political party," they were to "disregard the suggestion entirely, document the conversation in writing, and report the conversation directly to the Senate President." *Id.*

The Committee on Reapportionment also strengthened disclosure and transparency requirements for members of the public. Any person wishing to submit comments, suggestions, or proposed maps through the Legislature's redistricting website was required to complete a Redistricting Suggestion Form identifying every person who collaborated on the submission and any compensation received from organizations interested in redistricting. (SA.1134-35).

Finally, public submissions were not to be reviewed or considered by the Senate's map drawers unless a senator requested in writing that a submission be incorporated into a plan. (SA.1029). These procedures were intended to protect against the imputation of an external map drawer's undisclosed intent.

2. Constitutional protections for racial and language minorities.

The Tier-One standard protecting the interests of racial and language minorities states "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." Art. III, § 21(a), Fla. Const.

To comply with this standard, the Committee Directives instructed the Senate's professional staff to conduct a functional analysis where appropriate to confirm that any map submitted for consideration complies with the Florida Constitution's Tier-One standards and the federal Voting Rights Act. (SA.1024-26). Each staff-drawn map submitted for consideration included a report of the objective statistical data necessary to verify the results of a functional analysis under this Court's precedent. *See*, *e.g.*, A.435-38.

Because the non-diminishment requirement is measured against the performance of districts in the benchmark[6] plan, the map drawers ensured that the proposed maps would not eliminate "majority-minority districts"[7] or weaken other "historically

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[6] In redistricting, a "benchmark" plan is a jurisdiction's existing plan against which a newly created plan is measured to assess diminishment in the rights of racial or language minorities to elect representatives of their choice. *See*, *e.g.*, *Apportionment I*, 83 So.3d at 624 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997)).

[7] A "majority-minority" district is one "'in which a majority of the population is a member of a specific minority group.'" *Apportionment I*, 83 So.2d at 622 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993)).

performing minority districts" where doing so would "*actually diminish* a minority group's ability to elect its preferred candidates." *Apportionment I*, 83 So.3d at 625 (emphasis added).

After ensuring non-diminishment compared to the benchmark districts, the map drawers verified compliance with the Florida's Constitution's prohibition against vote dilution. Specifically, the Senate evaluated whether "a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed." *Apportionment I*, 83 So.3d at 622 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

Finally, the Senate accounted for federal Fourteenth Amendment precedent governing the consideration of racial information in redistricting by emphasizing a high degree of compliance with the Florida Constitution's Tier-Two standards of compactness, population equality, and consistent usage of political and geographical boundaries, even as to districts entitled to Tier-One protections for racial and language minority groups. (SA.1024-26). The Senate's procedures and standards were therefore designed to ensure not only compliance with the Florida Constitution's protections for racial and language minorities, but to do so without

subordinating traditional redistricting criteria to predominant racial considerations in violation of federal precedent.

B. Procedures and Standards Ensuring Compliance with Tier-Two Requirements.

The Tier-Two standards, *see* Art. III, § 21(b), Fla. Const., require districts to be compact, use existing political and geographical boundaries where feasible, and be as nearly equal in population as practicable. No Tier-Two standard has constitutional priority over another, *id.* at § 21(c), but "[s]trict adherence to these standards must yield" if they conflict with the Tier-One standards or federal law. *Apportionment I*, 83 So.3d at 628. Balancing the competing Tier-Two standards and the relative weight assigned to each is a matter of legislative discretion.

1. *"Districts shall be as nearly equal in population as is practicable."*

The Tier-Two standard regarding population equality requires districts to be "as nearly equal in population as is practicable." Art. III, § 21(b), Fla. Const.

To comply with this standard, the Committee Directives instructed professional staff to prepare Senate plans "with district population deviations not to exceed 1% of the ideal population of

538,455 people." (SA.1024-26)). Each staff-drawn map submitted for consideration complied with this directive, as reflected in the statistical reports reflecting the population of each Senate district and its deviation from the ideal district population. The population in each district deviates from the ideal population by less than 5,385 people (1%); the overall plan deviation is less than 2%. (A.432).

2. Districts shall be compact.

Another Tier-Two standard requires districts to be "compact." Art. III, § 21(b), Fla. Const. To comply with this standard, the Committee Directives instructed professional staff to draw districts that are visually compact in relation to their shape and geography, and to use mathematical compactness scores where appropriate (SA.1024-26)); *see also* (SA.108-10) (committee presentation on mathematical compactness measures).

Each staff-drawn map submitted for consideration complied with this Committee Directive. The statistical reports provided with each staff-drawn map included three recognized mathematical measurements of compactness used by this Court: Convex Hull, Polsby-Popper, and Reock. (A.432).

3. Districts shall, where feasible, utilize existing political and geographical boundaries.

A third Tier-Two standard requires districts to "where feasible, utilize existing political and geographical boundaries." Art. III, § 21(b), Fla. Const.

The Committee Directives instructed professional staff to examine the use of county boundaries as a primary political boundary and to explore concepts that, where feasible, would result in districts consisting of whole counties (in less populated areas) and that keep districts wholly within a county (in more densely populated areas). (SA.1024-26). Although the map drawers were also asked to explore concepts that kept cities whole, municipal boundaries were relatively deemphasized as a priority in comparison to other political and geographical boundaries in recognition of the "impermanent and changing nature of municipal boundaries." *Id.*; *see also* (SA.105-07, 119-122) (committee presentations on boundary analysis, municipal boundaries).

With respect to geographical boundaries, the Committee Directives instructed professional staff to examine the use of "easily

recognizable and readily ascertainable" boundaries consistent with this Court's precedent: railways, interstates, federal and state highways, and large water bodies. (SA.1024-26). The Committee Directives noted that these geographical features provide an opportunity to create districts with "static boundaries." *Id.*

Each staff-drawn map submitted for consideration complied with this directive. The statistical reports provided with each staff-drawn map provided a "boundary analysis report" directly measuring the degree to which each district's boundaries coincide with the political and geographical boundaries recognized by this Court's precedent. (A.432). The final column in the boundary analysis report (labeled "Non-Pol/Geo") displays the percentage of the corresponding district's boundary that *does not* coincide with existing political or geographical boundaries. A Non-Pol/Geo score of 0% for a given district therefore reflects that 100% of that district's boundaries consist of qualifying political or geographical boundaries: city or county boundaries, interstates, federal or state

highways, contiguous water bodies greater than ten acres, or railways.[8]

The statistical reports provided with each staff-drawn map also included a count of the overall number of county and city splits, to the extent those statistics bear on the boundary-usage standard. (A.432).

III. THE SENATE PLAN COMPLIES WITH ALL CONSTITUTIONAL STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES.

The Senate Plan as a whole is valid and complies with all constitutional standards. The validity of the Senate Plan is confirmed by a review of the plan itself and an analysis of the objective statistics this Court considered in *Apportionment I* and *In re Senate Joint Resolution of Legislative Apportionment 2-B* ("*Apportionment II*"), 89 So.3d 872 (Fla. 2012).

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[8] The "Non-Pol/Geo" score is most relevant when reviewing a district's compliance with the constitution's boundary-usage standard because it avoids the potential for "double-counting" of separate political and geographical boundaries that coincide with one another. For example, the same portion of the southern boundary of Senate District 1 is both the county boundary of Escambia County *and* waters contiguous with the Gulf of Mexico (a qualifying water boundary). (A.431)

A. The Senate Plan Complies with the Tier-One Standards.

The Florida Constitution provides that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory." Art. III, § 21(a), Fla. Const. The Senate Plan complies with these Tier-One standards.

1. *The Senate Plan was not drawn with the intent to favor or disfavor a political party or an incumbent.*

Consistent with Article III, Section 21(a), the Senate Plan was not drawn with the intent to favor or disfavor a political party or an incumbent. The Senate's procedures ensured that every district line in the Senate Plan was drawn by professional staff insulated from improper political considerations. The Senate Plan's exacting compliance with the Tier-Two standards further confirms the absence of any objective indicia of improper intent to favor or disfavor a political party or an incumbent.

The record before this Court reflects that every district line in CS/SJR 100 was drawn by professional staff under the standards in the Committee Directives. The staff-drawn maps were explained at length in three public meetings of the Select Subcommittee on Legislative Apportionment and at the final meeting of the Committee on Reapportionment. The draft maps reflected continual iterative improvements over the course of the legislative process, with no "back-sliding" in their objectively measurable statistics that might suggest improper intent.

The Senate Plan's strict compliance with the Tier-Two standards contradicts any suggestion of improper intent. The districts are visually and mathematically compact, with minimal population deviations, and an extraordinarily high usage of existing political and geographical boundaries. *Cf. Apportionment I*, 83 So.3d at 640 ("[A] disregard for the constitutional requirements set forth in tier two is indicative of improper intent, which Florida prohibits by absolute terms."). In short, the Senate Plan bears no "objective indicia of improper intent." *Id.* at 644.

Finally, the after-the-fact evidence is also contrary to any suggestion of improper intent to favor or disfavor an incumbent.

The Senate's map drawers did not consider any member's residence information when drawing district lines, but news outlets have subsequently reported that the Senate Plan draws multiple incumbent Senators (of both political parties) into districts with one another.[9] The Senate Plan therefore contrasts sharply with the plan invalidated by this Court in *Apportionment I*, which did not pit *any* incumbents against one another. 83 So.3d at 654.

Before the first staff-drawn maps were released, Senate leadership of both political parties released a memorandum asking all senators to set aside personal and political ambitions in the interest of "fulfilling our responsibility to pass constitutional maps." (SA.1031). The Senate Plan before this Court demonstrates compliance with that responsibility.

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[9] *See, e.g.*, Jacob Ogles, *Tour Florida and See Where the Boundary Lines Shifted on State Legislative Maps*, Florida Politics, (Feb. 8, 2022) (*available at*: https://floridapolitics.com/archives/493770-tour-florida-and-see-where-boundary-lines-shifted-on-state-legislative-maps/).

2. The Senate Plan does not violate the Florida Constitution's protections for racial and language minorities.

The Senate Plan was not 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." Art. III, § 21(a), Fla. Const. The two clauses of this provision parallel Sections 2 and 5 of the federal Voting Rights Act by proscribing, respectively: 1) impermissible vote dilution; and 2) impermissible diminishment (or "retrogression") in the ability of racial or language minorities to elect representatives of their choice. *Apportionment I*, 83 So.3d at 619-620. The Senate Plan protects against both vote dilution and retrogression consistent with the Florida Constitution.

a. The Senate Plan does not dilute the voting strength of racial or language minorities.

The requirement that "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" prohibits "impermissible vote dilution." *Id.* at 619-23. A vote-dilution claim involves "'the manipulation of district lines' by either fragmenting the minority voters among several districts where a

bloc-voting majority can routinely outvote them or 'packing' them into one or a small number of districts to minimize their influence in adjacent districts." *Id.* at 622 (quoting *Voinovich* 507 U.S. at 153-54). The Senate Plan engages in neither of these practices.

In *Apportionment I*, this Court noted the three "necessary preconditions" a plaintiff must demonstrate to establish that a legislative district must be redrawn to comply with Section 2 of the Voting Rights Act. *Id.* An individual challenging a plan must show that 1) a minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; 2) the minority population is "politically cohesive"; and 3) the majority population "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* (quoting *Gingles*, 478 U.S. at 50-51). "When the three *Gingles* preconditions are met, courts must then assess the totality of the circumstances to determine if the Section 2 'effects' test is met—that is, if minority voters' political power is truly diluted." *Id.* (citing *Johnson v. De*

Grandy, 512 U.S. 997, 1013 (1994)).[10]

A successful vote-dilution claim "requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed." *Apportionment I*, 83 So.3d at 622. In other words, a plaintiff must show that racial or language minorities could have constituted a majority in *an additional* compact district. *De Grandy*, 512 U.S. at 1008-09.

The Senate Plan does not violate the constitutional prohibition against vote dilution. Minority populations are neither "packed" into a single district nor "cracked" across adjacent districts in a manner that would prevent the creation of an additional performing majority-minority district. The Senate Plan contains one district

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[10] In *Apportionment I*, 83 So.3d at 667, this Court appeared to make findings of voting cohesion for purposes of Article III, section 21 through its own review of voter registration and elections data. The Senate notes that *Gingles*, by its own terms, identifies factors that a *plaintiff* challenging a plan under Section 2 must establish, not obligations on a legislative body considering legislation. *Cf. Ala. Leg. Black Caucus v. Alabama*, 231 F.Supp.3d 1026, 1033 (M.D. Ala. 2017) (three-judge court) ("[T]he Supreme Court does not require that the legislature conduct studies. It instead requires only that the legislature had a strong basis in evidence for its use of race.").

with a Black Voting Age Population ("BVAP")[11] exceeding 50%[12], and no "super-majority district requiring the Legislature to 'unpack' it." *Apportionment I*, 83 So.3d at 645.[13] As discussed below with respect to non-diminishment, the Senate Plan also contains four additional districts in different regions of the state with substantial Black voting strength[14] in which a functional analysis of political and elections data confirms that Black voters have the ability to elect candidates of their choice.

The Senate Plan contains five districts with a Hispanic Voting Age Population ("HVAP") exceeding 50% (Districts 25, 36, 38, 39, and 40)—one more than the four Hispanic majority-minority districts in the benchmark plan. (A.432, 440). The relatively high percentage of Hispanic voters in three of these five districts

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[11] For redistricting purposes, Florida aggregates multi-racial population according to Section II of OMB Bulletin No. 00-002 – Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement. (A.386).
[12] District 34, at 50.07% BVAP. (A.432).
[13] The benchmark plan, like the Senate Plan, also included one Senate district with a BVAP exceeding 50% (District 33, at 50.90% BVAP). (A.440).
[14] District 5 (41.62% BVAP), District 15 (37.48% BVAP), District 16 (33.20% BVAP), and District 32 (46.15% BVAP).

(Districts 36, 39, and 40, *see* A.432) is best explained by "the fact that the Hispanic population in Miami-Dade County, where these districts are located, is densely populated," *Apportionment I*, 83 So.3d at 645, and is similar to the benchmark plan. (A.440).

b. The Senate Plan does not diminish the ability of racial or language minorities to elect representatives of their choice.

The requirement that districts not be drawn "to diminish [racial or language minorities'] ability to elect representatives of their choice" prohibits impermissible "retrogression" in the position of racial or language minorities with respect to their effective exercise of the franchise. *Apportionment I*, 83 So.3d at 623-27. The existing Senate plan serves as the "benchmark" against which the effect of voting changes is measured. *Id.* at 624.

Under Florida's non-diminishment standard, the Legislature cannot eliminate "majority-minority districts" or weaken other "historically performing minority districts" where doing so would "*actually diminish* a minority group's ability to elect its preferred candidates." *Id.* at 625. (emphasis added). "A slight change in percentage of a minority group's population in a given district does not necessarily have cognizable effect on a minority group's ability

to elect its preferred candidate of choice." *Id.* Rather, an evaluation of retrogression requires a "functional analysis"—an inquiry into whether a district is "likely to perform for minority candidates of choice" that considers not only population data, but political and voting data. *Id.*

This Court in *Apportionment I* specifically identified the statistical data it would review to evaluate the non-diminishment requirement: 1) voting-age populations; 2) voter-registration data; 3) voter registration of actual voters (*i.e.*, voter turnout information); and 4) election results history. *Id.* at 626-27 (citing DOJ Guidance Notice, 76 Fed. Reg. at 7471, for data relevant to a functional analysis of electoral behavior under Section 5 of the federal Voting Rights Act).

The Senate has conducted a functional analysis of appropriate districts and has confirmed that they do not diminish the rights of racial or language minorities to elect representatives of their choice as compared to corresponding districts in the benchmark plan. The statistical data on population demographics and election results allowing for a functional analysis in the manner conducted by this Court in *Apportionment I* and *Apportionment II* are integrated into

the Legislature's redistricting application and were formatted for presentation with each iteration of the staff-drawn Senate maps. *See* A.435-38 (Senate Plan); A.443-46 (benchmark plan). The data points available in the map-drawing application to allow users to conduct a functional analysis include voter registration, voter turnout, and election results for the 2012 through 2020 primary and general elections. (A.435-38); *see also* (SA.111-18) (committee presentation on data points available in Legislature's map-drawing application).

The benchmark plan contained five districts (Senate Districts 6, 11, 19, 33, and 35) that were either Black majority-minority districts or "historically performing minority districts" protected against diminishment in the ability of Black voters to elect representatives of their choice. *Apportionment I*, 83 So.3d at 625. The Senate's functional analysis confirms that Districts 5, 15, 16, 32, and 34 in the Senate Plan do not diminish the ability to elect of Black voters as compared to the corresponding benchmark districts.

The benchmark plan contained five districts (Senate Districts 15, 36, 37, 39, and 40) that were either Hispanic majority-minority

districts or "historically performing minority districts" protected against diminishment in the ability of Hispanic voters to elect representatives of their choice. *Apportionment I*, 83 So.3d at 625. The Senate's functional analysis confirms that Districts 25, 36, 38, 39, and 40 in the Senate Plan do not diminish the ability to elect of Hispanic voters as compared to the corresponding benchmark districts.

Finally, the Senate complied with the Florida Constitution's protections for racial and language minority voters consistent with the federal Constitution's limitations on "racial gerrymanders" in legislative districting plans. *See, e.g.*, *Cooper v. Harris*, 137 S.Ct 1455, 1463-64 (2017) (noting that equal protection clause prevents a state, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race.") (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S.Ct. 788, 797 (2017)) (internal quotation marks omitted).

To that end, the Senate Plan was drawn without "subordinat[ing]" other factors (such as compactness, use of existing political and geographical boundaries, and respect for

political subdivisions) to "racial considerations." *Cooper*, 137 S.Ct. at 1463-64.

The record demonstrates the Senate districts protected against diminishment under Tier-One were drawn in a Tier-Two compliant manner, with quantitative measures of compactness and boundary-usage comparable to other districts in the Senate Plan. (A.432). Notwithstanding its Tier-Two compliant configuration of the districts in question, the Senate has also presumed—consistent with Supreme Court precedent as to the federal Voting Rights Act—that compliance with the Florida Constitution's analogous protections for racial and language minorities represents a "compelling interest" justifying the consideration of race. *Id.* at 1464. The statistical data on population demographics and election results, along with this Court's decisions in the last redistricting cycle interpreting Article III, section 21, provide a "strong basis in evidence" for the Senate's conclusions regarding the manner in which it must comply with the Florida Constitution's protections for racial and language minorities. *Cooper*, 137 S.Ct. at 1464.

3. The Senate Plan satisfies the contiguity standard.

The Senate Plan's districts "consist of contiguous territory" as required by the Florida Constitution. Art. III, § 21(a), Fla. Const. This Court has defined "contiguous" as "being in actual contact: touching along a boundary or at a point." *Apportionment I*, 83 So.3d at 628 (internal quotations omitted). A district lacks contiguity when a part is "'isolated from the rest of the territory of another district" or when the lands "mutually touch only at a common corner or right angle." *In re Constitutionality of House Jt. Res. 1987* ("*In re Apportionment—2002*"), 817 So.2d 819, 827 (Fla. 2002).

Every district in the Senate Plan consists of contiguous territory. (A.431).

B. The Senate Plan Complies with the Tier-Two Standards.

The Florida Constitution provides that "districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries." Art. III, § 21(b), Fla. Const. Strict adherence to the Tier-Two standards "must yield if there is a conflict between compliance with them and the tier-one standards." *Apportionment I*, 83 So.3d at 628.

The Senate Plan appropriately balances the co-equal Tier-Two standards of population equality, compactness, and boundary usage.

1. The Senate Plan satisfies the population-equality standard.

The Senate Plan complies with the Florida's Constitution's requirement that districts be "as nearly equal in population as is practicable." Art. III, § 21(b), Fla. Const. The population-equality standard does not require "strict and unbending adherence" or "mathematical precision." *Apportionment I*, 83 So.3d at 629-30. This Court has recognized, consistent with Supreme Court precedent, that there are "legitimate reasons for states to deviate from creating districts with perfectly equal populations, including maintaining the integrity of political subdivisions and providing compact and contiguous districts." *Id.* at 630. The requirement that districts be as nearly equal in population "as is practicable" recognizes that the population-equality standard must yield to the Tier-One standards, and may be balanced by the Legislature with the co-equal Tier-Two standards. *Id.*

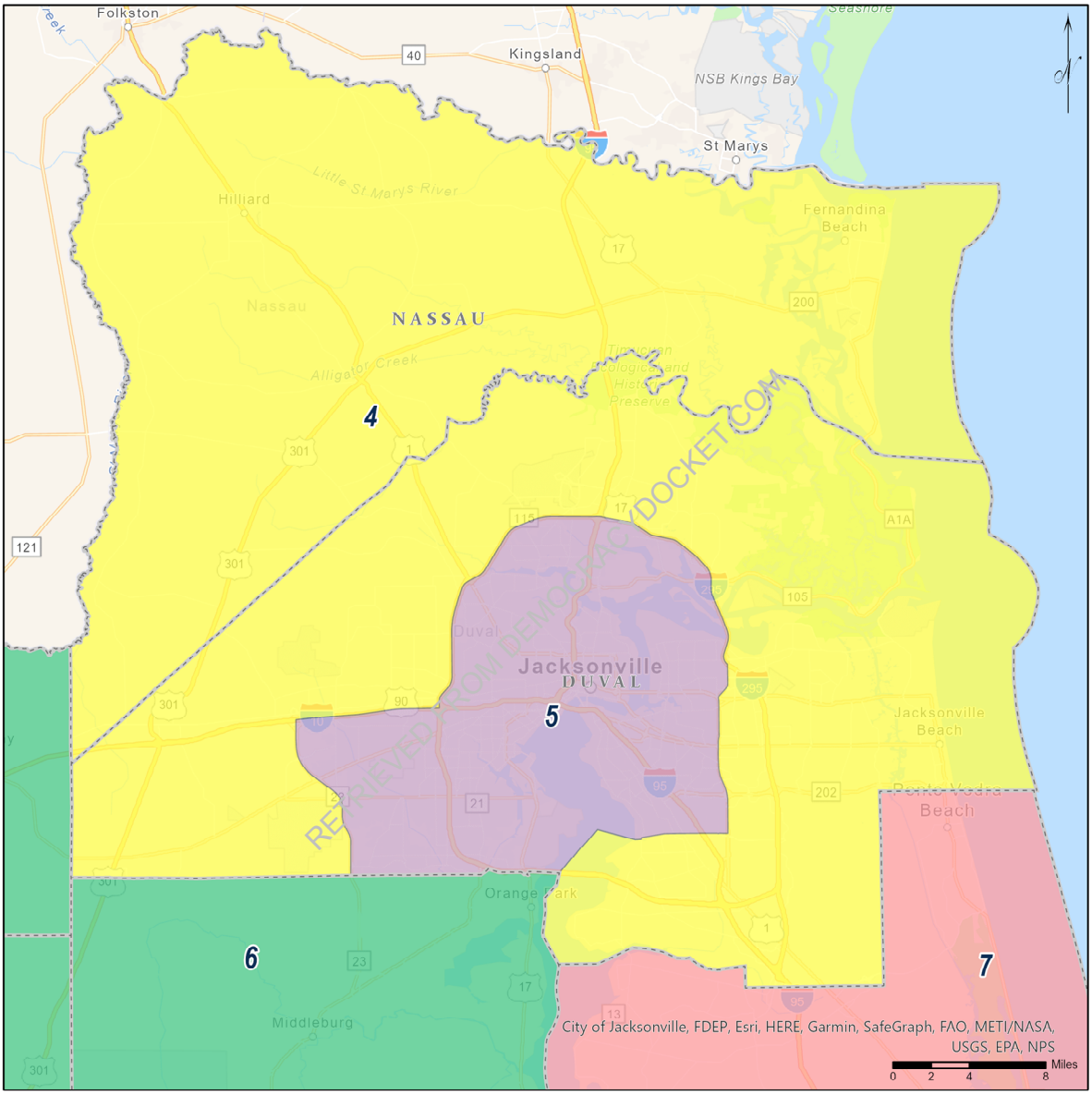
The Senate Plan satisfies the population-equality standard. The ideal population for each of Florida's 40 Senate districts is

538,455. (SA.46). No Senate district deviates by more than 1% (5,385 people) from the ideal population, with an overall deviation from the smallest to largest district of 1.92%. *Id.* The Senate Plan's overall deviation is "well under the 10% deviation that the Supreme Court and this Court have recognized as constitutionally valid." *In re Apportionment—2002*, 817 So.2d at 827. Indeed, the Senate Plan's total deviation of 1.92% is roughly half the total deviation of 3.97% in the 2012 House Plan that this Court approved in *Apportionment I*. *See* 83 So.3d at 646.

Minor deviations from the ideal district population also allowed the Senate to achieve other valid objectives identified in the Committee Directives, such as increased use of static political and geographical boundaries and respect for county boundaries. *See id.* at 630 (noting that population equality requirement should be "balanced with both compactness and the use of political and geographical boundaries").

The deviations above the ideal population in Districts 4 and 5, for example, allow those two districts alone to be contained entirely within Nassau and Duval Counties (which, combined, have a total

population roughly 9,000 people above the ideal population of two Senate districts). (A.432).



(A.431). Both Districts 4 and 5 also use existing political and graphical boundaries for 100% of their respective district boundaries. *Id.*

2. The Senate Plan satisfies the compactness standard.

The Senate Plan complies with the Florida Constitution's requirement that districts be "compact." Art. III, § 21(b), Fla. Const. This term refers to the "shape of a district" and can be evaluated "both visually and by employing standard mathematical measurements." *Apportionment I*, 83 So.3d at 636. A visual review for compactness seeks to ensure that districts do not have "an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement." *Id.* at 634. An "oddly shaped district" may nevertheless be justified after close examination if the district's configuration is a result of Florida's "irregular geometry" or efforts to keep counties or municipalities intact. *Id.* at 635-36.

Quantitative geometric measurements of compactness may also be used to evaluate compactness. This Court has used three common compactness measurements: 1) the Reock method, which "measures the ratio between the area of the district and the area of the smallest circle that can fit around the district"; 2) the Convex Hull method, which "measures the ratio between the area of the district and the area of the minimum convex bounding polygon that

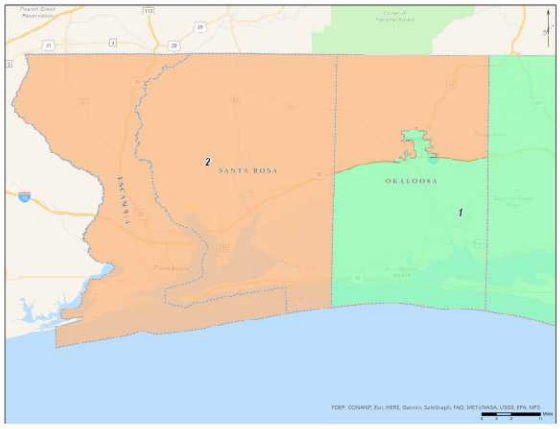
can enclose the district"; and 3) the Polsby-Popper method, which "measures the ratio between the area of the district and the area of the circle with the same perimeter as the district (the isoperimetric circle)." *League of Women Voters of Fla. v. Detzner*, 179 So.3d 258, 283 n.6-8 (Fla. 2015) ("*Apportionment VIII*"). The Committee on Reapportionment reviewed materials regarding the strengths and weaknesses of each of these quantitative compactness measures. (SA.108-110).

The Senate Plan is both visually and mathematically compact. A visual review reveals no districts with an "unusual shape, a bizarre design, or an unnecessary appendage." *Apportionment I*, 83 So.3d at 634. Consistent with the Committee Directives, the Senate Plan emphasizes the use of county boundaries and static geographical boundaries such as railways, interstates, federal and state highways, and large water bodies. (SA.1024-26). The Senate districts are visually appealing, with smooth, easily recognizable and visually compact district boundaries.

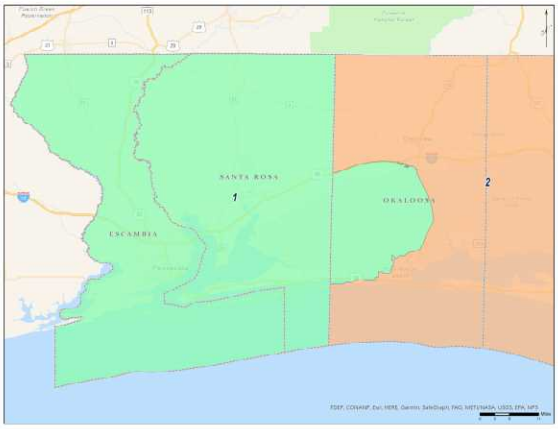
Consider the following visual comparisons of Northwest Florida, Northeast Florida, the I-4 Corridor, and Southeast Florida under the Senate plan approved in *Apportionment II* (SJR 2-B); the

court-imposed benchmark Senate plan from 2015, and the 2022 Senate Plan:

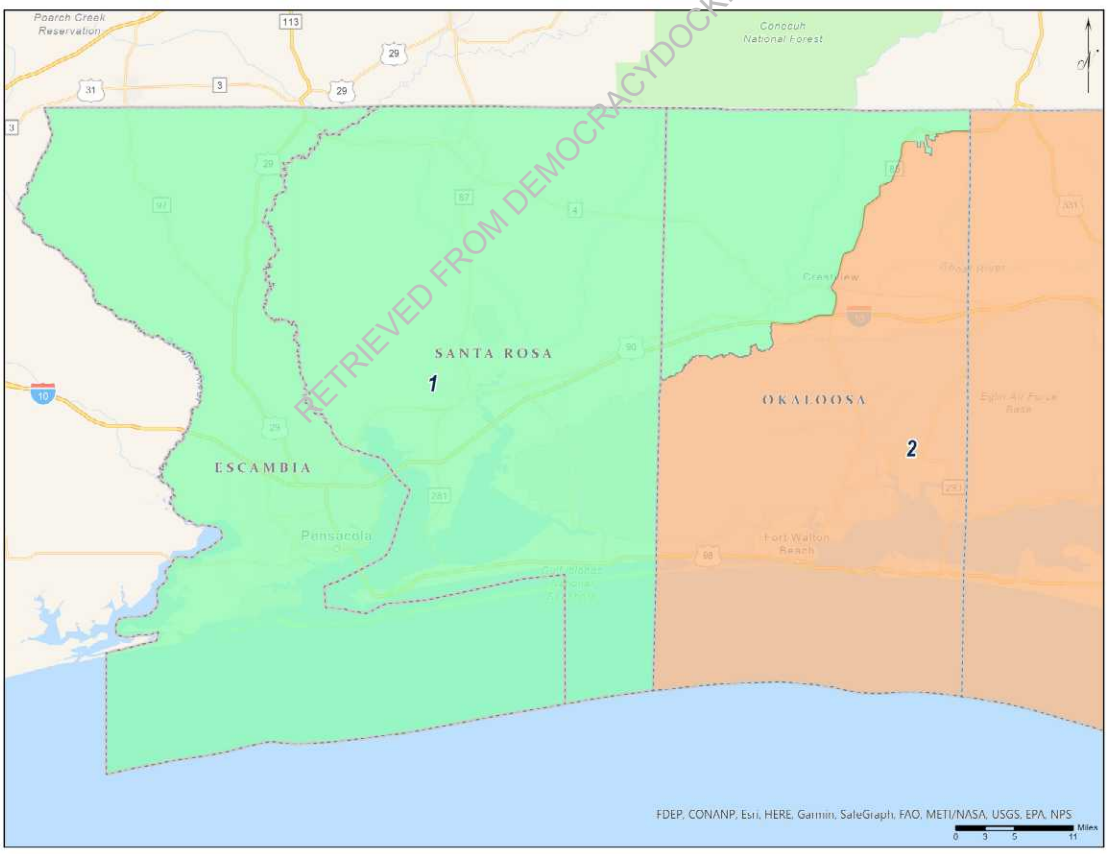
Northwest Florida



SJR 2-B
(approved in *Apportionment II*)

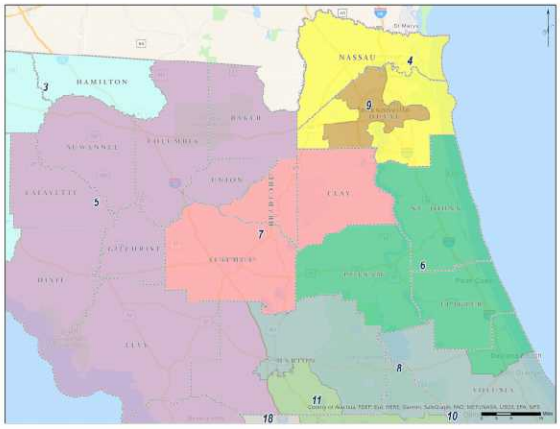


Benchmark Senate Plan (2015)



Senate Plan (2022)

Northeast Florida



SJR 2-B
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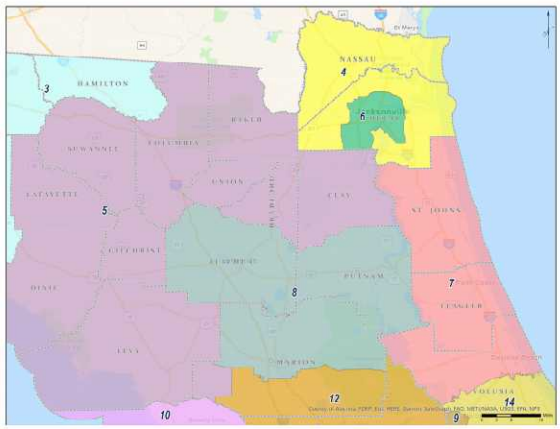
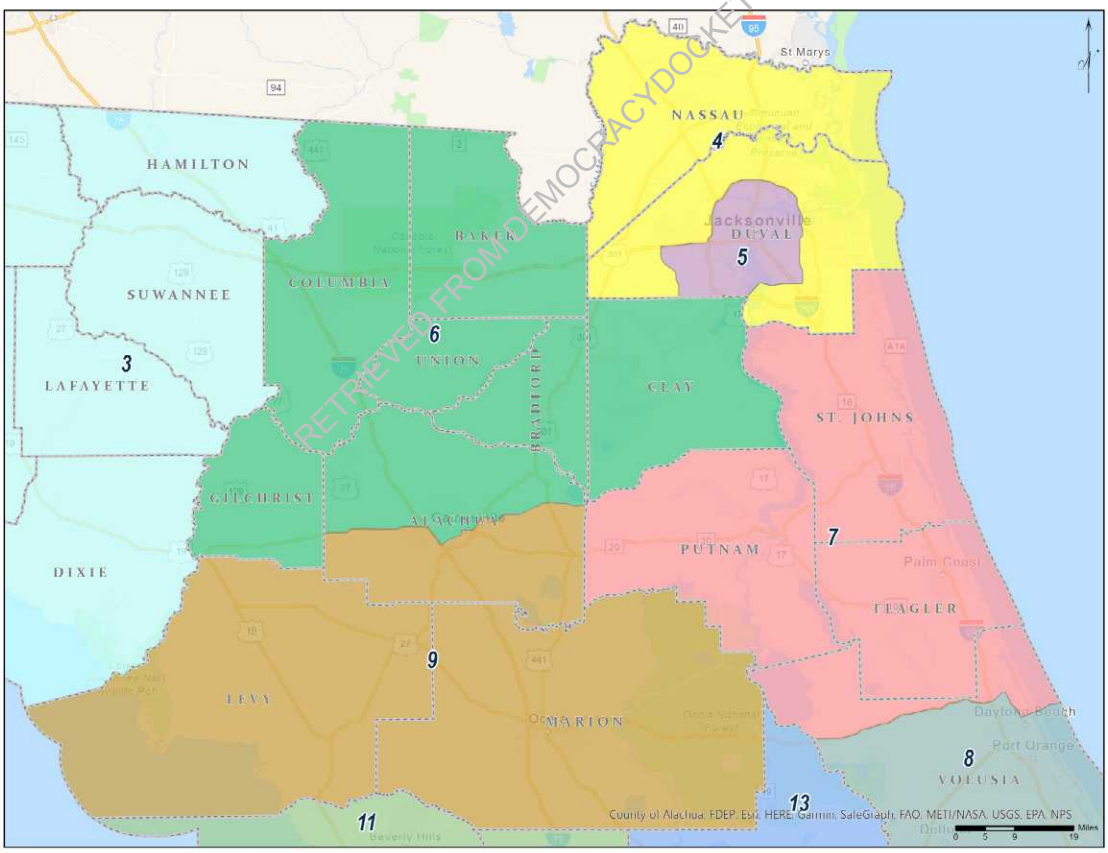
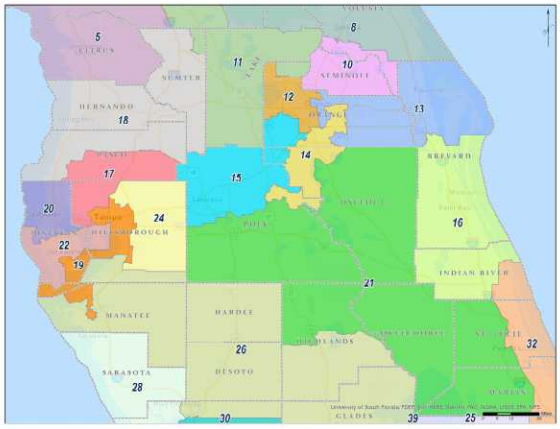


Benchmark Senate Plan (2015)



Senate Plan (2022)

I-4 Corridor



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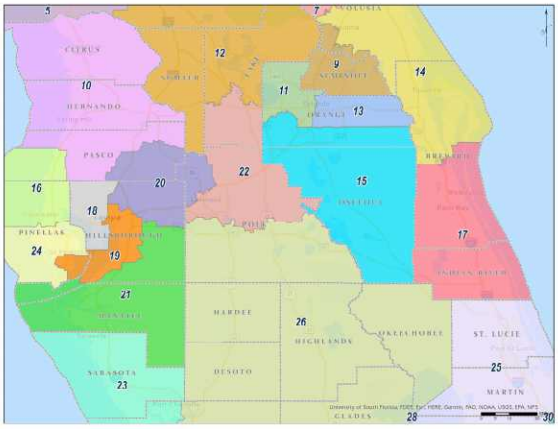
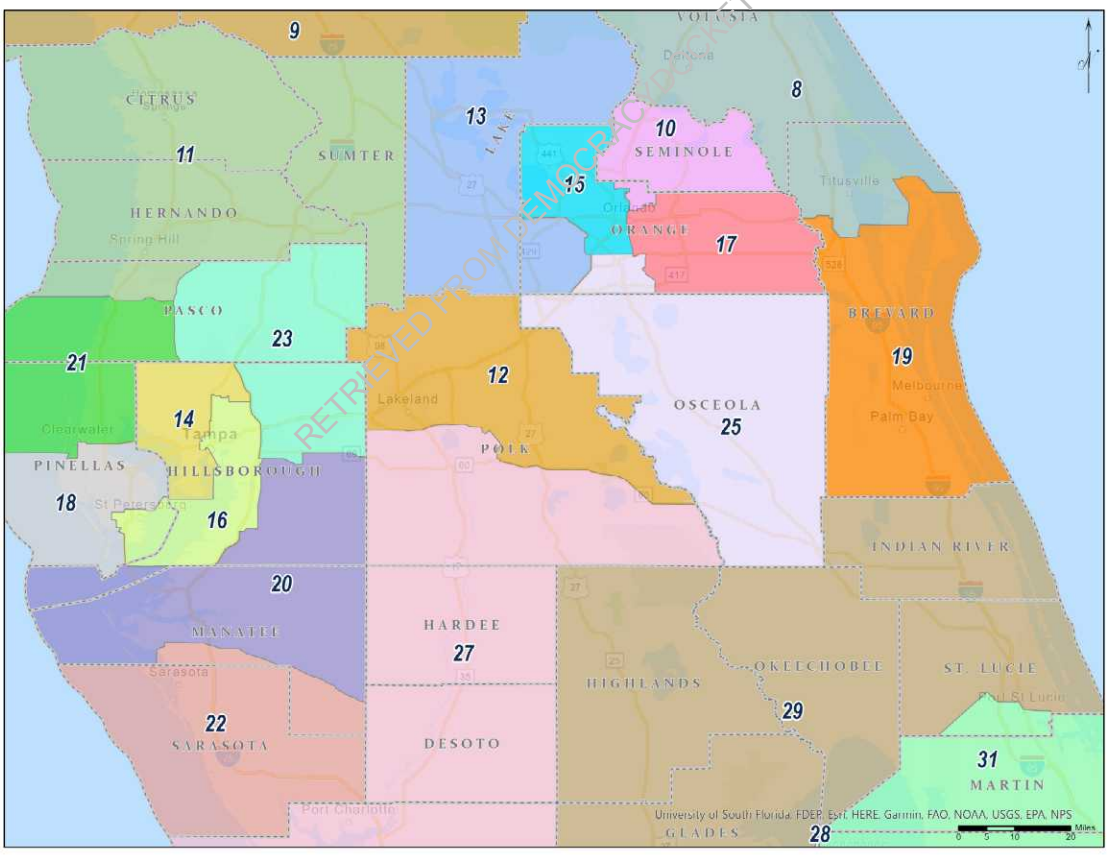
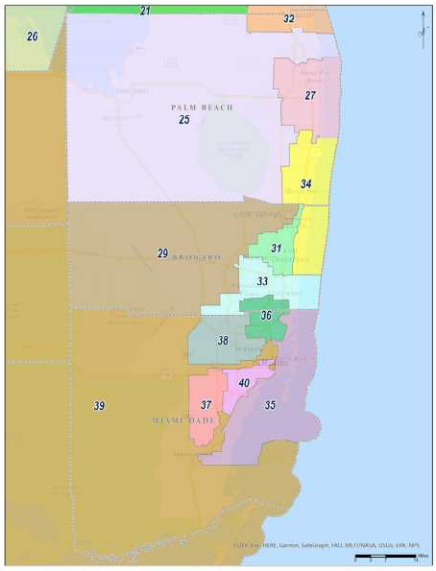


Benchmark Senate Plan (2015)

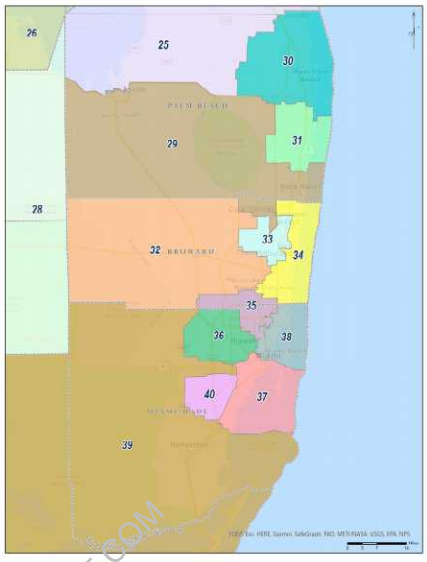


Senate Plan (2022)

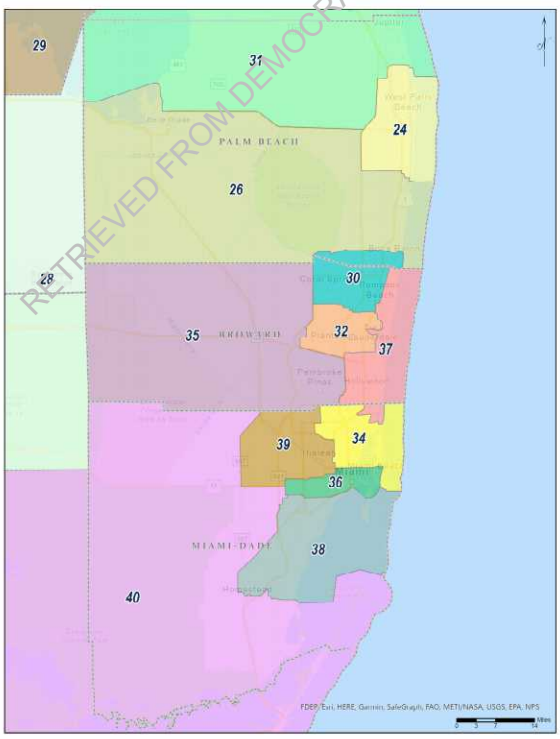
Southeast Florida



SJR 2-B
(approved in *Apportionment II*)



Benchmark Senate Plan (2015)



Senate Plan (2022)

Numerous mathematical measurements of compactness also confirm that the Senate Plan is compact. A comparison of average compactness scores demonstrates that the Senate Plan is not only superior to the court-imposed benchmark Senate plan, but also to the revised Senate plan that this Court approved in *Apportionment II* (SJR 2-B) and the benchmark House plan that this Court approved in *Apportionment I*:

Plan	**Compactness Measurement**		
	Convex Hull	Polsby-Popper	Reock
Senate Plan (2022)	0.82	0.46	0.46
Benchmark Senate Plan (2015)	0.81	0.41	0.50
SJR 2-B (approved in *Apportionment II)* (2012)	0.76	0.34	0.40
Benchmark House Plan (2012)	0.80	0.43	0.43

(A.432, 440, 475). The Senate does not suggest that an increase in quantitative compactness over the benchmark plan is necessary for a valid apportionment. The Florida Constitution does not require districts to "achieve the highest mathematical compactness scores." *Apportionment I*, 83 So.3d at 635. Instead, the favorable comparison

in quantitative compactness confirms what is apparent from a visual inspection: the districts in the Senate Plan are compact.

3. The Senate Plan satisfies the boundary-usage standard.

The Senate Plan complies with the Florida Constitution's requirement that districts "shall, where feasible, utilize existing political and geographical boundaries." Art. III, § 21(b), Fla. Const. In *Apportionment I*, this Court stated that the term "political boundaries" refers primarily to county and municipal boundaries, while "geographical boundaries" refers to boundaries that are "easily ascertainable and commonly understood" such as "rivers, railways, interstates, and state roads" rather than a "creek" or "minor residential road." 83 So.3d at 637-38, 656.

The majority opinion in *Apportionment I* also imposed a requirement for "consistent" boundary usage and disapproved district lines that used "different types of boundaries within the span of a few miles." *Id.* at 656.[15]

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[15] *But see id.* at 699 (Canady, C.J., concurring in part and dissenting in part) (noting that the majority opinion "imposes a requirement to use 'consistent' boundaries . . . that is nowhere to be found in the text of section 21 and that cannot reasonably be implied from the text").

The Senate complied with the *Apportionment I* Court's interpretation of "political and geographical boundaries" and used those features, where feasible, in drawing district boundaries.

a. The Senate Plan's boundary-analysis report confirms a very high use of existing political and geographical boundaries.

The boundary analysis report produced by the Legislature's redistricting application illustrates that the Senate Plan uses existing political and geographical boundaries for a large proportion of its district boundaries:

Political and Geographic Boundaries:					
City	County	Road	Water	Rail	Non-Pol/Geo
15%	59%	24%	38%	2%	4%

Senate Plan (2022)

(A.432). The average Non-Pol/Geo score of 4% for the Senate Plan means that, on average, *96% of a Senate district's boundaries* coincide with features identified by the U.S. Census Bureau's geographic layers as city boundaries; county boundaries; interstates, U.S. highways, or state roads; contiguous water bodies

larger than 10 acres; or railroads. *Id.* Fourteen districts have a Non-Pol/Geo score of 0%, meaning that *100% of their district boundaries* consist of qualifying political and geographical boundaries. (A.432). All but three districts use qualifying political and geographical boundaries for at least *90% of their district boundaries*. (A.432).

The boundary analysis report for the Senate Plan also shows substantial quantitative improvements in boundary usage over the benchmark Senate Plan:

Political and Geographic Boundaries:					
City	County	Road	Water	Rail	Non-Pol/Geo
22%	53%	17%	37%	1%	11%

Benchmark Senate Plan (2015)

(A.440). The benchmark plan's average Non-Pol/Geo score of 11% is almost three times higher than the Senate Plan's score, which shows that the benchmark plan's district boundaries use far fewer qualifying political and geographical boundaries. The benchmark Senate plan has only one district (District 3) that uses existing political and geographical boundaries for 100% of its district boundaries, in comparison to the *fourteen* such districts in the

Senate Plan. (A.432, 440). Only 23 districts in the benchmark Senate plan use qualifying boundaries for at least 90% of their district boundaries; the Senate Plan has 37 districts with at least this level of boundary usage. *Id.*

b. The enumeration of county and municipal "splits" does not necessarily measure compliance with the boundary-usage standard, but the Senate Plan nevertheless scores highly on this metric.

As described above, the Committee Directives that guided the Senate's map-drawing process prioritized the consistent use of static political and geographical boundaries such as county lines, major roads, water bodies, and railways. (SA.1024-26). As compared to these boundary types, the Senate placed a lower emphasis on the use of municipal boundaries, which are often irregular in shape and are subject to frequent changes. *Id.*

The City of Largo, for example, changed its city boundaries 364 times between January 1, 2010, and December 31, 2019—and another 31 times from January 1, 2020, through August 31, 2021. (SA.1131). The municipal boundary itself is composed of 75 parts and includes 59 "holes":

Largo

Id. The City of Apopka in Orange County, with a population of 54,873, has a municipal boundary so irregular that its perimeter is greater than that of 28 of the 40 districts in the Senate Plan:

Apopka

(SA.1127; A.432).[16]

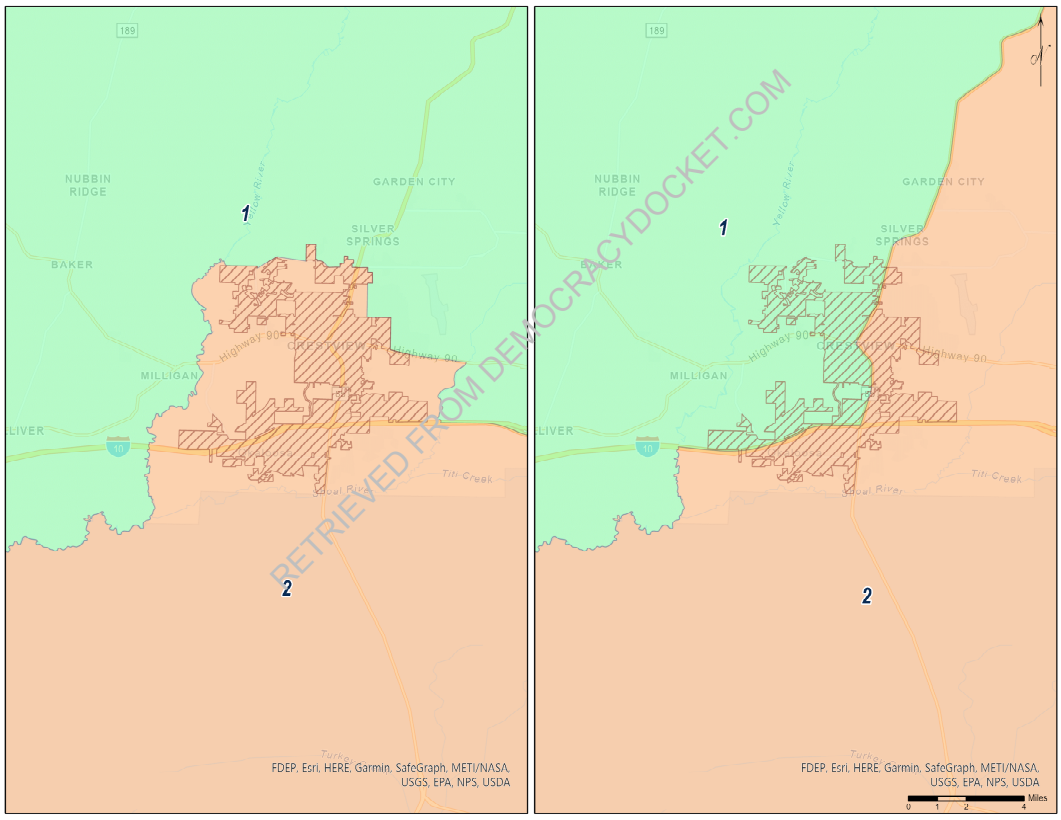
[16] The Senate Appendix includes other illustrative examples of Florida's irregular municipal boundaries. (SA.1127-33).

At times, this Court's precedents from the last decade appeared to characterize the number of counties or cities "split" in a redistricting plan as a measurement of compliance with an independent Tier-Two standard. *See*, *e.g.*, *Apportionment VIII*, 179 So.3d at 292 (describing a reduction in municipal splits as an improvement in "tier-two compliance"). The Senate views the count of counties and municipalities kept "whole" within a plan as, at best, an imperfect proxy for the constitutional requirement that districts use "existing political and geographical boundaries" where feasible. Art. III, § 21(b), Fla. Const.

While keeping counties or municipalities whole (or minimizing "splits") may be a constitutionally permitted objective, that statistic alone does not directly measure a plan's compliance with the boundary-usage standard. For example, Washington County is contained entirely within District 2 in both the Senate Plan and the benchmark Senate plan; the City of Tallahassee is contained entirely within District 3 in both the Senate Plan and the benchmark Senate plan. (A.431, 439). But the district boundaries of Districts 2 and 3 do not coincide at any point with the boundaries of Washington County or Tallahassee. The fact that Washington

County and Tallahassee are kept whole and not "split" in the Senate Plan says little about the use of existing political and geographical boundaries by these districts.

Consider also two staff-drawn alternative configurations of the boundary between Senate Districts 1 and 2 that were presented to the Select Subcommittee on Legislative Reapportionment:



(SA.281). The configuration on the left keeps the City of Crestview "whole" by following a part of its municipal boundary. The configuration on the right has a district boundary that follows Interstate 10 and State Road 85 through this part of Okaloosa

County, resulting in the "split" of Crestview. *Both* of these configurations use existing political and geographical boundaries, and a decision to prioritize static boundaries such as interstate highways and state roads over irregular and impermanent municipal boundaries[17] does not render a plan "less compliant" with the boundary-usage standard.

Notwithstanding the Senate's relative prioritization of static boundaries, statistical reports show the Senate Plan keeps a large number of counties and municipalities whole:

District lines and City and County Boundaries in Senate Plan (2022)	
Number of Counties	67
Counties with only one district	51
Districts with only one county	16
Counties split into more than one district	16
Counties with all population in a single district	51
Aggregate number of county splits	48
Aggregate number of splits with population	48
Number of Cities	412
Cities with only one district	364
Cities split into more than one district	48
Cities with all population in only one district	373
Aggregate number of city splits	103
Aggregate number of splits with population	94

[17] Crestview, with a 2020 census population of 27,134, had 36 municipal boundary changes from January 1, 2010, through August 31, 2021. (SA.1129)

(A.432). Consistent with the Committee Directives, the Senate Plan keeps 51 counties wholly within a district—one more than in the benchmark Senate plan. (A.432, 440). The Senate Plan contains 364 cities whose *municipal lines* fall wholly within a district, and 373 cities whose *population* falls wholly within a single district.[18] The benchmark Senate plan contains 357 cities whose municipal lines fall wholly within a district (seven fewer than in the Senate Plan), and 373 cities kept whole by population. (A.440).

The Senate Plan complies with the Tier-Two boundary-usage standard. To the extent *Apportionment I* imposes "consistent" boundary-usage requirements beyond the constitutional text, *see id.* at 638 (accepting county and city boundaries, rivers, railways, interstate, and state roads; rejecting creeks, minor roads, and other "well-traveled roadways"), this Court should recede from that decision for the reasons cogently expressed in the dissenting

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[18] The population-based measurement is more relevant under this Court's precedent, which has disregarded unpopulated splits. *See Apportionment VIII*, 179 So.3d at 294 n. 14 ("Since District 16 includes no population from Hillsborough County, it is not considered to include part of the county for the purpose of counting splits.").

opinion. *Id.* at 699. No reliance interests justify this extra-textual restriction on legislative discretion in the use of political and geographical boundaries when drawing districts.

C. The Senate's assignment of numbers to senatorial districts complies with the Florida Constitution.

The Florida Constitution requires Senate districts to be "consecutively numbered." Art. III, § 16(a), Fla. Const. Senators are elected for four-year terms, with those from odd-numbered districts elected in years that are multiples of four and those from even-numbered districts elected in even-numbered years that are not multiples of four. Art. III, § 15(a), Fla. Const. All Senate districts are on the ballot in the first election following a reapportionment, with senators elected from odd-numbered districts in 2022 serving a two-year term "to maintain staggered terms." *Id.* In some circumstances, this truncated two-year term following a reapportionment may allow a senator to serve for a total of ten—rather than eight—consecutive years. *Apportionment I*, 83 So.3d at 660.

In *Apportionment I*, this Court held that "the Legislature is prohibited from numbering the districts with the intent to favor or

disfavor an incumbent." *Id.* at 659. Reasoning that the numbers assigned to Senate districts are "part of the 'apportionment plan,'" *id.*, the Court found the "numbering scheme" in the 2012 Senate plan invalid because it allowed certain incumbents to serve longer than they would otherwise have been eligible to serve. *Id.* at 662. The Court ordered the Legislature to "renumber the districts in an incumbent-neutral manner." *Id.* at 686.[19]

The partial dissent in *Apportionment I* contested the majority's conclusion that the numbering of Senate districts fell within the constitution's limitations on the Legislature's power to "establish[] legislative district boundaries." 83 So.3d at 700 (Canady, C.J., concurring in part and dissenting in part). As a textual matter, the dissent noted that "[t]he prohibition on action to 'favor or disfavor . .

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[19] During the 2012 Extraordinary Apportionment Session, the Senate complied with the Court's direction by conducting "a bingo-style drawing complete with ping-pong balls and serious questions about their gravitational integrity"; "heated debate" over "Senate Lotto"; and concern from one Senator that "the drawing constituted illegal gambling." Matt Dixon, *With Help from Ping-Pong Balls, Florida Senate Map OK'd*, Fla. Times Union, Mar. 22, 2012. (*available at*: https://www.jacksonville.com/story/news/politics/2012/03/22/help-ping-pong-balls-florida-senate-map-okd/15871944007/)

. an incumbent' applies only to the manner in which district lines are 'drawn.'" *Id.* (quoting Art. III, § 21(a), Fla. Const.). The dissent concluded that the majority had "stretch[ed] the text of section 21 to reach legislative decisions that are not within the scope of section 21." *Id.*

During its 2022 reapportionment process, the Senate complied with this Court's existing precedent by assigning district numbers in an incumbent-neutral manner. During the final meeting of the Committee on Reapportionment, the results of a random drawing were used to assign "even" or "odd" numbers to each Senate district. (SA.905-06, 999, 1041, 1045). The Committee then adopted an amendment to renumber the districts in accordance with the random drawing. *Id.*

Notwithstanding its compliance with the majority opinion's holding in *Apportionment I* when adopting the Senate Plan, the Senate respectfully submits that the analysis of the dissenting opinion in that case is more faithful to the language of the Florida Constitution. The constitution's plain language prohibits the Legislature from intentionally favoring or disfavoring incumbents "[i]n establishing legislative district boundaries" and in the manner

in which an apportionment plan or district is "drawn." Art. III, § 21, Fla. Const. Even accepting the proposition that an incumbent Senator may stand to gain or lose from the assignment of an "even" or "odd" district number, the assignment of a district number plainly does not involve the "draw[ing]" of "legislative district boundaries." *Id.* The Senate therefore asks the Court to recede from *Apportionment I* to the extent it holds that the assignment of district numbers is subject to this Court's review for validity under Article III, section 21(a), of the Florida Constitution.

As noted earlier, "[t]he doctrine of stare decisis bends . . . where there has been an error in legal analysis." *Puryear*, 810 So.2d at 905. When this Court has chosen to reassess a precedent and has concluded that it is clearly erroneous, "the proper question becomes whether there is a valid reason *why not* to recede from that precedent." *Poole*, 297 So.3d at 507. "The critical consideration ordinarily will be reliance." *Id.*

As to the assignment of district numbers, the type of reliance interests ordinarily cited as a justification for retaining erroneous precedent are nearly nonexistent. The holding in *Apportionment I* involving the review of Senate district numbers does not involve

property or contract rights, does not govern primary conduct, and does not implicate the reliance interests of private parties. *Id.* The Court has good reason to address this matter now, during this proceeding, to "restore[] discretion" that *Apportionment I* "wrongly took from the political branches" on the assignment of district numbers for the redistricting cycle following the next decennial census. *Poole*, 297 So.3d at 507.

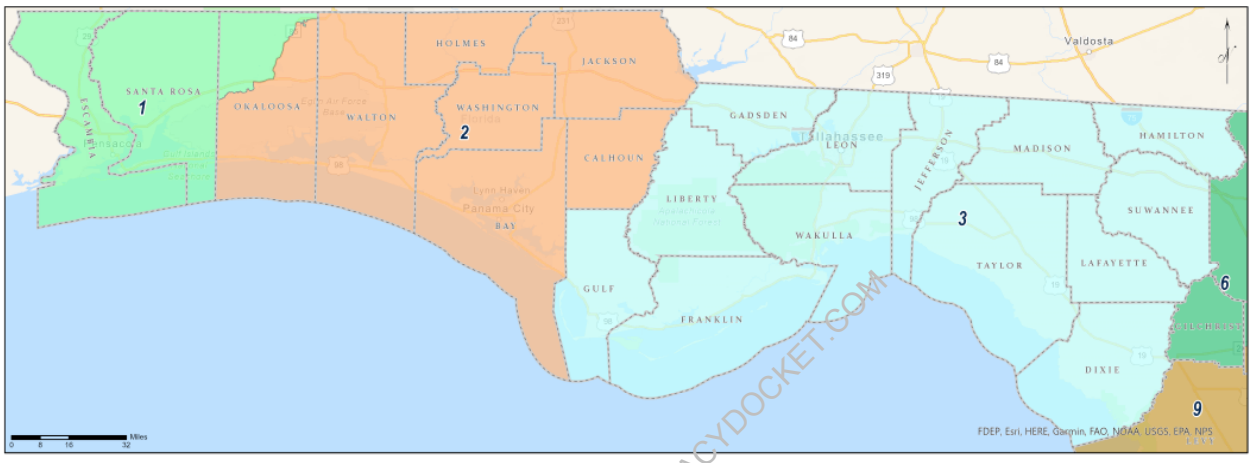
IV. THE SENATE DISTRICTS COMPLY WITH ALL CONSTITUTIONAL STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES.

The Senate Plan also satisfies all constitutional standards for the drawing of legislative district boundaries on a district-by-district basis. The following district-specific arguments are supplemental to the plan-wide arguments discussed above, which apply equally to each individual district unless otherwise noted.

No Senate district was drawn with the intent to favor or disfavor a political party or an incumbent. Art. III(a), § 21, Fla. Const. No district was 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. *Id.* All districts consist of

contiguous territory. *Id.* Finally, all districts satisfy the Florida Constitution's population-equality, compactness, and boundary-usage standards. *Id.*

A. Florida Panhandle (Senate Districts 1-3).

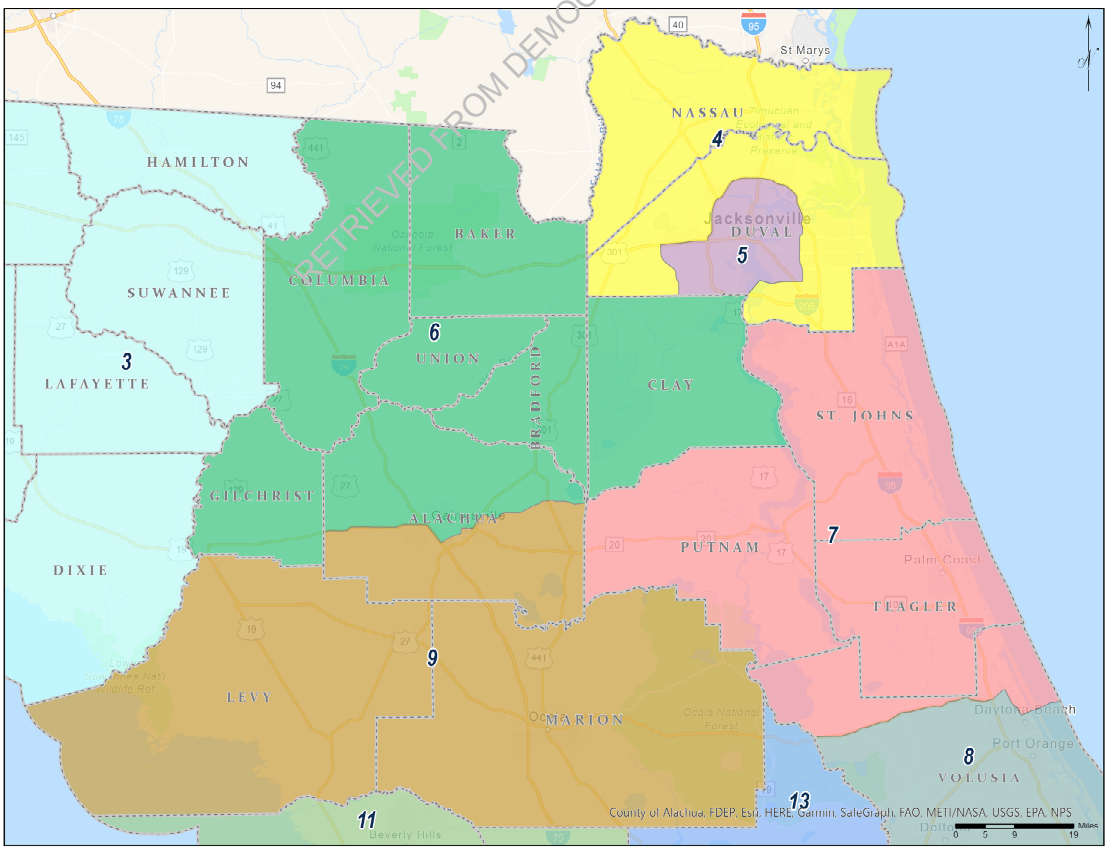


The Senate Plan's districts in the Florida Panhandle satisfy the Florida Constitution's standards for establishing legislative district boundaries.

The configuration of Districts 1 and 2 is fully contained within Escambia, Santa Rosa, Okaloosa, Walton, Holmes, Washington, Bay, Calhoun, and Jackson Counties. District 3 consists of all of Gadsden, Liberty, Gulf, Leon, Wakulla, Franklin, Jefferson, Madison, Taylor, Hamilton, Suwannee, Lafayette, and Dixie Counties in their entirety.

Consistent with the Committee Directives, the districts in the Florida Panhandle largely consist of whole county groupings. (A.431-32). Each of these districts also achieves the highest possible boundary-analysis score for use of existing political and geographical boundaries. The "easily ascertainable and commonly understood" political and geographical boundaries coinciding with 100% of the district boundaries are described in the Senate Appendix. (SA.1046-1225).

B. Big Bend and Northeast Florida (Senate Districts 4, 5, 6, 7, and 9).



The Senate Plan's districts in the Big Bend and Northeast Florida satisfy the Florida Constitution's standards for establishing legislative district boundaries.

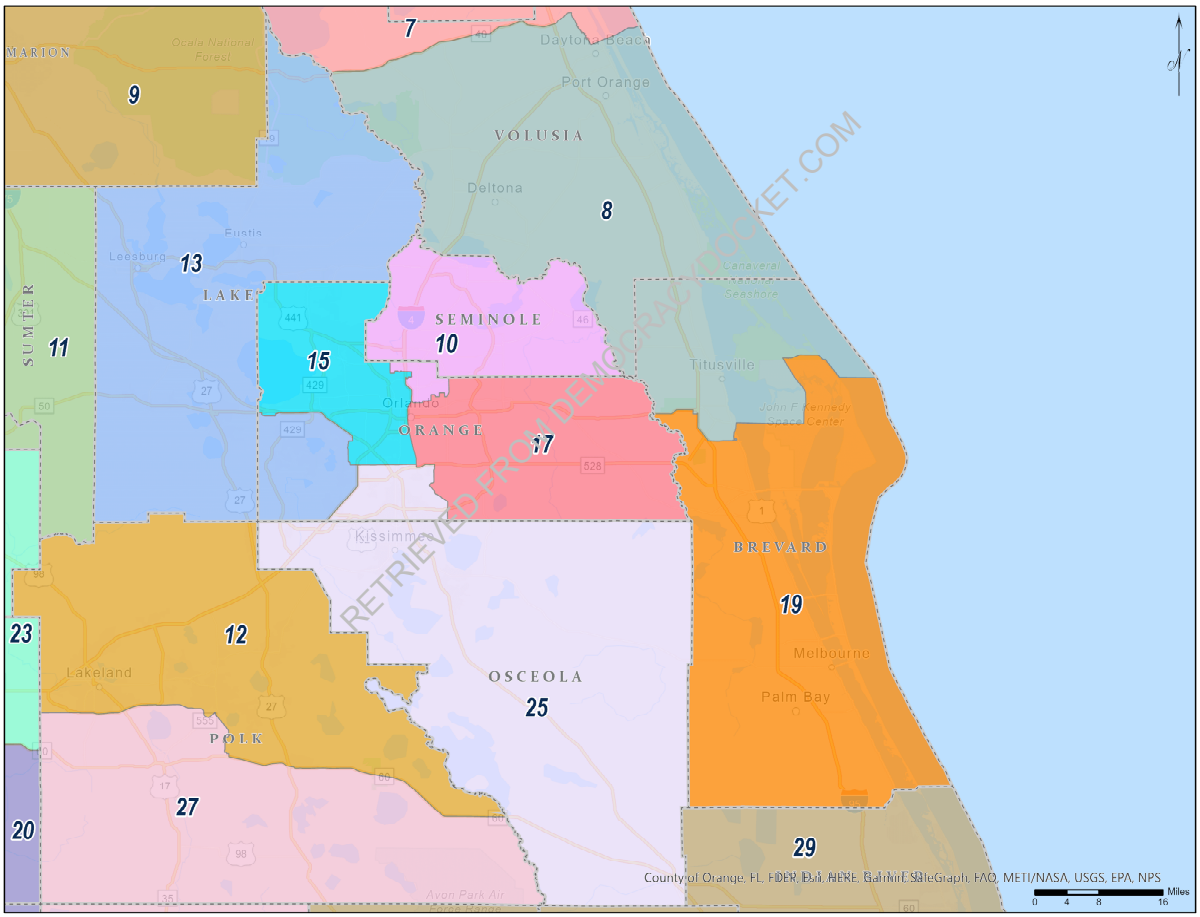
The configuration of Districts 6 and 9 is fully contained within Columbia, Baker, Union, Bradford, Clay, Gilchrist, Alachua, Levy, and Marion Counties. Districts 4 and 5 are fully contained within Nassau and Duval Counties. District 7 consists of all of St. Johns, Putnam, and Flagler Counties, and part of northern Volusia County.

Consistent with the Committee Directives, the districts in the Big Bend and Northeast Florida largely consist of whole county groupings. (A.431-32). Each of these districts also achieves the highest possible boundary-analysis score for use of existing political and geographical boundaries. The "easily ascertainable and commonly understood" political and geographical boundaries coinciding with 100% of the district boundaries are described in the Senate Appendix. (SA.1046-1225).

District 5 is a "historically performing minority district," *Apportionment I*, 83 So.3d at 625, that is protected against diminishment in the ability of Black voters to elect representatives

of their choice. A functional analysis of the statistical data that this Court analyzed in *Apportionment I* confirms that District 5 does not diminish the ability to elect as compared to its predecessor district, District 6 in the benchmark Senate plan. (A.435-38, 443-46).

C. Central Florida and Space Coast (Senate Districts 8, 10, 12, 13, 15, 17, 19, 25).



The Senate Plan's districts in Central Florida and the Space Coast satisfy the Florida Constitution's standards for establishing legislative district boundaries.

District 12 is fully contained within Polk County. Districts 15 and 17 are fully contained in Orange County. District 10 consists of all of Seminole County and part of Orange County. District 13 consists of all of Lake County and part of Orange County. District 25 consists of all of Osceola County and part of Orange County. The configuration of Districts 8 and 19 is fully contained within Volusia and Brevard Counties.

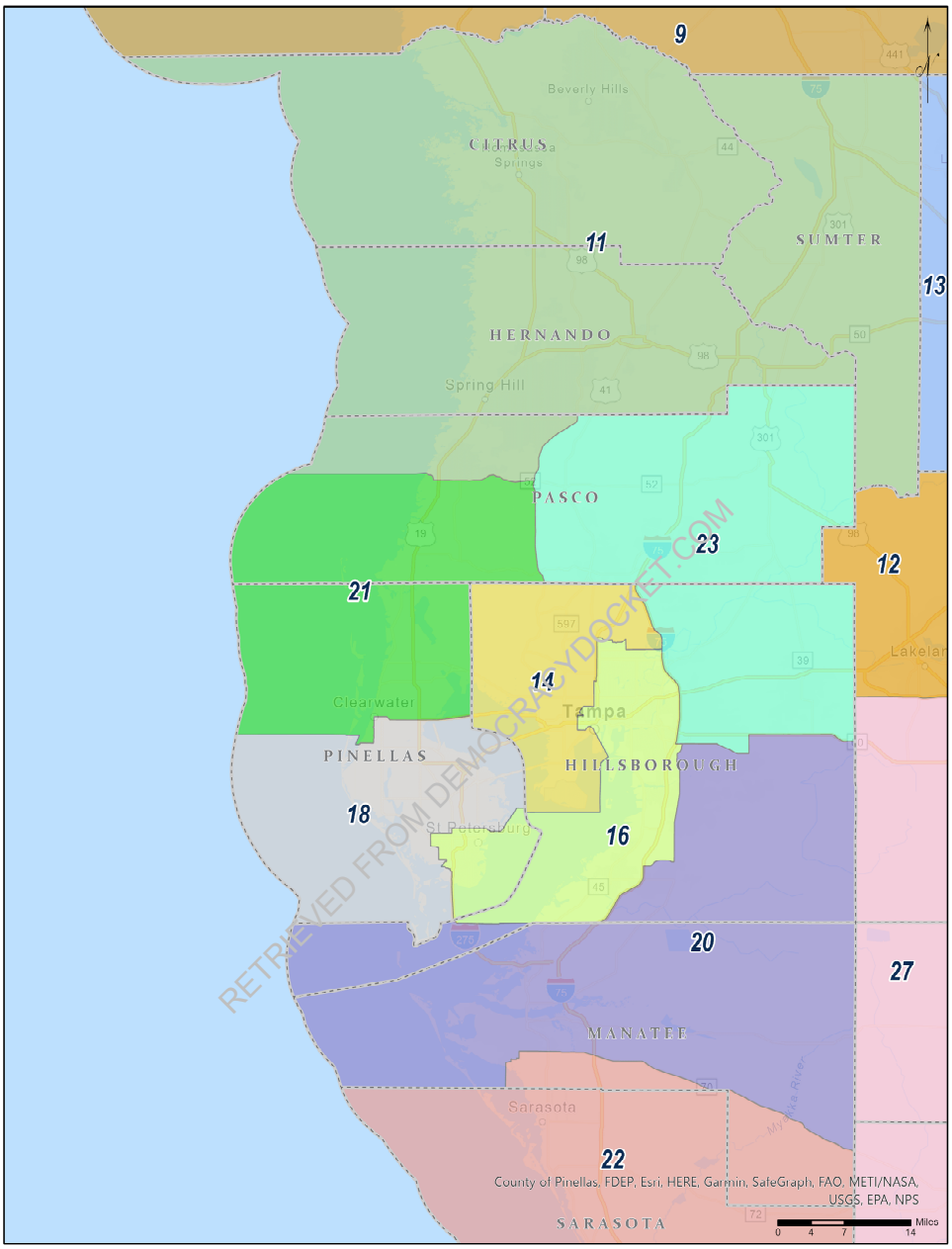
Consistent with the Committee Directives, the districts in Central Florida and the Space Coast seek to keep districts wholly within counties in more densely populated areas and consist of whole counties in less populated areas, with deviations as necessary to comply with the population-equality standard and the Tier-One protections for racial and language minorities.

Where it is feasible to do so, these districts exhibit a high use of existing political and geographical boundaries: 100% for Districts 8 and 19; 98% for Districts 10, 12, 13, and 25; 94% for District 15; and 93% for District 17. (A.432). The "easily ascertainable and commonly understood" political and geographical boundaries coinciding with these district boundaries are described in the Senate Appendix. (SA.1046-1225)

District 15 is a "historically performing minority district," *Apportionment I*, 83 So.3d at 625, that is protected against diminishment in the ability of Black voters to elect representatives of their choice. A functional analysis of the statistical data that this Court analyzed in *Apportionment I* confirms that District 15 does not diminish the ability to elect as compared to its predecessor district, District 11 in the benchmark Senate plan. (A.435-38, 443-46).

District 25 is a "historically performing minority district," *Apportionment I*, 83 So.3d at 625, that is protected against diminishment in the ability of Hispanic voters to elect representatives of their choice. Due to an increase in the Hispanic population in Central Florida, District 25 is now a majority-minority district. (A.432). A functional analysis of the statistical data that this Court analyzed in *Apportionment I* confirms that District 25 does not diminish the ability to elect as compared to its predecessor district, District 15 in the benchmark Senate plan. (A.435-38, 443-46).

D. Tampa Bay (Senate Districts 11, 14, 16, 18, 20, 21, 23).



The Senate Plan's districts in Tampa Bay satisfy the Florida Constitution's standards for establishing legislative district boundaries.

District 11 consists of all of Citrus, Sumter, and Hernando Counties and part of Pasco County. District 14 is fully contained in Hillsborough County. District 16 consists of a part of Hillsborough and a part of Pinellas County. District 18 is fully contained within Pinellas County. District 20 consists of a part of Hillsborough and a part of Manatee County. District 21 consists of a part of Pinellas and a part of Pasco County. District 23 consists of a part of Hillsborough and a part of Pasco County.

Consistent with the Committee Directives, and where feasible, the districts in Tampa Bay seek to keep districts wholly within counties in more densely populated areas, and consist of whole counties in less populated areas, with deviations as necessary to comply with the population-equality standard and the Tier-One protections for racial and language minorities.

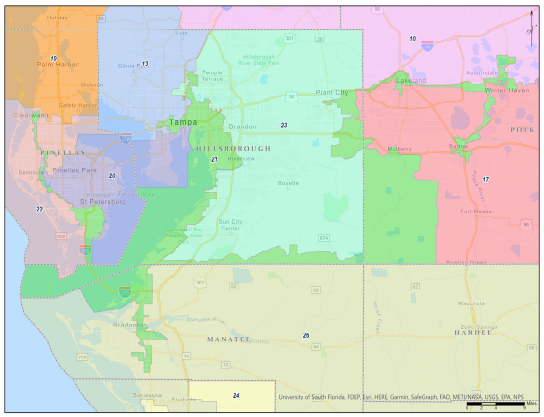
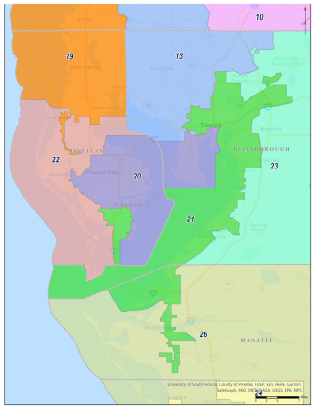
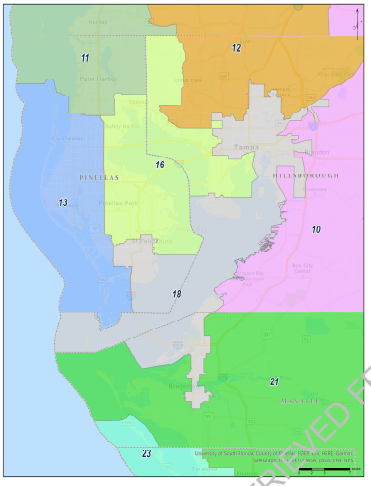
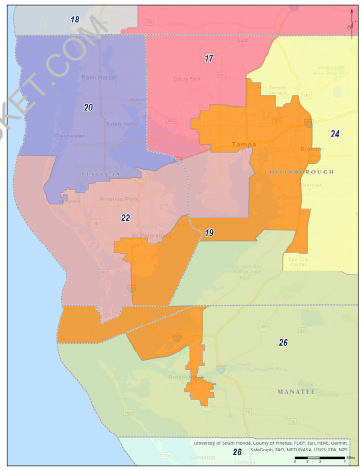
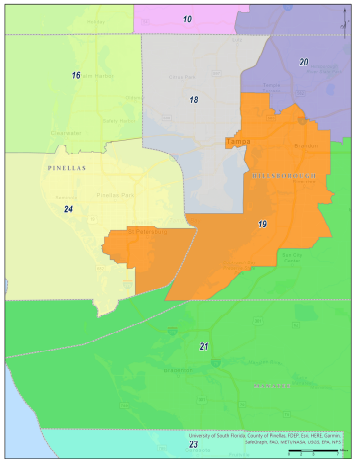
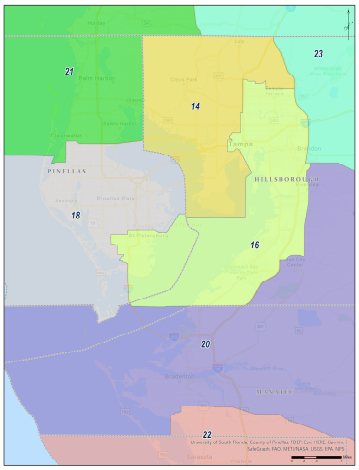
Where feasible, these districts also exhibit a high use of existing political and geographical boundaries: 100% for District 11; 93% for District 14; 82% for District 16; 92% for District 18; 91% for District 20; 99% for District 21; and 93% for District 23. (A.432). The "easily ascertainable and commonly understood" political and

geographical boundaries coinciding with these district boundaries are described in the Senate Appendix. (SA.1046-1225).

District 16 is a "historically performing minority district," *Apportionment I*, 83 So.3d at 625, that is protected against diminishment in the ability of Black voters to elect representatives of their choice. A functional analysis of the statistical data that this Court analyzed in *Apportionment I* confirms that District 16 does not diminish the ability to elect as compared to its predecessor district, District 19 in the benchmark Senate plan. (A.435-38, 443-46).

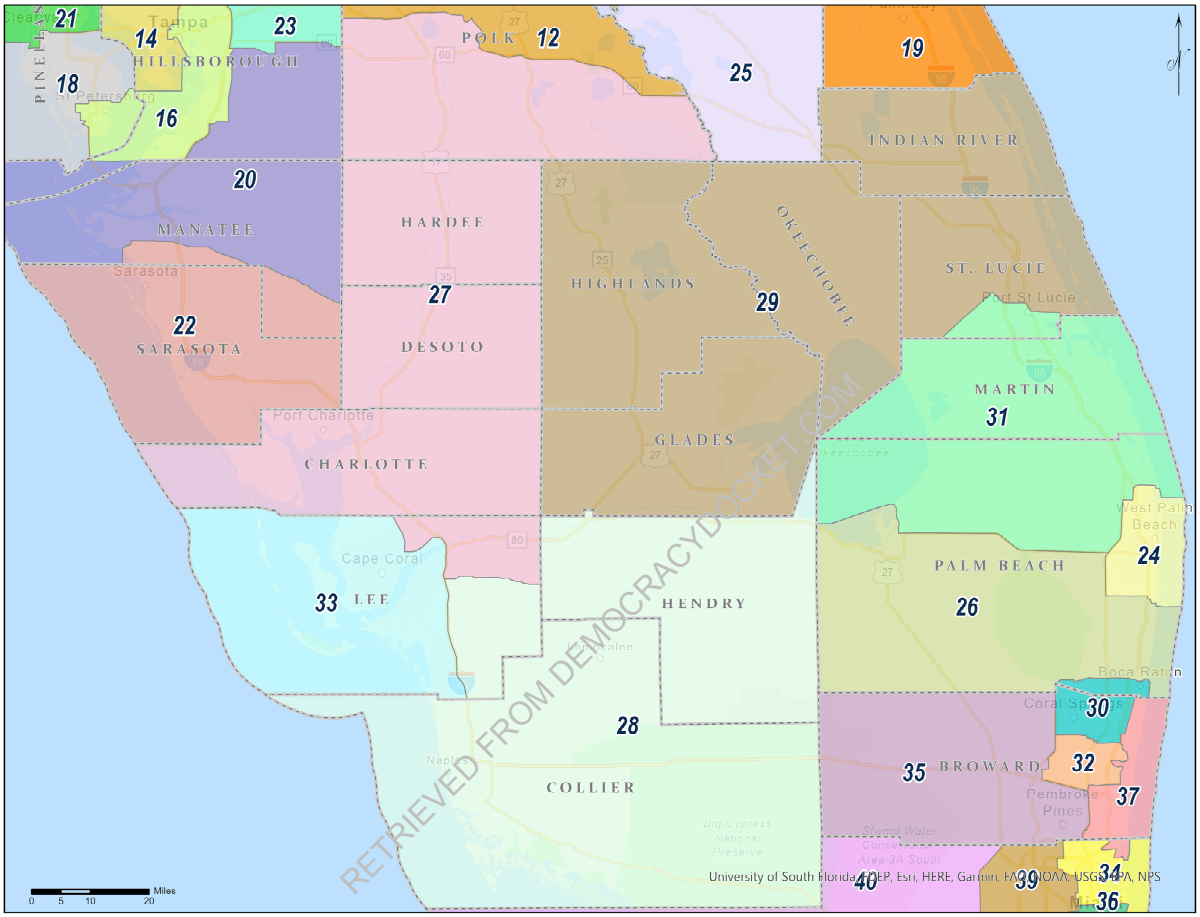
District 16 is also more compliant on Tier-Two metrics than its predecessor district in the benchmark Senate plan, with improvements on boundary usage, visual compactness, and the Convex Hull and Polsby-Popper quantitative compactness measures.

Although District 16 compares favorably with its immediate predecessor on Tier-Two metrics, its visual compactness improvements over its predecessor districts from the past three decades is even more remarkable:

	
1992 Senate Plan (Court-Ordered)	1996 Senate Plan (Court-Ordered)
	
2002 Senate Plan	2012 Senate Plan (SJR 2-B)
	
2016 Senate Plan (Court-Ordered)	2022 Senate Plan

(A.431, 439; SA.1140).

E. Heartland and Southwest Florida (Senate Districts 22, 27, 28, 29, 33).



The Senate Plan's districts in the Heartland and Southwest Florida satisfy the Florida Constitution's standards for establishing legislative district boundaries.

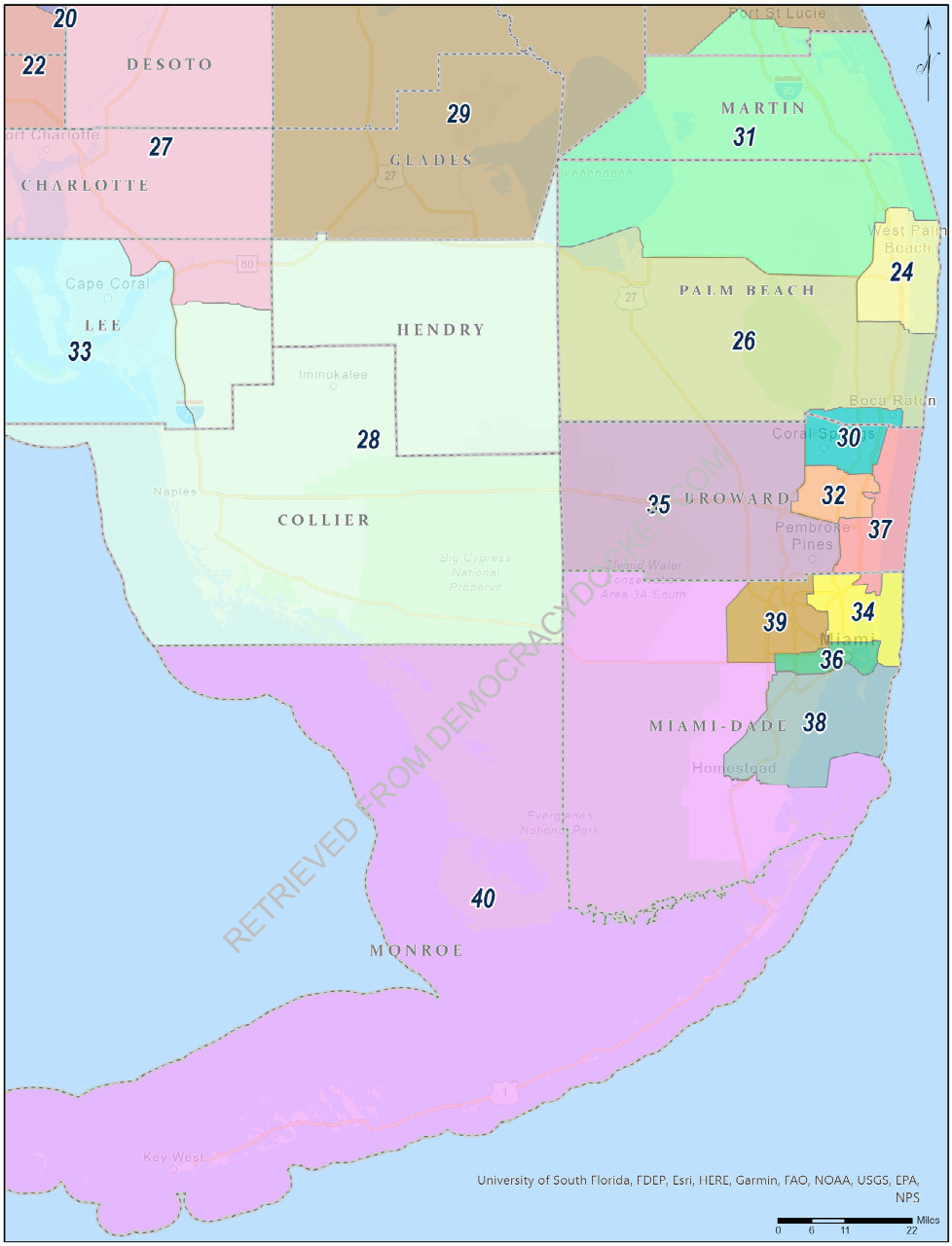
District 22 consists of all of Sarasota County and part of Manatee County. District 27 consists of all of Charlotte, DeSoto, and Hardee Counties and parts of Lee and Polk Counties. District

28 consists of all of Collier and Hendry Counties and part of Lee County. District 29 consists of all of Glades, Highlands, Okeechobee, and Indian River Counties and part of St. Lucie County. District 33 is wholly contained in Lee County.

Consistent with the Committee Directives, the districts in the Heartland and Southwest Florida seek to keep districts wholly within counties in more densely populated areas and consist of whole counties in less populated areas, with deviations as necessary to comply with the population-equality standard.

Where feasible, these districts all exhibit a high use of existing political and geographical boundaries: 98% for District 22; 96% for District 27; 97% for District 28; 99% for District 29; and 100% for District 33. The "easily ascertainable and commonly understood" political and geographical boundaries coinciding with these district boundaries are described in the Senate Appendix. (SA.1046-1225).

F. Southeast Florida (Senate Districts 24, 26, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40).



The Senate Plan's districts in Southeast Florida satisfy the Florida Constitution's standards for establishing legislative district boundaries.

Districts 24 and 26 are contained wholly within Palm Beach County. Districts 32 and 35 are contained wholly within Broward County. Districts 34, 36, 38, and 39 are contained wholly within Miami-Dade County. District 31 consists of all of Martin County and parts of St. Lucie and Palm Beach Counties. District 40 consists of all of Monroe County and part of Miami-Dade County. District 30 consists of parts of Broward and Palm Beach Counties. District 37 consists of parts of Broward and Miami-Dade Counties.

Consistent with the Committee Directives, the districts in Southeast Florida seek to keep districts wholly within counties in more densely populated areas and consist of whole counties in less populated areas, with deviations as necessary to comply with the population-equality standard and the Tier-One protections for racial and language minorities.

Where it is feasible to do so, these districts all exhibit a high use of existing political and geographical boundaries: 100% for Districts 37 and 40; 99% for District 35; 97% for District 32; 96% for District 34; 95% for Districts 31 and 39; 94% for District 38; 92% for District 26; 91% for District 36; 86% for District 24; and

84% for District 30. (A.432).[20] The "easily ascertainable and commonly understood" political and geographical boundaries coinciding with these district boundaries are described in the Senate Appendix. (SA.1046-1225).

Districts 32 and 34 are "majority-minority" or "historically performing minority district[s]," *Apportionment I*, 83 So.3d at 625, that are protected against diminishment in the ability of Black voters to elect representatives of their choice. A functional analysis of the statistical data that this Court analyzed in *Apportionment I* confirms that Districts 32 and 34 do not diminish the ability to elect as compared to their predecessor districts, District 33 and 35, respectively, in the benchmark Senate plan. (A.435-38, 443-46).

Districts 32 and 34 are also more compliant on Tier-Two metrics than their predecessor districts in the benchmark Senate plan, with both districts showing improvements on boundary usage,

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[20] The boundary-usage scores for District 24 and District 30 are adversely affected by their use of Hypoluxo Road and Glades Road, respectively, for significant portions of their respective district boundaries. Although these are significant thoroughfares in Palm Beach County, they are not coded by the U.S. Census Bureau as "primary or secondary roads within the federal or state highway systems" for the entirety of their length in Palm Beach County.

visual compactness, and all three quantitative compactness measures. (A.432, 440).

Districts 36, 38, 39, and 40 are majority-minority districts that are protected against diminishment in the ability of Hispanic voters to elect representatives of their choice. *Apportionment I*, 83 So.3d at 625. A functional analysis of the statistical data that this Court analyzed in *Apportionment I* confirms that Districts 36, 38, 39, and 40 do not diminish the ability to elect as compared to their predecessor Tier-One protected districts in Miami-Dade County, Districts 36, 37, 39, and 40, in the benchmark Senate plan.[21] (A.435-38, 443-46).

Districts 36, 38, 39, and 40 are also more compliant on Tier-Two metrics than their predecessor districts in the benchmark Senate plan, with improvements in boundary usage, visual

[21] The substantial reconfiguration of the four Hispanic majority-minority districts in Miami-Dade County complicates the task of identifying specific corresponding "benchmark" and "successor" districts. The Senate's functional analysis therefore confirmed non-diminishment in the ability to elect as to the set of four districts collectively.

compactness, and various quantitative compactness measures. (A.432, 440).

V. THE COURT SHOULD CONFIRM THAT A JUDGMENT DETERMINING THE APPORTIONMENT TO BE VALID WILL BE BINDING UPON ALL THE CITIZENS OF THE STATE.

Under the Florida Constitution, this Court must "enter its judgment" as to the validity of the apportionment within thirty days after the filing of the Attorney General's petition. Art. III, § 16(c), Fla. Const. The "effect of [the Court's] judgment in apportionment" is also constitutionally specified: "a judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state." Art. III, § 16(d), Fla. Const. The judgment in this proceeding should therefore confirm, consistent with the plain language of the Florida Constitution, that a decision determining the apportionment to be valid is "binding" and precludes collateral state-court attacks on the Court's declaratory judgment. And this Court should recede from *Florida House of Representatives v. League of Women Voters of Florida*, (*"Apportionment III"*), 118 So.3d 198 (Fla. 2013), to the extent that decision's holding contravenes the unambiguous language of Article III, Section 16(d).

In *Apportionment II*, this Court entered a "declaratory judgment declaring the revised Senate apportionment plan as contained in Senate Joint Resolution 2-B to be constitutionally valid under the Florida Constitution." 89 So.3d at 891. The Court's declaratory judgment of validity was based on the conclusion that the opponents had "failed to demonstrate that the revised Senate plan as a whole or with respect to any individual district violates Florida's constitutional requirements" set out in Article III, section 21. *Id.* at 890-91.

Notwithstanding this Court's declaration that the revised Senate plan was "constitutionally valid," a group of plaintiffs sued in circuit court alleging that the revised Senate plan violated Article III, Section 21. *Apportionment III*, 118 So.3d at 202. After the circuit court denied a motion to dismiss asserting lack of subject matter jurisdiction, the House and Senate sought extraordinary-writ relief from this Court: either a writ of prohibition (on the basis that this Court has exclusive jurisdiction to review legislative apportionment) or a constitutional writ under the "all-writs" authority (on the basis that the circuit court's exercise of jurisdiction interferes with the binding judgment of validity). *Id.* at 203.

This Court denied relief, concluding that the circuit court had subject matter jurisdiction to adjudicate "subsequent fact-based challenges to the legislative apportionment plan." *Id.* at 213. The majority opinion construed the review under Article III, section 16, as a "facial" review that did not preclude subsequent "as-applied" challenges in the trial court based upon alleged violations of the same constitutional standards addressed in the Court's declaratory judgment of validity. *Id.* at 204.

Two justices dissented, "strongly disagree[ing] with the majority's decision, which consigns section 16(d) to the status of a dead letter." *Id.* at 214 (Canady, J., dissenting). The dissent faulted the majority for failing to address the "unambiguous text," and instead relying on "dicta from prior opinions that also failed to reckon with the constitutional text." *Id.* at 214-15. The language of section 16(d), according to the dissent, "is unconditional and unequivocal." *Id.* at 215.

> It is plainly designed to conclusively determine and settle once for all the validity of a redistricting plan under state law. The plain import of the provision that a judgment of validity "shall be binding upon all the citizens of the state" is that no citizen is permitted to thereafter challenge the validity of the redistricting plan that has been held valid. If the citizens of the state are bound by a judgment of

> validity, they are necessarily precluded from challenging the validity of the redistricting plan in subsequent litigation. Those who are bound by a judgment will not be heard to challenge that judgment. Nothing in the constitutional text or structure suggests that the rule of preclusion in section 16(d) is limited to claims that are actually litigated in a section 16 validation proceeding.

Id. The Senate respectfully asks this Court to recede from *Apportionment III* in favor of the clear and unambiguous constitutional language vesting exclusive state-court jurisdiction in this Court to pass on the validity of the legislative apportionment, Art. III, § 16(d), Fla. Const.

If this Court agrees that *Apportionment III* is clearly erroneous for the reasons cogently explained in that case's dissenting opinion, no reliance interests or other factors would justify adherence to that precedent. "[C]laims of stare decisis are at their weakest" in cases involving constitutional interpretation, *Vieth*, 541 U.S. at 305, and "reliance interests are lowest in cases . . . involving procedural and evidentiary rules." *Poole*, 297 So.3d at 507 (internal quotation marks and citation omitted).

As in *Vieth*, it "is hard to imagine how any action taken in reliance upon [*Apportionment III*] could conceivably be frustrated—

except the bringing of lawsuits, which is not the sort of primary conduct that is relevant." 541 U.S. at 306.

"Because the Florida Constitution in article III, section 16(d), unambiguously precludes challenges under Florida law to a legislative redistricting plan that has been declared valid by this Court in a proceeding under article III, section 16," *Apportionment III*, 118 So.3d at 214 (Canady, J., dissenting), this Court should recede from its contrary precedent and confirm that a judgment determining the apportionment to be valid "shall be binding upon all the citizens of the state."

CONCLUSION

The Court should enter a declaratory judgment determining the apportionment to be valid, and should confirm that the Court's judgment is binding upon all citizens of the state.

Respectfully submitted,

/s/ Daniel Nordby

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief has been filed via the E-Filing Portal and served via electronic service on February 19, 2022, to:

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CERTIFICATE OF COMPLIANCE

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/s/ Daniel Nordby
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