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' BRIEF ON OUTSTANDING LEGAL ISSUES

The Parties now agree that the Enacted Map diminishes the electoral power of Black voters in North Florida, who were previously able to elect their candidates of choice in North Florida under last decade's Benchmark Map, *see* Stip. IV(B) & Stip. Ex. 1 at ¶ 3(o), but are no longer able to do so under the Enacted Map, *id.* ¶ 4(o). Under binding Florida Supreme Court precedent, that alone is enough to prove a diminishment claim under Article III, Section 20(a) of the Florida Constitution.

With the facts of diminishment beyond dispute, Defendants' only recourse to avoid liability is to upend Florida precedent. This Court should reject Defendants' invitation to adopt a new standard for diminishment claims. The Florida Supreme Court has *never* required a minority group to constitute 50% of the voting age population of a district before it can be protected from diminishment. Indeed, just last year, Defendants Florida House and Florida Senate disavowed any such requirement before the Florida Supreme Court.

This Court should also reject Defendants' affirmative defenses under the Equal Protection Clause, which Defendants Florida House and Florida Senate themselves frequently rebuffed as the

Governor's "novel legal theory" during the redistricting cycle. Not only do Defendants lack standing to raise this theory in the first place, but they do not and cannot meet their burden to establish that compliance with the non-diminishment provision of the Florida Constitution necessitates racial gerrymandering in violation of the Equal Protection Clause of the U.S. Constitution.

Ultimately, Defendants' legal arguments are foreclosed by binding precedent, and they do nothing to change the outcome of this straightforward challenge under Florida's Fair Districts Amendments. This Court should enter judgment in Plaintiffs' favor on Count I.

BACKGROUND

I. The Fair Districts Amendments protect minority voters from redistricting plans that diminish their ability to elect their candidates of choice.

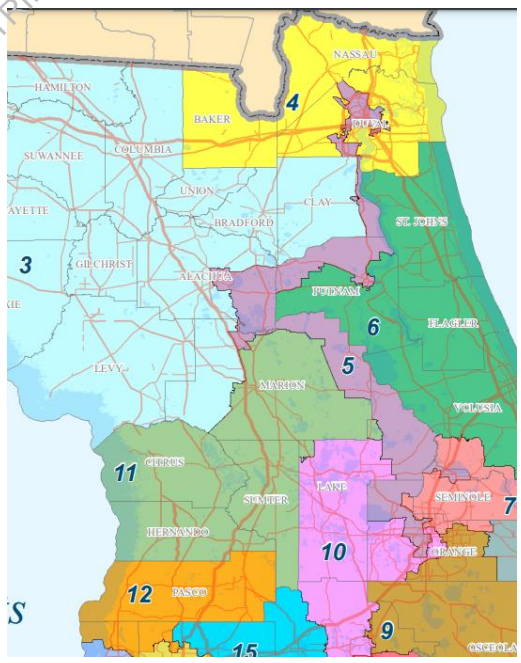
A decade ago, an overwhelming majority of Floridians voted to adopt the Fair Districts Amendments to the Florida Constitution. The Amendments explicitly constrain the Legislature's exercise of its reapportionment power, as enumerated within two "tiers" in Article III, Sections 20 and 21 of the Florida Constitution.[1] Tier I of Article III, Section 20(a) states, in relevant part: "[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." The Florida Supreme Court has recognized this provision contains two separate requirements: A non-dilution requirement and a non-diminishment requirement. *In re S. J. Res. of Legis. Apportionment 1176* ("*Apportionment I*"), 83 So. 3d 597, 619 (Fla. 2012).

[1] The Fair Districts Amendments provide "identical standards" for congressional redistricting in Section 20 and state legislative redistricting in Section 21. *Apportionment I*, 83 So. 3d at 598 n.1 (Fla. 2012). 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).

The "non-diminishment provision" prohibits map drawers from "eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625. To evaluate a diminishment claim, courts must determine whether minority voting strength has diminished under the new plan when compared to the previous plan (referred to as the "Benchmark Map"). *Id.* at 624–25.

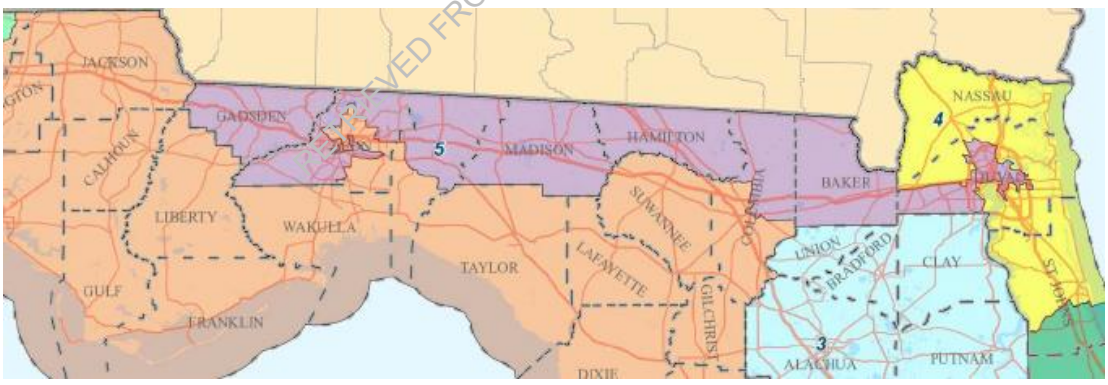
II. The Florida Supreme Court ordered the adoption of Benchmark CD-5 in 2015 after affirming that the previous district did not comply with the Florida Constitution.

In the last redistricting cycle, several plaintiffs challenged the state's 2012-enacted Congressional District 5 ("CD-5") after the Legislature artificially packed Black voters into a district to advantage the Republican Party. As the trial court explained at the time, the district "is visually not compact, bizarrely shaped, and does not follow traditional political boundaries as it winds from Jacksonville to Orlando," narrowing at one point to the "width of Highway 17." *Romo v. Detzner*, No. 2012-CA-000412, 2014 WL 3797315, at *9 (Fla. Cir. Ct. July 10, 2014). An image of the district appears below. **Ex. 1**, 2012 Congressional Districts.



At the time, the Legislature publicly justified the shape of this district not as an effort to advantage the Republican Party, but to increase the Black voting age population (BVAP) above 50% to comply with the Florida Constitution. *See Romo*, 2014 WL 3797315, at *9. As the trial court explained, however, neither the non-diminishment provision nor the non-dilution provision of the Florida Constitution required the district to be drawn as a majority-Black district. In particular, the district did not need to be drawn at 50% BVAP to comply with the non-diminishment provision of the Florida Constitution: the previous district had been a "plurality BVAP district," and the district could continue to elect a Black candidate of choice with less than 50% BVAP. *See id.* at *9–10.

In *LWV I*, the Florida Supreme Court affirmed the trial court's findings as to District 5 and ordered the new CD-5 (now commonly known as "Benchmark CD-5") to be drawn in an East-West configuration from Tallahassee to Jacksonville across Florida's northern border. 172 So. 3d at 403. An image of Benchmark CD-5 is shown below. *See* Stip. Ex. 3.



As the Florida Supreme Court explained, Benchmark CD-5 made marked improvements in Tier II compliance as compared to its predecessor. While acknowledging that the "East-West orientation is longer," "there is … no doubt that the numerical compactness scores … favor the East–West orientation," which also "allows for fewer incorporated city and county splits than the Legislature's North-South district." *LWV I*, 172 So. 3d at 406.

At the time of its adoption, Benchmark CD-5 had a BVAP of 45.12%. *Id.* at 404. As the Florida Supreme Court explained, the predecessor versions of this district had "perform[ed] for the black candidate of choice in every election from 2000 through the present" with BVAP percentages below 50%, including those within a 42-47% BVAP range. *Id.* at 404. In approving Benchmark CD-5 at the final remedial stage of the litigation, the Florida Supreme Court specifically found that this configuration would preserve a historically performing Black district. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) ("*LWV II*"). It concluded that, in Benchmark CD-5, "the ability of black voters to elect a candidate of their choice is not diminished." *Id.*

Benchmark CD-5 was in place during the 2016, 2018, and 2020 congressional elections. *See* Stip. IV(B). Black voters were able to elect their candidate of choice, Rep. Al Lawson, in each of those elections. *See* Stip. Ex. 1 ¶ 3(j)-(k).

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

Throughout the 2020 redistricting cycle, the Legislature concluded that Benchmark CD-5 should be protected under Florida's non-diminishment standard. *See, e.g.*, **Ex. 2**, Nov. 16, 2021 Fla. Senate Tr. at 17:19-23 (Senate affirming that "[d]istrict five is an effective minority district protected under Tier-One of Article three, section 20 of the Florida Constitution from diminishment"); **Ex. 3**, Jan. 13, 2022 Fla. House Tr. at 11:5-12:13 (House affirming same for the district, which they had renumbered as District 3). For months, the chambers proposed and voted on congressional redistricting plans that retained the East-West configuration of CD-5. *See, e.g.*, *id.* at 13:9-13.

Governor Ron DeSantis, however, wanted to eliminate Benchmark CD-5 and sought the Florida Supreme Court's blessing to do so, notwithstanding the Court's precedent. On February 1,

2022, Governor DeSantis requested the Florida Supreme Court's opinion on whether the "the Florida Constitution's non-diminishment standard" required a district from Tallahassee to Jacksonville which allowed Black voters to elect the candidates of their choice, "even without a majority." *See* **Ex. 4**, Feb. 1, 2022 Advisory Op. Request at 4. The Governor's Advisory Request acknowledged that existing precedent from the Florida Supreme Court "suggest[s] that the answer is 'yes.'" *Id.* at 4. The Governor's Advisory Request nonetheless asked the Florida Supreme Court to clarify "what the non-diminishment standard does require," both generally and as applied to CD-5 in North Florida. *Id.* at 5.

On February 10, 2022, the Florida Supreme Court declined the Governor's request to issue an advisory opinion providing new guidance either on the non-diminishment standard generally or on CD-5 specifically. *See Advisory Op. to Governor re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1108 (Fla. 2022). In other words, contrary to the Governor's request, the Florida Supreme Court did not revisit its precedent to authorize the Governor to eliminate a historically performing district in North Florida.

After the Florida Supreme Court rejected the Governor's advisory request, the Legislature continued to propose redistricting plans which retained an East-West CD-5. *See* **Ex. 5**, Feb. 18, 2022 Fla. House Tr. at 13:7-16. Undeterred, however, the Governor sent an ambassador, Mr. Robert Popper, to the Florida House to persuade the Legislature to abandon the district. *Id.* at 77:7-17. The Republican-led House Redistricting Committee was not receptive to Mr. Popper's arguments, which, as the committee members pointed out, were inconsistent with existing precedent. *See, e.g.*, *id.* at 103:4-12 (Chair Sirios remarking to Mr. Popper, "Sir, in your written testimony that you provided …, I think you said that Florida's non-diminishment standard protects only majority-minority districts. What is your strongest legal authority for that proposition? And

didn't the Florida Supreme Court say the exact opposite in its first apportionment decision in 2012?"); *id.* at 90:1-6 (Rep. Harding: "[A]re you aware of any court decision holding a state constitutional provision that protects minority voting rights that is insufficient to justify the use of race to draw a district?" Mr. Popper: "Well, no."). The House Redistricting Committee ultimately passed a redistricting plan containing an East-West configuration of CD-5 out of committee, with Chair Sirios remarking, "This is a legally sound map. It's a constitutionally compliant map." *Id.* at 131:7-8.

In March 2022, responding to continuing threats from the Governor's Office to veto plans retaining a district resembling Benchmark CD-5, the Florida Legislature passed a redistricting plan that contained both a "Primary Map" (Plan 8019) and a "Secondary Map" (Plan 8015) with two different configurations of CD-5, both of which the Legislature maintained would comply with the non-diminishment provision. **Ex. 6**, Fla. S. Comm. on Reapportionment, CS/SB 102 (2022), House Message Summary; **Ex. 7**, Mar. 4, 2022 Fla. Senate Tr. at 22:18-24:22. The Primary Map (Plan 8019) contained a configuration of CD-5 including only portions of Duval County. Ex 6. at 10. As the Legislature explained at the time, the Primary Map was intended "to address the novel legal theory raised by the Governor" about the East-West configuration of CD-5. **Ex. 8**, Feb. 25, 2022 Fla. House Tr. at 24:6-10. The Secondary Map (Plan 8015) retained the East-West configuration of CD-5. Ex. 6 at 2. The Legislature intended that the Secondary Map would take effect "[i]f Congressional District 5 in the primary map is invalidated" by a court as a violation of the Florida Constitution's non-diminishment provision. *Id.* at 1.

On March 29, 2022, Governor DeSantis vetoed the Legislature's Primary and Secondary Maps. *See* **Ex. 9**, Veto of CS/SB 102 (2022) (letter from Governor DeSantis to Sec'y of State Laurel Lee, Mar. 29, 2022); **Ex. 10**, Memorandum from Ryan Newman to Ron DeSantis re

Constitutionality of CS/SB 102 (Mar. 29, 2022). In the Governor's veto message, the Governor's legal counsel pointed to the Florida Supreme Court's non-diminishment precedent and acknowledged that CD-5 in Plan 8015 (which maintained Benchmark CD-5's East-West configuration and had a BVAP of 43%) "complies with the Florida's Constitution's non-diminishment requirement." Ex. 10 at 5, 7 (citing *Apportionment I*, 83 So. 3d at 624–25). The Governor understood that the elimination of a minority group's ability to elect a candidate of choice for this district would "violate[] the Florida Constitution's non-diminishment requirement as interpreted by the Florida Supreme Court." *Id.* at 6. The Governor nonetheless vetoed the plan under the theory that Plan 8015 would violate the Equal Protection Clause of the U.S. Constitution. *Id.*

The same day the Governor vetoed the Legislature's redistricting plans, he called a special session to consider the Governor's preferred congressional plan (hereinafter the "Enacted Map"), which eliminated the historically performing Black district in North Florida. **Ex. 11**, Proclamation of Governor DeSantis Declaring Special Session (Mar. 9, 2022). In advance of the special session, the Legislature's professional redistricting staff performed a functional analysis of certain districts in the Enacted Map and confirmed that, unlike the Benchmark Map, it did not include a district in North Florida which provided Black voters the ability to elect their candidate of choice. *See* **Ex. 12**, Apr. 20, 2022 Fla. House Tr. at 35:2-3. Throughout the session, even Republican legislators who ultimately voted for the map acknowledged the Governor's legal theory for eliminating CD-5 was not based on any existing precedent. *See, e.g.*, **Ex. 13**, Apr. 20, 2022 Fla. Senate Tr. at 41:4-7 (Senator Burgess recognizing the Governor's map put forward a "novel legal argument"); **Ex. 14**, Apr. 21, 2022 Fla. House Tr. at 68:1 (Representative Fine

acknowledging the Governor's argument was "novel"). The Legislature nonetheless passed the Enacted Map, and Governor DeSantis signed it into law.

The Enacted Map does not contain any district resembling Benchmark CD-5, as shown in the image above. *See* Stip. Ex. 4. Instead, the Enacted Map splits Benchmark CD-5 into four new districts: CD-2, CD-3, CD-4, and CD-5. *See* Stip. Ex. 1 ¶ 4(c). Whereas Black voters made up 46.2% of the voting age population in Benchmark CD-5, Black voters now make up only 23.1%, 15.9%, 31.7%, and 12.8% of the voters in these new districts, respectively. *Id.* at ¶ 4(d).

PROCEDURAL HISTORY

I. Temporary Injunction Proceedings

On April 22, 2022, the same day that Governor DeSantis signed his plan into law, Plaintiffs filed suit, alleging the plan violated the Florida Constitution. Compl. at 38. Plaintiffs include Black Voters Matter Capacity Building Institute, the League of Women Voters of Florida, Inc., the League of Women Voters of Florida Education Fund, Inc., Equal Ground Education Fund, Florida Rising Together, and individual Florida voters, including Black voters who resided in Benchmark CD-5. Compl. ¶¶ 11-27. In May 2022 they sought a temporary injunction against the Enacted Map exclusively on the basis that it resulted in the diminishment of Black voters' ability to elect their candidate of choice in North Florida, in violation of the non-diminishment provision of the Florida Constitution, Art. III, § 20(a). *See generally* Pls.' Mot. for Temporary Injunction. At this stage of the litigation, Plaintiffs put forward a potential remedial redistricting plan—known as "Plan A"—

which inserted the same East-West version of CD-5 from the Legislature's Plan 8015 straight into the Enacted Map. Defendants opposed Plaintiffs' motion primarily on Equal Protection grounds. *See* Sec'y's Resp. in Opp' to Prelim. Inj. (May 9, 2022).

In May 2022, Judge J. Layne Smith held an evidentiary hearing and heard testimony from Plaintiffs' expert, Dr. Stephen Ansolabehere. *See Black Voters Matter Capacity Bldg. Inst., Inc.*, No. 2022-ca-000666, 2022 WL 1684950, (Fla. Cir. Ct. May 12, 2022). Upon review of Dr. Ansolabehere's functional analysis and live testimony, the trial court found that his conclusions were credible, *id.* at *4, and that they were "buttressed by analysis from the Florida Legislature's redistricting staff, which conducted its own functional analysis and found that Black voters would not have the ability to elect their preferred candidates to Congress under the Enacted Map in [North Florida]," *id.* at *5. Judge Smith ultimately held that Plaintiffs had shown the Enacted Map violated the Florida Constitution's non-diminishment provision, *id.* at *4, and that Defendants had not shown that CD-5 from Plan 8015 would violate the Equal Protection Clause, *id.* at *5–7. Judge Smith ordered Plan A to go into effect for the 2022 elections. *Id.* at *9–10.

After Judge Smith vacated the automatic stay, the First DCA issued a preliminary order staying the trial court's temporary injunction. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070 (Fla. 1st DCA), *writ denied*, 340 So. 3d 475 (Fla. 2022). It did so not on the merits of Judge Smith's decision, but because the First DCA concluded that Judge Smith erred procedurally in ordering a new redistricting plan in a temporary injunction proceeding. *Id.* at 1073, 1082–83. As the First DCA explained, it "could not reach whether [the Enacted Map] comports with [the Fair Districts Amendments]" because there had been "no final adjudication." *Id.* at 1073. Plaintiffs sought the Florida Supreme Court's intervention, but the Florida Supreme Court declined to issue a constitutional writ, without addressing any of the merits of Plaintiffs' claim. *Black Voters*

Matter Capacity Bldg. Inst., Inc. v. Byrd, 340 So. 3d 475 (Fla. 2022). The First DCA ultimately vacated the trial court's temporary injunction for the same reasons it had previously stayed it. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 340 So. 3d 569, 571 (1st DCA 2022).

II. The Parties' Stipulation and Plaintiffs' Diminishment Claim

Following the temporary injunction proceeding, the parties exchanged discovery, produced expert reports, conducted depositions, and filed summary judgment motions. In advance of a hearing on Plaintiffs' motion for summary judgment on their diminishment claim, the parties reached a stipulation to streamline the issues for the Court's consideration by limiting the case to Plaintiffs' diminishment claim and stipulating to the facts relevant to proving diminishment under the Florida Constitution. *See* Stipulation, Exhibit 1.

Under the Stipulation, the only remaining legal disputes for this Court to resolve are as follows:

1. Whether Plaintiffs must satisfy the preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for the non-diminishment provision to apply.

2. Whether the non-diminishment provision's application to North Florida violates the Equal Protection Clause to the U.S. Constitution.

3. Whether the non-diminishment provision facially violates the Equal Protection Clause to the U.S. Constitution.

4. Whether the public official standing doctrine bars the Secretary's affirmative defenses based on the Equal Protection Clause to the U.S. Constitution.

Should Plaintiffs prevail, the parties have agreed that the Legislature will have the opportunity enact a remedial map for the 2024 elections. *See* Stip. VII.

ARGUMENT

Under the Parties' Stipulation, there is no dispute that the Enacted Map diminishes Black voting power in North Florida. The remaining legal questions are simply an attempt by Defendants to justify this diminishment. This Court should decline the invitation to rewrite the non-

diminishment standard in contravention of binding precedent or to take the extraordinary step of finding that the Florida Constitution is *itself* unconstitutional.

I. Under binding precedent, the Enacted Map violates the non-diminishment standard of Article III, Section 20.

The Parties' factual stipulation resolves Plaintiffs' diminishment claim under Florida law. As the Florida Supreme Court has explained, the non-diminishment standard proscribes redistricting plans "that have the purpose of *or will have the effect of* diminishing the ability of any citizens on account of race or color to elect their preferred candidates of choice." *Apportionment I*, 83 So. 3d at 620 (cleaned up) (emphasis added). Under the 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. The non-diminishment standard accordingly calls for a comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is measured." *Id.* at 624. And whether a minority group's voting power has been diminished is determined by a "functional analysis" of "whether a district is likely to perform for minority candidates of choice." *Id.* at 625.

To prevail on their diminishment claim, Plaintiffs must show that a minority group is "less able" to elect their candidate of choice under the new plan than it was under the old plan. *Id.* at 624–25. In other words, they must establish that (1) the Benchmark district (in this case, Benchmark CD-5) allowed Black voters the ability to elect the candidate of their choice, and (2) the Enacted Map weakens Black voters' ability to elect the candidate of their choice. Plaintiffs have unquestionably done so. It is now beyond dispute that:

- Plaintiffs have standing to bring their diminishment claim in North Florida, *see* Stip. III.B;
- Black voters had the ability to elect their candidate of choice in Benchmark CD-5, *see* Stip. Ex. 1 ¶ 3(o);

- The Enacted Map eliminates the ability of Black voters in North Florida to elect their preferred candidates, *see id.* ¶ 4(o).

This is the very definition of diminishment. *See Apportionment I*, 83 So. 3d at 625; *see also* Ex. 10 at 5 (Governor's legal counsel stating, "[w]here a voting change leaves a minority group 'less able to elect a preferred candidate of choice' than the benchmark, that change violates the non-diminishment standard.") (citing *Apportionment I*, 83 So. 3d at 625).

Defendants' remaining arguments either seek to reinvent the legal standard for diminishment claims under the Florida Constitution, *see* Stip. IV.A.1 ("Question 1"), or contend that the non-diminishment provision itself violates of the U.S. Constitution, *see* Stip. IV.A.2, 3 ("Questions 2 and 3"). This Court should reject Defendants' attempt to upend Florida law.

II. The *Gingles* preconditions do not apply to the non-diminishment provision (Question 1).

Because they cannot deny that the Enacted Map violates the non-diminishment standard set forth in *Apportionment I*, Defendants attempt to rewrite that standard altogether by requiring Plaintiffs to satisfy the preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to trigger application of the non-diminishment provision. *See* Stip. IV.A.1. In so doing, Defendants ask this Court to adopt a standard that is contrary not only to binding precedent but also to the positions already taken by *Defendants themselves* about what this standard requires. This Court must apply the non-diminishment provision just as the Florida Supreme Court has and reject Defendants' invitation to rewrite the standard.

A. 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 Florida's *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). As Defendants correctly acknowledge, Florida's non-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),[2] 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] Because the Fair Districts Amendments' minority voting protections "follow almost verbatim the requirements embodied in the Federal Voting Rights Act," Florida courts' "interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent." *Apportionment I*, 83 So. 3d at 619–20.

Section 2 of the VRA (non-dilution) 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." *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" ("*Gingles* preconditions") 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

[2] Secretary's Response refers to the Secretary's Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment on Count I (Diminishment), which was served on July 14, 2023. On the same day, the Florida House and Florida Senate filed a response joining the Secretary's opposition.

[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.").

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). 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 of the VRA (non-diminishment), by contrast, does not require states to affirmatively create *new* minority districts; it simply protects against backsliding in *existing* districts where a minority group has had the ability to elect a candidate of their choice. *See Apportionment I*, 83 So. 3d at 619–20. Thus, Section 5's non-diminishment standard "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015). Instead, it requires the state to "maintain a minority's ability to elect a preferred candidate of choice" in any new redistricting plan, which the state should accomplish by conducting "a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.,* 575 U.S. at 275–76 (citing Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011)); *see also Apportionment I*, 83 So. 3d at 625 ("To undertake a retrogression evaluation requires an inquiry into whether a district is likely to perform for minority candidates of choice. This has been termed a 'functional analysis.'").

Under the test as articulated by the Florida Supreme Court, in determining whether a previously-existing district "performs" for the minority group's candidate of choice—and is therefore protected from diminishment 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." *LWV II*, 179 So. 3d at 287 n.11. This three-part test for non-diminishment is plainly different from the three-part test required for vote dilution under *Thornburg v. Gingles*, 478 U.S. 30 (1986), and for good reason: non-dilution and non-diminishment are different requirements, seeking to guard against different harms. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 477 (1997) (explaining, "we have consistently understood [Section 2 and Section 5] to combat different evils and, accordingly, to impose very different duties upon the States"); *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").

Defendants concede that Plaintiffs have established the three-part test for non-diminishment set forth in *LWV II*, *see* Stip. Ex. 1 at ¶ 3 (e)-(n), but assert that Plaintiffs must *also* establish the three *Gingles* preconditions applicable to non-dilution cases to prevail on their diminishment claim. *See* Sec'y's Resp. at 2–6. But Defendants' attempt to conflate the non-diminishment standard with the non-dilution standard cannot be reconciled with Florida Supreme Court precedent.

In *Apportionment I*, the Court engaged in an exacting analysis of this constitutional text. 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." 83 So. 3d at 619 (emphasis added). These are two separate requirements, "*each of which must be satisfied*." *Id.* (quoting *Advisory Op. at Att'y Gen. re Standards For Establishing Legis. Dist. Boundaries,* 2 So. 3d 175, 189 (Fla. 2009)). Defendants' attempt to collapse these "dual constitutional imperatives" into a single standard thus has already been considered—and rejected—by the Florida Supreme Court. *Id.*; *see also* Ex. 10 at 5 (Governor's veto message recognizing Florida's non-dilution provision and non-diminishment provision as imposing two separate requirements under existing precedent).[4]

Based on the constitutional text, and as set forth above, the Florida Supreme Court has not required that the relevant minority group constitute 50% of the voting age population of the district at issue for the non-diminishment provision to apply. Instead, 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 candidates." *Apportionment I,* 83 So. 3d at 625 (emphasis added). Because a "majority-minority" district is, by definition, a district in which a minority group comprises a numerical majority (50%) of the 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.

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 first *Gingles* factor is not prerequisite for a diminishment claim. In the last redistricting cycle, when the Florida Supreme

[4] 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.

Court adopted 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 protected under the non-diminishment provision. *See LWV I*, 172 So. 3d at 403–05. In this redistricting cycle, the Court approved the Florida House's and Florida Senate's state legislative districts, holding that both chambers complied with the non-diminishment provision for all districts that performed for minority voters, regardless of whether they were majority-minority districts. *See In re S. J. Res. Of Legis. Apportionment 100,* 334 So. 3d 1282, 1289–90 (Fla. 2022).

B. Defendants have never argued that the *Gingles* prerequisites apply to diminishment claims—until now.

Defendants' new-found insistence that Florida's non-diminishment standard requires a Plaintiff to prove the first *Gingles* factor not only conflicts with binding precedent, but also is directly at odds with the position taken by Defendants Florida House and Florida Senate before the Florida Supreme Court. In February 2022 in a brief to the Florida Supreme Court, the Florida House explicitly advanced *the exact opposite position* that it does today. As the Florida House wrote then, any "suggest[ion] that the non-diminishment standard incorporates . . . the *Gingles* prerequisites" would directly conflict with U.S. Supreme Court precedent and would eliminate "the line between vote dilution (section 2) and non-diminishment (section 5)." **Ex. 15**, 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 also id.* at 20–21 (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"); *id.* (explaining that eleven House districts with BVAPs under 50% were protected by the non-diminishment standard). The

Florida Senate's briefing supported the same position. **Ex. 16**, 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) (not addressing or applying *Gingles* factors when discussing its compliance with the non-diminishment provision in drawing state legislative districts); *id.* at 33 (Defendant Florida Senate explaining that four Senate districts with BVAPs under 50% were protected by the diminishment standard).[5] 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). 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 that each chamber maintained were required under Florida's non-diminishment provision—both chambers are 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).

Defendants' argument before this Court also presents an about-face from the positions they took during the legislative process and at the outset of this case. For months throughout the redistricting cycle, the Legislature plainly understood that CD-5, with a BVAP of 46.2%, *see* Stip. Ex. 1 ¶ 3(a), should be protected from diminishment. *See supra* Background III; *see also* **Ex. 20**, Sept. 20, 2022 Fla. Senate Tr. at 43:17-24, 45:21-25 (Staff Director Jay Ferrin telling Senate

[5] A trial court may take judicial notice of court records, including the pleadings and briefs "of other actions filed which bear a relationship to the case at bar." *Falls v. National Environmental Products*, 665 So. 2d 320, 321 (Fla. 4th DCA 1995) (citing *Gulf Coast Home Health Servs. of Fla., Inc. v. Dep't of HRS,* 503 So. 2d 415 (Fla. 1st DCA 1987)).

Reapportionment Committee during its first meeting that "[a]n effective majority district" for purposes of non-diminishment standard "is a district that contains sufficient voting age population to provide the minority community with an opportunity to elect a candidate of choice but falls short of a majority"); Ex. 5, at 103:4-12 (Chair Sirios remarking to the Governor's ambassador Mr. Popper, "Sir, in your written testimony that you provided [], I think you said that Florida's non-diminishment standard protects only majority-minority districts. What is your strongest legal authority for that proposition? And didn't the Florida Supreme Court say the exact opposite in its first apportionment decision in 2012?"). In fact, counsel to the Senate Committee Daniel E. Nordby—the same counsel representing Defendant Florida Senate in this litigation—explained that, per the Florida Supreme Court's precedent, the non-diminishment provision protects any district—including those with less than 50% minority population "[i]n addition to majority-minority districts"—"that previously provided minority groups with the ability to elect a preferred candidate under the benchmark plan." **Ex. 18**, Oct. 11, 2021 Fla. Senate Tr. at 73:12-21. Mr. Nordby further underscored that "the legislature must perform a functional analysis to evaluate retrogression, and to determine whether a district is likely to perform for minority candidates of choice. . . . There is no predetermined or fixed demographic percentage used at any point in that functional analysis." *Id.* at 74:3-17.

The Governor, too, understood that CD-5 did not need a 50% BVAP to be protected by the non-diminishment provision, otherwise he would not have concluded that CD-5 in Plan 8015, with a BVAP of 43%, "complies with the Florida's Constitution's non-diminishment requirement." Ex. 10 at 5, 7. Similarly, the Secretary did not make any argument that the *Gingles* preconditions were required for Plaintiffs to state a diminishment claim at the temporary injunction stage, where, as here, the sole question was whether the Enacted Map violates the non-diminishment provision of

the Florida Constitution in North Florida. In over 150 pages of briefing before this Court, the First District Court of Appeals, and the Florida Supreme Court, the Secretary failed to so much as mention the *Gingles* preconditions he now asserts "bar the use of the Florida Constitution's non-diminishment provision." Sec'y's Resp. at 5. While Defendants are free to take new litigation strategies as the case progresses, they cannot invent novel theories that are not grounded in law or precedent to avoid their otherwise plain liability under the Florida Constitution.

For all of these reasons, the answer to Question 1—whether Plaintiffs must satisfy the *Gingles* preconditions for the non-diminishment provision to apply—is no. Under the Parties' Stipulation, Defendants concede that once the Court determines that the non-diminishment standard applies in the absence of the *Gingles* preconditions, Plaintiffs have established that there is no Black-performing district where there previously was, *see* Stip. IV(B), which is sufficient to prove their diminishment claim, *see supra* Argument I.

III. Defendants fail to establish the non-diminishment provision violates the U.S. Constitution.

The only way Defendants can avoid judgment, then, is to prove their affirmative defenses that the non-diminishment provision itself—either on its face or as applied—violates the Equal Protection Clause of the U.S. Constitution. *See Hough v. Menses,* 95 So. 2d 410, 412 (Fla. 1957) (holding that defendant has burden to prove affirmative defenses); *Ellingham v. Fla. Dep't of Child. & Fam. Servs.*, 896 So. 2d 926, 927 (Fla. 1st DCA 2005) (same). Defendants cannot meet this burden. As Plaintiffs have argued, Defendants are barred from even pursuing these affirmative defenses. But even if the Court could consider Defendants' audacious attempt to strike out a provision of the Florida Constitution altogether, their arguments fail under binding precedent and the demanding standard for establishing racial gerrymandering claims under the U.S. Constitution.

A. The public official standing doctrine bars the Secretary's affirmative defenses based on the Equal Protection Clause of the U.S. Constitution (Question 4).

As a threshold matter, the Secretary is jurisdictionally barred from asserting that he is excused from a legal duty because that duty is *itself* unconstitutional.[6] Under Florida's public official standing doctrine, it is well established that public officials lack standing to challenge the constitutionality of their legal duties in court. *See State ex rel. Atl. Coast Line R.R. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922). This is because, under foundational separation of powers principles, executive and legislative officers must assume that duties assigned to them by law are constitutional "*until* judicially declared otherwise." *Id.* at 683 (emphasis added). Accordingly, they cannot raise the unconstitutionality of their legal duties either affirmatively, *see Dep't of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981) ("Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion."), or as an affirmative defense, *see Atl. Coast Line*, 94 So. at 682 (holding that because "the allegation . . . that [a provision] is unconstitutional means that it has been so declared by a court of competent jurisdiction," any allegation of unconstitutionality before such a judicial declaration has been made is not "true" and therefore "no defense").

Under that longstanding precedent, this Court has already held that the public official standing doctrine applies to the Secretary's standing to challenge the constitutionality of the Fair Districts Amendments. Ex. 17 at 62:23–63:4. Because Florida Rule of Civil Procedure 1.140(h)(2)

[6] Plaintiffs first raised the public official standing doctrine in a motion to strike. This Court held a hearing on the motion on June 5, 2023, and denied Plaintiffs' motion as untimely. **Ex. 17**, Mot. to Strike Hearing Tr. 63:5–10. Plaintiffs then re-raised their arguments in a motion for judgment on the pleadings, which remains pending. *See* Stip. at 2 n.2. Plaintiffs incorporate by reference all of the arguments set forth in the motion for judgment on the pleadings briefing but briefly summarize the arguments here to frame the outstanding legal issues for the Court.

would allow Plaintiffs to raise their objection under the public official standing doctrine as late as trial itself, this Court should now dismiss the Secretary's affirmative defenses related to the Equal Protection Clause.[7]

B. The non-diminishment provision does not facially violate the Equal Protection Clause of the U.S. Constitution (Question 3).[8]

The Secretary's challenge to the facial validity of the non-diminishment provision under the Equal Protection Clause is foreclosed by binding Florida Supreme Court precedent, which has followed prevailing U.S. Supreme Court precedent in interpreting the provision. 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. In rejecting the Legislature's earlier contention that "the minority population in each district . . . is somehow fixed to an absolute number under Florida's minority protection provision," the Florida Supreme Court concluded: "To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment. However, the United States Supreme Court has cautioned: '[W]e do not read . . . any of our other § 5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression.'" *Apportionment I,* 83 So. 3d at 627 (citing *Shaw v. Reno*, 509 U.S. 630, 642 (1993)). Accordingly, the non-

[7] The Court previously held that the public official standing doctrine does not bar the House's and Senate's affirmative defenses. Ex. 17 at 62:11–16. Plaintiffs have preserved that issue for appeal in their motion for judgment on the pleadings, and, of course, "[a] trial court may sua sponte reconsider and amend or vacate its interlocutory orders prior to final judgment." *Seigler v. Bell*, 148 So. 3d 473, 479 (Fla. 5th DCA 2014) (citing *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998)).

[8] If the Court agrees with Plaintiffs on Question 4, *see supra* Argument III.A, then it need not reach the merits of the Secretary's facial challenge to the non-diminishment provision under the Equal Protection Clause. The Secretary is the only party that raised this affirmative defense. *See* Sec'y of State's Answer to Am. Compl. ¶ 2, at 14 (raising facial affirmative defense under the Equal Protection Clause; *see also* Fla. House Answer to Am. Compl. at 16 (raising only as-applied affirmative defense under the Equal Protection Clause); Fla. Senate Answer to Am. Compl. at 26 (not raising Equal Protection Clause affirmative defense).

diminishment provision, as interpreted by the Florida Supreme Court, specifically *avoids* any "risk" of permitting—let alone requiring—racial gerrymandering. Where the Florida Supreme Court "do[es] not read" the non-diminishment provision to *authorize* racial gerrymandering in violation of the Equal Protection Clause, the Secretary can hardly contend that this Court *must* read it to *require* racial gerrymandering in violation of the Equal Protection Clause. That alone requires rejecting the Secretary's affirmative defense challenging the facial validity of the non-diminishment provision.

Even if this Court could entertain this claim, the Secretary has no hope of satisfying it. A facial constitutional challenge considers only the text of the law, not its application to a particular set of circumstances. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018). And to succeed, "the challenger must demonstrate that no set of circumstances exists in which the [law] can be constitutionally valid." *Id.* The difficulty of this task is well recognized. *Miami-Dade Cnty. v. Miami Gardens Square One, Inc.*, 314 So. 3d 389, 392 (Fla. 3d DCA 2020). To prove that the non-diminishment provision *on its face* violates the Equal Protection Clause of the U.S. Constitution, the Secretary must show that the constitutional text *requires* (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 never "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.

First, the Secretary cannot establish his "demanding" burden to prove that the non-diminishment provision requires race to predominate over all other districting considerations. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that burden to establish predominance lies with party claiming unconstitutional racial gerrymandering); *see also id.* at 928 (O'Connor, J.,

concurring). Certainly, the plain text of the provision requires no such thing. All it requires is 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). 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*, 509 U.S. at 642. "Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller*, 515 U.S. at 916 (citations omitted); *see also Shaw*, 509 U.S. at 646.

Indeed, just recently in a case out of Alabama, the U.S. Supreme Court rejected the state's "contention that mapmakers must be entirely 'blind' to race" under the Equal Protection Clause, *Allen*, 143 S. Ct. at 1512 (plurality opinion), and reaffirmed "[t]he line that we have long drawn [] between consciousness and predominance" of race, *id.* Notably, upon vetoing the Florida Legislature's original plan, Governor DeSantis acknowledged that the Legislature had sought "to follow the case law from the last decade" but speculated that the existing law may not "end up being good law" based on the U.S. Supreme Court's decision to hear "the Alabama case." **Ex. 19**, Mar. 29, 2022 Governor DeSantis Press Conference Tr. at 18:12-19:8. The Governor predicted that "[the U.S. Supreme Court] would not have taken that case under that posture unless they're going to limit the role that race plays in congressional redistricting. I think that's almost assured[]." *Id.* at 19:3-8. The Governor's prediction turned out to be wrong. Contrary to his expectations, the Supreme Court reaffirmed long-standing federal precedent "authoriz[ing] race-based redistricting as a remedy for state districting maps that violate [anti-discrimination laws]." *Allen*, 143 S. Ct. at 1516-17 (majority opinion). In so doing, the Court undermined the very foundation of the Equal Protection Clause theory upon which Defendants' affirmative defenses are based.

Nor could the Secretary establish racial predominance in the abstract, divorced from any specific district. This is because the question of racial predominance is a district-specific evidentiary inquiry that requires the proving party "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. The U.S. Supreme Court has made clear that "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 191 (2017); *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) citations omitted)). The Secretary's attempt to establish racial predominance as a *general matter* on a universal basis is thus foreclosed by the legal standard for proving racial predominance in the first place. And if the Secretary has not proved the Fair Districts Amendments require race to predominate in all circumstances, strict scrutiny does not apply and the inquiry must end. *See Bush v. Vera*, 517 U.S. 952, 958–59 (1996).

Second, even if the Secretary could overcome the racial-predominance threshold, his facial Equal Protection claim would still fail because the use of race under the non-diminishment provision 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, 2315 (2018). 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. *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*, 580 U.S. at 193 ("[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, as several legislators recognized during the redistricting cycle. *See* **Ex. 21**, Apr. 19, 2022 House Tr. at 60:20-23, 146:12-17; Ex. 12 at 85:12-17.[9] Indeed, Defendant Florida Senate asserted as much last year when defending its state legislative districts. *See* Ex. 16 at 38 ("[T]he 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."). Defendants can hardly contend that complying with the non-diminishment provision is a "compelling interest" when drawing legislative maps but not when drawing congressional maps.

[9] As Representative Valdez explained on the House Floor, "[t]here are decades of precedents of the redistricting processes and countless historical examples of the process being used to marginalize and dilute the power of certain types of voters. That's why the U.S. Congress passed the Voting Rights Act. It's why Florida voters passed the Fair District Amendment in 2010. These are not simply polite suggestions. Following the law and the Constitution is our sacred duty as elected officials." Ex. 14 at 11:16-25.

The consideration of race under the non-diminishment provision would also be narrowly tailored. Even setting aside that evaluating "narrow tailoring" in the context of a facial constitutional attack—without a particular district to consider—is illogical, *see, e.g., McTernan v. City of York*, 564 F.3d 636, 656 (3d Cir. 2009) (cautioning against courts trying to determine narrow tailoring "in the abstract"), the "narrow tailoring" standard requires only that a mapdrawer have "good reasons to believe" that its use of race in drawing a particular district was necessary to comply with the non-diminishment provision. *Bethune-Hill*, 580 U.S. at 182 (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278). Here, there are certainly "good reasons to believe" that Florida's congressional map needs to comply with the non-diminishment provision based on existing Florida Supreme Court precedent, which Defendants the Florida House and Florida Senate repeatedly recognized during the legislative process. *See, e.g.*, Ex. 18 at 71:12-75:18 (citing Florida Supreme Court's application of non-diminishment provision).

At bottom, the Secretary's facial affirmative defense is nonsensical: the Secretary has not demonstrated and cannot demonstrate that the non-diminishment provision, by its very terms, violates the U.S. Constitution. Even the Governor's ambassador, Mr. Popper, who urged the Florida House to reject CD-5, agreed the Fair Districts Amendments is not facially unconstitutional: "I do not suggest, and my testimony is not to suggest that the Fair District Amendment would be unconstitutional in all its applications. It absolutely wouldn't." Ex. 5 at 101:12-15.

C. The non-diminishment provision's application to North Florida does not violate the Equal Protection Clause of the U.S. Constitution (Question 2).

Defendants' as-applied Equal Protection challenge to the non-diminishment provision fares no better.[10] Once again, to prove that a remedial district in North Florida would be an unconstitutional racial gerrymander, Defendants must show (1) that race "predominated" over all other considerations in the drawing of district lines and, if so, (2) that the remedial district is not "narrowly tailored to serve a compelling state interest." *Ala. Legis. Black Caucus*, 575 U.S. at 260–61 (citations omitted). Defendants cannot show either.

To begin with, Defendants' prior contention that "any district like benchmark CD-5" would necessarily stem from racial predominance, Sec'y's Resp. at 12, defies the district-specific analysis the racial-predominance inquiry demands. *See supra* Argument III(B). Unless and until a "particular" district is drawn to remedy Plaintiffs' diminishment claim, Defendants cannot establish racial predominance.

And there is no evidence that race predominated in the drawing of the North Florida district that the Legislature put forth in Plan 8015—the only remedial district that the parties have contemplated thus far. *See* Stip. Ex. 2 (Proposed Map A); *Order Granting Plaintiffs' Motion for Temporary Injunction* (May 12, 2022) at 19 (describing Proposed Map A as "a narrow remedy" because it "takes the Legislature's version of CD-5 from Plan 8015, and places it within the existing Enacted Map"). As Judge Smith found, "[r]ace neutral reasons exist for Plan 8015's CD-5." *Id.* at 11. The Legislature expressed an explicit desire to maintain and preserve the "existing district" in passing Plan 8015, *see* Ex. 7 at 9:18-10:2, and in so doing drew the district consistent

[10] Here, Defendants refer only to the Secretary and the Florida House, which, unlike the Florida Senate, raised as-applied affirmative defenses under the Equal Protection Clause. *See* Sec'y of State's Answer to Am. Compl. ¶ 1, at 14 (raising as-applied affirmative defense under the Equal Protection Clause); Fla. House Answer to Am. Compl. at 16 (same); *see also* Fla. Senate Answer to Am. Compl. at 26 (not raising Equal Protection Clause affirmative defense).

with the "legitimate state objective" of "preserving the cores of prior districts." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) ("The desire to minimize population shifts between districts is clearly a valid, neutral state policy") (citations omitted). The legislative record also reveals that the Legislature's purpose in drawing Plan 8015's CD-5 was to comply with the Florida Constitution, both generally, *see, e.g.*, Ex. 8 at 25:6-27:24, 44:4-45:4, and specifically with respect to CD-5, *id.* at 45:9-48:9 (Chair Sirois describing how CD-5 in Plan 8015 was drawn to comply with both Tier I and Tier II metrics). Indeed, Plan 8015 was originally put forward to automatically replace the Legislature's Primary Map if a court found the Primary Map illegal because the Legislature knew Plan 8015 was "legally compliant under the current law." *Id*. at 23:16-20. The Legislature's desire to avoid protracted litigation undermines Defendants' claim of racial predominance. *See, e.g.*, Ex. 8 at 7:24-8:5 (Chair Leek noting, "We have hired outside counsel to advise us in this process because we want the House to be successful, because we want our maps to be upheld, . . . because we do not want to spend years in litigation"). As the U.S. Supreme Court has explained, a desire to avoid litigation is specifically one of the race-neutral reasons that may motivate a Legislature to adopt a plan. *See Abbott*, 138 S. Ct. at 2327 (finding race did not predominate where the Legislature chose a plan which would "bring the litigation about the State's districting plans to an end as expeditiously as possible").

Relatedly, no circumstantial evidence suggests that race predominated in the drawing of Plan 8015's CD-5, particularly where 8015's CD-5 hews closely to Benchmark CD-5. *See Lee v. City of L.A.*, 908 F.3d 1175, 1185 (9th Cir. 2018) (holding that "[t]he circumstantial evidence . . . fails to create a genuine dispute on racial predominance" where the challenged congressional district was "not any more bizarrely shaped than it was with its previous boundaries"). Indeed,

Benchmark CD-5 made marked improvements in Tier II compliance as compared to its predecessor. *See supra* Background II; *LWV I*, 172 So. 3d at 405–06 (emphasizing that "length is just one factor to consider in evaluating compactness" and noting that Benchmark CD-5 "is visually less 'unusual' and 'bizarre' than" its predecessor, that "the numerical compactness scores actually favor the East-West orientation," and that it "allows for fewer incorporated city and county splits than the Legislature's North-South district").

In any event, even if Defendants could show that racial considerations predominated in the drawing of 8015's CD-5, they would have a heavy burden to demonstrate that the Legislature's configuration of CD-5 is not narrowly tailored to advance compelling state interests under existing federal precedent. As set forth above, compliance with the Fair Districts Amendments' non-diminishment provision is a compelling state interest. *See supra* Argument III.B.

Likewise, Plan 8015's CD-5 is narrowly tailored to address this compelling state interest. First, the Florida Supreme Court's installation of Benchmark CD-5 itself provided a "good reason[] to believe" that the Legislature's use of race was necessary to comply with the non-diminishment provision. *See Abbott*, 138 S. Ct. at 2332 (holding that the legislature had "good reasons" because plaintiff groups had argued that it was mandated by the Voting Rights Act and a court had previously approved it). And the legislative record includes detailed testimony that Plan 8015's configuration of CD-5 is necessary to ensure minority voters' continued ability to elect candidates of their choice. *See, e.g.*, Ex. 8 at 24:20-22 (Chair Leek noting the Committee's aim "to protect the minority group's ability to elect a candidate of their choice"). The Legislature, which conducted a functional analysis on Plan 8015, *see* Ex. 7 at 25:7-19, thus "had good reasons to believe that" 8015's configuration of CD-5 "was necessary . . . to avoid diminishing the ability of black voters to elect their preferred candidates." *Bethune-Hill*, 580 U.S. at 182; *see also id.* at 193-

94 (crediting legislature's functional analysis to find narrow tailoring). This "strong showing of a pre-enactment analysis with justifiable conclusions," amply demonstrates narrow tailoring. *Abbott*, 138 S. Ct. at 2335; *see id.* 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").

* * *

Ultimately, each of Defendants' federal affirmative defenses is a strawman that they set up to distract from their goal of dismantling a provision that Florida voters overwhelmingly voted to enshrine in their constitution, and that the Florida Supreme Court has approved and applied multiple times over the past decade. Defendants cannot carry their burden on either of them, and under binding precedent, all of their arguments fail.

CONCLUSION

The Florida Supreme Court has made clear that "[i]t is this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid." *Apportionment I*, 83 So. 3d at 607. By dismantling a congressional district that enabled Black voters to elect their candidates of choice under the previous plan, the Enacted Map indisputably violates the Florida Constitution, and this Court should (once again) declare it invalid. Plaintiffs respectfully request the Court enter final judgment on their claim that the Enacted Map results in diminishment in contravention of Article III, Section 20(a) of the Florida Constitution.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 16, 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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