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

Black Voters Matter Capacity Building Institute, Inc., *et al.*,

Plaintiffs, Case No. 2022-ca-000666

v.

Cord Byrd, in his official capacity as Florida's Secretary of State, *et al.*,

Defendants.
_____/

FLORIDA LEGISLATURE'S RESPONSE BRIEF

The Florida House of Representatives and the Florida Senate (collectively, the "Legislature") submit this response brief in support of their contention that, given the geography and population demographics in North Florida, any application of the non-diminishment provision to Benchmark Congressional District 5 would violate the Equal Protection Clause.

In this brief, the Legislature will show that (i) race is the predominant factor in the design of the east-west configuration of District 5, and Plaintiffs' attempts to deny the obvious are futile; (ii) as the proponents of a district drawn predominantly on racial grounds, Plaintiffs bear the extraordinary burden to establish that the proposed district is narrowly tailored to achieve a compelling state interest; and (iii) Plaintiffs have failed to establish that a compelling state interest justifies their preferred district configuration.

Accordingly, Plaintiffs are not entitled to relief, and the Court should enter a final judgment in favor of Defendants.

Argument

I. Race Is the Predominant Factor in the Design of the East-West District That Plaintiffs Seek to Foist on Florida.

Racial considerations predominated in the design of east-west District 5—and it is not a close call. Plaintiffs' attempts to avoid or obscure that conclusion are painfully implausible.

East-west District 5 and its predecessors have been a posterchild for race-based districting for three decades. The district's bizarre shape, its selective and even surgical incorporation of far-flung minority communities, and its abject sacrifice of traditional race-neutral districting principles unmistakably broadcast one obvious conclusion: race was the driving force behind the district. No district in the Enacted Map even remotely resembles east-west District 5, nor would anybody ever draw a district as unusual as east-west District 5 but for race. The map and data alone make this clear. *See Johnson v. Mortham*, 915 F. Supp. 1529, 1550 (N.D. Fla. 1995) ("[O]ne does not need to look any further than a map of the Third District to reach the conclusion that race was in fact the predominant motivating factor . . . .").

In ordering the establishment of an east-west configuration, the Florida Supreme Court focused solely on the district's performance for racial minorities. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402–05 (Fla. 2015). The ability to elect candidates

preferred by minority voters was the one affirmative virtue cited by the Court in support of the district's adoption. *Id.*[1] As to race-neutral criteria, the Court faintly suggested that the district is "less unusual and bizarre" than its predecessor, violates "fewer" political subdivisions than the north-south configuration, and is not a "model of compactness." *Id.* at 406. And tellingly, like the Florida Supreme Court, Plaintiffs in this case have cited one—and *only* one—reason for the east-west district's reinstatement: race. Race is what this litigation is all about—and all that the east-west configuration has ever been about.[2]

Plaintiffs deny that race was the primary motivation for a 200-by-20-mile district with arms and hands that capture minority communities from the Big Bend to the First Coast. They contend the district was actually drawn (i) to "maintain and preserve" the east-west district that, for some reason, was already there; (ii) to comply with the non-diminishment provision, which compels the consideration of race in drawing districts; and (iii) to avoid litigation. Plaintiffs' arguments miss the mark both legally and factually.

[1] When the Florida Supreme Court approved the east-west configuration, it was seeking to replace a north-south configuration that the trial court had determined was drawn with partisan intent. *League of Women Voters of Fla.*, 172 So. 3d at 403. The Court chose the east-west district because it avoided diminishment in the ability of minorities to elect their preferred candidates. *Id.* at 402–05. The Court was not presented with any claim that the east-west configuration was a racial gerrymander, and therefore did not address it.

[2] Unless Plaintiffs seek an east-west configuration for partisan reasons, but that would violate the Florida Constitution's prohibition on partisan intent in map-drawing. Art. III, § 20(a), Fla. Const.

A. The District-Preservation Theory.

First, Plaintiffs claim that the predominant motivation for an east-west district is not race, but simply to "maintain and preserve" a district that already exists. Br. at 29.[3] There are several problems with this theory.

1. The evidence does not support it. The only evidence that Plaintiffs cite for this proposition is one statement by one committee chair who noted the objective, verifiable fact that the map initially passed by the Senate "preserved" the east-west district. Br. at 29 (citing Ex. 7 at 9:18–10:2 ("In the map that we passed, we preserved that. . . . We maintained that district in the map that we produced."")). That statement does not even remotely suggest that the map preserved the east-west district simply to preserve it, or for reasons unrelated to race. Nor does a statement by one legislator, even a committee chair, reveal the motives of the legislature as a whole. *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1324 (11th Cir. 2021) ("It is also questionable whether the sponsor speaks for all legislators. The vote of a sponsor is only one vote . . . ."). In fact, the motives of the 2022 legislature are of little or no relevance, since the east-west district was vetoed and did not become law.

2. To the extent the motives of the 2022 legislature are relevant, however, the legislative record is replete with evidence that race was the predominant motive behind an east-west configuration of the unenacted District 5. Ex. A at 16:4–9 (explaining that

[3] The trial brief that Plaintiffs filed on August 16, 2023, is cited as "Br."

the district "is a protected black district that was drawn to protect the black population's ability to elect a candidate of their choice"); Ex. B at 13:7–16 (explaining that the district "is a performing black district that was recreated similarly to the benchmark district" and that "the functional analysis on this district that was conducted by staff ensures the minority group's ability to elect is not diminished"); Ex. C at 68:16–21 (explaining that the district "has Tier 1 protections" under the Florida Constitution and that "Gadsden County is Florida's only majority-minority black county in the entire state, which goes into part of that Tier 1 consideration, which, again, outranks compactness as a Tier 2 requirement").

3. The assertion that a district was drawn to "maintain and preserve" an existing district does not shield the district from scrutiny. That assertion only begs the question *why* the legislature maintained and preserved the district—or created it in the first place. *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1280 (M.D. Fla. 2022) ("Of course, core preservation and incumbency protection do not address the question of how the 'cores' of these oddly shaped districts came to be in the first place, only why they have remained so."); *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 544–45 (E.D. Va. 2015), *vacated in part on other grounds*, 580 U.S. 178 (2017) ("[W]here district lines track a path similar to their predecessor districts or where 'core retention' seems to predominate, courts should also examine the underlying justification for the original lines or original district."). Otherwise, a district originally drawn on the basis of race might be unconstitutional when first drawn, but would be immunized from

constitutional challenge when maintained and preserved through a second redistricting cycle. The racially motivated district would then be enshrined forever on the pretense that the legislature intended only to "maintain and preserve" the district. This position would pardon all race-based districts that survive one redistricting cycle and create a loophole that enables the perpetuation of race-based classifications. *Jacksonville Branch of NAACP*, 635 F. Supp. 3d at 1288 ("To apply core preservation in the way the City asserts in this case would mean that once enacted, a legislature could perpetuate racially gerrymandered districts into the future merely by invoking a 'neutral' desire to maintain existing lines.").

Unsurprisingly, Plaintiffs cite no case that ever shielded a district from scrutiny on the assertion that the district was simply drawn to "maintain and preserve" a district in the prior map. The cases cited by Plaintiffs recognized only that the preservation of a district might be a legitimate redistricting consideration; none suggested that a race-based district ceases to be race-based when, to maintain and preserve it, the legislature enacts it a second time.

B. The Legal-Compliance Theory.

Next, Plaintiffs claim that the predominant motivation for an east-west district is not race, but a desire to comply with legal requirements—here, the non-diminishment standard. Br. at 30. That assertion is flatly contrary to the Supreme Court's precedents.

A desire to comply with the law does not disprove racial predominance when the law itself requires the consideration of race. For example, States frequently defend race-

based districts on the ground that the VRA required them to create those districts. But that has never foreclosed judicial inquiry. Instead, the Supreme Court has consistently found racial predominance even in those circumstances and then considered whether the State's asserted desire to comply with the VRA justified the predominance of race. *See*, *e.g.*, *Cooper v. Harris*, 581 U.S. 285, 299–301 (2017) (finding that race predominated before inquiring whether compliance with the VRA justified the racial predominance); *Miller v. Johnson*, 515 U.S. 900, 917 (1995) (same). This same two-step inquiry forecloses Plaintiffs' argument.

If legal compliance were itself a predominant motive, then racial predominance would never have been found in any district drawn to comply with the VRA, since the stated objective of complying with the VRA would have precluded a finding of racial predominance. For the same reason, the Supreme Court would never have considered whether compliance with the VRA might serve as a compelling interest—the stated goal of complying with the VRA would have precluded a finding of racial predominance and, in turn, obviated the need to consider whether a compelling interest might justify the racial predominance.

Here too, a desire to comply with a legal standard that requires the consideration of race does not prove that race was not the predominant factor. The only question is whether compliance with that standard justifies the predominance of race. *See infra* Part III.

C. The Litigation-Avoidance Theory.

Finally, Plaintiffs claim that the predominant motivation for an east-west district is not race, but rather a desire to avoid litigation. Br. at 30. This assertion also comes up short, for three reasons.

1. The evidence does not support it. The only evidence that Plaintiffs cite for that hypothesis is a statement by a legislator that the House retained outside counsel to help it avoid litigation in the redistricting process generally. Br. at 30 (citing Ex. 8 at 7:24–8:5). That statement says nothing about District 5 or the factors that shaped it, or the motives of 159 other members of the Florida Legislature. Plus, *all* States retain legal counsel to help them avoid redistricting litigation. If the retention of outside counsel to avoid litigation could be considered the predominant factor that motivates a district's configuration, then no district would ever violate the constitutional prohibition on racial gerrymandering—or, for that matter, the Florida Constitution's prohibition on partisan gerrymandering.

2. Again, the Legislature's motives in 2022 are at best marginally relevant because the State ultimately did not enact, but rejected, the east-west configuration that Plaintiffs propose.[4]

[4] The same Legislature also supported the Governor's request for an advisory opinion from the Florida Supreme Court interpreting the Florida Constitution's non-diminishment requirement in the specific context of Benchmark Congressional District 5. Leg. Tr. Br. at 3–4.

3. No court has ever held that race is not predominant because a legislature draws a race-based district to avoid litigation. *Abbott v. Perez*, 138 S. Ct. 2305 (2018)—which Plaintiffs cite—involved a unique and tangled set of facts that differentiates it from this case. There, a federal district court found that districts were drawn with discriminatory intent. *Id.* at 2313. The Supreme Court instructed the district court to adopt a remedial map that cured the "legal defects" in the original map—and it did so. *Id.* at 2313, 2325. With litigation still ongoing, and to bring the litigation to a close, the legislature adopted the court-drawn map with no material change. *Id.* at 2313. The district court, however, then invalidated the legislature's new map on exactly the same grounds—discriminatory intent—that the court's remedial map was intended to remedy. *Id.* The Supreme Court found that, in these circumstances, the legislature did not act with discriminatory intent when, to bring ongoing litigation to a close, it adopted the same map the district court had specifically drawn to eradicate the discriminatory intent found in the original map. *Id.* at 2327.

In *Abbott*, the Supreme Court reached the fact-bound conclusion that the 2013 Texas Legislature did not act with discriminatory intent under the unique circumstances presented there. It did not suggest that a desire to avoid litigation—a desire common to all legislatures—eclipses race-based motivations and disproves racial predominance. A district drawn on racial grounds is still drawn on racial grounds—even if it was done to avoid litigation. The Equal Protection Clause contains no fear-of-litigation exception that excuses race-based government action.

II. Because Race Is the Predominant Factor, Plaintiffs Bear a Heavy Burden to Establish a Compelling Interest.

The United States Constitution condemns race-based classifications and subjects all race-based classifications to a "most searching examination." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion)). As the Supreme Court wrote, a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

It is therefore the *proponent* of a race-based classification who bears the burden to justify it. *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1244 (11th Cir. 2001) ("The proponent of the classification bears the burden of proving that its consideration of race is narrowly tailored to serve a compelling governmental interest."); *id.* at 1251 ("[I]t is the burden of the party proposing a racial preference to show that its approach is narrowly tailored to achieving its asserted interest."). That allocation of the burden reflects the strong disfavor with which the Constitution views race-based classifications.

Thus, in racial-gerrymandering cases, once the challenger demonstrates that race was the predominant factor, the burden shifts to the proponent to prove that the race-based district is narrowly tailored to achieve a compelling interest. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 193 (2017). Ordinarily, the State is the proponent of the race-based district—but not here. Here, the State did not enact a race-based district;

it is Plaintiffs who seek to force onto the State a district drawn on racial grounds. Under these circumstances, Plaintiffs bear the extraordinary burden to justify the race-based classification.

Plaintiffs cite no support for the topsy-turvy proposition that the opponent of race-based classifications—here, the State—must prove that a compelling interest does *not* support the race-based classification. This allocation of the burden would treat race-based classifications as presumptively constitutional and require the opponent to prove the negative—that the district cannot be justified under any conceivable circumstances.

This allocation of the burden would be appropriate under rational-basis review, where the challenger must negate every conceivable basis for the challenged conduct. *See FCC v. Beach Commc'ns*, 508 U.S. 307, 314–15 (1993) ("On a rational-basis review . . . those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it . . . ." (internal marks omitted)). No court has applied that allocation of the burden to claims analyzed under strict scrutiny.

By analogy, a party that challenges speech restrictions bears no burden to prove that the infringement of First Amendment rights cannot be justified. On the contrary, the speech restriction is presumed invalid, and its proponent bears the heavy burden to justify conduct odious to the Constitution. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 660 (2004).

The same is true of race-based classifications. Race-based classifications offend the Constitution's most elementary principles. *Wis. Legislature v. Wis. Elections Comm'n*,

142 S. Ct. 1245, 1248 (2022) ("Under the Equal Protection Clause, districting maps that sort voters on the basis of race are 'by their very nature odious.'" (quoting *Shaw v. Reno*, 509 U.S. 630, 643 (1993))). To require the party that *opposes* a race-based district to prove that the district cannot be justified presumes the validity of the race-based district and inverts a foundational principle of our post-Reconstruction Constitution. It is the party that advocates—not the party that opposes—race-based government action that must justify that action.[5]

III. The East-West District That Plaintiffs Seek to Foist on Florida Does Not Serve a Compelling Interest.

Finally, Plaintiffs argue that, if race is the predominant consideration behind the east-west district (which it is), the use of race is justified because it serves a compelling interest. The only argument that plaintiffs advance to establish a compelling interest is that compliance with the non-diminishment standard *ipso facto* advances a compelling interest. For the reasons discussed in the Legislature's and the Secretary's trial briefs, that contention is wrong.

To support their contention, Plaintiffs cite a "substantive similarity" between the non-diminishment standard and section 5 of the VRA and note that the Supreme Court

[5] Ultimately, the allocation of the burden might be of little moment because the Court's determination whether an interest qualifies as "compelling" is a question of law. *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) (en banc); *Citizens Concerned About Our Child. v. Sch. Bd. of Broward Cnty., Fla.*, 193 F.3d 1285, 1292 (11th Cir. 1999).

has assumed, but not decided, that compliance with section 5 serves a compelling state interest. Br. at 27.

Plaintiffs ignore significant differences between the non-diminishment standard and section 5 of the VRA. Section 5 was narrowly drawn to remedy established patterns of exclusion or discrimination against minorities in the political process. Congress did not apply section 5 nationwide, but restricted its application to select jurisdictions with exceptionally depressed rates of voter turnout or voter registration among minorities. 52 U.S.C. §§ 10303(b), 10304. In 2011, section 5 applied to only nine States, 57 counties, and 12 municipalities across the country. Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239, 21,250 (Apr. 15, 2011); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (explaining, in finding section 5 constitutional, that the VRA "confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name"). Section 5 was also expressly time-limited—at its last reauthorization, to a period of 25 years. *Shelby Cnty. v. Holder*, 570 U.S. 529, 537–38 (2013).

Indeed, the VRA as a whole applied remedies to specific, discriminatory practices and to the places where those practices persisted. As the Supreme Court explained, the VRA "was designed by Congress to banish the blight of racial discrimination in voting, which [had] infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S. at 308. It created "stringent new remedies for voting discrimination where it persists on a pervasive scale" and bolstered "existing remedies for pockets of

voting discrimination elsewhere in the country." *Id.*[6] The VRA was predicated on many detailed findings in the legislative record and remains perhaps "the most successful civil rights statute in the history of the Nation." *Allen v. Milligan*, 143 S. Ct. 1487, 1499 (2023).

The VRA and the non-diminishment provision of the Florida Constitution are not the same thing. Unlike section 5 of the VRA, the non-diminishment provision is not a remedial device at all. It is not targeted at specific, identified instances of race discrimination. Nor is it time-limited. It applies statewide—and permanently—with or without any evidence of race discrimination. The Supreme Court, moreover, has rejected the view that congressional findings of discrimination can justify States in adopting race-based preferences that do not themselves remedy specific, identifiable race discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989) ("Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity."). The Court has long recognized a

[6] Like section 5, section 2 of the VRA was narrowly drawn to target identifiable race discrimination. It applies only when "the political processes leading to nomination or election in the State . . . are not equally open to participation" by a minority group, 52 U.S.C. § 10301(b), and it prohibits practices that, "when interacting with social and historical conditions, impair[] the ability of a protected class to elect its candidate of choice on an equal basis," *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 621–22 (Fla. 2012) (internal marks omitted). The "presence of discriminatory effects" is a prerequisite to section 2's application. *Allen v. Milligan*, 143 S. Ct. 1487, 1507 (2023).

fundamental difference between carefully calibrated remedial measures founded on demonstrated need and race-based preferences founded on little more than benign motives. *See*, *e.g.*, *Students for Fair Admissions*, *Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2147 (2023) (rejecting the "inherent folly . . . of trying to derive equality from inequality"). The non-diminishment standard's statewide, permanent guarantee of seats in Congress for select racial groups is unlike the targeted remedial measures that Congress found necessary when it enacted the VRA nearly 60 years ago.

This distinction is critical. As the Supreme Court recognized when it invalidated race-based higher-education admissions policies, the only compelling interest the Court has ever found to justify race-based action (outside the prison context) is "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Id.* at 2162. A State's "generalized assertion of past discrimination" does not suffice. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). "While the States . . . may take remedial action when they possess evidence of past or present discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.*

Thus, even if compliance with the VRA serves a compelling interest—a question the Supreme Court has not decided—it does not follow that compliance with the non-diminishment standard does too. There is a fundamental difference between section 5 and the non-diminishment standard, which, for all future time, reserves a fixed number

of seats in Congress for racial minorities solely on account of race, discrimination or no discrimination.

The non-diminishment provision is therefore unlike section 5 of the VRA and cannot, in isolation, justify the predominance of race as a redistricting criterion. It makes no difference *which* racial groups are benefited. The Equal Protection Clause does not play favorites; the whole point of equal protection is to eradicate official favoritism on account of race. *See Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." (citations omitted)); *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground . . . .").

Last, the non-diminishment provision cannot be equated to the VRA for another reason: Congress and the States do not stand on equal footing when it comes to race. Section 5 of the Fourteenth Amendment entrusts Congress with express responsibility to enforce equal protection. *City of Richmond*, 488 U.S. at 490 (plurality opinion). The Reconstruction Amendments thus "worked a dramatic change in the balance between congressional and state power over matters of race," limiting the authority of States and expanding the authority of Congress. *Id.* Congress may, therefore, impose remedies that States may not, *id.* ("That Congress may identify and redress the effects of society-wide

discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate."), while States "might have to show more than Congress before undertaking race-conscious measures," *id.* at 489. If compliance with the VRA serves a compelling interest, therefore, it does not follow that compliance with a race-conscious *state-law* provision serves a compelling interest as well.

Apart from pointing to the non-diminishment standard, Plaintiffs have failed to identify any compelling state interest in the maintenance of the east-west configuration of District 5. Notably, Plaintiffs do *not* contend that the district is necessary to remedy or eradicate specific, identifiable discrimination in North Florida. Because the east-west configuration does not serve a compelling interest, its preservation would have violated equal protection, and the Legislature appropriately enacted an alternative configuration.

Conclusion

Race is the predominant factor in the design of the east-west configuration of District 5. Plaintiffs have failed to overcome their heavy burden to demonstrate that an east-west configuration furthers a compelling state interest and is narrowly tailored to achieve that interest. Plaintiffs' challenge to the Enacted Map should be denied in its entirety, and the Court should enter final judgment in favor of Defendants.

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CERTIFICATE OF SERVICE

I certify that, on August 21, 2023, the foregoing document was furnished by email to all individuals identified on the Service List that follows.

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