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.
_____/

SECRETARY OF STATE'S RESPONSIVE TRIAL BRIEF AND INCORPORATED MEMORANDUM OF LAW

The Secretary of State provides this brief response to the arguments raised in Plaintiffs' trial brief.

INTRODUCTION

The Secretary takes Plaintiffs' arguments out of order. He begins with the public-official-standing doctrine, then addresses the Equal Protection Clause arguments, and concludes with his textual reading of Article III, § 20(a).

ARGUMENT

I. Plaintiffs Still Waived Their Public-Official-Standing Arguments.

This is Plaintiffs' third attempt at raising their public-official-standing arguments. This third try is not the charm.

A. The Equal Protection Clause is relevant to the Secretary's arguments in two ways. First, Article III, § 20(a) shouldn't be read to violate the Equal Protection Clause, and neither the Florida Legislature nor the Florida Secretary of State's office has any obligation to give Article III, § 20(a) an interpretation that would render it without effect under the U.S. Constitution. This is an interpretative argument, not an affirmative-defense argument; it goes to whether the Florida Constitution can or should be interpreted in the manner Plaintiffs ask. As such, it's not subject to Plaintiffs' attack on the Secretary's affirmative defenses. *See generally State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) ("An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." (cleaned up)).

Second, the Equal Protection Clause is also an affirmative defense to Plaintiffs' non-diminishment claim: should this Court agree with Plaintiffs' reading of the Florida

Constitution's non-diminishment provision—one that mandates the preservation and re-creation of a sprawling race-based district—then the Equal Protection Clause would prevent Plaintiffs from ultimately prevailing.

B. Plaintiffs' use of the public-official-standing doctrine is also too little and too late. Plaintiffs waived their ability to make those arguments.

Unlike the federal courts, the Florida Supreme Court has said that standing arguments are waivable. *See Page v. Deutsche Bank Tr. Co. Ams.*, 308 So. 3d 953, 960-61 (Fla. 2020) ("[T]his Court has held that the issue of standing is a waivable defense."); *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 842 (Fla. 1993) ("The issue of standing should have been raised as an affirmative defense before the trial court, and Krivanek's failure to do so constitutes a waiver of that defense, precluding her from raising that issue now."); *Jaffer v. Chase Home Fin., LLC*, 155 So. 3d 1199, 1202 (Fla. 4th DCA 2015) (holding that a "failure to raise" a standing challenge "in a responsive pleading generally results in a waiver").

Plaintiffs waived their public-official-standing arguments by failing to raise them as an avoidance in their reply. *Gamero v. Foremost Ins. Co.*, 208 So. 3d 1195, 1197 (Fla. 3d DCA 2017); *Burton v. Linotype Co.*, 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989). More specifically, Florida Rule of Civil Procedure 1.100(a) required Plaintiffs to raise standing as an avoidance in their reply: "if an answer" "contains an affirmative defense and the opposing party seeks to avoid it, the opposing party *must* file a reply containing the avoidance." (emphasis added).

C. Not content, Plaintiffs argue that they may raise their standing arguments under Florida Rule of Civil Procedure 1.140(h)(2). Pls. Br.22-23. That rule states:

> *The defenses of failure to state* a cause of action or *a legal defense* or to join an indispensable party *may be raised* by motion for judgment on the pleadings or *at the trial on the merits* in addition to being raised either in a motion under subdivision (b) or in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised at any time.

(emphases added). This doesn't get Plaintiffs home, for three reasons.

First, while a "defense of lack of jurisdiction of the subject matter" can be raised at any time, Fla. R. Civ. P. 1.140(h)(2), in the Florida courts, standing isn't a component of subject-matter jurisdiction. *Page*, 308 So. 3d at 960-61. Plaintiffs can't raise their public-official-standing arguments now after having failed to raise them before.

Rule 1.1140(h)(2)'s language concerning the "failure to state a cause of action or a legal defense" doesn't conceptually fit either. That language is triggered when a plaintiff fails to adequately state a cause of action in its complaint, or a defendant fails to state a legal defense. But nothing requires the defendant to preemptively rebut an avoidance—to explain why the public-official-standing doctrine isn't an appropriate avoidance even before the opposing party raises it as one. The burden was on Plaintiffs to raise their public-official-standing arguments in their reply. They didn't do that.

Second, Rule 1.140(h)(2) is a general provision. Rule 1.100(a) is the more specific provision. The specific provision controls over the general. *Heron at Destin W. Beach & Bay Resort Condo. Ass'n v. Osprey at Destin W. Beach & Bay Resort Condo. Ass'n*, 94 So. 3d

623, 631 (Fla. 1st DCA 2012). Plaintiffs therefore should have, but failed to, raise their public-official-standing arguments as an avoidance in their reply under Rule 1.100.

Third, Plaintiffs failed to cite any case in their brief that allows them to raise their untimely and procedurally improper public-official-standing arguments under Rule 1.140(h)(2). Absent this case law, and contrary to Florida Supreme Court precedent going in the other direction, Plaintiffs' standing arguments fail.

In sum, Plaintiffs' third attempt at their public-official-standing arguments highlights, rather than strengthens, their untimeliness and deficiencies.

II. Plaintiffs' Proposed Racial Gerrymander Would Still Violate the Equal Protection Clause.

At a broad level, Plaintiffs' Equal Protection Clause arguments are unavailing. They argue that racial predominance in redistricting is fine. It isn't. *See generally Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2160-61 (2023). Their more granular arguments don't fare any better.

First, Plaintiffs improperly shift the burden to the Secretary. It is Plaintiffs who seek a declaration that the Enacted Map is improper and a remedy to effectuate that declaration. To prove their claim and obtain the remedy they seek, Plaintiffs must show that the Florida Constitution *required* and the U.S. Constitution *allowed* the retention of a black-performing district in North Florida that didn't diminish the opportunity of black voters to elect a candidate of their choice. As *proponents* of this race-based action, it is Plaintiffs who must carry the heavy burden of showing that the race-based sorting

of voters is needed—they are the ones who must overcome the Equal Protection Clause's race-neutral default. *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.").

Second, Plaintiffs argue that the Secretary can't raise his Equal Protection Clause arguments "[u]nless and until a 'particular' district is drawn to remedy Plaintiffs' diminishment claim." Pls. Br.29. This argument is disingenuous.

Let's break down Plaintiffs' non-diminishment claim. They argue that the Florida Constitution's non-diminishment provision applies to Benchmark CD-5. Pls. Br.4-5, 12-13. They say that the Florida Supreme Court mandated that Benchmark CD-5 be drawn with the express intent of uniting black communities in North Florida, all to ensure that black voters can elect candidates of their choice. Pls. Mem. in Support of Mot. for Temp. Inj. at 5; Pls. Br.12-13. They fault the State for not preserving a district like Benchmark CD-5 in North Florida and argue that a district like Benchmark CD-5 must be drawn in North Florida, again, to ensure black voters can elect candidates of their choice. Pls. Br.9, 12-13. Plaintiffs even stipulated that an East-West district like Benchmark CD-5 would remedy a non-diminishment violation. Joint Stipulation IV(D). Their remedial map mirrors Plan 8015, which itself had a district that mirrors Benchmark CD-5 in North Florida, and Plaintiffs' remedial map was drawn by an

expert who pushed the configuration of Benchmark CD-5 during the last redistricting cycle. Pls. Br.29; *see also* Expert Report of Dr. Ansolabehere on *Romo* Plaintiffs' Proposed Remedial Plan for the State of Florida, *Romo v. Detzner*, Nos. 2012-CA-00412 & 2012-CA-00490 (Fla. 2d Jud. Cir. Sept. 18, 2015).

Yet Plaintiffs now claim that the Secretary can't raise his Equal Protection Clause arguments because it's unclear what a remedial district would look like. Suffice to say, Plaintiffs' own statements and actions rebut their argument. Regardless, the Florida Supreme Court approved Benchmark CD-5—a district that spans 200 miles to connect black communities in Duval and Leon and Gadsden Counties—for predominantly race-based reasons. That's the district Plaintiffs seek to preserve though the non-diminishment provision. And assuming a non-diminishment violation in the Enacted Map, as explained in the Secretary's trial brief, Sec'y Br.5-15, the *only* configuration of a district that would remediate that race-based violation would be one that's virtually identical to Benchmark CD-5.

Third, Plaintiffs improperly shift the focus to the passage of Plan 8015's CD-5. Pls. Br.30-31. The consideration of Plan 8015's CD-5 is useful to show that a legislature would only draw such a district for race-based reasons. But Plaintiffs seem to elevate Plan 8015 as if that's the map that's being challenged. It's not. It was the secondary map in a two-map legislative package, one designed to assuage the Governor's concerns about the race-based districting. In the end, the Governor vetoed the package because of those concerns.

The only reason why Plaintiffs present a remedial map like Plan 8015 is because they believe that it remedies a non-diminishment violation in North Florida—not because of its legislative history or legislative justifications.

Nevertheless, Plaintiffs are simply wrong about the legislative record. There were statements from legislators about their race-based reasons for drawing a district in Plan 8015 like Benchmark CD-5. Sec'y Br.7-8. Plaintiffs readily quote the record for that proposition. *See* Pls. Br.31.

And it mattered that the North Florida district in Plan 8015 mirrored Benchmark CD-5: Benchmark CD-5 was a race-based gerrymander—even Plaintiffs seem to acknowledge this. Pls. Mem. in Support of Mot. for Temp. Inj. at 5. Any district that "hews closely to Benchmark CD-5" would perpetuate the race-based gerrymander. Pls. Br.30. It's an insufficient core-retention argument, one frequently rejected by federal courts. *Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023); *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1280 (M.D. Fla. 2022); *see also United States v. Fordice*, 505 U.S. 717, 729 (1992) (by perpetuating a map undoubtedly drawn with race at the forefront—and doing so merely to "preserv[e]" or "comply with" that earlier practice of predomination—mapmakers carry forward that racial predomination).

Litigation avoidance doesn't work, either. Pls. Br.30-31. An incantation of "we did this to avoid litigation" doesn't transform unconstitutional actions into constitutional ones. Were this true, legislatures across the country would have a get-out-of-unconstitutionality card for nearly every action they decided to take.

Fourth, no compelling governmental interest justifies the race-based gerrymander in North Florida. Plaintiffs merely assert that compliance with a state constitutional provision, albeit one that attempts to mirror the Voting Rights Act, is a compelling justification. Pls. Br.26-27. The Secretary's argument in his brief sufficiently refutes Plaintiffs' argument. Sec'y Br.15-19 (arguing that § 5 of the Voting Rights Act is unlike the non-diminishment provision, in part, because § 5 was never applied to Florida statewide). So does the U.S. Supreme Court in *Reynolds v. Sims*:

> [A] state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.

377 U.S. 533, 584 (1964).

And fifth, narrow tailoring isn't met. That the Florida Supreme Court approved Benchmark CD-5 says nothing of its constitutionality under the Equal Protection Clause; that issue was never raised, considered, or decided during that litigation. Pls. Br.31. Let's also not forget that the Florida Supreme Court approved Benchmark CD-5 for expressly and solely race-based reasons: "in an East-West orientation of the district, the black candidate of choice is still likely to win." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402-05 (Fla. 2015).

That legislators stated that Plan 8015's CD-5 was drawn for non-diminishment ends *shows* that race predominated in its drawing; those statements help the Secretary's

arguments, not Plaintiffs'. Pls. Br.31-32. And Plan 8015's "pre-enactment analysis" is inapt, because Plan 8015 was never enacted; it was vetoed. Pls. Br.32. Plaintiffs try to rely on *Abbott v. Perez*, but that case dealt with *enacted* state maps, not *unenacted* maps, and where the taint from one legislative session was simply carried over into another session with the appropriate analysis of improper intent. 138 S. Ct. 2305, 2317 (2018).

III. Without the Secretary's Reading of Article III, § 20(a), the Non-Diminishment Provision Still Careens Toward Unconstitutionality.

Plaintiffs fail to grapple with the fact that their reading of Article III, § 20(a)'s non-diminishment provision raises significant concerns under the U.S. Constitution. As the Florida Supreme Court has instructed, "when two constructions" of state law "are possible, one of which is of questionable constitutionality," the law "must be construed so as to avoid any violation of" the "Florida and *the United States Constitutions*." *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116, 120 (Fla. 2006) (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983)) (emphasis added). The Secretary's reading avoids such unconstitutionality. This Court should therefore adopt it.

To begin, the Secretary didn't stipulate that the non-diminishment provision was violated in this case. Pls. Br.1. Instead, he has maintained that the non-diminishment provision isn't even triggered in this case.

His central argument remains true: a state can't put itself under a preclearance-like regime without sufficiently linking that race-based solution to a race-based problem. Again, the Equal Protection Clause puts strict requirements on race-based actions:

establishing specific evidence of discrimination, having durational limitations, and demanding narrow tailoring. *Students for Fair Admissions*, 143 S. Ct. at 2162, 2165.

Plaintiffs' reading adheres to none of those requirements. Under their reading, it only matters that a minority group votes cohesively and that its candidates win elections. Pls. Br.16 (quoting *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 287 n.11 (2015)). That could be true of a district with a black-voting-age population of 10%, 25%, 45%, or 51%. That's a broad standard—so broad that it's constitutionally unmanageable and places the non-diminishment provision on the weakest footing.

Plaintiffs' reading also doesn't depend on the identification of specific discriminatory evidence. It doesn't contain durational limitations; a district can be protected in perpetuity. And Plaintiffs' unfettered reading of the non-diminishment provision applies statewide, not just in specific jurisdictions.

As the Secretary explained in his trial brief, Plaintiffs' reading raises significant federal constitutional issues—issues that the Florida Supreme Court never addressed and never considered in the past redistricting cycle. Sec'y Br.20-27. These issues remain live and open.

The Florida Supreme Court has suggested as much. It declined to issue the Governor an advisory opinion on this issue, and in its review of the state legislative maps, the court expressly stated that it wasn't offering any opinions on the executive branch's reading of Article III, § 20. *Advisory Op. to the Governor re: Whether Article III, Section 20(a) of the Fla. Constitution Requires the Retention of a Dist. in N. Fla.*, 333 So. 3d

1106, 1108 (Fla. 2022); *In re Sen. J. Res. of Leg. Apportionment 100*, 334 So. 3d 1282, 1289 n.7 (Fla. 2022) ("Our decision today should not be taken as expressing any views on the questions raised in the Governor's" advisory-opinion "request."). Surely, if the Secretary's reading was so off base, as Plaintiffs suggest, the Florida Supreme Court would have rejected it out of hand by now.

Plaintiffs offer no defense of the non-diminishment provision, other than it exists, that it hasn't been declared unconstitutional, and that the Florida Supreme Court has applied it. Pls. Br.12-21. None of these arguments address why the provision raises federal constitutional issues and why the Secretary's reading avoids those issues.

The Secretary, therefore, rests on the explanation of his reading of the non-diminishment provision in his trial brief: that it's textually based, practical, compliant with case law, and avoids federal constitutional concerns for now. Sec'y Br.20-27.

CONCLUSION

For these reasons, and the reasons in the Secretary's trial brief, this Court should enter judgment for the Defendants.

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Respectfully submitted by,

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

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)
mjazil@holtzmanvogel.com
Gary V. Perko (FBN 855898)
gperko@holtzmanvogel.com
Michael Beato (FBN 1017715)
mbeato@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
119 S. Monroe St. Suite 500
Tallahassee, FL 32301
Telephone: (850) 270-5938

Taylor A.R. Meehan*
taylor@consovoymccarthy.com
Cameron T. Norris*
cam@consovoymccarthy.com
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington VA 22209
Telephone: (703) 243-9423
Counsel for Florida Secretary of State

*admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal, on August 21, 2023.

/s/ Mohammad O. Jazil
Attorney