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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.
_______________________________/

DEFENDANTS' NOTICE OF FILING PROPOSED FINAL ORDER

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Defendants Secretary of State, Florida House of Representatives, and Florida Senate provide this Court with their proposed final order.

Dated: August 30, 2023

Respectfully submitted by,

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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 30, 2023.

/s/ Mohammad O. Jazil
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IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Black Voters Matter Capacity
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Defendants.
_______________________________/

FINAL ORDER

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The issue before this Court is whether Florida's congressional districts comply with the state and federal constitutions. That question turns on whether it was possible for the Florida Legislature to avoid diminishing the ability of black voters to elect a congressional candidate of their choice in North Florida while still complying with the U.S. Constitution's Equal Protection Clause. Put another way, the issue is whether it was possible to be *race conscious* without having *race predominate* (absent a compelling interest and a narrowly tailored means to achieve that interest) when drawing a congressional district in North Florida after the 2022 decennial census. Yes, say Plaintiffs. No, say Defendants. Defendants have the better of the argument. This Court enters judgment for Defendants for the reasons detailed below.

I.

The State Constitution, the U.S. Constitution, and the federal Voting Rights Act of 1965 impose requirements for redistricting. Because all provide background principles with which every map drawer must comply, this Order begins with a brief discussion of each, and what happens where the requirements conflict.

A.

In 2010, Florida voters amended the State's Constitution to adopt specific standards for redistricting. The standards concerning congressional redistricting appear in Article III, § 20 of the Florida Constitution. It creates two "tiers" for the Florida Legislature to follow when drawing congressional district lines.

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Tier 1 requires four things. First, districts cannot be drawn "with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const. Second, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process." *Id.* Third, "districts shall not be drawn . . . to diminish their ability to elect representatives of their choice," with "their" referring to "racial or language minorities" in the previous clause. *Id.* Fourth, districts must "consist of contiguous territory." *Id.*

Tier 2 concerns traditional redistricting criteria. It requires districts to "be as nearly equal in population as is practicable,"[1] to "be compact," and to "utilize existing political and geographical boundaries . . . where feasible." *Id.* § 20(b).

Though map drawers do not need to prioritize one standard over another within the same tier, *id.* § 20(c), tier 1 standards always take priority when they "conflict[]" with the traditional redistricting criteria in tier 2. *Id.* § 20(b). Thus, the race-based provisions in tier 1 take priority over the traditional redistricting criteria in tier 2 whenever the two conflict. *Id.*

B.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution also constrains the Florida Legislature when drawing *any* congressional district and constrains the Secretary of State when overseeing *any* elections held for those districts. The Equal Protection Clause provides that "[n]o State shall *make* or *enforce* any law which shall . . . deny to any person within its jurisdiction the *equal protection* of the laws." Amend. XIV, § 1, U.S. Const. (emphasis added). The U.S. Supreme Court recently called the Equal Protection Clause "the Constitution's pledge of racial

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[1] The federal constitution has been interpreted to require states to "make a good-faith effort to achieve precise mathematical equality" in the population of congressional districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

equality." *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2161 (2023).

What does this pledge of racial equality require in a redistricting context? The U.S. Supreme Court attempted to address the issue in *Allen v. Milligan*, 143 S. Ct. 1487 (2023). Unfortunately, only four justices agreed in Part III-B-1 of Chief Justice Roberts's opinion concerning when "considering race in the context of redistricting is appropriate." *Id.* at 1510; *see also id.* at 1517 (Kavanaugh, J., concurring in all but Part III-B-1). Based on Chief Justice Roberts's distillation of redistricting cases, in which only four of nine justices joined, it appears that being "race conscious[]" is okay but "racial predominance" is not. *Id.* at 1510.

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"Race predominates in the drawing of district lines . . .when 'race-neutral considerations [come] into play only after the race-based decision had been made.'" *Id.* (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017)). That happens when the mapmaker "subordinate[s] traditional race-neutral districting principles . . . to racial considerations." *Bethune-Hill*, 580 U.S. at 187.

In *Allen*, the U.S. Supreme Court looked at the "illustrative maps" put forward by the plaintiffs' expert, Bill Cooper, to assess whether race would predominate in the creation of additional majority-minority districts. *Allen*, 143 S. Ct. at 1510. It affirmed the three-judge federal court's conclusion that race did not predominate in Cooper's maps because, though Cooper did "*consider* race," he gave "equal weight[]" to traditional redistricting criteria like "compactness, contiguity, and population equality." *Id.* at 1511

(emphasis in the original). *Allen*'s focus on the maps put forward by plaintiffs' expert will become relevant in the discussion of the burdens of proof in this case; Plaintiffs here ask for the creation of a race-based district in North Florida just as the *Allen* plaintiffs sought the creation of additional majority-minority districts in Alabama.

If race does predominate, that is not the end of the inquiry. Strict scrutiny must be met. Strict scrutiny requires a "compelling" governmental "interest" and "narrow[] tailoring" to achieve that interest. *Cooper v. Harris*, 581 U.S. 285, 292 (2017) (quoting *Bethune-Hill*, 580 U.S. at 193). As the U.S. Supreme Court explained in *Students for Fair Admissions*: "our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot." 143 S. Ct. at 2162 (citations omitted).

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C.

For redistricting purposes, compliance with § 2 of the Voting Rights Act has been *assumed* to serve as a compelling interest—one that identifies and then works to remedy a specific and identifiable race-based harm. *See Cooper*, 581 U.S. at 301.

Section 2 of the Voting Rights Act has a very specific trigger. It prevents vote-dilution only where a majority-minority community, in a geographically compact area, is being denied an opportunity to elect a representative of its choice because the majority community votes against the minority's preferred candidate. *Thornburg v.*

Gingles, 478 U.S. 30, 50 (1986); *see also* 52 U.S.C. § 10301(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.")

By contrast, § 5 of the Voting Rights Act prohibits "[a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 52 U.S.C. § 10304(b). It applies only in certain pockets of discrimination; the coverage formula in § 4 of the Act identifies the places.

"[G]iven *Shelby County v. Holder*," 570 U.S. 529 (2013), the U.S. Supreme Court has declined to answer whether "continued compliance with §5 remains a compelling interest." *Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015). *Shelby County* said that the formula used to identify the jurisdictions where § 5 would apply was unconstitutional. That formula was intended to identify "pervasive," "flagrant," "widespread," and "rampant" discrimination; however, it was "based on 40–year–old facts having no logical relation to the present day." *Shelby County*, 570 U.S. at 554. The U.S. Supreme Court explained that only "current conditions" can justify § 5's "current application." *Id.* at 550. Without an updated record that identified a race-based problem, Congress could no longer justify the race-based coverage formula. *Id.* at 556.

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To take a step back, the Voting Rights Act of 1965 is a landmark piece of legislation that sought to "banish the blight of racial discrimination." *Katzenbach*, 383 U.S. at 308. Congress enacted it consistent with its authority to safeguard the right to vote from interference by the states. *Id.* at 326. Indeed, the Fifteenth Amendment specifically provides that "Congress shall have power to enforce this article by appropriate legislation." Amend. XV, § 2, U.S. Const. States have no such authority under the Fifteenth Amendment. And though the U.S. Supreme Court held the Voting Rights Act to be constitutional after assessing the detailed record of discrimination that Congress had compiled as support, *South Carolina v. Katzenbach*, 383 U.S. 301, 313, 329-30 (1966), the Court later struck down the coverage formula in § 4 of the Voting Rights Act because current conditions did not justify its current application. *Shelby County*, 570 U.S. at 556.

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Importantly, the provisions of the Voting Rights Act most relevant here apply only in very specific circumstances. Section 2 of the Act applies only to majority-minority communities, in a compact geographic area, with cohesive minority voting and polarized voting among the races. Section 5 of the Act would apply only if Congress adopted a new coverage formula that identified areas in which there is *currently* pervasive, flagrant, widespread, and rampant racial discrimination by the government in the electoral process similar to that existing at the time the Voting Rights Act was adopted.

D.

To be sure, this case does *not* concern the Florida Legislature or Secretary of State's noncompliance with the Voting Rights Act. Nor does it concern the constitutionality of the Act. Sections 2 and 5 of the Act are relevant for two reasons. First, they inform our understanding of Article III, § 20(a)'s race-based provisions, which borrow from federal law. Second, they provide a roadmap for the kind of provisions that might thread the needle between race consciousness and racial predominance.

Threading the needle between race consciousness and racial predominance is critical here. The former might not violate the U.S. Constitution's Equal Protection Clause. The latter certainly does absent a compelling interest and narrow tailoring.

Compliance with the U.S. Constitution's Equal Protection Clause is mandatory. The "Constitution . . . of the United States" is "the supreme Law of the Land." Art. VI, cl. 2, U.S. Const. Since *McCulloch v. Maryland*, 17 U.S. 316 (1819), "it has been settled that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (citations omitted).

Stated differently, the Florida Constitution's non-diminishment standard in Article III, § 20(a) is without effect and does not constrain the Defendants if it conflicts with the U.S. Constitution's Equal Protection Clause. This constitutional principle is the pole star of this Court's analysis.

II.

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Having detailed the constitutional and statutory provisions that apply, the question is who bears the burden of proof? This section explains why Plaintiffs bear the burden of displacing a race-neutral map in favor of one where racial preference dictates the redrawing of lines. This section then rejects Plaintiffs' invitation to limit their burden of proof by ignoring the Equal Protection Clause and basing liability only upon a violation of Article III, § 20(a)'s non-diminishment standard, and rejects their inaccurate use of the public-official-standing doctrine.

A.

In Count I of their Amended Complaint, Plaintiffs ask for an order: (1) "[d]eclaring" that the Enacted Plan violates Article III, § 20(a)'s non-diminishment standard as to North Florida, (2) "[e]njoining" the Defendants "from implementing, enforcing, or giving" effect to the Enacted Plan in North Florida, and (3) "[o]rdering or adopting a new congressional districting plan that complies with Article III, Section 20 of the Florida Constitution." Amend. Compl. at 33; *see also* Joint Stipulation I(A). As the ones seeking a declaration that the Enacted Plan violates the Florida Constitution, an injunction preventing its use, and an injunction mandating the adoption of another map, Plaintiffs bear the burden of proof. This is for three reasons.

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First, the Enacted Plan comes to this Court with a presumption of validity. *In re Sen. J. Resol. of Leg. Apportionment 1176*, 83 So. 3d 597, 606 (Fla. 2012) ("*Apportionment I*"). For Plaintiffs to overcome that presumption, they must prove that the Florida Legislature erred in enacting a race-neutral map. They can do that only by showing that

Article III, § 20(a) of the Florida Constitution *required* the creation of a race-based district in North Florida and the U.S. Constitution's Equal Protection Clause *allowed* the creation of the race-based district. That is because both constitutional provisions apply whenever the Florida Legislature is drawing congressional districts. *See supra*. Without accounting for the requirements of both constitutional provisions, Plaintiffs cannot show that the Florida Legislature should have done something differently when drawing congressional district lines; they cannot show that the actions of the political branches were in error and should be enjoined.

Second, only Plaintiffs—and not the State Defendants—seek something other than a race-neutral map in North Florida. Plaintiffs are the ones who seek a new North Florida district that would *require* racial preference in the drawing of district lines. As proponents of a map that takes race into account, and before compelling the Florida Legislature to adopt and the Secretary to implement any such map, Plaintiffs must show that it is possible to be race conscious without having race predominate in North Florida. *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.").

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Third, as a practical matter, cases illustrate that Plaintiffs bear the burden. The situation here is most analogous to a claim under § 2 of the Voting Rights Act where a

plaintiff asserts that the government should have drawn additional majority-minority districts. In those situations, the courts require the plaintiff to prepare and present alternative maps that show that it was possible to draw additional, race-conscious districts that favor a particular race *but* where race does not predominate. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993); *White v. Regester*, 412 U.S. 755, 766 (1973); *Nipper v. Smith*, 39 F.3d 1494, 1531-32 (11th Cir. 1994) (en banc). These alternative maps make it possible for a plaintiff to state a cause of action; "[t]he absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes . . . a finding of liability." *Nipper*, 39 F.3d at 1533; *accord Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998) ("Thus, . . . our precedents *require plaintiffs to show* that it would be possible to design an electoral district, consistent with traditional redistricting principles, in which minority voters could successfully elect a minority candidate." (emphasis added)).

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Again, take the U.S. Supreme Court's recent decision in *Allen* as an example. As noted above, the plaintiffs' expert in that case, Cooper, presented alternative maps. *See supra*. The three-judge panel judged Cooper's credibility and accepted his word that race would not predominate in an alternative plan that called for more majority-minority districts. *Id.* Stated differently, the *Allen* plaintiffs proved that their alternatives were race conscious but not ones where race predominated.

The Florida Supreme Court took a similar approach in *Apportionment I*. When assessing whether specific senate districts had improper intent—though partisan and

not racial in that instance—the Florida Supreme Court looked to "alternative plan[s]" to assess whether "it was possible" to draw districts without the tainted intent. *Apportionment I*, 83 So. 3d at 641, 664. The challengers put forward the alternative maps.

In sum, Plaintiffs seek to change the status quo. They ask this Court to direct the Legislature to redraw a map where race is given preference in the drawing of a district. And, as in *Allen* and *Apportionment I*, they must show that it is possible to avoid diminishment in a lawful way.

B.

Plaintiffs attempt to evade their burden by suggesting that all they need to do here is prove that the Enacted Plan violates Article III, § 20(a)'s non-diminishment standard. They say that the question of a workable remedy can be left for another day after the Florida Legislature tries and fails to craft a remedy that complies with both the Florida Constitution and the U.S. Constitution. That cannot be so.

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First, consider the absurd result this invites. Suppose that this Court declares that the Florida Legislature is liable for violating the Florida Constitution's non-diminishment standard and defers any questions concerning the need to comply with the U.S. Constitution's Equal Protection Clause until a separate remedial phase. Suppose further that the Florida Supreme Court affirms that result. But it later turns out at the remedial phase that there is no way to comply with both the non-diminishment standard and the Equal Protection Clause in a North Florida

congressional district. There are good reasons for this Court to decide these intertwined constitutional questions concurrently, rather than sequentially.

Second, to avoid an absurd result, consider the way that § 2 cases under the Voting Rights Act proceed. Again, the § 2 lawsuit by a plaintiff asking for more majority-minority districts is most analogous to the situation here because the § 2 plaintiff is also attempting to inject race into the mix in a manner that the plaintiff thinks might pass constitutional muster. In such cases, the en banc U.S. Court of Appeals for the Eleventh Circuit has explained that "the issue of remedy is part of the plaintiff's prima facie case." *Nipper*, 39 F.3d at 1530. If the plaintiff cannot show that there is "a permissible remedy in the particular context of the challenged system," then the case cannot proceed. *Id.* at 1530-31. "The inquiries into remedy and liability, therefore, cannot be separated." *Id.*; *see also Davis*, 139 F.3d at 1419 (same); *S. Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281, 1289 (11th Cir. 1995) (same).

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In sum, there can be no liability without remedy. Plaintiffs must show that a constitutional remedy is possible before they can seek a declaration that the Enacted Plan is unlawful and before they can seek an injunction keeping that plan from going into effect. That is especially so given the Florida Constitution's express separation of powers clause, which counsels that courts should not declare legislation unconstitutional when that legislation could, in fact, turn out to be constitutional after all. Said another way, Plaintiffs must prove that the State could lawfully have drawn a district that does not diminish before the courts set aside duly enacted legislation.

C.

Plaintiffs also say that this Court need not worry about the U.S. Constitution's Equal Protection Clause because it only comes into play as part of Defendants' affirmative defenses. And, according to Plaintiffs, Defendants cannot pursue those affirmative defenses because the public-official-standing doctrine serves as a bar. The problem with Plaintiffs' argument is threefold.

First, compliance with the U.S. Constitution's Equal Protection Clause serves as more than an affirmative defense; it goes to the very heart of whether Plaintiffs have a cause of action at all. That is because, as detailed above, the Florida Constitution *and* the U.S. Constitution serve as dual constraints every time the Florida Legislature draws a district. Where those constraints conflict, the U.S. Constitution prevails. Therefore, when assessing whether the Florida Legislature erred in passing the race-neutral Enacted Plan, this Court must assess whether it was possible to comply with the Florida Constitution's non-diminishment standard *and* the U.S. Constitution's Equal Protection Clause. This Court cannot turn a blind eye to the U.S. Constitution.

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Second, Plaintiffs waived their public-official-standing argument. Florida Rule of Civil Procedure 1.100(a) provides that "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). Plaintiffs never filed the avoidance. They waived the argument. *See 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). To be certain, unlike

in federal court, the Florida Supreme Court "has held that the issue of standing is a waivable defense." *Page v. Deutsche Bank Tr. Co. Ams.*, 308 So. 3d 953, 960-61 (Fla. 2020).

Third, if the only way to consider the U.S. Constitution's Equal Protection Clause is through an affirmative defense (which it is not) and Plaintiffs have preserved their argument (which they have not), the public-official-standing doctrine still does not apply. Both the first and the most recent cases concerning the doctrine make clear that it is rooted in a respect for the Florida Constitution's express separation of powers. It was because of this express separation of powers that the Attorney General could not unilaterally deem an act of the Florida Legislature unconstitutional in *Atlantic Coast Line Railway Company v. State Board of Equalizers*, 94 So. 681 (Fla. 1922). Nor could the board of a public agency deem an act of the Florida Legislature unconstitutional in *State Department of Transportation v. Miami-Dade County Expressway Authority*, 316 So. 3d 388 (Fla. 1st DCA 2021). Unlike *Atlantic Coast Line* and *Miami-Dade County Expressway*, however, the separation of powers is not implicated. Defendants are not challenging a state statute; they are attempting to defend a state statute.[2] And, of course, the Secretary here is not declining to enforce the law establishing Florida's congressional districts.

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[2] This Court also considered the affirmative defense last cycle. *See* Final Judgment at 40, *Romo v. Detzner*, 2012 CA 412 & 490 (Fla. 2d Cir. Cir. July 10, 2014) ("As I find the Legislature's remaining affirmative defenses to be without merit, I find the Congressional Redistricting plan adopted by the Legislature to be constitutionally invalid.").

In sum, neither Plaintiffs nor this Court can turn a blind eye to the U.S. Constitution's Equal Protection Clause. The public-official-standing doctrine is not a bar to considering the import of the Equal Protection Clause.

III.

After discussing the interplay between state and federal law, and assigning the burden of proof, this section addresses the merits. It begins with whether the Florida Constitution's non-diminishment standard applies in North Florida, specifically to Benchmark CD-5 adopted in 2015. Assuming the standard applies, this section assesses whether it is possible to comply with that standard without running afoul of the U.S. Constitution's Equal Protection Clause.

A.

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Defendant Secretary of State argues that the non-diminishment standard cannot apply to North Florida, namely to Benchmark CD-5. His argument is based on the text of Article III, § 20(a) and has the advantage of avoiding, for now, any possible conflict between the Florida Constitution's non-diminishment standard and the U.S. Constitution's Equal Protection Clause.

The Secretary rightly notes that Article III, § 20(a) includes two race-based standards: the non-vote-dilution standard and the non-diminishment standard. The Florida Supreme Court has said that the former "is essentially a restatement of Section 2 of the Voting Rights Act." *Apportionment I*, 83 So. 3d at 619. The latter "reflects the statement codified in Section 5" of the Voting Rights Act. *Id.* at 620.

Unlike the two provisions of the Voting Rights Act, however, the Florida Constitution textually links the non-vote-dilution and non-diminishment standards. Here is Article III, § 20(a) with brackets added:

> a) . . . districts shall not be drawn **[**with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process**]** or **[**to diminish their ability to elect representatives of their choice**]** . . .

The two race-based standards appear in a single sentence with the "same negative verb," "shall not be drawn," linking the "two clauses" with an "or." *Apportionment I*, 83 So. 3d at 619 (citing text). The pronoun "their" also appears twice in the second clause, the non-diminishment standard. Art. III, § 20(a), Fla. Const. "[T]heir" defines the universe of people to whom the clause applies by referring to the "racial" and "language minorities" in the first clause. *Id.* In this way, the text tells us that the first and second bracketed clauses protect the same people—"racial" and "language minorities" whose "participat[ion] in the political process" is otherwise being impeded. *Id.*

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Federal cases tell us "racial" and "language minorities" refer to (1) groupings that are "sufficiently large and" geographically "compact to constitute a majority in a reasonably configured district," *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) (citing *Gingles*, 478 U.S. at 50-51); (2) that are "politically cohesive," *Gingles*, 478 U.S. at 51; (3) where "the white majority votes sufficiently as a bloc to enable it . . .to defeat the minority's preferred candidate"; and (4) where the "totality of circumstances" establish that the political process is not "equally open" to

the minority group. *Id.* at 43, 46. The first three parts of the test are called the *Gingles* preconditions.[3]

Together, the *Gingles* "preconditions" and the "totality of circumstances" are intended to identify specific instances of discrimination for which the Voting Rights Act requires a remedy, such as at-large election schemes diluting the voting strength of a minority group. *See Allen*, 143 S. Ct. at 1503-04; *compare, e.g.*, *White*, 412 U.S. at 766-67, *with Whitcomb v. Chavis*, 403 U.S. 124, 149-53 (1971). The first *Gingles* precondition—that a "'minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district'"—is a necessary first step to trigger Voting Rights Act scrutiny. *See Allen*, 143 S. Ct. at 1503 (quoting *Wis. Legislature*, 142 S. Ct. at 1248).

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[3] Courts have interpreted the fourth to entail an assessment of the following factors listed in the Senate report accompanying 1980s amendments to the Voting Rights Act:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 44-45.

As the U.S. Supreme Court explained in *Bartlett v. Strickland*, that trigger for any § 2 analysis is the existence of a majority-minority district. 556 U.S. 1, 15-16 (2009) (plurality op.). *Strickland* rejected the argument that "the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential [single-member] election district." *Id.* at 12. Thus, a federal Voting Rights Act plaintiff must identify a reasonably configured area where the minority group makes up more than 50% of the voting-age population. *Id.* at 15-16. The plaintiff cannot rely on crossover districts (where it is possible for both white voters and the minority group to elect the minority's representative of choice), nor coalition districts (where one minority group works with others to elect that minority group's representative of choice). *Id.* ("Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.").

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The U.S. Supreme Court rejected as unworkable a scheme that would require the political branches and the courts "to make inquiries based on racial classifications and race-based predictions" without that 50% limitation. *Id.* at 17-18 ("Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?").

Consistent with the Florida Supreme Court's past reliance on federal cases as a guide, this Court interprets Article III, § 20(a) to require the same initial showing here.

Because Article III, § 20(a) links both the non-vote-dilution and non-diminishment standards—referring to the same minority group for both, *supra*—there is every reason to impose *Strickland*'s 50-percent threshold before either provision can be triggered.[4] Without any such limitation, the non-diminishment standard would rest on weak constitutional footing because there would be no conceivable mechanism to identify with specificity the race-based problem that the provision remedies through a race-based solution.

In *League of Women Voters of Florida v. Detzner* ("*Apportionment VIII*"), the Florida Supreme Court took a similar course when it rejected the legislature's attempt to justify a district's configuration because "Hispanic voters' ability to elect a representative of their choice [would be] diminished." 179 So. 3d 258, 286 (Fla. 2015). Before relying on the non-diminishment standard, the Florida Supreme Court explained that the legislature had to make "a preliminary showing of cohesion." *Id.* at 286 n.11. This was so because "[t]he *Gingles* preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis"—the preconditions mattered for purposes of the Florida Constitution's non-diminishment analysis. *Id.*

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[4] *See, e.g.*, *Apportionment I*, 83 So. 3d at 620, 625 ("Because Sections 2 and 5 raise federal issues, our interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent. . . . Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

Note that the Florida Supreme Court referred to the *Gingles* preconditions, plural. Without satisfying all three preconditions—which would include the first precondition of showing a reasonably configured district exceeding 50% black voting age population—there is no real mechanism to find the "insidious and pervasive" pockets of racism that must be remedied. *Katzenbach*, 383 U.S. at 308-09. Plaintiffs' preferred cohesion-only approach would tell us only that a minority group votes alike, not that there is a sufficiently concentrated group of minority voters who have been the target of discrimination.

Read in this way, the provisions would still continue to serve "dual constitutional imperatives." *Apportionment I*, 83 So. 3d at 619. The non-vote-dilution standard justifies the creation of a district. The non-diminishment standard preserves it. And this Court can leave for another day whether the non-diminishment standard could constitutionally justify the preservation of a once-majority-minority district when it becomes a coalition or crossover district.

Here, it is undisputed that there is not "a minority group" that's "sufficiently large and" geographically "compact to constitute a majority" in Benchmark CD-5. *Wis. Legislature*, 142 S. Ct. at 1248. The breakdown of the district is as follows:

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Benchmark District 5 Voting Age Population (See Joint Factual Stipulation (3)(a))			
	Black	**White**	**Hispanic**
Voting Age Population	46.2%	40.2%	9.1%

That is fatal under *Strickland*. "When *a minority group* is not sufficiently large to make up a majority in a reasonably shaped district, §2 [of the Voting Rights Act] simply does not apply." *Cooper*, 581 U.S. at 305 (citing *Strickland*, 556 U.S. at 18-20) (emphasis added). By extension, the non-diminishment standard does not either, at least when there has never been a showing that Benchmark CD-5 was a majority-minority district (it was not) that has now become a coalition or crossover district. *See generally League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 404 (Fla. 2015) ("*Apportionment VII*") (noting demographics of the district).

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In sum, because the Florida Constitution's non-diminishment standard does not apply to Benchmark CD-5, as Plaintiffs argue, there is no district to be protected in North Florida. This Court can thus enter judgment for Defendants.

B.

The result would be no different even if the Florida Constitution's non-diminishment standard did apply to Benchmark CD-5. To reiterate, Plaintiffs have the burden of establishing the application of the Florida Constitution's non-diminishment standard in a manner that does not run afoul of the U.S. Constitution's Equal Protection Clause. They cannot carry their burden. Per the Joint Stipulation, the demographic and

legislative information available to this Court makes plain that the evidence is hardly in equipoise. It tilts decidedly in favor of race predominating. Indeed, the only configuration Plaintiffs have proposed as an alternative is one where a district would stretch from Duval to Leon and Gadsden Counties, one that cannot comply with the U.S. Constitution's Equal Protection Clause.

1.

Before proceeding, a note on the record. The Parties' Joint Factual Stipulation provides the universe of record material. Under the stipulation, the Parties agree to the use of the functional-analysis data of Benchmark CD-5 and the North Florida districts in the Enacted Plan. Joint Factual Stipulation (3)-(4). The Parties also agree that the legislative committee and floor proceeding transcripts, which were provided to this Court, are evidence for purposes of this case. *Id.* (2). As are legislative materials, prior congressional plans, and gubernatorial veto messages and advisory opinion briefing, the veracity of which none can challenge. *Id.* Also available for use are:

> The compactness numbers, demographic information, political information, and other districting criteria (such as boundary analysis and city and county splits) for all districts used for the 2016-2020 congressional elections ("Benchmark Plan") and all districts used for the 2022 congressional election ("Enacted Plan"), as available on floridaredistricting.gov.

Id. (1).

When the Parties submitted their respective trial briefs and responsive briefs, they referenced record materials and provided those materials in appendices. In this

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Order, this Court will refer to and incorporate by reference specific portions of the record and will provide the relevant stipulation provisions that allow this Court to consider the material.

That is all the record material needed in this case. The Florida Supreme Court made use of similar material in *Apportionment I*. In so doing, the Florida Supreme Court noted that with the benefit of "technology," a court can "objectively evaluate many of Florida's constitutionally mandated criteria without the necessity of traditional fact-finding, such as making credibility determinations of witnesses." 83 So. 3d at 610. The same is true here.

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2.

If ever there was an instance of "race for its own sake" being "the overriding reason" for a mapmaking decision, then applying the non-diminishment standard to the Benchmark Map's CD-5 would be it. *Bethune-Hill*, 580 U.S. at 190. The reasons are threefold.

First, the Florida Supreme Court has explained that the non-diminishment standard allows for only "a *slight* change in percentage of the minority group's population in a given district," one that does not have more than a "cognizable effect on a minority group's ability to elect its preferred candidate of choice." *Apportionment I*, 83 So. 3d at 625. That is, with every new redistricting cycle, Florida's map drawers must hit a racial target based on the last redistricting cycle's racial target or face a claim that they violated the non-diminishment standard. Anything more than a "slight" change

would leave the minority group "less able to elect a preferred candidate of choice" when measured against the benchmark. *Id.*; *see also id.* at 702 (Canady, C.J., concurring in part and dissenting in part) (noting that the dictionary defines "diminish" as "to make less or cause to appear less").

This means that there are specific, numerical racial targets that any districting effort must meet in North Florida—with only *slight* deviation—to comply with Article III, § 20(a)'s non-diminishment standard. Those racial targets are the black voting-age population (46.20% in Benchmark CD-5), black voter turnout rates in the Democratic primary (average of 66.89% in Benchmark CD-5), and the political performance of black voters' candidate of choice in the general election (14 out of 14 victories in statewide elections in Benchmark CD-5). Sec'y Tr. Br. App. **Ex. C** (VAP summary report, Enacted Map); Sec'y Tr. Br. App. **Ex. D** (VAP summary report, Benchmark Map); Sec'y Tr. Br. App. **Ex. L** at 6 (Benchmark packet) *see also* Joint Factual Stipulation (1) ("demographic information . . . available on floridaredistricting.gov"); *id.* (2)(5) ("redistricting committee meeting materials from the 2022 regular session"). And when a State redistricts according to an "announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites," race predominates. *Cooper*, 581 U.S. at 300-01.

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Second, the legislative record is replete with detailed testimony explaining that the Benchmark Map's CD-5 was both configured to connect black communities hundreds of miles away for predominantly race-based reasons *and* that maintaining a

substantially similar East-West configuration was necessary to comply with the non-diminishment standard in North Florida. Among the statements were these:

- Benchmark CD-5 "unifie[d]" "black communities" "into one district." Sec'y Tr. Br. App. **Ex. E** 9:9-15 (Senate session, March 4, 2022).
- "[B]lack voters" "in Duval[]," "in Tallahassee," and "in any points in between" should have a "minority access" "district that represents them." Sec'y Tr. Br. App. **Ex. F** 25:21-26:4 (Senate session, April 20, 2022).
- An East-West configuration would have "Tier 1 protections. Gadsden County is Florida's only majority-minority black county in the entire state, which goes into part of that Tier 1 consideration, which, again, outranks compactness as a Tier 2 requirement." Sec'y Tr. Br. App. **Ex. G** 68:16-21 (House congressional redistricting subcommittee, February 18, 2022).
- In Plan 8015, the Florida Legislature drew an East-West district in north Florida, a district that would "remain[] a protected black district." Sec'y Tr. Br. App. **Ex. H** 45:22-24 (House redistricting committee, February 25, 2022).
- Plan 8015 contained a North Florida "district" whose "configuration" was "similar to the benchmark district." Sec'y Tr. Br. App. **Ex. H** 24:6-15.
- Plan 8015 was an "attempt at continuing to protect the minority group's ability to elect a candidate of their choice, addressing compactness concerns, and working to make sure we bring this process in for a landing during our regular session." Sec'y Tr. Br. App. **Ex. H** 24:16-24.
- Inquiring whether "going from the current [Benchmark] CD 5" configuration to a different configuration would "diminish the ability" of black voters "to elect" candidates of their choice. Sec'y Tr. Br. App. **Ex. G** 83:23-84:7.
- Arguing that there should be a "minority access" district like Benchmark "CD 5" in the Enacted Map. Sec'y Tr. Br. App. **Ex. I** 85:11-19 (House session, April 20, 2022).[5]

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[5] For these bullet points, see also Joint Factual Stipulation (2)(1) ("Transcripts of legislative committee and floor proceedings" are "judicially noticeable").

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In other words, the existence, creation, and preservation of an East-West, North-Florida district was predicated solely on race.

Notably, at no point in the legislative debate was anything other than a configuration that connected Duval to Leon seriously debated or considered to comply with the non-diminishment standard. Though the Florida Legislature did at one point propose a district in Duval County, that district dropped the black voting-age population by nearly eleven percentage points compared to the Benchmark Map, from 46.20% to 35.32%, thereby violating *Apportionment I*. *Compare* Sec'y Tr. Br. App. **Ex. C** (VAP summary report, Enacted Map), Sec'y Tr. Br. App. **Ex. D** (VAP summary report, Benchmark Map), *with* Sec'y Tr. Br. App. **Ex. J** (VAP summary report, 8019); *see also* Sec'y Tr. Br. App. **Ex. H** 63:16-65:7 (observing that proposed Duval County district would not guarantee elections for black-preferred candidates with those candidates losing in "one-third" of "test elections"); Joint Factual Stipulation (2)(1) ("Transcripts of legislative committee and floor proceedings" are "judicially noticeable"); *id.* (1) ("demographic information . . . available on floridaredistricting.gov").

More specifically, the maps voted out of each committee stop were as follows:

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Legislatively Proposed Maps (Sec'y Supp. App. **Ex. Q**)[6]

Plan 8001, Florida House Redistricting Committee

Plan 8002, Florida Senate Committee on Reapportionment

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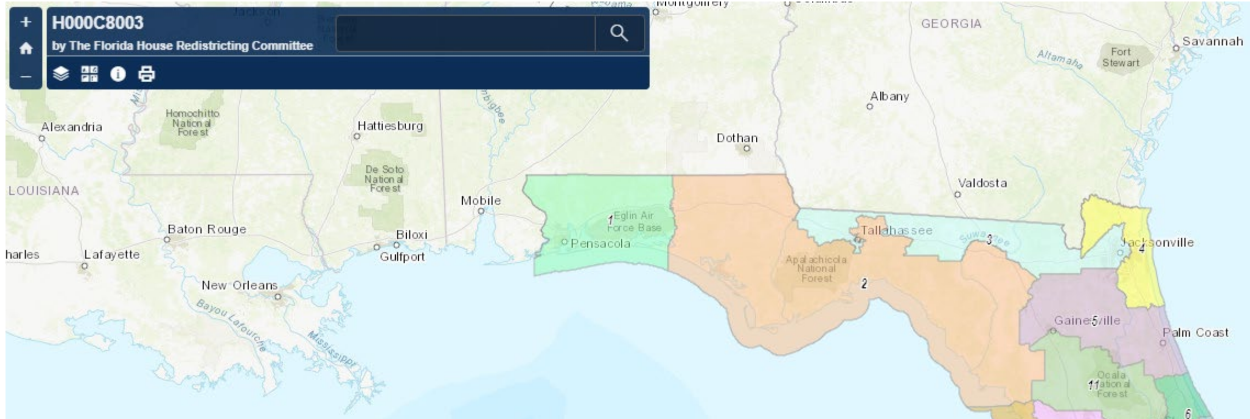
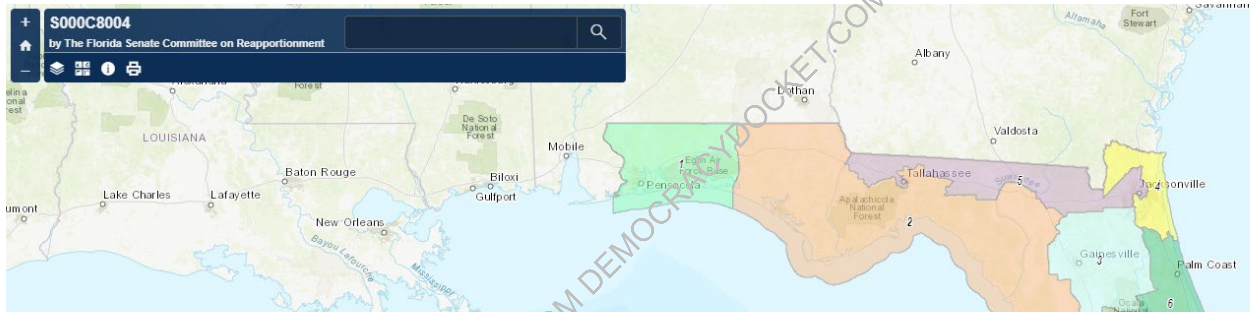
[6] As explained in the Secretary's supplemental appendix, these screen captures of legislatively proposed maps were taken from floridaredistricting.gov. *See* Joint Factual Stipulation (1) ("other districting criteria . . . as available on floridaredistricting.gov"); *id.* (2)(4): ("the Florida Legislature's redistricting plans that were published during the 2021-2022 redistricting cycle"). To access the maps, select "Submitted Plans" on the home screen, select "CON" to view congressional-district maps, and for the map sponsors, select the option for the House or Senate. Those clicks will provide a list of all legislatively proposed maps, which can be viewed and displayed as shown above.

Plan 8003, Florida House Redistricting Committee



Plan 8004, Florida Senate Committee on Reapportionment



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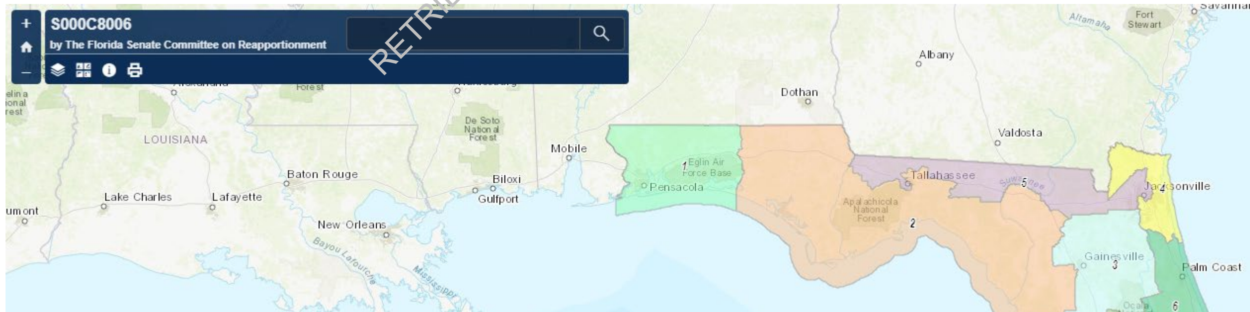
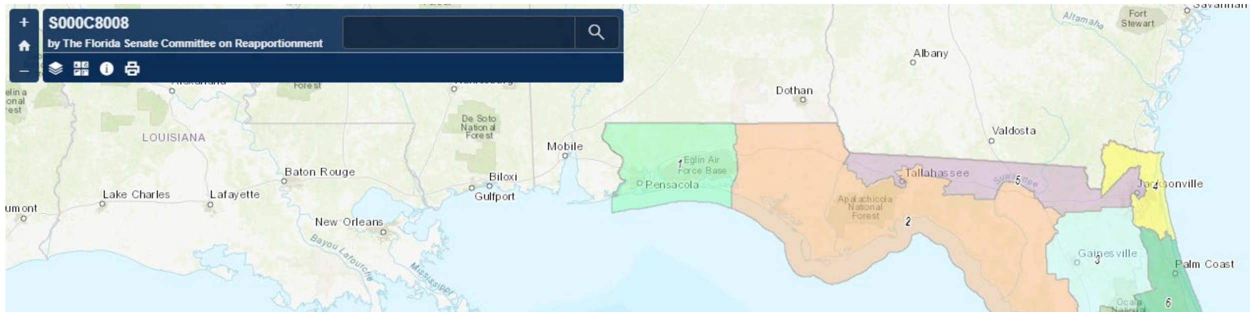
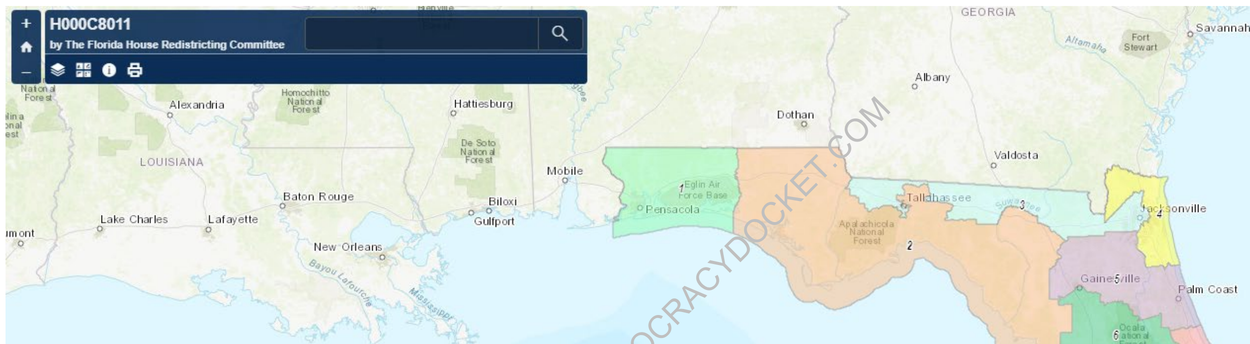
Plan 8006, Florida Senate Committee on Reapportionment



Plan 8008, Florida Senate Committee on Reapportionment



Plan 8011, Florida House Redistricting Committee



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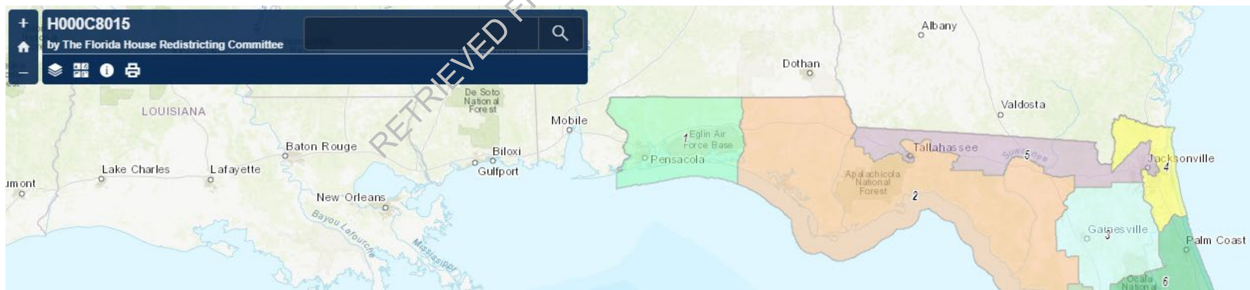
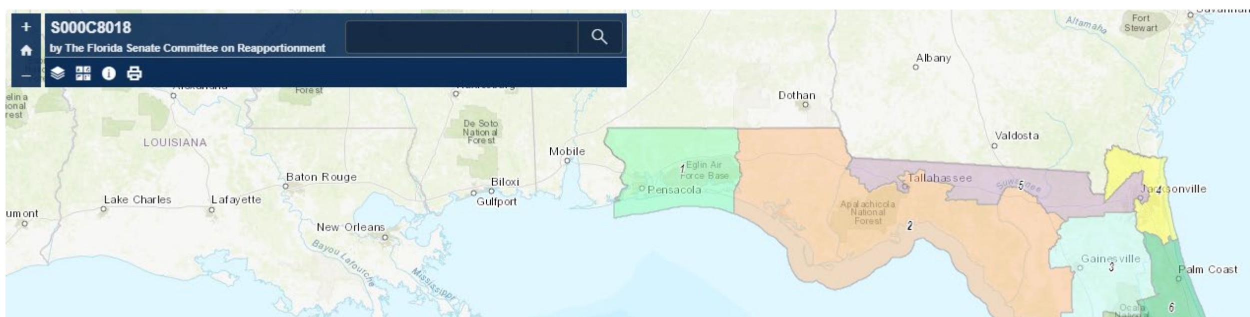
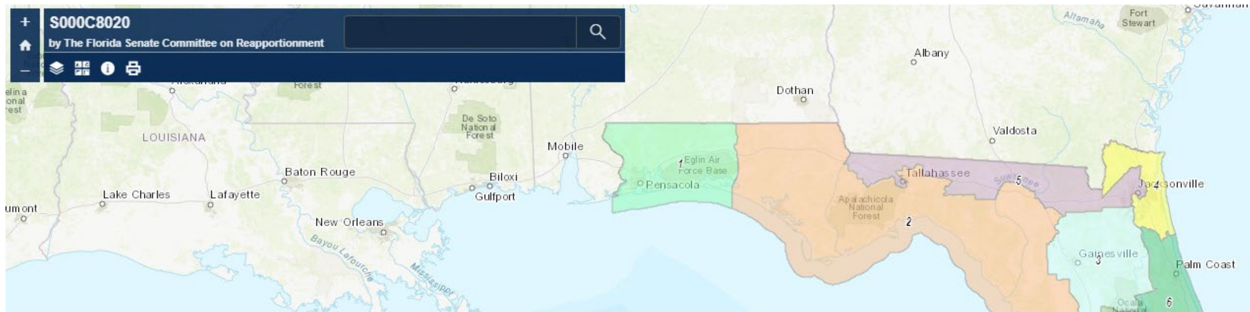
Plan 8015, Florida House Redistricting Committee



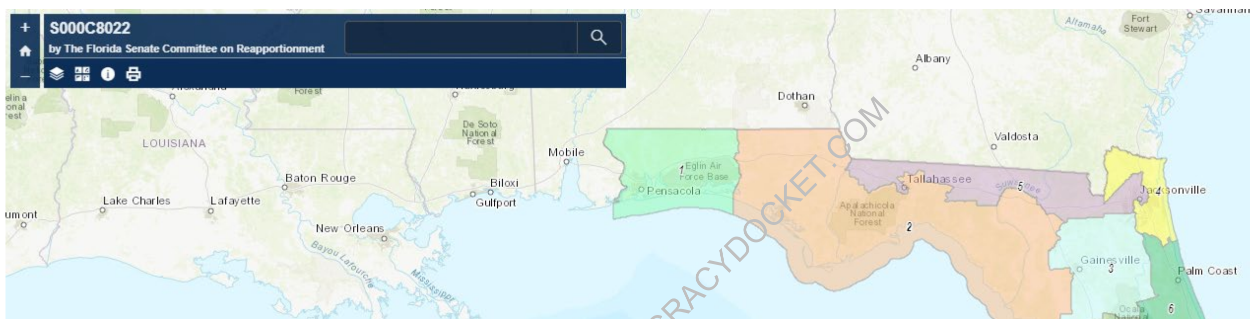
Plan 8018, Florida Senate Committee on Reapportionment



Plan 8020, Florida Senate Committee on Reapportionment



Plan 8022, Florida Senate Committee on Reapportionment



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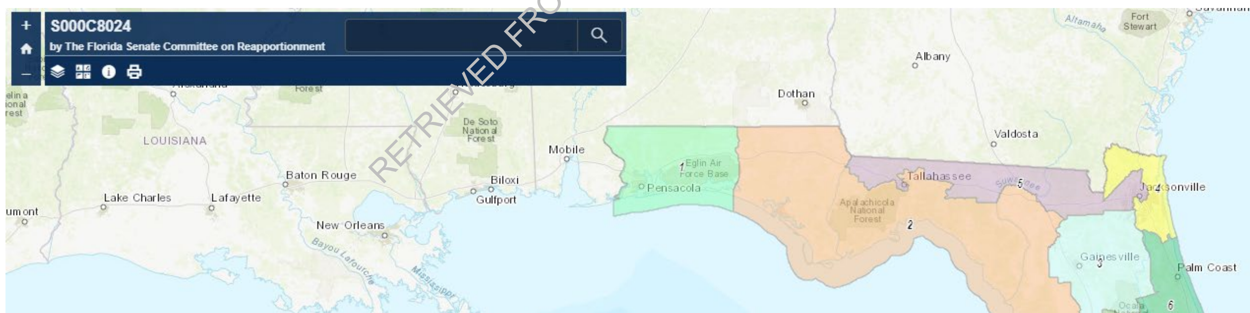
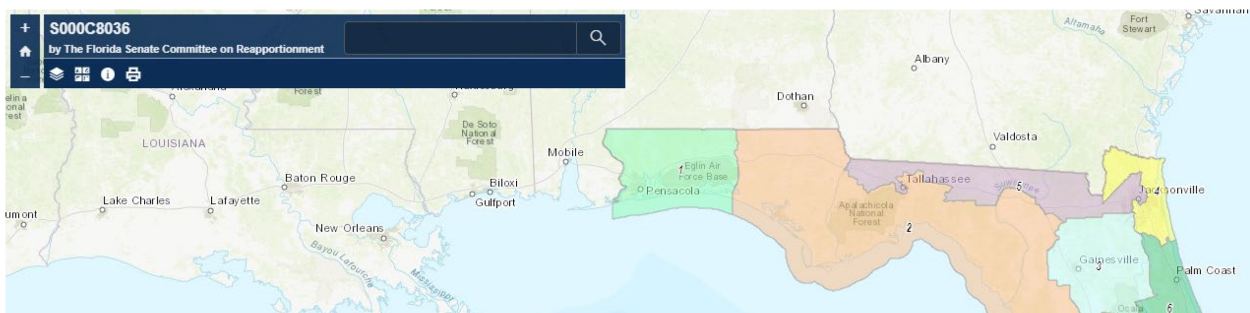
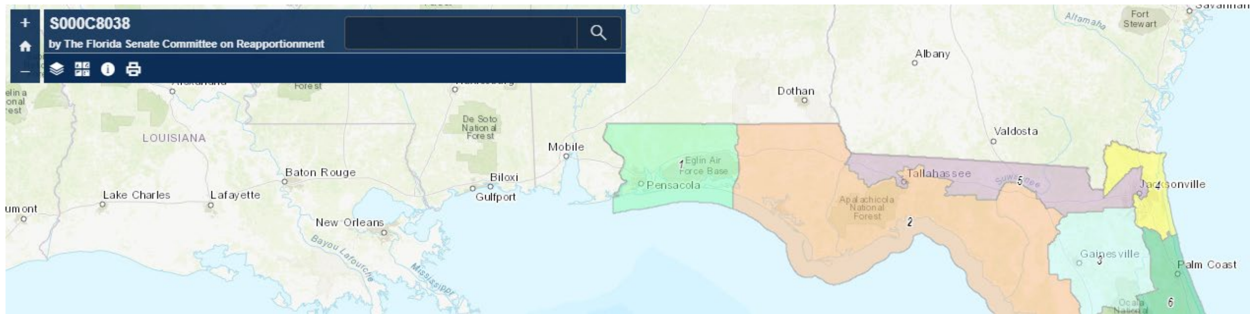
Plan 8024, Florida Senate Committee on Reapportionment



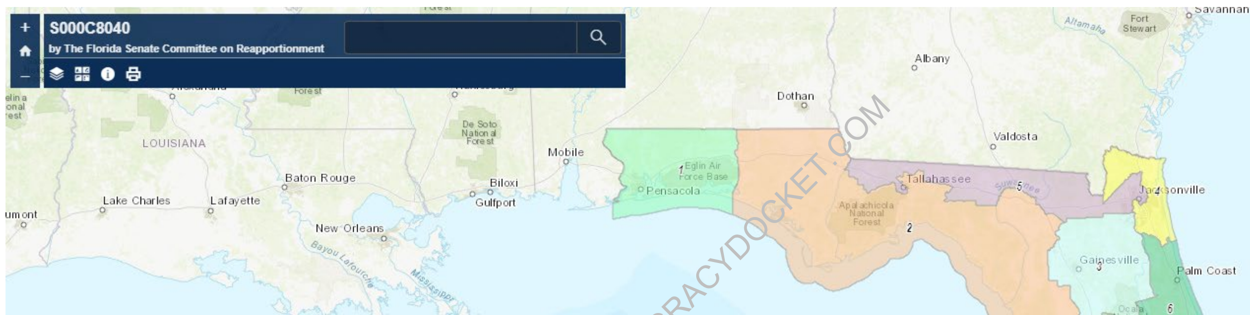
Plan 8036, Florida Senate Committee on Reapportionment



Plan 8038, Florida Senate Committee on Reapportionment



Plan 8040, Florida Senate Committee on Reapportionment



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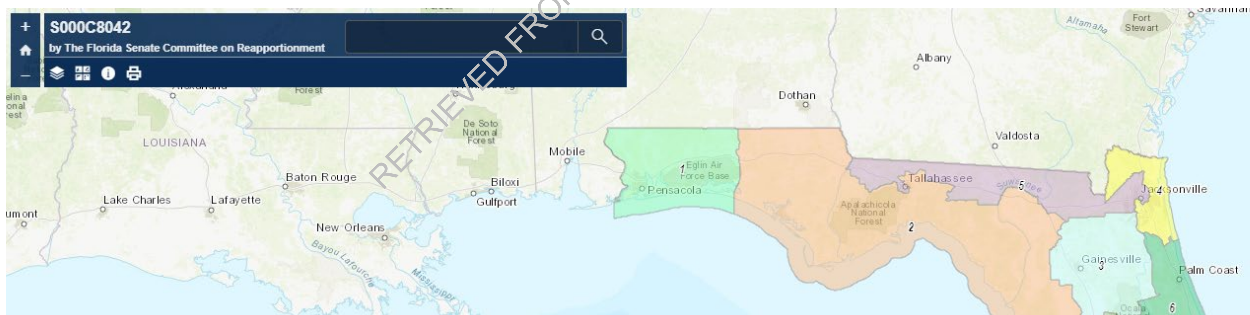
Plan 8042, Florida Senate Committee on Reapportionment



Plan 8052, Sen. Rouson

Plan 8060, Sen. Jones

Plan 8062, Sen. Rouson

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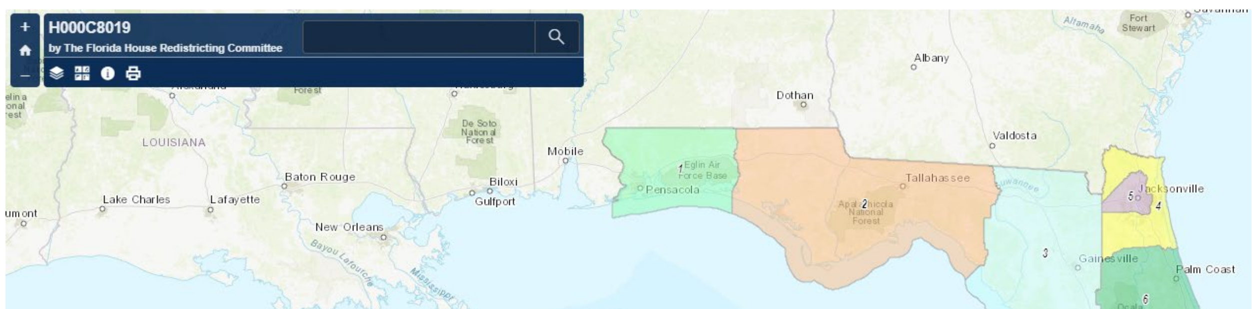
Plan 8017, Florida House Redistricting Committee

Plan 8019, Florida House Redistricting Committee



As Plaintiffs put it, "[e]very draft congressional plan proposed and debated by the Legislature, until the very last one, maintained the general configuration of Benchmark CD-5." Pls. Memo. in Support of Mot. for Temp. Inj. at 15; *see also id.* at 8 ("[U]ntil the very last moment, every single congressional plan proposed by the House and Senate redistricting committees maintained the general configuration of CD-5.").

There was only one other proposed configuration: a Duval-only district that diminished the ability of black voters to elect the representative of their choice in a third of elections. Consider the following table from the Florida Legislature's functional analysis:

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Plan 8019 Functional Analysis (Sec'y Supp. App. **Ex. R**) (blue highlights added)[7]

	DISTRICT	ELECTION RESULTS													
		2020 President		2018 Governor		2018 AG		2018 CFO		2018 Ag Commish		2018 US Senate		2016 President	
		R_Trump	D_Biden	R_DeSantis	D_Gillum	R_Moody	D_Shaw	R_Patronis	D_Ring	R_Caldwell	D_Fried	R_Scott	D_Nelson	R_Trump	D_Clinton
Performing Black Districts	5	43.11	55.58	42.37	56.70	45.36	53.04	45.73	54.27	44.86	55.15	44.36	55.65	44.38	52.29
	20	23.52	75.89	19.45	79.93	20.26	78.44	20.20	79.79	19.89	80.09	20.00	80.00	20.39	77.83
	24	25.28	74.18	17.83	81.45	18.39	80.05	18.46	81.53	18.00	82.00	18.64	81.36	17.28	81.05
Performing Hispanic Districts	26	59.13	40.33	53.79	44.84	54.93	43.09	55.54	44.45	54.35	45.64	54.79	45.21	46.48	51.21
	27	50.01	49.45	45.75	53.18	46.10	51.99	47.41	52.59	45.38	54.63	45.52	54.47	40.05	57.42
	28	52.99	46.42	46.31	52.49	46.94	50.86	48.07	51.92	46.56	53.44	46.55	53.46	40.81	56.46

Included in this chart are the results of Florida's 14 statewide general-election contests from 2012 to 2020. Highlighted cells indicate the contest's winner.

2016 US Senate		2014 Governor		2014 AG		2014 CFO		2014 Ag Commish		2012 President		2012 US Senate	
R_Rubio	D_Murphy	R_Scott	D_Crist	R_Bondi	D_Sheldon	R_Atwater	D_Rankin	R_Putnam	D_Hamilton	R_Romney	D_Obama	R_Mack	D_Nelson
51.92	44.53	49.80	45.95	53.40	43.69	55.52	44.48	52.58	47.42	46.20	52.98	39.83	57.33
22.42	75.64	17.97	79.92	22.42	76.13	24.50	75.48	22.99	77.02	19.06	80.52	16.82	81.97
21.99	75.93	16.24	82.18	18.77	79.80	20.93	79.06	20.21	79.78	16.83	82.82	15.49	83.46
56.71	41.07	56.03	41.23	60.81	36.85	61.75	38.25	62.10	37.89	49.98	49.53	46.53	51.32
50.17	47.78	47.55	50.00	51.96	46.03	56.52	43.49	55.69	44.30	47.27	52.22	44.15	54.47
49.92	47.69	45.89	51.20	51.75	45.82	54.11	45.87	53.95	46.04	44.61	54.83	42.03	56.33

. This set of statistics is provided as part of the functional analysis for this plan's performing minority districts. All statistics denoted are percentages.

Note that the above table lists fourteen elections, and that in five elections (marked by blue circles) the black candidate of choice (the Democrat) *loses*. This can be juxtaposed to the functional analysis in Benchmark CD-5, where the black candidate of

[7] See also Joint Factual Stipulation (2)(5) ("redistricting committee meeting materials from the 2022 regular session").

choice wins all fourteen elections. *See* Sec'y Tr. Br. App. **Ex. L** at 6; *see also* Joint Factual Stipulation (2)(5) ("redistricting committee meeting materials from the 2022 regular session").

J. Alex Kelly, an experienced map drawer himself, also confirmed that one could not draw a district in North Florida that complied with the non-diminishment test (and the U.S. Constitution). As he put it before the Florida Legislature, it was impossible "to draw a compact, politically effective, minority district and check all the boxes, so to speak, without violating some manner of law." Sec'y Tr. Br. App. **Ex. B** 32:23-33:24; *see also* Joint Factual Stipulation (2)(1) ("Transcripts of legislative committee and floor proceedings" are "judicially noticeable"). Race would have to predominate.

This inability to draw a district in North Florida that, at the very least, adheres to the non-diminishment standard, makes sense. In Benchmark CD-5, 82.7% of the district's population (black, white, and other) comes from Duval and Leon Counties. *See* Joint Factual Stipulation (3)(b).

Moreover, the following maps show that the black voting-age population in North Florida resides mostly in Duval, Leon, and Gadsen Counties. These populations must thus be joined to create a race-based district that doesn't diminish the 46.20% benchmark, as the failed experiment with the Duval-centered district proved.

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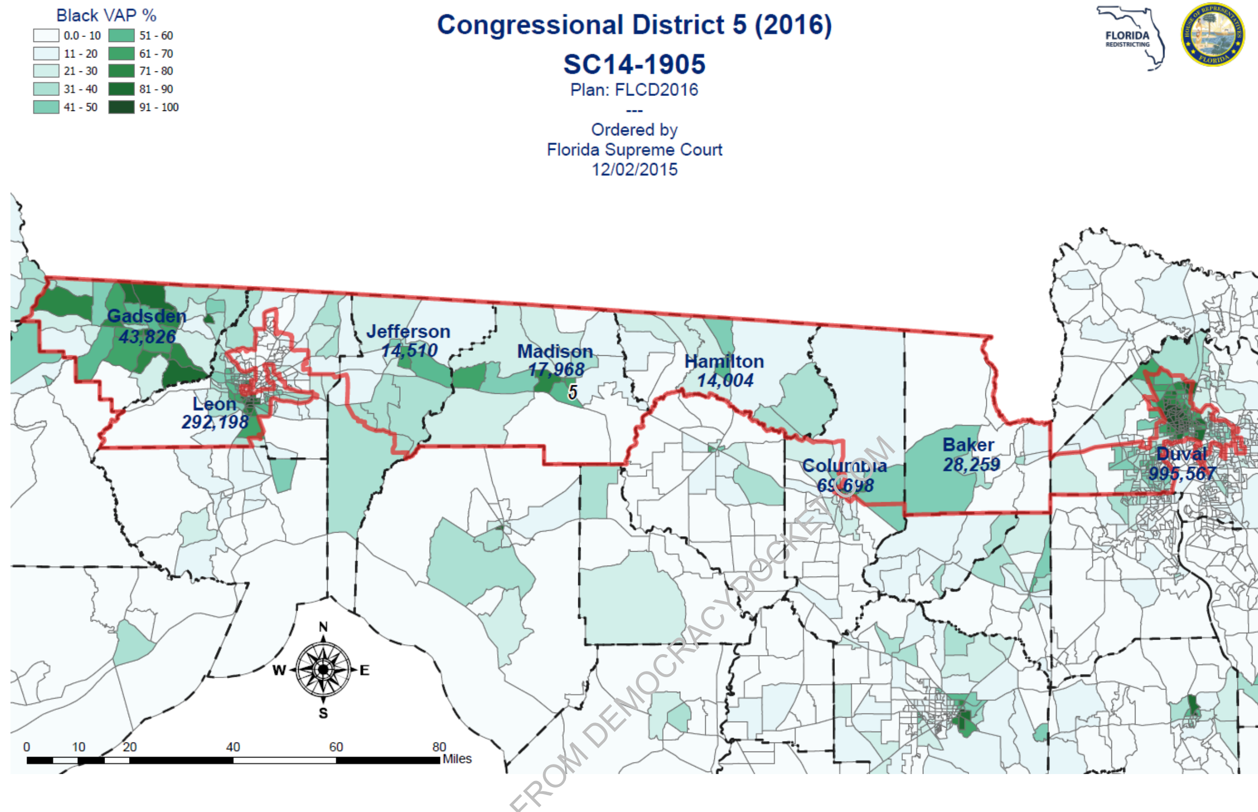
Benchmark North Florida Districts, Heat Map & Population Density
(Sec'y Tr. Br. App. **Ex. K**)[8]



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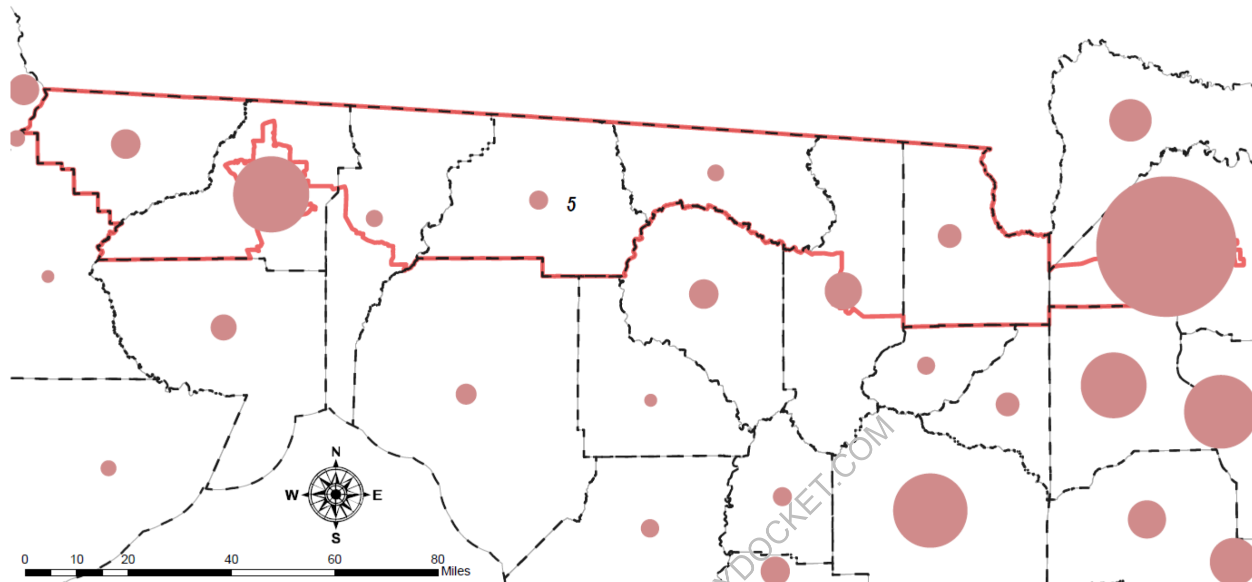
[8] *See also* Joint Factual Stipulation (1) ("demographic information, political information, and other districting criteria . . . for all districts used for the 2016-2020 congressional elections . . . as available on floridaredistricting.gov").

Distribution of
2020 Census
Total Population

Congressional District 5 (2016)
SC14-1905
Plan: FLCD2016

Ordered by
Florida Supreme Court
12/02/2015



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Third, even without "direct evidence" of "legislative purpose," "circumstantial evidence of [the] district's shape and demographics" makes plain that "traditional race-neutral districting principles" must be subordinated to "racial considerations" to draw a differently configured district in North Florida that also complies with the non-diminishment standard. *Bethune-Hill*, 580 U.S. at 187. To connect the black populations in Duval County with Leon and Gadsen Counties requires that compactness and fidelity to political and geographic boundaries be ignored.

Sprawling over 200 miles, across eight counties, splitting four in the process, Sec'y Tr. Br. App. **Ex. L** at 2 (Benchmark packet); *see also* Joint Factual Stipulation (2)(5) ("redistricting committee meeting materials from the 2022 regular session"), Benchmark CD-5 was "one of the least compact" districts possible. *Apportionment VIII*,

179 So. 3d at 272. Kept substantially the same in the version initially passed by the Florida Legislature but vetoed by Governor DeSantis, the district had the lowest numerical compactness score of any district. Sec'y Tr. Br. App. **Ex. M** (District compactness report, 8015); *see also* Joint Factual Stipulation (1) ("demographic information, political information, and other districting criteria . . . for all districts used for the 2016-2020 congressional elections . . . as available on floridaredistricting.gov").

Robert Popper, the namesake of the Polsby-Popper compactness measure, also raised concerns during the regular session of the Florida Legislature about the compactness (and constitutionality) of any district that looks like Benchmark CD-5. His written testimony concluded that a district with a similar configuration and similar compactness scores would have "very low compactness scores for any U.S. congressional district," and certainly "the lowest compactness scores in the State of Florida." Sec'y Tr. Br. App. **Ex. N** at 5 (Popper written testimony); Sec'y Tr. Br. App. **Ex. G** (Popper legislative testimony, beginning on page 72); *see also* Joint Factual Stipulation (2)(1) ("Transcripts of legislative committee and floor proceedings" are "judicially noticeable"); *id.* (2)(5) ("redistricting committee meeting materials from the 2022 regular session").

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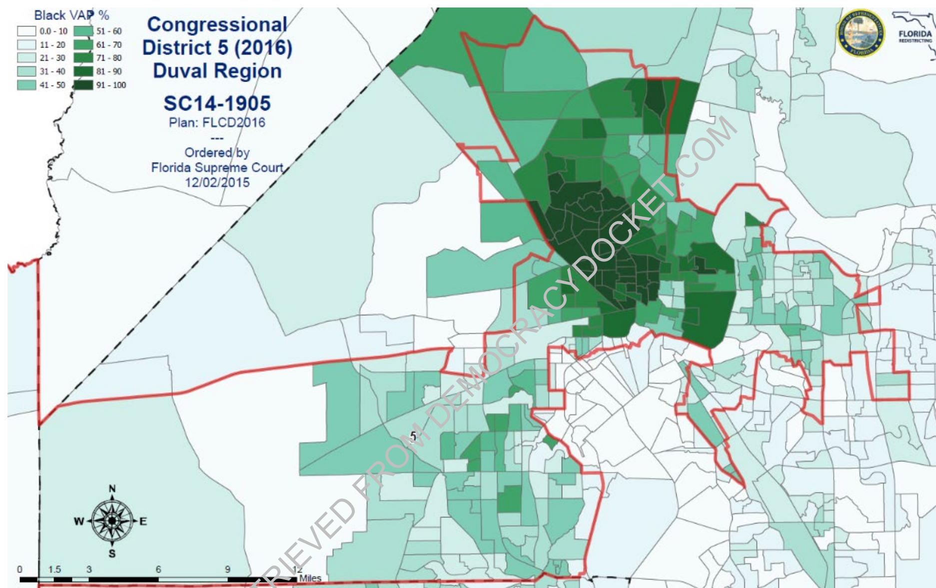
Indeed, as Benchmark CD-5 shows, the configuration needed to connect black populations requires nips and tucks that slice through North Florida with the precision of a scalpel. In the two major population centers, Duval and Leon Counties, "bizarrely shaped," "far from compact" lines must be drawn to pack black voters—fingers in

Duval and a horseshoe in Leon. *Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality op.). Certainly, "[n]o one looking at [Duval's fingers and Leon's horseshoe] could reasonably suggest that the district contains a geographically compact population of any race" nor say that there "has been a wrong" against a particular race that needs a "remedy." *Shaw v. Hunt*, 517 U.S. 899, 916 (1996) ("*Shaw II*") (cleaned up).

Benchmark Districts, Heat Map, Duval County (Sec'y Tr. Br. App. **Ex. O**)



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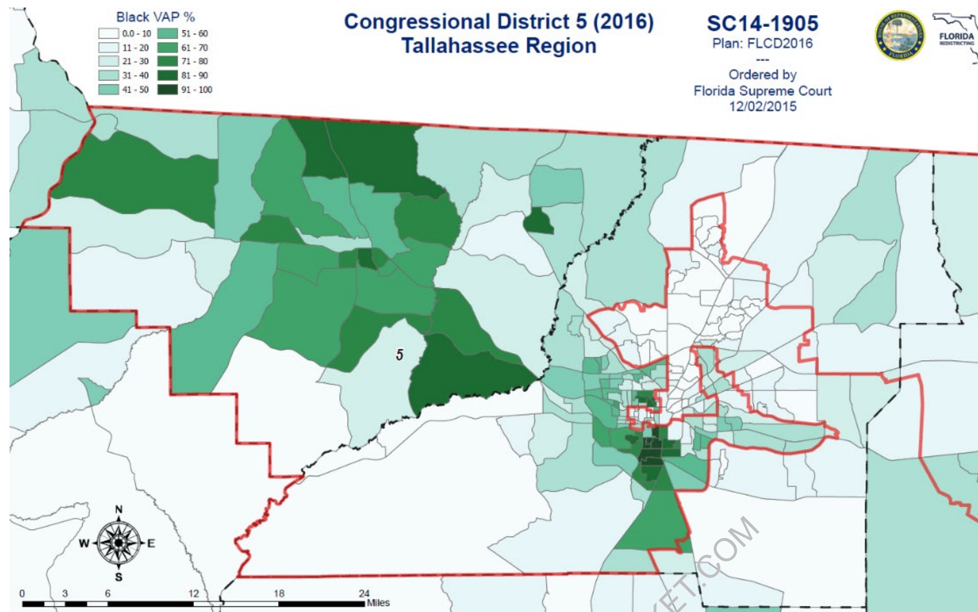
Benchmark Districts, Heat Map, Leon County (Sec'y Tr. Br. App. **Ex. P**)[9]



Nor would it be any defense for the State to retain Benchmark CD-5 (or smooth out its edges as some of the proposed maps did) by hiding behind the race-neutral districting principle of core retention or continuity of representation. By retaining Benchmark CD-5, the State wouldn't be acting on those race-neutral principles alone. The State would be deploying those principles *in pursuit of a racial target*. The State would be perpetuating Benchmark CD-5's race-based lines for race-based reasons, and solely because this Court, in rejecting the Legislature's race-neutral map, ordered it to do so. That is unconstitutional.

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[9] For Ex. O and P, see also Joint Factual Stipulation (1) ("demographic information, political information, and other districting criteria . . . for all districts used for the 2016-2020 congressional elections. . . as available on floridaredistricting.gov").

Consider the Eleventh Circuit's decision in *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002), and the Middle District of Florida's decision in *NAACP v. City of Jacksonville*, 2022 WL 7089087 (M.D. Fla. Oct. 12, 2022). Both cases rejected the government's defense about core retention because in both cases it was undisputed that the government retained the existing districts in pursuit of race-based goals. In *Clark*, the Eleventh Circuit rejected the county's conceded goal of maintaining existing lines to maximize black voting strength. 293 F.3d at 1267. Likewise, the district court in *NAACP* rejected a municipality's attempt to retain the core of city-council and school-board districts that had been previously drawn for race-based reasons based on substantial evidence that the districts had been maintained for race-based reasons. *See* 2022 WL 7089087, at *23-82 (M.D. Fla. Oct. 12, 2022) (recounting historical backdrop), *119-22 (rejecting core retention rationale); *see also Allen*, 143 S. Ct. at 1505 (explaining that "adherence to a previously used districting plan" can't defeat an effects based "§ 2 claim" because "[i]f that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan").

So too here. Carrying over unconstitutional lines with the express purpose of not diminishing their race-based effect doesn't alleviate equal-protection concerns; instead, it only further perpetuates a racial gerrymander into the next decade.

And that is the kind of district Plaintiffs seek—and have sought throughout this litigation. For over one year, Plaintiffs have sought the implementation of a district in

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North Florida that mirrors Benchmark CD-5. This was so during the temporary-injunction phase of litigation. *See* Pls. Reply in Support of Mot. for Temp. Inj., Ex. 13, Proposed Maps A & B (seeking to implement alternative maps that both mirror Benchmark CD-5). This was so during expert discovery and at summary judgment. *See* Ansolabehere Expert Report, Map 4 (Demonstration Map that mirrors Benchmark CD-5); Pls. Mot. for Sum. Judg. at 15 (referencing Demonstration Map). This remains so in the Joint Stipulation, which provides that "an appropriate remedy to the diminishment in North Florida would join the Black community in Duval County with the Black community in Leon and Gadsden Counties to create a North Florida district that satisfies *Apportionment I* and the non-diminishment standard, so long as that remedy is consistent with the courts' rulings." Joint Stipulation IV(D).

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Plaintiffs put it best: an East-West configuration is the "only alternative option" to "compl[y] with the constitutional non-diminishment standard." Pls. Memo. in Support of Mot. for Temp. Inj. at 4. To that end, Plaintiffs have pushed one configuration and one configuration alone: a district like Benchmark CD-5, a district "the non-diminishment standard required the creation of" back in 2015. Pls. Memo. in Support of Mot. for Temp. Inj. at 1. A district whose creation, existence, and protection solely concerned race. *See also* Pls. Mem. in Support of Mot. for Temp. Inj. at 5 ("Benchmark CD-5 unites North Florida's historic Black communities.").

In sum, the specific racial target, the direct evidence available through the legislative record, and the circumstantial evidence showing the subordination of

traditional districting criteria all point to the same conclusion: race invariably predominates in the application of the non-diminishment standard to North Florida.

3.

Because race predominates, Plaintiffs must point to a compelling interest and narrow tailoring to further that interest. *See Cooper*, 581 U.S. at 292. They cannot do that here.

Complying with a state constitutional provision isn't a compelling governmental interest. No court has ever said so. For good reason: the Fourteenth Amendment was enacted to limit state-based racial actions. If a state constitution has a school-segregation provision, the state can't claim that it satisfies the Equal Protection Clause by adhering to that school-segregation provision.

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The non-diminishment standard is not like the Voting Rights Act. The non-diminishment standard tries to mirror the Voting Rights Act. But it lacks the voluminous record, temporal, and geographic limitations that underlie the Voting Rights Act. *Katzenbach*, 383 U.S. at 313, 329-30. Plus, the U.S. Supreme Court has never specifically held that adherence to the Voting Rights Act is a compelling governmental interest. *Supra*.

The non-diminishment standard also lacks narrow tailoring. To have narrow tailoring, a race-based requirement must be backed by specific evidence of racial discrimination, must be geographically limited, and must be durationally limited. *Shelby County*, 570 U.S. at 529; *Students for Fair Admissions*, 143 S. Ct. at 2165. Here, Plaintiffs

have failed to show that, as applied to the Legislature's North Florida congressional districts, the non-diminishment standard satisfies all of these requirements.

Finally, this Court discusses what it is not doing. It is not rendering an opinion on the validity of Benchmark CD-5. Nor can it. That benchmark district has already been legislatively superseded by the Enacted Map. Instead, this Court is asked to decide whether the *Enacted Plan* is constitutional—whether the Florida Constitution's non-diminishment standard can be applied to Benchmark CD-5 in a *new map* in a manner consistent with the U.S. Constitution's Equal Protection Clause. And, because Plaintiffs failed to present any alternative to the Enacted Plan's configuration of North Florida that would satisfy the non-diminishment standard other than an equally sprawling East-West district, this Court assessed whether a new district that looked like the benchmark would be permissible. The issue addressed by this Court here has not previously been presented to any state or federal court.

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C.

Finally, the Secretary has argued that the Florida Constitution's non-diminishment standard is facially unconstitutional. Article III, § 20(a) makes race (along with partisanship and incumbency) a tier 1 standard. Subsection (b) makes traditional districting criteria (compactness and adherence to political and geographic boundaries) tier 2 standards. When a tier 1 standard "conflicts" with a tier 2 standard, the tier 2

standard must always give way. Art. III, § 20(b), Fla. Const. Traditional districting criteria are thus always subordinate to racial considerations.

Unlike the Voting Rights Act, however, there is no authorization for this race-based solution in the Fifteenth Amendment to the U.S. Constitution. There are no geographic limitations to its application. No temporal limitations. And no detailed record supporting its current application based on current facts.

Judged against the standards for race consciousness and race predominance, under the Florida Constitution's non-diminishment standard, race always predominates. This makes the provision facially unconstitutional.

IV.

For the foregoing reasons, this Court enters final judgment for Defendants. Plaintiffs shall take nothing by this suit and shall go hence without day.

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