Case No. 1D23-2252; LT. Case No. 2022-CA-666

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

SECRETARY OF STATE CORD BYRD, the **FLORIDA HOUSE OF REPRESENTATIVES**, and the **FLORIDA SENATE**,

Appellants,

v.

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al.,

Appellees.

INITIAL BRIEF OF THE FLORIDA SENATE AND THE FLORIDA HOUSE OF REPRESENTATIVES

DANIEL E. NORDBY (FBN 14588)
GEORGE N. MEROS (FBN 263321)
TARA R. PRICE (FBN 98073)
SHUTTS & BOWEN LLP
215 South Monroe Street,
Suite 804
Tallahassee, Florida 32301
(850) 241-1717

CARLOS REY (FBN 11648)
KYLE GRAY (FBN 1039497)
FLORIDA SENATE
404 South Monroe Street
Tallahassee, Florida 32399
(850) 487-5855

Counsel for the Florida Senate

ANDY BARDOS (FBN 822671)
GRAYROBINSON, P.A.
301 South Bronough Street,
Suite 600
Tallahassee, Florida 32301
(850) 577-9090

Counsel for the Florida House of Representatives

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INTRODUCTION

This appeal concerns the constitutionality of the congressional districting plan enacted by the Florida Legislature and signed into law by Governor DeSantis in April 2022 (the "Enacted Plan"). *See* Ch. 2022-265, Laws of Fla. The question here is whether the Equal Protection Clause's prohibition on race-based redistricting precluded the Legislature from drawing a district in North Florida to avoid "diminishment" in the ability of Black voters to elect representatives of their choice, as compared to predecessor District 5 ("Benchmark District 5")—a sprawling East-West district that stretched across eight counties from downtown Jacksonville in the East to Gadsden and portions of Leon County in the West.

The Enacted Plan does not include such a district in North Florida. In light of the region's unique geography and population demographics, a North Florida district that satisfies the Florida Constitution's prohibition against diminishment would have contravened the Fourteenth Amendment's prohibition against racial gerrymandering. Where state and federal law conflict, the United States Constitution is "the supreme law of the land . . . anything in

the constitution or laws of [Florida] to the contrary notwithstanding." Art. VI, cl. 2, U.S. Const.

The trial court disagreed and issued a final judgment declaring the Enacted Plan unconstitutional and enjoining its implementation. The final judgment concluded that Plaintiffs satisfied their burden to prove a violation of the Florida Constitution's non-diminishment provision without showing that it would be possible to design a remedial district consistent with both state and federal constitutional requirements.

But the final judgment went even further, concluding: 1) that Florida's public official standing doctrine prohibited the Secretary of State and Legislature from defending the constitutionality of the Enacted Plan by arguing that alternative district configurations would violate the federal constitution; 2) that Defendants failed to show that race would predominate in the drawing of a North Florida congressional district satisfying the non-diminishment provision; and 3) that even if race *would* predominate in the drawing of a North Florida congressional district, compliance with the Florida Constitution's non-diminishment provision is itself a compelling state interest justifying race-based districting.

This appeal followed. The final judgment on appeal should be reversed.

STATEMENT OF THE CASE AND FACTS

I. THE FACTS

A. The Benchmark Plan

Florida's congressional elections in 2016, 2018, and 2020 were conducted under the Benchmark Plan imposed by the Florida Supreme Court in 2015. As relevant here, the Benchmark Plan included a new "East-West" configuration of Congressional District 5 stretching from downtown Jacksonville in the East to Gadsden County and portions of Leon County in the West. Benchmark District 5's configuration resulted from two Florida Supreme Court decisions in 2015 that ordered the creation of an "East-West" district with a sufficient black voting-age population so as not to diminish the ability of black voters to elect their candidates of choice as compared to the 2002 benchmark district. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402–06 (Fla. 2015) ("*Apportionment VII*"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271–73 (Fla. 2015) ("*Apportionment VIII*"). *See Apportionment VII*, 172 So. 3d at 421 (Canady, J., dissenting) (image of "East-West" District 5):

Benchmark District 5

The sprawling "East-West" configuration adopted by the Florida Supreme Court arose from its conclusion that the non-compact "North-South" orientation adopted by the Legislature in 2012 (and a similar remedial map adopted in 2014) was intended to favor the Republican Party and incumbent Congresswoman Corrine Brown. *Apportionment VII*, 172 So. 3d at 403; *see also id.* at 420 (Canady, J., dissenting) (image of "North-South" District 5):

Remedial District 5 (2014)

Because the plaintiffs in *Apportionment VII* had asserted *political* gerrymandering claims against the 2012 congressional map, the Florida Supreme Court had no occasion to consider whether Benchmark District 5 complied with the Equal Protection Clause's prohibition against *racial* gerrymandering.

B. The Plan Adopted During the Regular Session

The 2020 Census data reflected Florida's substantial growth over the past decade. Florida's statewide population grew by more than 14%, from 18,801,310 to 21,538,187. As a result, Florida was entitled to a 28th congressional district. Uneven population growth across the state also meant that the districts in the Benchmark Plan were malapportioned and required modification to comply with the one-person, one-vote principle. For each of these reasons, the Benchmark Plan could not constitutionally be used to conduct congressional elections in 2022 or thereafter.

Relatively early in the 2022 legislative session, it became apparent that the status of Benchmark District 5 presented significant legal questions not present elsewhere in the map. The Legislature's initial drafts were prepared under the premise that: 1) the Benchmark Plan's configuration of Congressional District 5

represented a valid "benchmark" district; and 2) the non-diminishment standard in article III, section 20(a) of the Florida Constitution could be applied to the benchmark district in a manner consistent with the federal Equal Protection Clause, notwithstanding Congressional District 5's unique geography and population demographics. Neither of these key legal questions had previously been addressed by the Florida Supreme Court.

While the Legislature was still in session, and seeking guidance as to the exercise of his constitutional responsibilities, Governor DeSantis sought an advisory opinion from the Florida Supreme Court as to whether the Florida Constitution "requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations (either in Leon and Gadsden Counties or outside of Orlando) to ensure sufficient voting strength, even if not a majority, to elect a candidate of their choice." *Adv. Op. to Gov. re: Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1107–08 (Fla. 2022) (*"Adv. Op. to Gov. 2022"*). The Governor's request cited intervening precedent from the United States Supreme Court interpreting the Equal Protection Clause and affirming that where

"racial considerations predominate[] over others, the design of the district must withstand strict scrutiny." Letter from Ron DeSantis to the Chief Justice and Justices of the Florida Supreme Court at 5 (Feb. 1, 2022) (quoting *Cooper v. Harris*, 581 U.S. 285, 292 (2017)).

The Legislature filed a brief requesting that the Court accept jurisdiction and provide an opinion interpreting the Florida Constitution's non-diminishment requirement in the specific context of Benchmark District 5. *Adv. Op. to Gov. 2022*, SC2022-0139 (Fla. Feb. 7, 2022). The Legislature's brief noted that judicial guidance on the narrow question presented by the Governor "will provide needed resolution of a question of significant importance to the enactment and executive approval of a congressional redistricting plan for the State of Florida, and may obviate the need for judicial involvement at later stages of that process." *Id.* at 3. Three days later, the Florida Supreme Court issued an opinion "acknowledg[ing] the importance of the issues presented by the Governor" but declining to grant an advisory opinion without a complete factual record. *See Adv. Op. to Gov. 2022*, 333 So. 3d at 1108 (noting importance of a "full record" to "assist the judiciary in answering the complex federal and state constitutional issues implicated by the Governor's request").

On March 4, 2022, in the absence of an advisory opinion from the Florida Supreme Court, the Legislature passed Committee Substitute for Senate Bill 102 to apportion the State into 28 congressional districts. CS/SB 102 included two alternative configurations of the congressional districts in North Florida. The primary map in CS/SB 102 (Plan 8019) contained a congressional district located entirely within Western Duval County. R.8757-64. The secondary map in CS/SB 102 (Plan 8015) included a district that, like Benchmark District 5, connected portions of Duval County with Gadsden County and portions of Leon County in an attempt to comply with the Florida Constitution's non-diminishment provision. R.8749-56.

The Governor's constitutional concerns ultimately led him to veto CS/SB 102. A legal memorandum accompanying the Governor's veto letter concluded that the primary map (Plan 8019) violated the Florida Constitution's non-diminishment requirement by reducing the black voting age population from 46.20% in Benchmark District 5 to 35.32%, with a diminishment of the ability of black voters to elect representatives of their choice. R.9225-33. The memorandum also explained why the secondary map, although it would satisfy the

Florida Constitution's non-diminishment provision, would nevertheless violate the federal Equal Protection Clause by elevating racial considerations to predominance over traditional redistricting criteria without a compelling interest. *Id.*

C. The Enacted Plan Adopted During the Special Session

Following the Governor's veto, the Legislature convened in special session in April 2022 to consider the adoption of a new congressional redistricting plan. Senate Bill 2-C was filed on April 15, 2022. The North Florida congressional districts reflected in the legislation were configured in a compact and race-neutral manner consistent with the Governor's veto message. R.4405. Senate Bill 2-C was publicly presented in legislative committee hearings on April 19, and was ultimately passed by the Legislature on April 21, 2022.

The redistricting process concluded with the Florida Legislature's passage and the Governor's approval of Senate Bill 2-C on April 22, 2022.

II. THE CASE

A. Complaint and Temporary Injunction Proceedings

Plaintiffs filed a complaint challenging the constitutionality of the Enacted Plan on the day it was signed into law. R.28-64. The

original complaint (which named as defendants the Secretary of State, Attorney General, Florida Senate, Florida House of Representatives, and each legislative chamber's presiding officer and redistricting committee chair) asserted five claims for relief under article III, section 20, of the Florida Constitution. R.58-63. The complaint sought both statewide relief and specific relief as to nine districts throughout the state on the purported basis of intentional political favoritism, intentional diminishment of the ability of minority voters to elect representatives of their choice, non-compactness, and failure to use political and geographical boundaries where feasible. *Id.*

Four days later, Plaintiffs filed a motion seeking to temporarily enjoin the Secretary from implementing the Enacted Plan for the 2022 congressional elections based solely on a purported violation of the Florida Constitution's non-diminishment standard in the configuration of the North Florida districts. R.331-35. After expedited briefing on the injunction motion (R.65-1157), the trial court issued an order on May 12 granting Plaintiffs' motion for temporary injunction and ordering the Secretary to implement an alternative congressional map prepared by Plaintiffs' expert witness. R.1161-81.

The Secretary filed an immediate notice of appeal of the trial court's non-final order granting injunctive relief. R.1182-1207.[1] The following day, Plaintiffs moved for an order vacating the automatic stay (R.1208-15), which the trial court granted. R.1484-87.

Eleven days later, on May 27, this Court issued an opinion quashing the trial court's order vacating the automatic stay and reinstating the stay. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070 (Fla. 1st DCA 2022), *writ denied*, 340 So. 3d 475 (Fla. 2022). The Court's decision to reinstate the automatic stay was based on its conclusion that the trial court's temporary injunction was "very likely unlawful" because it granted an interim remedy rather than preserving the status quo. *Id.* at 1082-84.

After the Florida Supreme Court denied Plaintiffs' request for a constitutional writ, *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, 340 So. 3d 475 (Fla. 2022), this Court issued a merits decision vacating the temporary injunction and similarly concluding that the

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[1] The legislative defendants filed a timely notice of joinder in the Secretary's appeal. Notice of Joinder, *Byrd v. Black Voters Matter Capacity Building Inst.*, Case No. 1D22-1470 (Fla. 1st DCA May 18, 2022).

trial court abused its discretion by granting a temporary injunction that failed to preserve the status quo. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 340 So. 3d 569, 571 (Fla. 1st DCA 2022).

B. Motion Practice Reduces Parties and Claims

Motion practice in the trial court reduced the number of parties in the case and narrowed the claims at issue. After filing motions to dismiss (R.1471-83, 1547-56), the Attorney General (R.1488) and individual legislators (R.1608-15) were dismissed as improper defendants. On August 25, Defendants moved for partial summary judgment on Counts IV and V of the complaint—Plaintiffs' "Tier Two" claims alleging that the Enacted Plan and specific districts are not compact and do not use political and geographical boundaries where feasible. R.1616-58. After the trial court denied Plaintiffs' motion to defer consideration of the Defendants' summary-judgment motion (R.1972), Plaintiffs filed a notice voluntarily dismissing Counts IV and V. R.2501-03.

The Secretary, House, and Senate filed timely answers and affirmative defenses. R.1489-1506; 1507-30; 1531-46.

C. Legislative Privilege Dispute

On October 10, 2022, a group of eleven non-party legislators and current or former legislative staff members moved for a protective order to prevent their compelled videotaped depositions by Plaintiffs on the basis of the legislative privilege and the apex doctrine. R.2049-78. After expedited briefing and a hearing, the trial court entered an order granting in part and denying in part the non-parties' motion for protective order. R.2504-10. The non-parties filed a timely appeal of that order to this Court on November 28, 2022. *Rodrigues v. Black Voters Matter Capacity Bldg. Inst., Inc.*, No. 1D22-3834 (Fla. 1st DCA). The non-parties' appeal remains pending.

D. Amended Complaint, Responsive Pleadings, Plaintiffs' Motion to Strike Certain Affirmative Defenses

Plaintiffs filed an amended complaint on February 8, 2023, which would serve as the operative complaint at trial. R.2677-2713. The amended complaint substituted certain individual plaintiffs, removed defendants and claims that had been dismissed from the action, and added factual allegations involving the 2022 midterm elections. R.2626. The Secretary (R.2733-48), House of Representatives (R.2714-32), and Senate (2749-76) filed timely

answers and affirmative defenses to the amended complaint. Plaintiffs filed a reply on March 20, 2023, denying and asserting claims of avoidance as to the defendants' affirmative defenses. R.3107-3115.

Nearly a month after filing their reply to defendants' affirmative defenses, Plaintiffs moved to strike certain affirmative defenses on the basis of Florida's public official standing doctrine. R.3279-96. The Secretary and Legislature filed separate responses in opposition to Plaintiffs' motion to strike. R.3305-26 (Secretary's Response); R.3327-37 (Legislature's Response). The defendants noted that the motion to strike should be denied as untimely under Florida Rule of Civil Procedure 1.140(b) and that the plaintiffs failed to demonstrate on the merits that the defendants' affirmative defenses implicated the public official standing doctrine. R.3331-36.

The trial court denied the motion to strike as untimely. R.3346 (order); 3427 (hearing transcript). As to the legislative defendants, the court denied plaintiffs' motion to strike on the additional ground that the public official standing doctrine does not apply to the Legislature. R.3426.

E. Pre-trial Motions

The parties filed several pre-trial motions in an attempt to narrow the issues for trial. Defendants filed a motion for partial summary judgment on Count III of the amended complaint as to twenty-two districts in the Enacted Plan. R.4365-85. The motion demonstrated that, as to those twenty-two districts, there were no genuine disputes of material fact regarding Plaintiffs' allegations of intentional partisan favoritism. *Id.* The motion was resolved by a stipulation of the parties—confirmed by the trial court—that Plaintiffs would not seek a judgment on Count III as to any of the twenty-two districts. R.7076-81.

After their motion to strike was denied, Plaintiffs filed a motion for judgment on the pleadings asserting effectively the same arguments: that the public official standing doctrine bars the Secretary and Legislature from defending the constitutionality of the Enacted Plan by arguing that the remedy sought by Plaintiffs would violate the federal constitution. R.3351-63. The Secretary and Legislature again responded in opposition with arguments that the motion should have been pleaded as an avoidance in Plaintiffs' reply and also failed to demonstrate a legal basis for judgment in favor of

Plaintiffs on the specified affirmative defenses. R.7039-44 (Legislature's response); 7045-49 (Secretary's response).

Plaintiffs also filed a motion for summary judgment as to Count I of their amended complaint, which alleged that the Enacted Plan had the result of diminishing the ability of minority voters to elect representatives of their choice in North Florida as compared to the Benchmark Plan. R.3486-3503. The Secretary responded in opposition to Plaintiffs' summary-judgment motion (R.7084-7101); the Legislature filed a response joining the Secretary in opposing Plaintiffs' motion for summary judgment as to Count I. R.7082-83.

F. Joint Stipulation

On August 11, 2023, the parties filed a joint stipulation to narrow the issues for resolution at trial. R.8026-57. Plaintiffs agreed to limit the non-diminishment claim in Count I of their amended complaint to North Florida and to dismiss Counts II and III with prejudice. R.8026. Defendants agreed to withdraw certain affirmative defenses. *Id.* The parties stipulated to a set of facts relevant to Plaintiffs' non-diminishment claim, stipulated to Plaintiffs' standing, and agreed that no material factual issues remain in dispute as to Plaintiffs' non-diminishment claim. R.8026-27.

The parties' Joint Stipulation agreed that only four legal issues remained to be addressed at a final hearing: 1) whether Plaintiffs must satisfy the preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for the non-diminishment provision to apply; 2) whether the non-diminishment provision's application to North Florida violates the Equal Protection Clause; 3) whether the non-diminishment provision facially violates the Equal Protection Clause; and 4) whether the public official standing doctrine bars the Secretary's affirmative defenses based on the Equal Protection Clause. R.8027.

The parties' Joint Stipulation also agreed to a proposed briefing schedule in the trial court and to procedures for seeking an expedited appellate resolution and remedial phase, if necessary. R.8028-29.

G. Trial Briefs and Responses

The parties filed trial briefs and response briefs on the outstanding legal issues. *See* R.8334-10376 (Plaintiffs' trial brief); 11121-37 (Legislature's trial brief); 11138-66 (Secretary's trial brief); 11569-89 (Legislature's response brief); 11590-11603 (Secretary's response brief); 11604-60 (Plaintiffs' response brief).

The Legislature argued in its trial brief that the Enacted Plan is constitutional because the Equal Protection Clause precludes the

drawing of a North Florida congressional district that would satisfy the Florida Constitution's non-diminishment provision in comparison to Benchmark District 5. R.11121-37. The unique geography and population demographics in North Florida ensure that the only way to satisfy the non-diminishment requirement would be through the creation of a sprawling and non-compact congressional district that subordinates race-neutral redistricting criteria to racial considerations in violation of federal law. R.11125. Because the Supremacy Clause requires conflicts between state and federal constitutional requirements to be resolved in favor of the federal-law requirements, Plaintiffs cannot prevail on their claim that the Florida Constitution's non-diminishment provision requires the drawing of a district contrary to federal law. *Id.*

The Legislature's trial brief also explained why the Equal Protection concerns raised by the application of the non-diminishment provision are limited to North Florida: Benchmark District 5 was an extreme outlier, with an egregiously non-compact configuration that abandoned traditional race-neutral districting principles to connect disparate pockets of minority voters in downtown Jacksonville, portions of Tallahassee, and Gadsden

County. R.11129-30. Drawing a new district that would satisfy the non-diminishment provision in comparison to Benchmark District 5 would likewise require the elevation of racial considerations to the predominant factor and the subordination of traditional districting principles. *Id*. These irreconcilable conflicts between state and federal districting standards in North Florida are not present elsewhere in the State; the Legislature's trial brief contains numerous examples of congressional districts in the Enacted Plan in which the requirements of the Florida Constitution, Voting Rights Act, and the Fourteenth Amendment can all be harmonized. *See* R.11131 (identifying Districts 9, 24, and 27 as examples of extremely compact districts drawn with respect for political and geographical boundaries that also do not diminish the ability of racial or language minorities to elect representatives of their choice in comparison to their corresponding districts in the Benchmark Plan).

Finally, the Legislature's trial brief argued that Plaintiffs have not demonstrated that a compelling state interest justifies a North Florida congressional district drawn predominantly on the basis of race as would be required by Supreme Court precedent. R.11132-35.

H. Final Hearing and Final Judgment

The parties presented legal arguments to the trial court at a final hearing held on August 24, 2023. R.12089-12323.

On September 2, 2023, the trial court rendered its final order after hearing and final judgment. R.12466-12520. The final judgment concluded that Plaintiffs proved the Enacted Plan violates the non-diminishment provision of the Florida Constitution because the Enacted Plan results in a diminishment of the ability of black voters to elect their representatives of choice as compared to Benchmark District 5. R.12479-90. The court rejected the Secretary's argument that the non-diminishment provision applies only to districts that satisfy the *Gingles* preconditions. R.12488-90.

The final judgment also rejected the defendants' Equal Protection arguments. R.12490-12520. The court analyzed the Equal Protection arguments not as justifications for the State's chosen configuration of the Enacted Plan, but as though the defendants had asserted a cause of action: "a racial gerrymandering claim" or "racial gerrymandering challenge" in the form of a counterclaim or cross-claim. R.12493-94. Under this framework of analysis, the trial court concluded that defendants lacked the ability to bring a "racial

gerrymandering challenge" against an unenacted district (R.12493-96) and lacked standing to assert an Equal Protection violation under both federal law and the public official standing doctrine (R.12496-12501). The trial court also ruled that Defendants had "not proven race would necessarily predominate in the drawing of any district in North Florida" (R.12501-12508) and that a district that remedies the diminishment in the Enacted Plan would be "narrowly tailored to address a compelling state interest": "[c]ompliance with the Florida Constitution's non-diminishment provision." (R.12508-18).

Defendants filed a timely appeal to this Court. R.12521-83.

SUMMARY OF ARGUMENT

The Enacted Plan is constitutional. The trial court committed reversible error in concluding otherwise.

First, the trial court erred in concluding that Plaintiffs had carried their burden to prove the Enacted Plan unconstitutional under the Florida Constitution's non-diminishment provision. Plaintiffs failed to overcome the presumption of validity by proving that an otherwise constitutionally compliant congressional district satisfying the non-diminishment provision could have been drawn in North Florida without resorting to racial gerrymandering in violation

of the U.S. Constitution's Equal Protection Clause. Stated differently, Plaintiffs failed to prove that a lawful remedy existed for the purported violation on which they filed suit.

Second, the trial court erred in evaluating the Legislature's defense of the Enacted Plan. The final judgment appears to have considered the Legislature's arguments in defense of the Enacted Plan as though they constituted an unpleaded counterclaim seeking a determination that an unenacted congressional district should be stricken as a racial gerrymander. That framework led the trial court to erroneously conclude that the Legislature lacked standing to defend the Enacted Plan against Plaintiffs' challenge. The trial court also erred in concluding that race would not predominate in the drawing of a North Florida congressional district that complies with the non-diminishment requirements and that compliance with the non-diminishment provision would constitute a "compelling interest" for purposes of the Equal Protection Clause.

The final judgment should be reversed.

STANDARD OF REVIEW

A trial court's decision based in part on factual findings presents a mixed question of law and fact. *MTGLQ Inv'rs, L. P. v.*

Moore, 293 So. 3d 610, 615 (Fla. 1st DCA 2020). The trial court's factual findings are reviewed under a competent, substantial evidence standard; the trial court's application of the law to the facts is reviewed *de novo*. *Id.*; *see also Crews v. Fla. Pub. Emp'rs. Council 79, AFSCME*, 113 So. 3d 1063, 1068 (Fla. 1st DCA 2013) (applying *de novo* review to interpretation of statutes and provisions of the Florida Constitution and application of those laws to undisputed facts); *Cnty. of Volusia v. DeSantis*, 302 So. 3d 1001, 1003 (Fla. 1st DCA 2020) (reviewing *de novo* questions of constitutional interpretation).

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFFS CARRIED THEIR BURDEN TO PROVE THE ENACTED PLAN UNCONSTITUTIONAL.

The trial court found the Enacted Plan unconstitutional on the grounds that the Florida Constitution's non-diminishment provision required the State to draw a congressional district in North Florida that would not diminish the ability of black voters to elect the representatives of their choice as compared to Benchmark District 5. R.12479-90. That ruling was in error, as Plaintiffs failed to carry their initial burden to prove that a constitutionally-compliant

congressional district satisfying the non-diminishment provision *could be drawn* in North Florida without resorting to racial gerrymandering in violation of the Equal Protection Clause. The final judgment should be reversed.

A. State and federal standards governing congressional redistricting legislation.

The Supreme Court acknowledged in *Abbott v. Perez* that "[r]edistricting is never easy." 138 S. Ct. 2305, 2314 (2018). States must comply with the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965, which sometimes pull in opposite directions on racial issues and leave states vulnerable to "competing hazards of liability" when attempting to produce a lawful districting plan. *Id.* at 2315 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). Some states, including Florida, impose additional restrictions on the redistricting process as a matter of state law.

A brief overview of the redistricting provisions relevant to this case is provided below.

1. Redistricting standards under the Florida Constitution

The Florida Constitution prescribes "standards for establishing congressional district boundaries." Art. III, § 20, Fla. Const. The constitutional provision is organized into two "tiers," each with its own distinct standards. The tier-one standards take precedence over those in tier two when in conflict; but the order of the standards within each tier "shall not be read to establish any priority of one standard over the other." Art. III, § 20(c), Fla. Const.

The first of the tier-one standards prohibits intentional political favoritism: "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."[2] Art. III, § 20(c), Fla. Const.; *In re Sen. Jt. Resol. of Leg. Apportionment 100*, 334 So. 3d 1282, 1286 (Fla. 2022) (*"Apportionment 2022"*).[3] The next set of tier-one standards protects racial and language minority voters: "districts shall not be drawn

[2] Plaintiffs stipulated to the dismissal with prejudice of the amended complaint's intentional political favoritism claims. R.8026.

[3] Although *Apportionment 2022* addresses the parallel standards for establishing legislative district boundaries under article III, section 21 of the Florida Constitution, the congressional-district standards under section 20 are substantively identical.

with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Art. III, § 20(c), Fla. Const. The final tier-one standard requires districts to "consist of contiguous territory." *Id.*

The Florida Supreme Court has held that the minority voting standards of the Florida Constitution "identify and proscribe two types of discrimination: 'impermissible vote dilution' and 'impermissible diminishment of a minority group's ability to elect a candidate of its choice.'" *Apportionment 2022*, 334 So. 3d at 1288 (quoting *In re Sen. Jt. Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 619 (Fla. 2012) ("*Apportionment I*"). These provisions "were modeled on and 'embrace[ ] the principles' of key provisions of the federal Voting Rights Act of 1965, section 2 (vote dilution)[4] and

[4] Vote dilution is "the practice of reducing the potential effectiveness of a group's voting strength by limiting the group's chances to translate the strength into voting power." *Apportionment I*, 83 So. 3d at 622. The Florida Supreme Court has recognized that "[a] successful vote dilution claim under Section 2 [of the Voting Rights Act] requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed." *Id.* This case does not involve any vote-dilution

section 5 (diminishment, or retrogression)." *Id.* (quoting *Apportionment I*, 83 So. 3d at 619-21).

The non-diminishment provision "means that 'the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates.'" *Id.* at 1289 (quoting *Apportionment I*, 83 So. 3d at 625)[5]. The non-diminishment standard requires a comparison between the former redistricting plan—the benchmark plan—and the new districts. *Apportionment I,* 83 So. 3d at 624. Evaluating the extent to which benchmark and new districts perform for minority voters requires a "functional analysis" of voting behavior within the districts at issue that considers population data and election results. *Apportionment 2022*, 334 So. 3d at 1289.

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claims under Section 2 of the Voting Rights Act or the parallel provision of the Florida Constitution.

[5] The Supreme Court noted that its decision in *Apportionment 2022* "should not be taken as expressing any views on the questions raised in the Governor's request" for an advisory opinion on the interpretation of the non-diminishment provision. *Apportionment 2022*, 334 So. 3d at 1289 n.7.

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

The tier-two standards address districts' "population, shape, and boundaries." *Id.* at 1286. Districts "shall be as nearly equal in population as is practicable"; they "shall be compact"; and they "shall, where feasible, utilize existing political and geographical

boundaries." Art. III, §20(b), Fla. Const.[6] Where compliance with the tier-two standards would conflict with the standards in tier one or with federal law, the latter provisions prevail. *Id.*

2. Federal constitutional standards

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution also constrains States when drawing congressional 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. The Supreme Court has interpreted this provision to require precise mathematical equality of population among a state's congressional districts. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

In addition to the requirement for population equality among a state's congressional districts, the Equal Protection Clause restricts the use of race in the redistricting process. A State ordinarily violates the Equal Protection Clause when it makes race the predominant

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[6] In response to Defendants' motion for partial summary judgment (R.1616-58), Plaintiffs voluntarily dismissed their claims that the Enacted Plan violates the tier-two standards. R.2501-03.

factor in drawing an electoral district. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). In other words, a State may not "subordinate[] traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Race predominates in establishing district boundaries when "'race-neutral considerations [come] into play only after the race-based decision had been made,'" *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017)), or when race furnished "'the overriding reason for choosing one map over others,'" *Cooper*, 581 U.S. at 301 n.3 (quoting *Bethune-Hill*, 580 U.S. at 190).

When race predominates over traditional race-neutral districting principles, then, to survive constitutional scrutiny, the district must be narrowly tailored to serve a compelling governmental interest. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Apart from a State's interest in prison safety, the only compelling interest the United States Supreme Court has ever recognized to justify race-based government action is the remediation of "specific, identified instances of past discrimination that violated the Constitution or a

statute." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023). The Supreme Court has only assumed, but not decided, that a State's compliance with the federal Voting Rights Act advances a compelling interest. *Bethune-Hill*, 580 U.S. at 193.

3. Resolving conflicts among competing redistricting standards

The Florida Constitution expressly provides that the tier-two standards apply to congressional redistricting unless compliance with their requirements would conflict with the tier-one standards or with federal law. Art. III, § 20(b), Fla. Const. In the event of a conflict between the Florida Constitution and federal law, the Supremacy Clause provides a clear answer as to priority: 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), "[i]t 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).

Because the Supremacy Clause subordinates the requirements of the Florida Constitution to federal law, the redistricting standards imposed by the U.S. Constitution and federal laws constitute a "tier

zero" for the purpose of resolving conflicts: the redistricting criteria in tier two yield to those in tier one in the event of a conflict, but *both* tier-one *and* tier-two requirements yield to the U.S. Constitution and federal law where the Florida Constitution's requirements conflict with federal requirements. Art. VI, cl. 2, U.S. Const.

B. Plaintiffs failed to carry their burden to prove the Enacted Plan unconstitutional.

Given these competing standards governing the redistricting process, the trial court committed reversible error when it concluded in its final judgment that Plaintiffs had proven the Enacted Plan unconstitutional. R.12479-90. To be sure, the Enacted Plan does not contain a congressional district in North Florida that would satisfy the Florida Constitution's non-diminishment provision with respect to Benchmark District 5. The Legislature has not contended otherwise. R.12176, 12250. But Plaintiffs failed to carry their burden to overcome the presumption of validity by proving that it was *possible* for the Legislature to draw a congressional district in North Florida that would satisfy *both* the Florida Constitution's non-diminishment provision *and* the federal constitutional prohibitions

against racial gerrymandering. The final judgment should therefore be reversed.

Plaintiffs plainly bore the burden of proof. First, the Enacted Plan comes to this Court with a presumption of validity. *Apportionment 2022*, 334 So. 3d at 1285; *Apportionment I*, 83 So. 3d at 606. For Plaintiffs to overcome that presumption, they must prove that the Legislature erred in enacting a race-neutral congressional map in North Florida. They can do that only by showing that the Legislature could have drawn a district in North Florida that complies with the non-diminishment standard in the Florida Constitution without violating the Equal Protection Clause. That is because both state and federal constitutional provisions apply whenever the Legislature draws congressional districts. *See supra*. Without accounting for the requirements of both constitutional provisions, Plaintiffs cannot show that the Legislature should have done something differently when drawing congressional district lines.

Second, it is Plaintiffs—not the Defendants—who are seeking 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 considerations to predominate in the drawing of district lines.

As proponents of a map that prioritizes race, and before compelling the Legislature to adopt and the Secretary to implement any such map, Plaintiffs must show that it is possible to be race conscious, as the non-diminishment standard requires, 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."). Plaintiffs failed to make that showing and therefore failed to impeach the Legislature's assessment of the interplay between redistricting standards.

Third, the Florida Supreme Court's precedents illustrate that Plaintiffs' burden includes an obligation to prove the existence of a potential remedy: an alternative, constitutionally compliant district configuration. Throughout last decade's redistricting cycle, the challengers presented alternative plans as a part of their prima facie case. For example, in *Apportionment I*, a challenger argued that House District 70 "could have been drawn differently to be more

compact and to better utilize boundaries." 83 So. 3d at 648. The Court upheld the district, explaining that the challenger had "not demonstrated that this can be done without causing retrogression." *Id.* The Court upheld House districts in South Florida on the same ground, again placing the burden on the challenger to demonstrate that compliance could have been achieved consistent with all other requirements. *Id.* at 650 ("The FDP does not assert or demonstrate that the district can be drawn more compactly while also adhering to Florida's minority voting protection provision."); *id.* at 652 ("The FDP has not shown that it was feasible for the Legislature to keep more municipalities together in this heavily populated area while comporting with Florida's minority voting protection provision."); *id.* at 653 ("The FDP has not demonstrated that it was feasible for the Legislature to configure District 105 differently while comporting with Section 5 of the VRA and Florida's minority voting protection provision."); *id.* ("The FDP does not allege how either district could be drawn differently to be more compact without violating Florida's minority voting protection provision.").

Meanwhile, the Court invalidated several districts on compactness grounds because the challenger established that it was

possible to draw compact districts without violating a superior, tier-one requirement. *Id.* at 669 ("Thus, the Coalition has demonstrated that District 6 can be drawn much more compactly and remain a minority-opportunity district."); *id.* ("[T]here is no constitutional impediment to the alternatives set forth in the Coalition plan, which comply with the constitutional requisites. Accordingly, we conclude that Districts 6 and 9 are constitutionally invalid."); *id.* at 678 ("[T]he Coalition's plan demonstrates that the Senate was able to draw districts in this region of the state to better comply with Florida's compactness requirement while, at the same time, maintaining a black majority-minority district.").

Similarly, the Florida Supreme Court assessed whether specific Senate districts were motivated by improper partisan intent by looking to "alternative plan[s]" to assess whether "it was possible" to draw districts that complied with tier-two standards. *Apportionment I*, 83 So. 3d at 640, 664; *see also id.* at 641 ("If an alternative plan can achieve the same constitutional objectives that prevent vote dilution and retrogression . . . without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan."); *In re Sen. Jt. Resol. of Legis.*

Apportionment 2-B, 89 So. 3d 872, 889-90 (Fla. 2012) (*"Apportionment II"*) (concluding that challengers "have not carried their burden of proof" where their alternative plans "do not demonstrate that the redrawn Orlando districts are invalid" but alternative plans instead "raise[d] concerns" under the non-diminishment provision and contained "potential Section 2 issues").

In a portion of his post-trial judgment invalidating certain districts in the 2012 congressional plan, Circuit Judge Terry Lewis noted that the plaintiffs had "shown that a more tier-two compliant district could have been drawn that would not have been retrogressive." *See* Appendix, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 436 (Fla. 2015) (trial court final judgment); *see also id.* at 446 (trial court's conclusion that plaintiffs challenging 2012 congressional map "have not proved tier-two deviations" because plaintiffs' alternative map failed to demonstrate improved region-wide compactness).

The challengers in last decade's redistricting litigation proffered alternative maps as part of their initial burden of proof on invalidity. Plaintiffs bore the same burden here. They failed to carry that burden and to prove that the Legislature could have drawn a district that

does not diminish the ability of minorities to elect candidates of their choice without violating the United States Constitution's paramount commands.

The requirement that a redistricting plaintiff prove the existence of a lawful alternative remedy as a part of its prima facie case is also well-established in federal redistricting litigation under Section 2 of the Voting Rights Act. In those situations, courts require a plaintiff to present an alternative map that shows that it was *possible* to draw an appropriate remedy that satisfies Section 2. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993); *White v. Regester*, 412 U.S. 755, 766 (1973); *Davis v. Chiles*, 139 F.3d 1414, 1419, 1425 (11th Cir. 1998) ("As part of any prima facie case under Section Two, a plaintiff must demonstrate the existence of a proper remedy. . . . [O]ur precedents *require* plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate." (emphasis in original)); *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994) (en banc) ("[T]he issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases. . . . The inquiries into remedy and liability, therefore, cannot be

separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system."). Plaintiffs' claim here that the State was required to include a North Florida district that satisfies the non-diminishment requirement is analogous to a claim under the Voting Rights Act in which a plaintiff asserts that Section 2 required a state to draw additional minority districts.

The trial court erred by relieving Plaintiffs of their burden to prove the Enacted Plan unconstitutional by demonstrating that a North Florida congressional district *could have been* drawn that complies with both the non-diminishment provision and the Equal Protection Clause. Instead, as described below, the final judgment evaluates Plaintiffs' non-diminishment claim without discussion of whether Plaintiffs had proven it would be possible to draw a congressional district in North Florida satisfying the competing federal and state constitutional requirements. R.12479-90; *see also* R.12252-57 (trial court's suggestion that it might be a sufficient remedy to say "don't use this map"). The danger of the trial court's approach is obvious: it permits a duly enacted district to be declared invalid without *any evidence* that *any valid alternative* is even

available.[7] And if a valid alternative is unavailable, then, in enacting a remedial plan, the Legislature would find itself in the impossible position of enacting an invalid alternative or refusing to enact any remedial plan at all. The Florida Supreme Court's approach, which places the burden on challengers to establish the existence of a valid remedy, is far more sensible and respectful of a coordinate branch of government.

The trial court erred in concluding that Plaintiffs satisfied their burden to prove a non-diminishment claim without proving that an alternative plan could be drawn in North Florida that satisfies the non-diminishment provision and all other constitutional standards. The final judgment should be reversed.

II. THE TRIAL COURT ERRED IN EVALUATING THE LEGISLATURE'S DEFENSE OF THE ENACTED PLAN.

The trial court also erred in evaluating the Legislature's defense of the Enacted Plan. At the heart of the Legislature's defense was the contention that Plaintiffs failed to establish that a valid alternative

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[7] As discussed further below, neither of the two alternative configurations of the North Florida districts in CS/SB 102 discussed by the trial court satisfies *both* the non-diminishment provision *and* the Equal Protection Clause.

congressional district in North Florida could be drawn that would satisfy both the non-diminishment provision and the Fourteenth Amendment's prohibition against racial gerrymandering. Rather than ruling on that contention, the final judgment determined that the Defendants lacked standing to defend the Enacted Plan and essentially failed to satisfy the elements of an unpleaded counterclaim or cross-claim for racial gerrymandering against a hypothetical congressional district. R.12490-12519.

The final judgment should be reversed because the trial court committed reversible error in evaluating the Legislature's defense of the Enacted Plan.

A. The trial court erred in concluding that the public official standing doctrine precluded the Legislature from defending the constitutionality of the Enacted Plan.

Florida's public official standing doctrine generally prohibits public *officials* from *challenging* the constitutionality of statutes imposing duties upon them. *Dep't of Transp. v. Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d 388, 390 (Fla. 1st DCA 2021). The trial court erred as a matter of law by applying that doctrine to prohibit the *Legislature* from *defending* the constitutionality of the Enacted Plan. That decision should be reversed.

"The public official standing doctrine . . . provides that 'a public official may not defend his nonperformance of a statutory duty by challenging the constitutionality of the statute.'" *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019) (quoting *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 797 (Fla. 2008)). "The doctrine, grounded in the separation of powers, recognizes that public officials are obligated *to obey the legislature's duly enacted statute* until the judiciary passes on its constitutionality." *Id.* (emphasis added); *accord id.* at 496 ("the public official standing doctrine broadly prohibits ministerial officers from challenging legislative enactments").

As a threshold matter, the doctrine does not apply to the Legislature; the judgment in this case appears to be the first time in the doctrine's 100-year existence that a Florida court has ever applied it against the Legislature. The Legislature, of course, is not a "public official" or a "ministerial officer" in the first place; it is the lawmaking branch of state government. No governmental function is less "ministerial" than the creative power to originate new legislation.

As the seminal *Atlantic Coast Line* decision demonstrates, the doctrine's purpose is to preclude "ministerial officers" from exercising a purported "right and power to nullify *a legislative enactment*." *State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681, 683 (Fla. 1922) (emphasis added); *accord id.* at 682 (describing "the question here presented" as one involving "the right of a branch of the government, other than the judiciary, to declare *an act of the Legislature* to be unconstitutional" (emphasis added)). The Legislature's defense of the Enacted Plan does not implicate any purported "power of the ministerial officer to refuse to perform a statutory duty because in his opinion the law is unconstitutional." *Id.* at 684.

The Legislature, moreover, does not legislate in a vacuum. It must legislate within the confines of the United States and Florida Constitutions, and it must always remain cognizant of both. The doctrine was not intended—and has never been applied—to tie the hands of legislators by prohibiting them from adhering to the United States Constitution, as their oaths require, or to prohibit the Legislature from justifying its legislative acts when the validity of those acts has been challenged.

Under Florida's public official standing doctrine, public officials are generally barred from "attacking the constitutionality of a statute." *Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d at 391. This Court recently held, for example, that the Miami-Dade County Expressway Authority (a state agency) lacked standing to file a complaint challenging the constitutionality of a statute dissolving the Authority and transferring its assets and authority to the newly created Greater Miami Expressway Agency. *Id.* at 391-92; *see also Santa Rosa Dunes*, 274 So. 3d at 496 (holding that school district lacked standing to attack the constitutionality of a property tax exemption because the public official standing doctrine "broadly prohibits ministerial officers from challenging legislative enactments").

In addition to the prohibition on initiating constitutional challenges to statutory enactments, the public official standing doctrine also provides that a public official "may not defend his nonperformance of a statutory duty by challenging the constitutionality of the statute." *Crossings at Fleming Island*, 991 So. 2d at 797 (citing *Atl. Coast Line*, 94 So. 681). In this respect, the doctrine exists "to prevent public officials from nullifying legislation

through their refusal to abide by the law and requires them instead to defer to the judiciary's authority to consider the constitutionality of a legislative act." *Santa Rosa Dunes*, 274 So. 3d at 495. For example, in *Crossings at Fleming Island*, a property appraiser who denied tax exemptions to the plaintiff sought to defend the non-performance of his statutory duties by asserting, as an affirmative defense, the unconstitutionality of the statute that entitled the plaintiff to those tax exemptions. 991 So. 2d at 794–95.

Ultimately, the trial court's ruling turns the public official standing doctrine on its head by applying it to preclude the *Legislature* from *defending* the constitutionality of Florida's legislation adopting congressional districts against a constitutional challenge *brought by the Plaintiffs*. R.12497-99. No case cited by the Court or Plaintiffs has applied the doctrine to prohibit a defendant—let alone the Legislature—from *defending* the constitutionality of legislation. The trial court committed reversible error by invoking the public official standing doctrine to preclude the Legislature's defense of its duly enacted legislation.

B. The trial court erred in analyzing the Legislature's defense of the Enacted Plan as a counterclaim or cross-claim of racial gerrymandering.

The trial court appears to have considered the Legislature's defenses as though they represented an unpleaded counterclaim or cross-claim seeking a determination that an unenacted congressional district should be stricken as a racial gerrymander. *Id.* The final judgment fundamentally misconceives Defendants' arguments in a manner compelling reversal.

As described above, the Legislature defended the Enacted Plan on the grounds that Plaintiffs had not shown it was possible to draw a congressional district in North Florida that would both: 1) comply with the Florida Constitution's non-diminishment provision with respect to Benchmark District 5; and also 2) comply with the Fourteenth Amendment's prohibition on racial gerrymandering.

The final judgment nonetheless faults Defendants for failing to identify a "specific and *existing* electoral district" as a racial gerrymander (R.12493-96) and concludes that Defendants lack standing "to assert an Equal Protection violation" without demonstrating personal harm (R.12496-12501). Those requirements might apply if the Legislature had asserted a claim in this action

asking the Court to invalidate an existing district as a racial gerrymander. But that's not this case. Instead, the Legislature's arguments that Plaintiffs had not established the existence of a lawful alternative—and therefore had not established the existence of a lawful remedy—were made *in defense of* the Enacted Plan. The trial court's erroneous analysis requires reversal.

C. The trial court erred in concluding that race would not predominate in the drawing of a North Florida congressional district that complies with the non-diminishment requirement.

The final judgment also concludes that Defendants failed to prove race would necessarily predominate in the drawing of a North Florida district that would satisfy the non-diminishment provision. R.12501-08. Apart from erroneously requiring Defendants to prove a negative—the absence of an alternative district configuration that complies with the equal protection—the trial court's conclusion is unsupported by the record evidence, which demonstrated that racial considerations predominated in the East-West district configuration. The record contains both direct and circumstantial evidence of racial predominance.

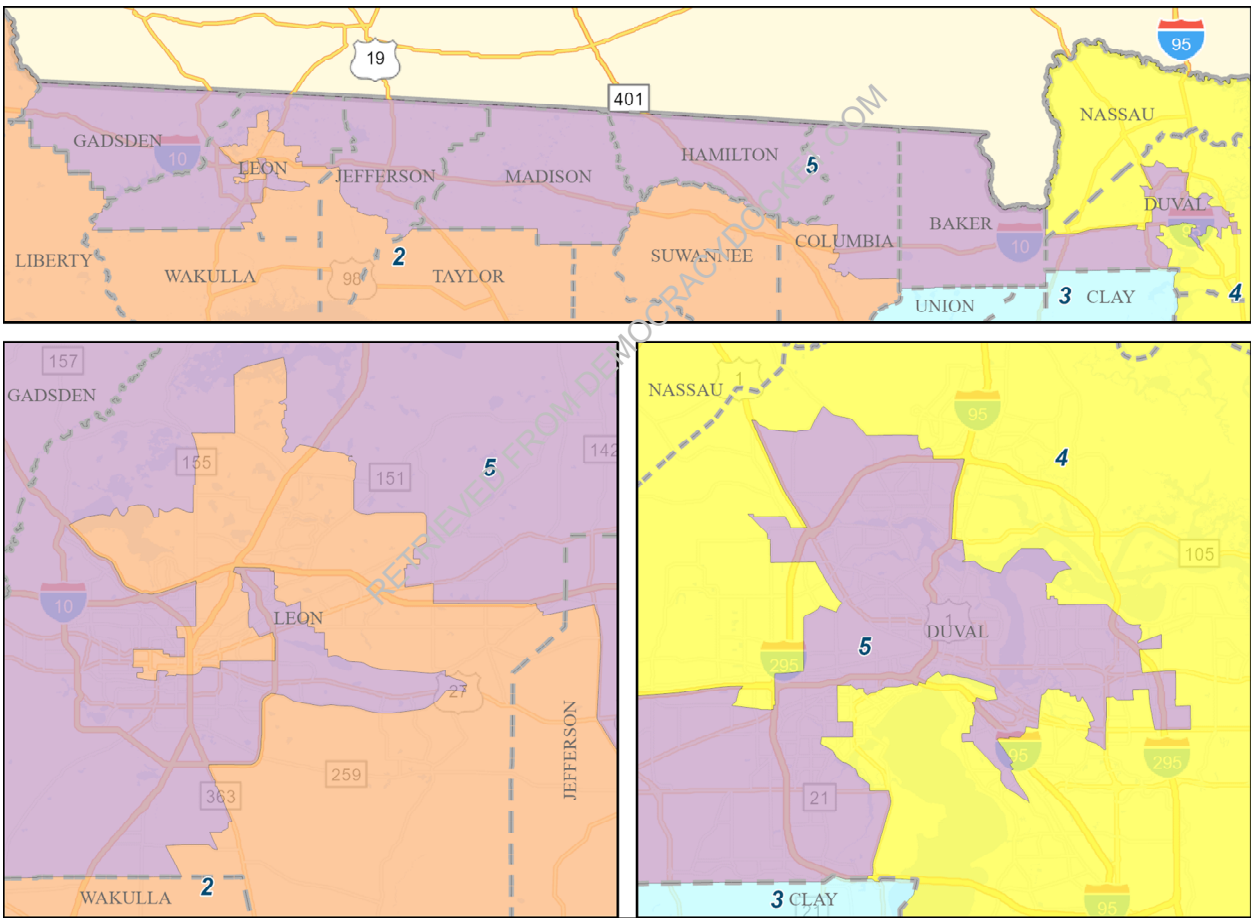
Because of North Florida's unique geography and population demographics, applying the non-diminishment provision to Benchmark District 5 presents unique equal-protection concerns. Benchmark District 5's configuration renders it an extreme outlier on the "traditional redistricting criteria" reflected in Florida's tier-two standards. Judged by those standards, the East-West configuration clearly would be invalid. It is egregiously non-compact and disregards existing political and geographical boundaries on both the east and west ends of the district in an attempt to capture a sufficient number of black voters to satisfy the Florida Constitution's non-diminishment requirement. In short, the population demographics in North Florida reflected in the 2020 census simply do not allow for the creation of a congressional district that accomplishes non-diminishment with respect to Benchmark District 5 without elevating race to the predominant consideration in the assignment of voters to districts.

Benchmark District 5 abandons traditional race-neutral districting principles. The district resembles a dragon spreading nearly the entire length of the Florida-Georgia border, with its head resting along the St. Johns River in Jacksonville, its haunches extending West to Chattahoochee and the Apalachicola River, and its

forked tail curling back to the East into portions of Tallahassee's southside, with one spike protruding North to the intersection of Thomasville Road and Interstate 10 and another East down Apalachee Parkway beyond Chaires Cross Road. Its 200-mile length is approximately ten times its 20-mile height, which narrows to approximately two miles north of Tallahassee and west of Jacksonville.

The district not only fails to respect political and geographical boundaries; it splits four counties and reaches into Jacksonville and Tallahassee with narrow, tortured arms and fingers to carve from these cities large numbers of minority voters. The district strings eight counties together in a line. In the process, it combines some of the State's most densely populated urban areas with some of Florida's most sparsely populated, agrarian counties—and does so to connect pockets of minority voters in urban Jacksonville and Tallahassee that are more than 150 miles apart. Most of the district's population lies at its outermost ends (82.7 percent of its population is derived from the easternmost and two westernmost counties), with comparatively little population found in the five-county corridor that connects those populous, far-flung extremities. The district is not

"compact" and does not, "where feasible, utilize existing political and geographical boundaries." Art. III, § 20(b), Fla. Const.; *see also Apportionment I*, 83 So. 3d at 634 (explaining that "a review of compactness begins by looking at the shape of a district; the object of the compactness criterion is that a district should not yield bizarre designs" (internal marks omitted)).



Benchmark District 5 (with Leon and Duval County Insets)

The East-West district passed by the Legislature in CS/SB 102 (Plan 8015) has the same general configuration as Benchmark

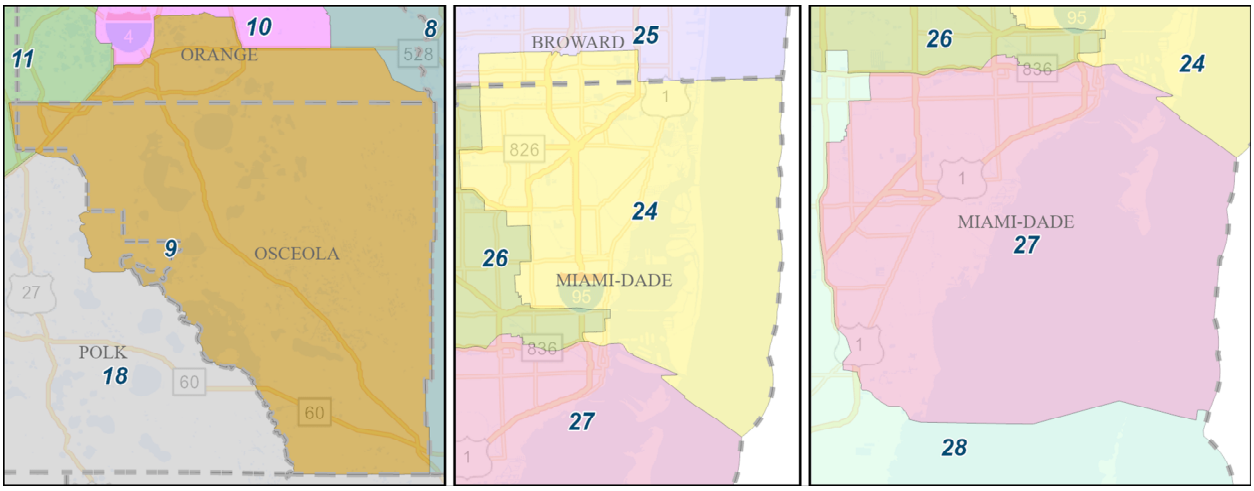
District 5, stretching across North Florida from downtown Jacksonville to Gadsden County and portions of Leon County. R.8749. The circumstantial evidence confirms that the configuration of the East-West district in Plan 8015—like Benchmark District 5—was based predominantly on race. The district does not comply with tier two, so its configuration is justifiable—if at all—only on racial grounds. Indeed, under Florida's redistricting standards, race is the only consideration that can justify a departure from tier-two standards. *See* Art. III, § 20(a), Fla. Const. And race plainly predominates; neither the Plaintiffs nor the trial court suggested any legitimate basis for a congressional district stretching from Jacksonville to Gadsden County *other than* race. In ordering the creation of an East-West district in 2015, the Florida Supreme Court focused solely on the district's performance for racial minorities. *Apportionment VII*, 172 So. 3d at 402–05. 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.* As to race-neutral criteria, the Court suggested only 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. 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 all that the East-West district has ever been about.

Although circumstantial evidence is enough to establish racial predominance, *Miller*, 515 U.S. at 916 (explaining that predominance may be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence"), direct evidence confirms what the circumstantial evidence proves. Statements of legislators and legislative staff made clear that the overriding purpose of the East-West district proposed in Plan 8015 was to maintain the voting ability of one racial group. R.11683 at 16:4–9 (explaining that the district "is a protected black district that was drawn to protect the black population's ability to elect a candidate of their choice"); 11926 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"); 11981 at 68:16–21 (explaining that the district "has Tier 1 protections" 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").

No other district in the Benchmark Map raises the same equal-protection concerns. Other districts that the Florida Constitution protects from diminishment were redrawn without elevating race to a predominant position and subordinating race-neutral districting principles. In contrast to Benchmark District 5, concerns about racial predominance did not prohibit the Legislature from drawing congressional districts elsewhere in the State that satisfy the Florida Constitution, the Voting Rights Act (the "VRA"), and the Fourteenth Amendment. For example, Congressional Districts 9, 24, and 27 in the Enacted Plan are compact both visually and by statistical measurements and were drawn with respect for existing political and geographical boundaries. But these districts also do not diminish the ability of racial and ethnic minorities to elect representatives of their choice:



Congressional Districts 9, 24, 27 (Enacted Plan)

In Central and South Florida, the State's geography and population demographics can accommodate congressional districting decisions that are simply not possible in North Florida.

In 2022, the Legislature also considered an alternative district (Plan 8019) that was situated wholly within Duval County. But that district—which attempted to avoid the equal-protection questions surrounding the East-West district—raised its own constitutional concerns. The data confirm that the black voting-age population in the Duval-only district was approximately 11 percent lower than in Benchmark District 5. *Compare* R.8313 (46.2% BVAP in Benchmark CD-5), *with* R.12337 (35.32% BVAP in Plan 8019's CD-5). Other indicators of minority voting strength, such as minorities' share of turnout and registration within the district, revealed comparable

reductions. R.8316-19, 8761-64. Whereas the candidates preferred by black voters prevailed in 14 out of 14 statewide elections under Benchmark District 5 (R.8319), the comparable figure under the Duval-only district in Plan 8019 is 9 out of 14 statewide elections. R.8764. The Duval-only district in Plan 8019 would have elected Republican Marco Rubio over Democrat Patrick Murphy in the 2016 U.S. Senate race; Republican Rick Scott over Democrat Charlie Crist in the 2014 Gubernatorial race; and would have elected Republicans Jeff Atwater, Pam Bondi, and Adam Putnam over their Democrat opponents in the 2014 Cabinet races. *Id.*

Even when it was presented in the Legislature, the House Redistricting Committee Chair described the Duval-only district not as a district that *complied* with the non-diminishment provision, but as a "singular exception to the diminishment standard." R.10959.

The trial court erred in concluding that race would not necessarily predominate when drawing a congressional district in North Florida that satisfies the non-diminishment requirement.

D. The trial court erred in concluding that compliance with the Florida Constitution is a compelling interest for purposes of the Equal Protection Clause.

Finally, the trial court erred in concluding that the drawing of a congressional district in North Florida whose lines were predominantly based on race would serve a compelling interest. The *only* interest that Plaintiffs ever advanced as justification for the predominance of race in a North Florida district was the State's interest in compliance with the non-diminishment standard in the Florida Constitution. Thus, the record contains no evidence that the maintenance of a minority district in North Florida is necessary to eradicate the ongoing effects of specific, identifiable instances of past discrimination. *See*, *e.g.*, *Bush*, 517 U.S. at 982 (plurality opinion) (explaining that a State's interest in remedying past discrimination is "compelling" when the discrimination is "specific" and "identified," and the State had a "strong basis in evidence" to conclude that its remedial action was necessary) (internal quotation marks and citation omitted); *Miller*, 515 U.S. at 920–22. Nor does any party claim that Section 2 of the VRA protects Benchmark District 5 and requires its preservation. Absent a compelling interest in its preservation, the subordination—and outright abandonment—of traditional race-

neutral districting principles in an attempt to draw a district in compliance with the non-diminishment provision cannot be justified.

Without more, compliance with the non-diminishment standard is not a compelling interest that justifies the predominance of race in drawing districts. If it were, then the United States Constitution's ban on racial gerrymandering would be categorically inapplicable to all existing minority-performing districts in Florida. The preservation of those districts in compliance with the non-diminishment standard would always justify the predominance of race. But Florida cannot vote into its State Constitution an exemption from the Fourteenth Amendment.

Apart from a State's interest in prison safety, the only compelling interest the Supreme Court has ever recognized to justify race-based action is the remediation of "specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162. Consistent with that interest, the Supreme Court has assumed, without deciding, that a State's compliance with the VRA serves a compelling interest. But the Court has never extended the same presumption to a State's efforts to comply with its own state laws requiring government

decisions to be made on racial grounds. This distinction is perhaps unsurprising when considering the history that led to the adoption of the Fourteenth Amendment: States' denial of the equal protection of the laws on the basis of race.

Moreover, even if compliance with the VRA serves a compelling state interest, it does not follow that compliance with Florida's non-diminishment standard does too. There are important differences between the VRA and Florida's non-diminishment standard. The VRA's mandates are narrow in scope; section 5 of the VRA, which prohibited retrogression, was both time-limited and limited to "covered" jurisdictions in which Congress found evidence of race discrimination in elections. 52 U.S.C. §§ 10303(a)(8), (b), 10304; *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 537–39 (2013). 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.*, 570 U.S. at 537–38.

Thus, when the U.S. Supreme Court assumed that compliance with a federal retrogression prohibition advances a compelling state interest, its assumption was limited to a prohibition that applied only to jurisdictions with a demonstrated history of racial discrimination.

Florida's non-diminishment standard, in contrast, has no time limitation and applies statewide without regard to whether a specific jurisdiction has any recent or identifiable history of racial discrimination in elections. Unlike section 5 of the VRA, then, it is *not even arguably* tethered to specific, identified instances of past discrimination that demand remediation. The Supreme Court has never assumed, let alone held, that there is a compelling state interest in preventing retrogression or diminishment for its own sake, or on a blanket basis.

Moreover, the non-diminishment standard does not share the VRA's storied legacy as landmark civil-rights legislation, and, unlike the VRA, Florida's non-diminishment standard finds no express constitutional warrant in the Fourteenth Amendment. Importantly, 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 v. J.A. Croson Co.,* 488 U.S. 469, 490 (1989) (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.

The final judgment fails to explain why Plaintiffs' absolutist approach would not require Florida to ensure non-diminishment no matter how much the resulting district would subordinate traditional redistricting criteria to racial considerations. Plaintiffs offer no limiting principle or logical endpoint to this argument. *Cf. Students*

for Fair Admissions, Inc., 143 S. Ct. at 2170-73, 2175 (holding that race-based admissions programs could not be reconciled with the Equal Protection Clause, in part, because they lacked any meaningful endpoint). If the 2020 census had revealed that black population of Benchmark District 5 had decreased by 50%, the Plaintiffs' approach would require the State to draw an even more sprawling district with tendrils stretching perhaps as far as Panama City and Orlando to ensure non-diminishment. The Equal Protection Clause does not tolerate the total abandonment of traditional race-neutral districting principles in favor of the single-minded pursuit of racial considerations in redistricting. And in regions of the State where application of the Florida Constitution's requirements would necessarily conflict with the requirements of the Fourteenth Amendment, the Supremacy Clause requires the former to yield.

When racial considerations outrank race-neutral considerations in redistricting, the resulting district is subject to strict scrutiny. Here, the non-diminishment standard, as Plaintiffs interpret it, would require not only the elevation of racial over race-neutral considerations, but also the adoption and perpetual preservation of a district so focused on race that it wholly abandons—

and does not even minimally advance—traditional race-neutral districting principles. Because the maintenance of Benchmark District 5 would have violated the Equal Protection Clause, the non-diminishment standard could not compel its preservation in the Enacted Plan. The trial court's conclusion to the contrary constitutes reversible error.

CONCLUSION

The Supreme Court recently explained that the "Constitution's pledge of racial equality" cannot be "overridden except in the most extraordinary case," *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2161, 2163, and condemned the "inherent folly . . . of trying to derive equality from inequality," *id.* at 2147. The Constitution's pledge of racial equality applies no less to seats in Congress than to seats in a college class. This Court should reaffirm that pledge and uphold the Legislature's refusal to elevate race to the predominant factor in its government decision-making. The final judgment should be reversed with instructions to enter judgment for the defendants.

Respectfully submitted,

/s/ Daniel Nordby
DANIEL E. NORDBY (FBN 14588)
GEORGE N. MEROS (FBN 263321)
TARA R. PRICE (FBN 98073)
SHUTTS & BOWEN LLP
215 South Monroe Street,
Suite 804
Tallahassee, Florida 32301
(850) 241-1717
DNordby@shutts.com
GMeros@shutts.com
TPrice@shutts.com

CARLOS REY (FBN 11648)
KYLE GRAY (FBN 1039497)
FLORIDA SENATE
404 South Monroe Street
Tallahassee, Florida 32399
(850) 487-5855
Rey.Carlos@flsenate.gov
Gray.Kyle@flsenate.gov

Counsel for the Florida Senate

/s/ Andy Bardos
ANDY BARDOS (FBN 822671)
GRAYROBINSON, P.A.
301 South Bronough Street,
Suite 600
Tallahassee, Florida 32301
(850) 577-9090
Andy.Bardos@gray-robinson.com

Counsel for the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been filed with the Florida Courts E-Filing Portal and served by email on October 4, 2023, to:

BRADLEY R. MCVAY
Fla. Bar No. 79034
JOSEPH S. VAN DE BOGART
Fla. Bar No. 84764
ASHLEY DAVIS
Fla. Bar No. 48032
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399
(850) 245-6536
Brad.Mcvay@dos.myflorida.com
Joseph.VandeBogart@dos.myflorida.com
Ashley.davis@dos.myflorida.com

MOHAMMAD O. JAZIL
Fla. Bar No. 72556
GARY V. PERKO
Fla. Bar No. 855898
MICHAEL BEATO
Fla. Bar No. 1017715
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
119 S. Monroe St.,
Suite 500
Tallahassee, FL 32301
(850) 270-5938
mjazil@holtzmanvogel.com
gperko@holtzmanvogel.com
mbeato@holtzmanvogel.com

Taylor A.R. Meehan*
Cameron T. Norris*

ABHA KHANNA*
ELIAS LAW GROUP LLP
1700 Seventh Ave.,
Suite 2100
Seattle, WA 98101
(206) 656-0177
akhanna@elias.law

CHRISTINA A. FORD
Florida Bar No. 1011634
JOSEPH N. POSIMATO*
JYOTI JASRASARIA*
JULIE ZUCKERBROD*
ELIAS LAW GROUP LLP
250 Massachusetts Ave.
NW, Suite 400
Washington, D.C. 20001
(202) 968-4490
cford@elias.law
jposimato@elias.law
jjasrasaria@elias.law
jzuckerbrod@elias.law

*admitted pro hac vice

FREDERICK S. WERMUTH
Florida Bar No. 0184111
THOMAS A. ZEHNDER
Florida Bar No. 0063274
QUINN B. RITTER
Florida Bar No. 1018135

CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com
cam@consovoymccarthy.com

*admitted pro hac vice

KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802
(407) 422-2472
fwermuth@kbzwlaw.com
tzehnder@kbzwlaw.com
qritter@kbzwlaw.com

Counsel for Plaintiffs

HENRY C. WHITAKER (FBN 1031175)
DANIEL W. BELL (FBN 1008587)
JEFFREY PAUL DESOUSA (FBN 110951)
DAVID M. COSTELLO (FBN 1004952)
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for Florida Secretary of State

/s/ Daniel Nordby
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the typeface requirements of Rule 9.045(b), Florida Rules of Appellate Procedure because it was prepared in a proportionally spaced typeface using 14-point font Bookman Old Style. This brief complies with the type volume limitations set in Rule 9.210(a)(2)(B), Florida Rules of Appellate Procedure. This brief contains 11,154 words, excluding the parts of the brief exempted by Rule 9.045(e).

/s/ Daniel Nordby
Attorney