IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D23-2252
L.T. CASE NO. 2022-CA-666

CORD BYRD, IN HIS OFFICIAL CAPACITY AS FLORIDA SECRETARY OF STATE, *ET AL.*,
Appellants,

v.

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., *ET AL.*,
Appellees.

On Appeal from a Final Order of
the Second Judicial Circuit

SECRETARY BYRD'S INITIAL BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 2016, the non-diminishment provision in Florida's Constitution[1] compelled the State to adopt a misshapen, 200-mile-wide district in North Florida so that candidates preferred by black voters win in every election. That racial gerrymander not only "balkanize[d]" North Florida "into competing racial factions"; it "carr[ied] us further from the goal of a political system in which race no longer matters." *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 657 (1993).

Because "[e]liminating racial discrimination means eliminating all of it," *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2161 (2023), the State declined to perpetuate that gerrymander in its 2022 congressional map. Instead, the State adopted a map with compact districts that bring together individuals based on where they live, not based on their race.

Plaintiffs immediately sued to undo all that. They asserted that the 2022 map violated the non-diminishment provision by eliminating the racially gerrymandered district in North Florida. The trial court agreed, struck down the State's map, and ordered the State to

[1] Article III, § 20, Fla. Const.

reimpose the race-based electoral monopoly that the Legislature had abolished.

That ruling flouts the Fourteenth Amendment's Equal Protection Clause. The clause does "away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (footnote omitted). So when the State prioritizes race over other districting criteria—like compactness, population equality, and fidelity to geographic and political boundaries—its line-drawing must survive strict scrutiny. *Shaw I*, 509 U.S. at 653. Because Florida's non-diminishment provision invariably requires the State to prioritize race over traditional redistricting principles, Plaintiffs must show that the provision's mandates are narrowly tailored to meet a compelling interest. They have not done so. Nor have they shown that the specific North Florida gerrymander on which they hinge their claim—Benchmark CD-5—survives strict scrutiny either.

Because Florida's 2016 electoral map was plagued by both those constitutional defects, Plaintiffs cannot rely on that map as a comparator to show that Florida's 2022 electoral map diminished minority voting strength. Those same defects also prevent Plaintiffs from showing that the State can comply with the non-diminishment

provision here while still respecting the Equal Protection Clause. Either failure justifies reversal.

Apart from those constitutional shortcomings, Plaintiffs also fail to state a non-diminishment claim on the merits. To do so, they must show that the black population in Benchmark CD-5 was large and politically cohesive enough to constitute an electoral majority in a reasonably configured district. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). But black voters did not constitute a majority in Benchmark CD-5, nor was Benchmark CD-5 reasonably configured.

The Court should reverse the judgment below.

BACKGROUND

I. Legal background

A. The Voting Rights Act of 1965

The Fourteenth and Fifteenth Amendments empower "Congress" to enact "appropriate legislation" to enforce their guarantees, including the promise that the franchise be neither "denied [n]or abridged . . . on account of race." U.S. Const. amend. XIV, § 5; *see also* U.S. Const. amend. XV. After a century of State-led efforts to disenfranchise minority citizens, *see Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197–98 (2009), Congress exercised that

authority to enact the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10301 *et seq.* In support of that law, Congress compiled a detailed evidentiary record, highlighting for instance the use of subjective tests to disenfranchise voters, or that only 6.4% of black voting-age citizens were registered to vote in Mississippi in 1964. *South Carolina v. Katzenbach*, 383 U.S. 301, 312–13 (1966).

The lynchpins of the VRA were Sections 2 and 5. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 536–37 (2013). Section 2 bars States from diluting minority voting strength. In the redistricting context, it mainly does that by barring States from "fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them or 'packing' them into one or a small number of districts to minimize their influence." *In re S. J. Resol. of Legis. Apportionment 1176 (Apportionment I)*, 83 So. 3d 597, 622 (Fla. 2012) (citation omitted). Section 2's prohibitions remain in effect and "appl[y] nationwide." *Shelby Cnty.*, 570 U.S. at 537.

Section 5, however, prescribed "strong[er] medicine." *Id.* at 535. It placed "covered jurisdictions" with particularly torrid histories of "racial discrimination in voting" on electoral probation through the so-called "preclearance" requirement. *Id.* at 535, 537; 52 U.S.C.

§ 10304(a). Before changing their voting processes, those jurisdictions had to prove, among other things, that the changes had neither "the purpose" nor the "effect of diminishing the ability of any citizens of the United States on account of race" to "elect their preferred candidates of choice." 52 U.S.C. § 10304(b). That rule against non-diminishment was known as the "non-retrogression principle." *Apportionment I*, 83 So. 3d at 624. In essence, if a new voting procedure impeded a politically cohesive minority group from electing their preferred candidate in a covered jurisdiction, the voting procedure would not be approved. *See id.* at 625–26. In the redistricting context, plaintiffs could establish diminishment by showing that the enacted electoral plan diminished minority voting strength compared to a "benchmark plan." *Id.* at 624–25.

From the start, the U.S. Supreme Court acknowledged that Section 5 "was an 'uncommon exercise of congressional power' that would not have been 'appropriate' absent the 'exceptional conditions' and 'unique circumstances' present in the targeted jurisdictions." *Nw. Austin*, 557 U.S. at 222 (Thomas, J., concurring in part and dissenting in part) (quoting *Katzenbach*, 383 U.S. at 334–35). In 2014, the Court held that "current conditions" could no longer justify the

VRA's formula for identifying covered jurisdictions subject to Section 5's mandate because the formula was based "on decades-old data relevant to decades-old problems, rather than current data reflecting current needs." *Shelby Cnty.*, 570 U.S. at 538–39, 553, 557. The Court thus struck down the coverage formula, rendering Section 5 inoperative. *Id.* That reasoning also cast doubt on the constitutionality of Section 5's race-based requirements, *e.g.*, *id.* at 559 (Thomas, J., concurring), though the Court did not definitively hold as much, *id.* at 557.

Shelby County had a muted effect in Florida. Unlike many other southern States, "Florida [wa]s not a covered jurisdiction for the purposes of Section 5." *Apportionment I*, 83 So. 3d at 624. Section 5 applied to only five Florida counties, none of which are in North Florida. *See id.* (Collier, Hardee, Hendry, Hillsborough, and Monroe).

B. The Equal Protection Clause

The VRA's requirements "pull[] in the opposite direction" of the Fourteenth Amendment's Equal Protection Clause. *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). On one hand, the "Equal Protection Clause forbids racial gerrymandering"— the practice of "intentionally assigning citizens to a district on the basis of race without" narrowly

tailoring that district to advance a compelling interest. *Id.* (cleaned up). That stringent standard is triggered whenever race is the "predominate factor" for drawing a district. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017). On the other hand, the VRA "demands consideration of race" to ensure that a State's districting plan does not violate its prohibitions. *Abbott*, 138 S. Ct. at 2315; *see, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 18 (2023) (considering race to determine whether Alabama had violated Section 2).

"[T]o harmonize these conflicting demands," the U.S. Supreme Court has "assumed" without deciding "that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Abbott*, 138 S. Ct. at 2315. In particular, it has "assumed that complying with the VRA is a compelling state interest, and that a State's consideration of race in making a districting decision is narrowly tailored" if the State "has 'good reasons' for believing that its decision is necessary" to "comply with the VRA." *Id.* (collecting cases). But this is important: The Court has entertained that assumption only in the context of the *federal* VRA, a statute passed under the federal congressional power to enforce the Reconstruction Amendments. The Court has never suggested that a State has a

compelling interest in discriminating based on race to comply with a state-law analogue to the VRA.

C. The Fair Districts Amendment

In 2010, shortly before *Shelby County* held the VRA's preclearance regime unconstitutional, Florida voters amended Florida's Constitution to address standards the State must meet when drawing congressional districts. Art. III, § 20, Fla. Const. Called the Fair Districts Amendment, the new provision contains two "tiers" of redistricting criteria. Tier 1 requires, among other things, that the State must draw contiguous districts and must not draw districts "with the intent to favor or disfavor a political party or an incumbent." *Id.* § 20(a). It also enshrines two race-based standards into Florida's Constitution. *See id.*

The first racial criterion, known as the "non-dilution standard," mirrors Section 2 of the VRA. *See* 52 U.S.C. § 10301. It states that "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." Art. III, § 20(a), Fla. Const.; *see*

also Apportionment I, 83 So. 3d at 619.[2] The second criterion, known as the "non-diminishment standard," tracks Section 5's "non-retrogression principle." *Apportionment I*, 83 So. 3d at 624; *see also* 52 U.S.C. § 10304. It provides that "districts shall not be drawn" to "diminish the[] ability" of "racial or language minorities" "to elect representatives of their choice." Art. III, § 20(a), Fla. Const. This case turns on the non-diminishment standard.

Beneath Tier 1 of Section 20, Tier 2 contains several core principles of congressional districting. That tier requires districts to (1) "be as nearly equal in population as is practicable," (2) "be compact," and (3) "utilize existing political and geographical boundaries" "where feasible." *Id.* § 20(b); *see Bush v. Vera*, 517 U.S. 952, 959–60 (1996) (plurality op.) (listing these requirements as "traditional redistricting principles").

Finally, though the State need not prioritize one criterion over another within the same tier, *id.* § 20(c), it must prioritize Tier 1

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[2] *Apportionment I* dealt with an identically worded constitutional provision for state legislative districting, *see* Art. III, § 21, Fla. Const., but the case's analysis applies equally to Section 20, *see League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 139 n.2 (Fla. 2013).

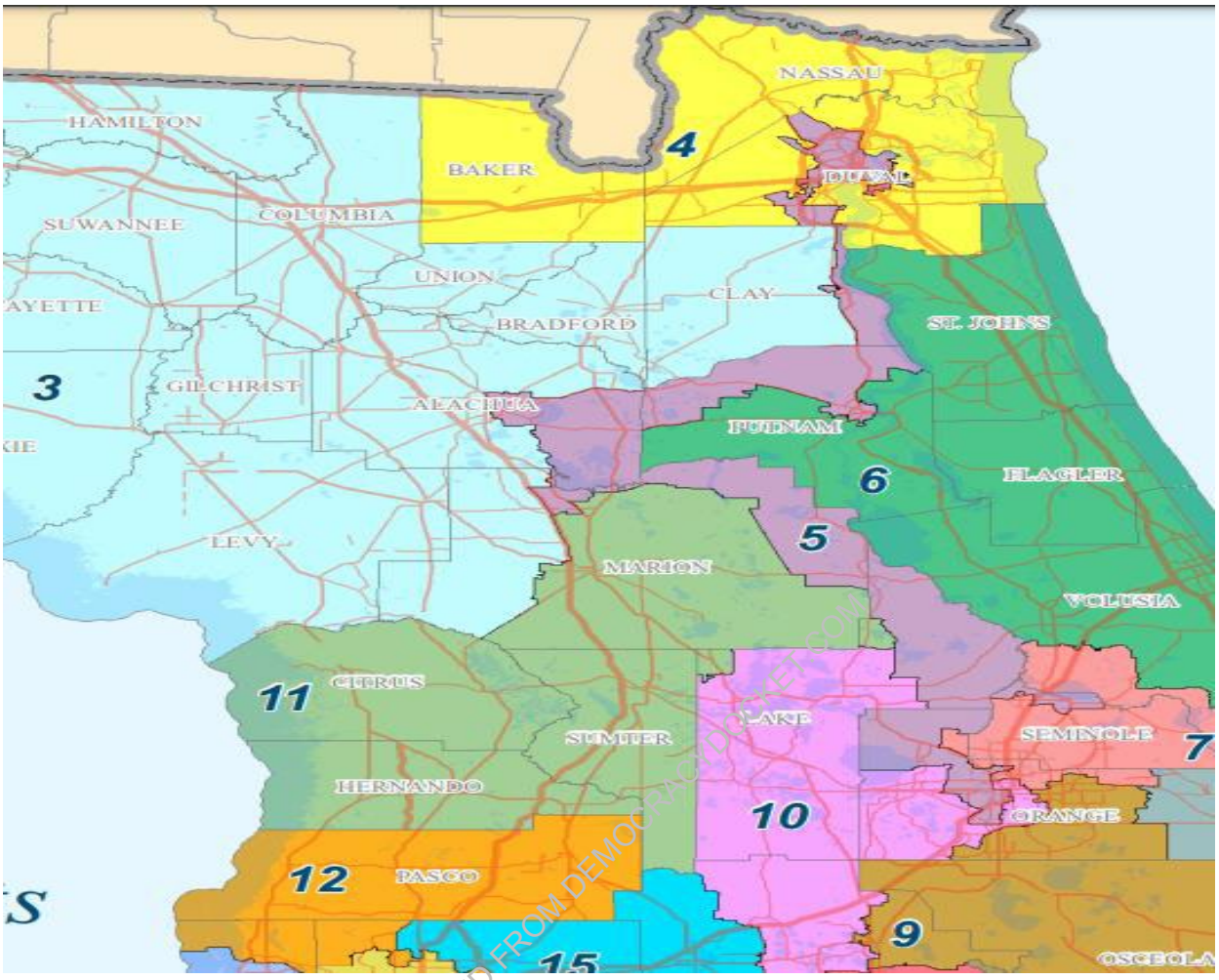
standards over Tier 2 standards when "compliance with the standards in [Tier 2] conflicts with the standards in [Tier 1]," *id.* For example, if ensuring that a district does not "diminish" minority voting strength conflicts with the district being "compact" or tracking "existing political and geographical boundaries," the State must choose the race-based map over a map more consistent with those traditional redistricting principles. *See id.* "[T]he criteria of [Tier 1] must *predominate* to the extent that they conflict with [Tier 2]." *Apportionment I*, 83 So. 3d at 636 (emphasis added).

II. Facts and procedural history

A. The 2016 Plan

After the Fair Districts Amendment was ratified, the State redrew its congressional districts to track the State's population as reflected in the 2010 census. Its first attempt at a congressional map drew Congressional District 5 in a north-south configuration, spanning from Jacksonville to Orlando:

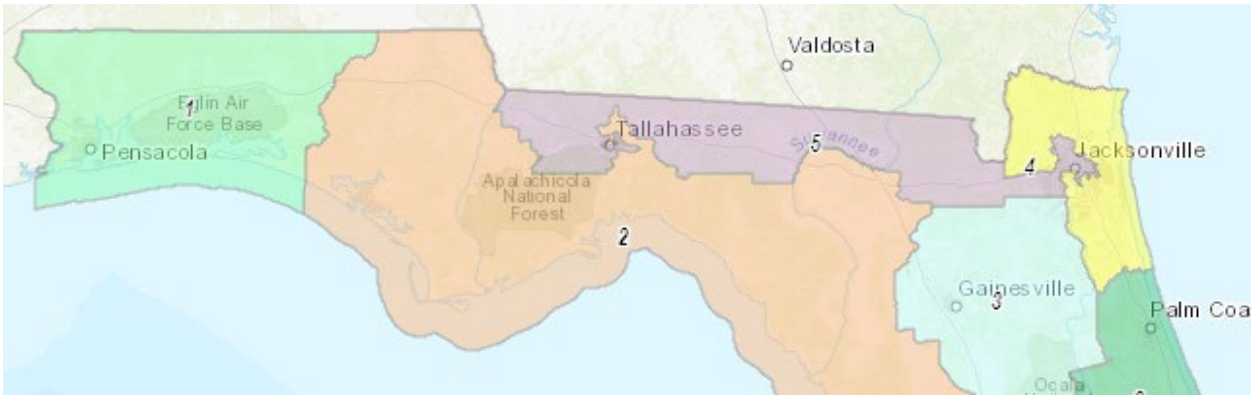
(Graphic on next page.)



R.8336; *League of Women Voters of Fla. v. Detzner (Apportionment VIII)*, 179 So. 3d 258, 271–72 (Fla. 2015).

After years of litigation, that map was invalidated for violating Section 20's restriction on partisan gerrymandering. *See League of Women Voters of Fla. v. Detzner (Apportionment VII)*, 172 So. 3d 363, 403 (Fla. 2015). As a remedy, the Florida Supreme Court adopted the 2016 Plan. *Apportionment VIII*, 179 So. 3d at 263. That plan drew

Congressional District 5 (Benchmark CD-5) in an east-west configuration, spanning from Gadsden and Leon Counties to Duval County:



R.8312, 12471; *Apportionment VIII*, 179 So. 3d at 271, 308.

The Florida Supreme Court conceded that Benchmark CD-5 was no "model of compactness." *Apportionment VII*, 172 So. 3d at 406. It stretched 200 miles, spanned eight counties, split four of them, and narrowed to just a three-mile strip at some points. *See Apportionment VIII*, 179 So. 3d at 309; R.8312–15. Still, the Court explained that "District 5 [had to] be redrawn in an East–West orientation" to "abid[e] by" Section 20's mandate that the State not "diminish [minority groups'] ability to elect representatives of their choice." *Apportionment VII*, 172 So. 3d at 406. In the Court's view, Benchmark CD-5, even with its bizarre shape, was the "the only alternative option" to the north-south iteration that would remedy the partisan-gerrymandering violation and comply with the non-diminishment

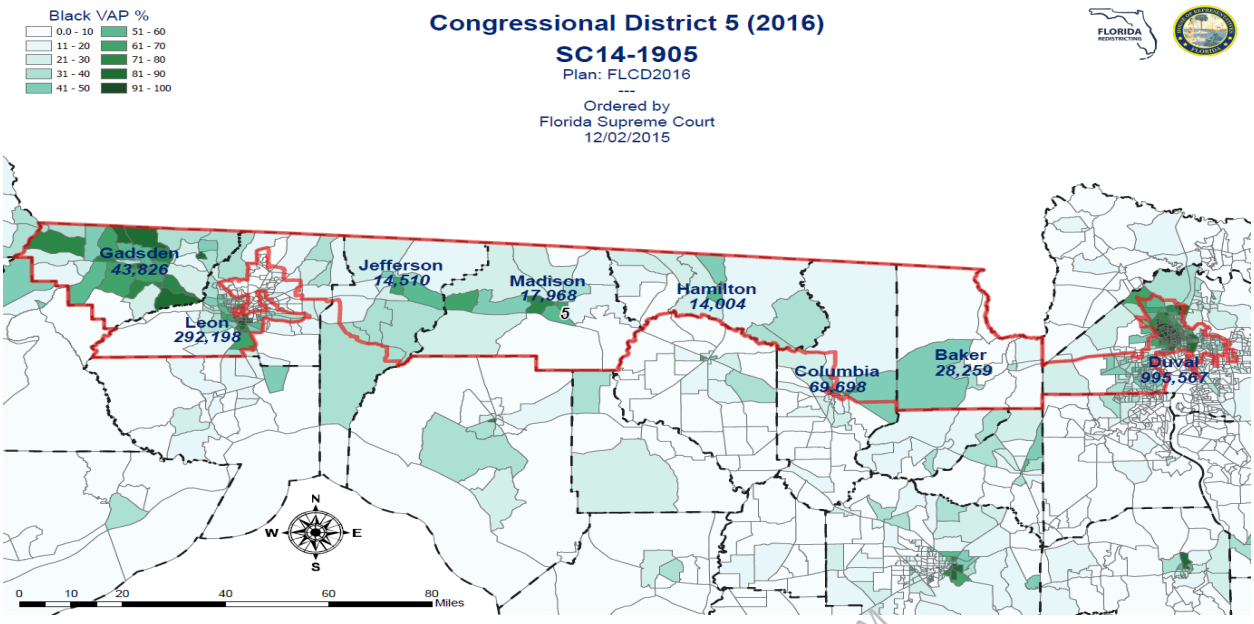
standard, mainly by connecting distant black populations in Gadsen, Leon, and Duval Counties. *See id.* at 403. Neither the Court's decision nor the parties' briefs, however, discussed whether Benchmark CD-5 complied with the Fourteenth Amendment's Equal Protection Clause.

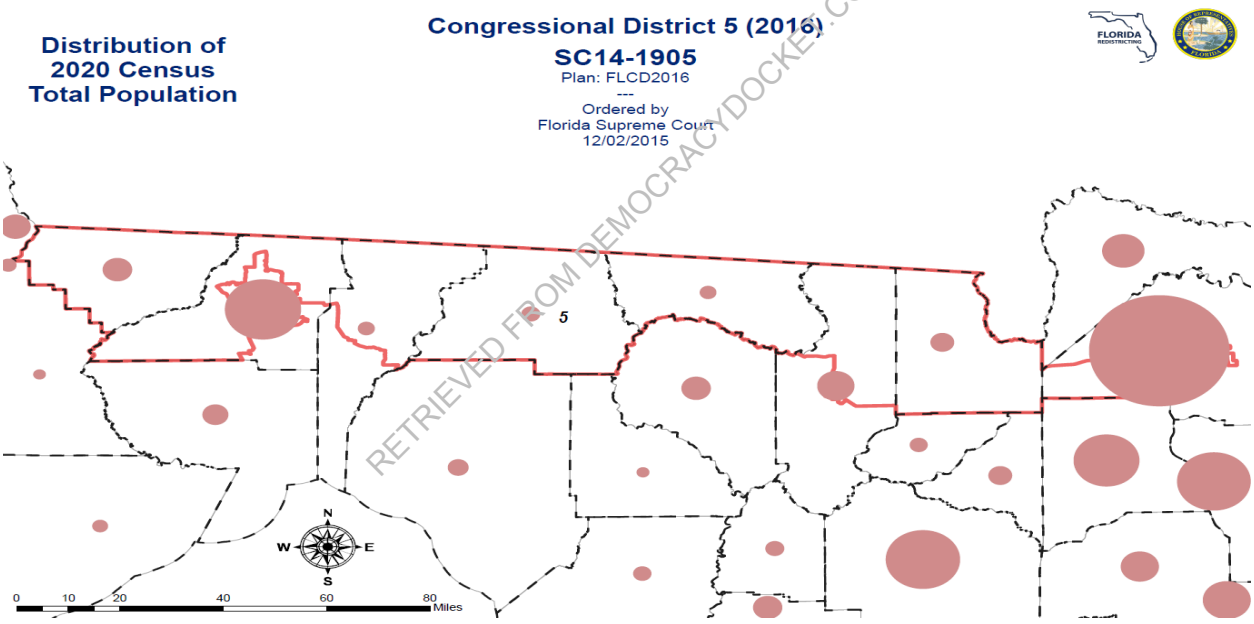
B. The Enacted Plan

1. Florida gained a congressional seat based on the State's population growth revealed by the 2020 census. Both to incorporate the new congressional district and to comply with federal apportionment requirements, Florida had to enact a new congressional district map for the 2022 elections. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969).

Applying the non-diminishment standard to the unique, mostly rural demographics of North Florida proved difficult. Nearly 83% of the area's population comes from Leon and Duval Counties, R.8034, and the vast majority of the black-voting-age population (BVAP) is concentrated in Duval to the east and in Gadsden and Leon to the west:

(Graphic on next page.)





R.8309–10.[3]

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[3] Despite originally overruling Plaintiffs' objection to these population maps, R.12130, the trial court later granted a post-trial motion to strike the maps because, in its view, they were not encompassed by the parties' joint stipulation on admissible evidence, R.12464; *see also infra* 21–22 (explaining the joint stipulation). That was error, both procedurally and substantively. *See* R.12454–57

Those dispersed racial demographics led officials to conclude that Benchmark CD-5[4] had to be retained because of "Tier 1 protections" that "outrank[ed] compactness as a Tier 2 requirement." R.10841. Some worried that "going from the current [Benchmark] CD 5" to a different configuration would "diminish the ability" of black voters "to elect" candidates of their choice. R.10856–57. Others suggested that compliance with the non-diminishment standard *required* a "minority access" district like Benchmark CD-5. *See* R.9488–89, 11500.

(Secretary's opposition below). Procedurally, a post-trial motion to strike cannot be used to strike evidence; it can be used only to strike "pleadings." Fla. R. Civ. P. 1.140(f). And substantively, the population maps are merely graphics that organize census data available in the ESRI Redistricting Application on floridaredistricting.gov. The parties stipulated that they could rely on data from that website, R.8034, and nothing in the stipulation foreclosed the Secretary from organizing the data in digestible illustrations.

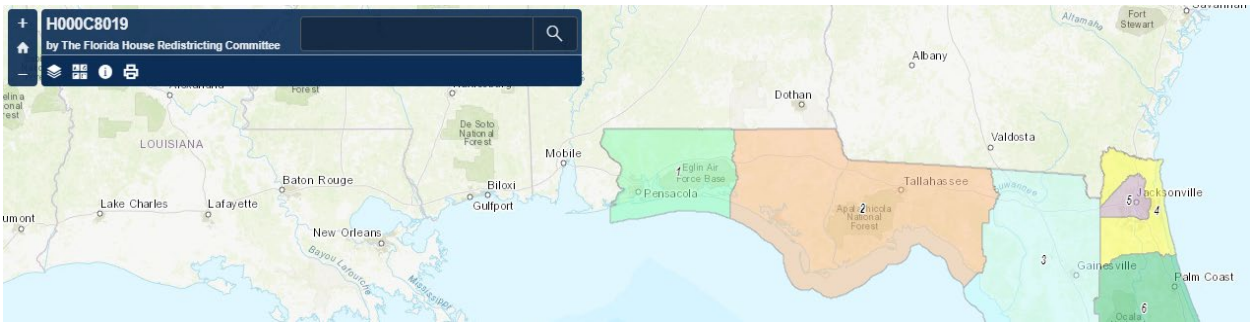
Regardless, the data represented in the population maps is available on Florida's redistricting website and is thus indisputably part of the record. R.8034. So even if the Court does not reverse the trial court's order striking the maps, it may still rely on the data that the maps represent.

[4] During the Legislature's deliberations, an iteration of Benchmark CD-5 was sometimes called District 3 because of the numbering structure in some legislative plans. The name was purely stylistic; the district retained the same general shape as Benchmark CD-5. *See* R.3842.

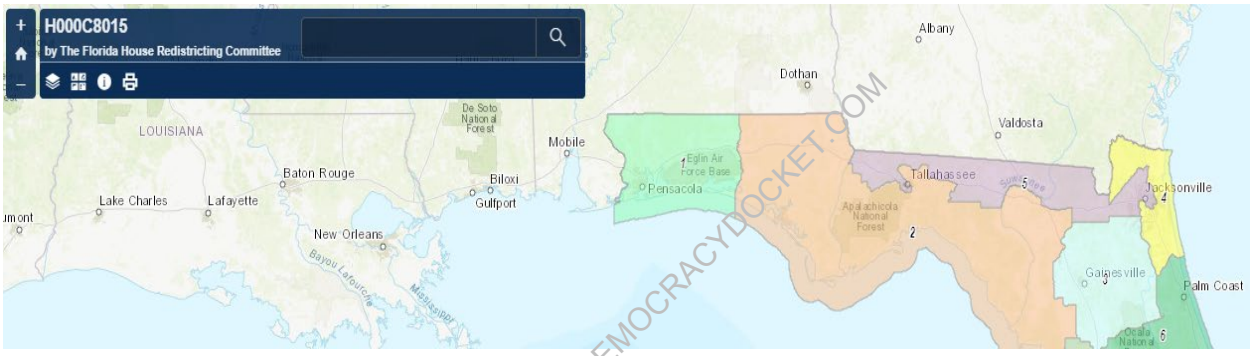
2. As deliberations progressed, Governor DeSantis expressed concern that the non-diminishment standard—to the extent it required the sprawling configuration of Benchmark CD-5—violated the Equal Protection Clause's prohibition on racial gerrymanders. R.2025–30. He petitioned the Florida Supreme Court for an advisory opinion on whether that district was necessary to comply with non-diminishment. *Id.* Though the Court "acknowledge[d] the importance of the issues presented by the Governor," it declined to issue an advisory opinion, understanding that the issue would "be subject to more judicial review through subsequent challenges in court." *Advisory Op. to Governor re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1108 (Fla. 2022); *see also In re S. J. Resol. of Legis. Apportionment 100*, 334 So. 3d 1282, 1289 n.7 (Fla. 2022) (declining to resolve "the questions raised in the Governor's request" while reviewing the 2022 electoral map for state legislative elections).

3. Without judicial guidance, the Legislature passed two plans in one bill: a primary plan (Plan 8019) and an alternative plan (Plan 8015).

Plan 8019 (the primary plan)



Plan 8015 (the alternative plan)



R.8748–64.

The primary plan, Plan 8019, drew CD-5's boundaries exclusively around the black population in Jacksonville, surrounded by a donut-shaped CD-4. R.8749. Democratic representatives objected to that version of CD-5, though, because that district's BVAP was about 11% points lower than that in Benchmark CD-5. R.11070–71, 11081, 11086; *compare* R.8313 (46.2% BVAP in Benchmark CD-5), *with* R.12337 (35.32% BVAP in Plan 8019's CD-5). Past election data also suggested that Plan 8019's CD-5 would not "perform" for black-

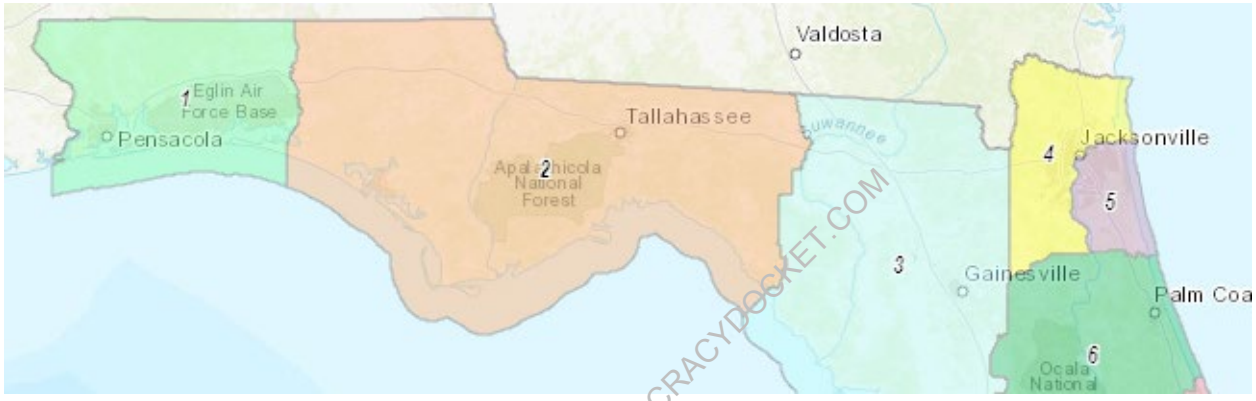
preferred candidates in a third of elections. R.10999, 12390–91. The secondary map, Plan 8015, therefore maintained the east-west configuration of Benchmark CD-5 "should the court find that [Plan 8019] is unconstitutional." R.8776.

Legislators explained that they had no choice but to draw those distorted maps: In their view, the maps would "continu[e] to protect the minority group's ability to elect a candidate of their choice," as required by the non-diminishment standard. R.10960.

4. The Governor vetoed both plans. R.1734. He explained that both maps violate the Fourteenth Amendment's Equal Protection Clause because they "include a racially gerrymandered district—Congressional District 5—that is not narrowly tailored to achieve a compelling state interest." R.1736. He called a special legislative session so the Legislature could pass a constitutional map. R.9235–36.

During that session, the Legislature passed Plan 109 (the Enacted Plan). J. Alex Kelly—the veteran mapmaker who served as staff director of the House Redistricting Committee during the 2010 redistricting cycle, *see Apportionment VII*, 172 So. 3d at 403–04; R.11186–87 (listing Mr. Kelly's districting experience)—drew 18 of the districts in Plan 109; ten came from prior legislative maps. R.11186, 11227.

The Enacted Plan is compact, contiguous, and equalized, and it respects traditional political boundaries while maintaining communities of interest. Most important, it was drawn without considering race, R.9317, 10208, 11240–41, which resulted in it eliminating the racially gerrymandered versions of CD-5:



R.4405.

The Governor approved the Enacted Plan in April 2022. Ch. 2022-265, Laws of Fla.

C. Temporary-injunction proceedings

Plaintiffs challenged the Enacted Plan the same day the Governor signed it. R.27–64. They sued the Florida Secretary of State, the Florida House of Representatives, and the Florida Senate, alleging five ways in which they believed the Enacted Plan violated Section 20. *Id.* They also moved for a temporary injunction, solely arguing that eliminating Benchmark CD-5 violated the non-diminishment

standard. R.331–61. The Secretary opposed the motion on the ground that Benchmark CD-5 was an unconstitutional racial gerrymander and that complying with the non-diminishment standard in North Florida would violate the Equal Protection Clause. R.877–94. The trial court ultimately sided with Plaintiffs, enjoined enforcement of the Enacted Plan, and ordered the State to institute a remedial map with an iteration of Benchmark CD-5 for the 2022 election. R.1161–81.

This Court reversed. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 340 So. 3d 569, 571 (Fla. 1st DCA 2022). It held that ordering the State to comply with a court-drawn remedial map "unmoored from an adjudication [on the merits], was an unauthorized exercise of judicial discretion, making the temporary injunction unlawful on its face." *Id.* (quoting *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070, 1073 (Fla. 1st DCA 2022)). The Florida Supreme Court then denied Plaintiffs a constitutional writ, *Black Voters Matter Capacity Bldg. Inst., Inc. v Byrd*, 340 So. 3d 475 (Fla. 2022), leaving the Enacted Plan in place for the 2022 election.

D. Merits proceedings

The case proceeded to trial. As he did during the temporary-injunction phase, the Secretary opposed Plaintiffs' non-diminishment claim on equal-protection grounds, even listing the issue as an affirmative defense in an abundance of caution to preserve his arguments. R.2746. He also asserted that Plaintiffs would be unable to establish that the 2016 Plan was a valid benchmark plan—the prior electoral plan that Plaintiffs must compare to the Enacted Plan to establish retrogression, *see Apportionment I*, 83 So. 3d at 624–25—both because Benchmark CD-5 was an unconstitutional gerrymander and because it did not satisfy the preconditions set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). R.7084–99, 11138–64.

As trial approached, the parties executed a joint stipulation that narrowed the claims and streamlined the facts. R.8026–57. Among other things, Plaintiffs agreed to drop all their counts besides the non-diminishment claim related to North Florida. R.8026. The parties also stipulated that Benchmark CD-5 was a "Black-performing district" and that "there is no Black-performing district in North Florida under the Enacted Map." R.8027. They agreed that "no material factual issues remain in dispute regarding Plaintiffs' diminishment

claim and that the Court may rule on that claim as a matter of law." *Id.* And they stipulated that, in evaluating the Secretary's equal-protection arguments, the court could consider all publicly available information from the Florida Legislature's redistricting website (floridaredistricting.gov), and other material like the legislative record for the 2022 redistricting cycle. R.8034.

The trial court dispensed with trial, held a final hearing, and entered judgment for Plaintiffs. R.8061, 12466–520. It concluded that Plaintiffs had established that the Enacted Plan, compared to the 2016 Plan, diminished the ability of black voters to elect their preferred candidates. R.12479–90. It also held that compliance with non-diminishment in North Florida would not violate the Equal Protection Clause, R.12495–96, 12502–18, though it declined to even address the Secretary's argument that Benchmark CD-5 was an unconstitutional gerrymander, R.12494–95. It further held that the Secretary (along with the Florida Senate and House of Representatives) lacked standing to raise any equal-protection issues. R.12496–501. Finally, it enjoined the Secretary from enforcing the Enacted Plan, and it ordered the Legislature to draw a remedial map that does not diminish black voting strength. R.12519–20.

All Defendants appealed. A day later, the parties suggested that this Court certify the trial court's order to the Florida Supreme Court for immediate review. This Court instead voted to hear the case en banc in the first instance. The parties have urged the Court to resolve the case by November 22, 2023, to permit time for Florida Supreme Court review and for the Legislature to draw a remedial map if necessary.

STANDARD OF REVIEW

Because the trial court's final order turned on pure questions of law applied to stipulated facts, R.8026–57, this Court's review is de novo, *Arena Football League v. Bishop*, 220 So. 3d 1243, 1245 (Fla. 1st DCA 2017). In reviewing a redistricting challenge, the Court must be mindful that a State's electoral map is entitled to a "presumption of validity." *Apportionment I*, 83 So. 3d at 606.

ARGUMENT

In drawing its 2022 congressional districts, Florida disengaged from the "sordid business" of "divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part). Instead, the State enacted a map that rests on traditional, race-neutral redistricting principles. Plaintiffs,

however, would demand that the State retain the distorted racial gerrymander of Benchmark CD-5—a so-called "black-performing district" that could be drawn only by making race a non-negotiable criterion. That sort of naked racial sorting requires satisfying strict constitutional scrutiny. Plaintiffs do not come close to doing so.

This Court should reverse. The trial court erred several times over in embracing Plaintiffs' claim that it was unlawful for Florida to refuse to racially gerrymander a congressional district.

I. The Equal Protection Clause forecloses Plaintiffs' non-diminishment claim.

The "central purpose" of the Equal Protection Clause is "to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw I*, 509 U.S. at 642. That principle precludes States from making race the "predominant factor" in drawing an electoral district unless doing so satisfies strict scrutiny. *Bethune-Hill*, 580 U.S. at 187,189. Here, the Equal Protection Clause blocks Plaintiffs' attempt to mandate state-sanctioned discrimination. First, it invalidates their proffered benchmark map—the 2016 Plan, which was drawn to effectuate racial balancing. Without a valid benchmark, Plaintiffs have not established diminishment in North Florida.

Second, the Equal Protection Clause makes compliance with the non-diminishment provision unlawful in North Florida, leaving that provision "without effect" as relevant here. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (state laws that violate the U.S. Constitution are inoperative).

A. The 2016 Plan is not a valid benchmark because it contains an unconstitutional racial gerrymander.

To establish that the Enacted Plan diminishes black voting strength in North Florida, Plaintiffs must demonstrate using a functional analysis[5] that (1) black voters in North Florida had the ability to elect their preferred candidates under a benchmark plan, and (2) the Enacted Plan diminished that electoral ability. *See Apportionment I*, 83 So. 3d at 624–25; *Apportionment VII*, 172 So. 3d at 405–06. The benchmark plan "is the last legally enforceable redistricting plan in force or effect." *DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice*, 76 Fed. Reg. 7470-01, 7470 (Feb. 9,

[5] A functional analysis "consider[s] not only" the "minority population in the districts, or even the minority voting-age population in those districts," but also "political data and how a minority population group has voted in the past." *Apportionment I*, 83 So. 3d at 625; *see also DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice*, 76 Fed. Reg. 7470-01, 7470 (Feb. 9, 2011).

2011) (citing *Riley v. Kennedy*, 553 U.S. 406 (2008)).[6] Here, Plaintiffs cited the 2016 Plan as the benchmark plan. R.8027, 8034–35.

"A plan found to be [an] unconstitutional" racial gerrymander under the Equal Protection Clause, however, "*cannot* serve as the [non-diminishment] benchmark." *DOJ Guidance*, 76 Fed. Reg. at 7470 (emphasis added) (citing *Abrams v. Johnson*, 521 U.S. 74 (1997)). In that event, "the benchmark" is "the last legally enforceable plan predating the unconstitutional plan." *Id.*; *cf. Allen*, 599 U.S. at 22 (rejecting Alabama's argument that retaining the core of its prior electoral map could defeat a Section 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"); *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1267, 1278 (11th Cir. 2002) (government could not subvert finding of racial discrimination by claiming it merely sought to retain "core" of prior discriminatory map); *Jacksonville Branch of NAACP v.*

[6] The Florida Supreme Court has drawn heavily from this federal guidance in interpreting Florida's non-diminishment standard. *See Apportionment I*, 83 So. 3d at 619, 626, 640.

City of Jacksonville, 635 F. Supp. 3d 1229, 1255, 1281, 1285–89 (M.D. Fla. 2022) (similar).

Against that backdrop, the 2016 Plan is not a valid benchmark. It contains an unconstitutional racial gerrymander: Benchmark CD-5. The benchmark for Plaintiffs' non-diminishment claim is thus "the last legally enforceable plan predating" the 2016 Plan. *DOJ Guidance*, 76 Fed. Reg. at 7470. But Plaintiffs failed to adduce any functional-analysis evidence for any earlier benchmark plan, so their non-diminishment claim fails.

1. Race was the predominant factor in adopting Benchmark CD-5.

When race predominates in a redistricting plan, the proponents of the plan must satisfy strict scrutiny. *Bethune-Hill*, 580 U.S. at 189. Race is the predominant factor in redistricting when "[r]ace was the criterion that, in the [mapmaker's] view, could not be compromised." *Id.* That occurs when "race-neutral considerations [come] into play only *after* the race-based decision ha[s] been made." *Id.* (cleaned up; emphasis added). Racial predominance can be shown "either through circumstantial evidence of a district's shape and demographics or

more direct evidence going to [the mapmaker's] purpose." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

A host of direct and circumstantial evidence shows that the 2016 Plan prioritized race in drawing Benchmark CD-5.

i. To begin with, Section 20's tier-based structure compels the State to prioritize racial non-diminishment (a Tier 1 requirement) over traditional redistricting principles, like compactness, population equality, and fidelity to political and geographical boundaries (Tier 2 requirements). Art. III, § 20(a)–(b), Fla. Const. Florida's constitutional structure thus mandates that "race-neutral considerations [come] into play only after the race-based decision ha[s] been made." *Bethune-Hill*, 580 U.S. at 189 (cleaned up). "Race [i]s the [Tier 1] criterion that" cannot "be compromised." *Id.* (cleaned up).

Imagine a mapmaker drawing a district in Duval County. The mapmaker might consider many traditional redistricting factors, like buttressing the district against a natural geographic boundary, or ensuring that the district resembles a standard geometric shape. But even if he faithfully adheres to all race-neutral, traditional redistricting criteria, Section 20 commands him to ask—above traditional criteria—whether the district diminishes the ability of minorities to elect

their preferred candidates. Art. III, § 20(a)–(b), Fla. Const. If it does, our mapmaker must scrap the district's smooth lines, "subordinat[e]" fidelity to traditional redistricting principles, *Bethune-Hill*, 580 U.S. at 187, and "choos[e]" a map that hits a specific racial quota, *id.* at 190. "[R]ace for its own sake" under Section 20 is "the overriding reason for choosing one map over others." *Id.*

The Florida Supreme Court has never shied from that reality. "[T]he criteria of [Tier 1]," it has said, "must *predominate*" over the race-neutral principles in Tier 2. *Apportionment I*, 83 So. 3d at 636 (emphasis added). Discussing the non-diminishment standard specifically, the Court held in *Apportionment I* that "compactness and other redistricting criteria" must "be compromised in order to avoid retrogression." *Id.* at 626. That tracks how the Justice Department construed Section 5—the federal analogue to the non-diminishment standard—when that provision was operative. *See DOJ Guidance*, 76 Fed. Reg. at 7472 ("[C]ompliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria" to "avoid retrogression.").

This litigation exemplifies how Florida's non-diminishment standard compels race to predominate. The Enacted Plan has

compact lines and follows natural geographic boundaries, closely observing traditional redistricting principles. R.4405–08. Yet Plaintiffs convinced a trial court to strike down the Plan *solely* because it could not satisfy a race-based criterion. R.12490 ("Plaintiffs have established that there is no Black-performing district where there previously was, which is sufficient to prove their diminishment claim." (citation omitted)). Race, in other words, was "the overriding reason" that the trial court chose a different map over the Enacted Plan. *Bethune-Hill*, 580 U.S. at 188.

The result is that the State must "subordinate traditional race-neutral districting principles to racial considerations" in *every map that it enacts* under Section 20's tier-based structure. *Id.* at 187 (cleaned up). By the provision's very operation, race predominates.

ii. The Florida Supreme Court acknowledged as much when adopting Benchmark CD-5 to remedy an improper partisan gerrymander in *Apportionment VII*. There, it observed that Benchmark CD-5 violated traditional districting principles, including by not being "compac[t]." 172 So. 3d at 406. But it insisted that the district's odd shape was needed to avoid "diminish[ing] [the] ability" of minorities to "elect representatives of their choice." *Id.* The Court eventually

approved the district only because there was "no evidence" that CD-5 "could have been drawn more tier-two compliant without adversely affecting minority voting rights protected under tier one." *Apportionment VIII*, 179 So. 3d at 272 (cleaned up). And that is exactly the racial polestar that the plaintiffs there (represented by the same lawyers representing Plaintiffs here) implored the Court to adopt. *See, e.g.*, Appellants' Br., *Apportionment VII*, 2014 WL 7662310 (Fla.), at *73–74 (arguing for "an East-West configuration of District 5 that maintains African Americans' ability to elect their chosen candidates").

Benchmark CD-5's bizarre shape and telling racial demographics only confirm that it is a racial gerrymander. *Bethune-Hill*, 580 U.S. at 187; *see also Apportionment I*, 83 So. 3d at 618 ("A disregard for [the traditional redistricting] principles" expounded in Tier 2 "can serve as indicia of improper intent."). It sprawled 200 miles, narrowed at times to just three miles wide, spanned eight counties (splitting four in the process), and was "one of the least compact" proposed in North Florida. *Apportionment VIII*, 179 So. 3d at 272; R.8312–15. Its bounds sliced across North Florida to catch distant pockets of far-flung black populations in Gadsden, Leon, and Duval Counties,

R.8309–13, curling at one point into a "constitutionally suspect" "hook-like shape"—a telltale "indicat[or]" of a gerrymander, *Apportionment I*, 83 So. 3d at 638; R.8312. And that gerrymander was no doubt a racial one, as partisan and incumbency considerations are banned under Section 20(a); in fact, the Florida Supreme Court adopted Benchmark CD-5 to remedy a *partisan* gerrymander to begin with. *Apportionment VIII*, 179 So. 3d at 262.

As Plaintiffs have long boasted, Benchmark CD-5's purpose was clear: It was drawn to "unite[] historic Black communities" scattered across North Florida. R.344, 351; *see also* R.10401 (legislator explaining that Benchmark CD-5 "unifie[d] [black] communities into one district"). Even J. Alex Kelly—an experienced mapmaker who played a critical role in the 2010 redistricting cycle, *see Apportionment VII*, 172 So. 3d at 403–04—testified that Benchmark CD-5 was drawn "predominantly based on one criteria, based on race." R.11230; *see also Cooper v. Harris*, 581 U.S. 285, 299–301 (2017) (race predominated where legislators "purposefully established a racial target" and "were not coy in expressing that" target).

The district's paltry compactness scores affirm that racial motive. *See Apportionment I*, 83 So. 3d at 635 (relying on quantitative

geometric measures to assess compactness). Benchmark CD-5 scored 10% on the Polsby-Popper test.[7] R.8042, 11986–87. As Robert Popper, one of the test's creators, himself testified: "That is extremely low. That is low nationally. That is the lowest in Florida. Below 20 percent for a landlocked district, which [Benchmark CD-5] is, is extremely non-compact." R.8657. For comparison, CD-5 in the Enacted Plan scored 52%, one of the highest in the State. R.4406.

Benchmark CD-5 fared no better on the Reock test.[8] R.8042. Even though "[i]t is unusual for the Polsby-Popper and the Reock method to agree," Benchmark CD-5 scored 11% on the Reock test. R.8658. The Enacted Plan's CD-5, in contrast, scored 56%. R.4406. And Benchmark CD-5 notched one of the lowest scores of any district in the 2016 Plan on the Convex-Hull test,[9] R.8042 (71%), while the Enacted Plan's CD-5 scored among the highest on Convex-Hull, R.4406 (89%). That rare level of statistical agreement led Mr. Popper to conclude, in sworn testimony before the Legislature, that

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[7] *See Apportionment VIII*, 179 So. 3d at 283 n.8 (explaining the Polsby-Popper method).

[8] *See Apportionment I*, 83 So.3d at 635 (explaining the Reock method).

[9] *See id.* (explaining the Convex-Hull method).

Benchmark CD-5 was drawn not using typical districting principles, but "on the basis of racial considerations." R.10846.[10]

All in all, when a district groups together geographically dispersed minority voters with bizarrely shaped boundaries that "disregard[] traditional districting principles," race is the likely cause. *Shaw I*, 509 U.S. at 647. Benchmark CD-5 "conflict[ed] with traditional redistricting criteria"—powerful "evidence that race for its own sake" was the "dominant and controlling rationale." *Bethune-Hill*, 580 U.S. at 188, 190. And the Florida Supreme Court has explained that Section 20's race-based prioritization structure compelled that result. *See Apportionment VII*, 172 So. 3d at 406. Race, in short, was the "criterion" that could "not be compromised." *Bethune-Hill*, 580 U.S. at 189.

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[10] The trial court suggested (in a footnote) that "politics, not race, [may have] predominated" in drawing Benchmark CD-5 given that it was "drawn entirely by Democratic operatives." R.12495. That equivocal statement is no finding. It also ignores that the relevant question is not why Benchmark CD-5's initial proponents drew the district, but why the Florida Supreme Court adopted the district. And it forgets that, since the adoption of the criteria in Section 20, factors like partisanship and incumbency can no longer justify deviations from traditional redistricting criteria, like compactness and respecting political and geographic boundaries. Race still can. *See* Art. III, § 20(a), Fla. Const.

2. Benchmark CD-5 does not survive strict scrutiny.

To justify Benchmark CD-5's "race-based sorting of voters," Plaintiffs must show that the district is "narrowly tailored" to serve a "compelling interest." *Cooper*, 581 U.S. at 292 (cleaned up). They have not done so.

Both Plaintiffs and the trial court have identified just one compelling interest: "Compliance with the non-diminishment provision." R.12510–15; R.8361, 8364–65. By their lights, complying with Section 20 is "*itself* a compelling state interest" because the U.S. Supreme Court has "assumed that complying with the [similarly worded] VRA" is a compelling state interest. R.12510–11 (quoting *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022)). For three reasons, that is wrong.

i. The U.S. Supreme Court has "assumed"—almost always to strike down racial gerrymanders for lack of narrow tailoring, *e.g.*, *Cooper*, 581 U.S. at 292—that compliance with the VRA is a compelling state interest. *Abbott*, 138 S. Ct. at 2315.[11] But it has never

[11] The trial court claimed that the U.S. Supreme Court has "reached consensus that compliance with" the VRA is a compelling state interest across the splintered opinions in *LULAC v. Perry*, 548 U.S. 399 (2006). R.12511. But the Court has repeatedly cautioned,

assumed, let alone suggested, that a State has a compelling interest in complying with a *state version* of the VRA. Nor does the theory undergirding the Court's "assumption" about the VRA extend to state election laws.

A straightforward premise underlies the notion that complying with the VRA may be a compelling state interest. *See Vera*, 517 U.S. at 990–92 (O'Connor, J., concurring). The Fourteenth and Fifteenth Amendments empower "Congress" to "enforce" their guarantees through "appropriate legislation," U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2, and the VRA is a "presum[ptively] constitutional" exercise of that authority, *Vera*, 517 U.S. at 990–92 (O'Connor, J., concurring). "[R]espect" for the "apparatus chosen by Congress to effectuate" the Fourteenth and Fifteenth Amendments requires that the VRA "be accepted and applied" unless "it is held unconstitutional." *Id.*; *see also LULAC*, 548 U.S. at 518 (Scalia, J.,

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well after *LULAC*, that it has only "assumed" that complying with the VRA is a compelling interest. *E.g.*, *Abbott*, 138 S. Ct. at 2310. And a member of one of *LULAC*'s splintered opinions rejected the assumption's validity just this year. *See Allen*, 599 U.S. at 79 (Thomas, J., dissenting) ("[T]he slightest reflection on first principles should make clear why [the assumption is] problematic . . . ."); *see also id.* at 86. The issue is far from resolved.

concurring in part and dissenting in part). And so long as the VRA is operative, the "Supremacy Clause obliges the States to comply with" it. *Vera*, 517 U.S. at 990–92 (O'Connor, J., concurring).

That reasoning does not transfer to state election laws. The U.S. Constitution does not empower States to enforce the Reconstruction Amendments. To the contrary, those amendments *restrain* State power to discriminate based on race. *E.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) ("[T]he Fourteenth Amendment was framed and adopted" to preclude "State laws [that] might be enacted or enforced to perpetuate [racial discrimination].").

State laws therefore do not receive the substantial "deference" afforded to Reconstruction Amendment legislation like the VRA. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *see also Vera*, 517 U.S. at 990–92 (O'Connor, J., concurring); *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in part and dissenting in part). And without that deference, the notion that complying with Section 20 is itself a compelling interest boils down to the circular claim that compliance with a state law justifies racial discrimination based on that law. The State of Virginia, for example, could not have credibly cited compliance

with its ban on interracial marriage to defend acts taken under that law. *See Loving v. Virginia*, 388 U.S. 1 (1967). So too here.

ii. The trial court did not grapple with this critical distinction between federal and state authority to address voting discrimination. Instead, the court concluded that compliance with the non-diminishment standard was itself a compelling interest because it operates like the VRA and is justified by a similar record of racial discrimination in Florida. R.12511–15. Both conclusions are wrong.

To start, the non-diminishment provision and Section 5 of the VRA are critically different. Section 5 "was intended to be temporary," *Shelby Cnty.*, 570 U.S. at 546, and at most could last only so long as the country's "current needs" justified the law's "current burdens," *Nw. Austin*, 557 U.S. at 203. And even when Section 5 was operative, *see Shelby Cnty.*, 570 U.S. at 556–57, it covered only select areas that fell within a rigorous coverage formula designed to identify jurisdictions that had engaged in particularly "pervasive" suppression of minority voters, *Katzenbach*, 383 U.S. at 309.

Section 20 is nothing like that. It does not "temporar[ily]" impose its race-based remedies, *Shelby Cnty.*, 570 U.S. at 546—it mandates that they "extend indefinitely into the future," *see Allen*, 599

U.S. at 45 (Kavanaugh, J., concurring); *see also SFFA*, 143 S. Ct. at 2173 (striking down affirmative-action programs that were "not set to expire any time soon—nor, indeed, any time at all"). It also sweeps far more broadly, because Florida was not a covered jurisdiction under Section 5. *Apportionment I*, 83 So. 3d at 624. Just five Florida counties were subject to its mandates, none of which are in North Florida. *Id.* By contrast, Section 20 prescribes Section 5's "unusual remedies" for the entire State. *Shelby Cnty.*, 570 U.S. at 549. It is thus far more intrusive than Section 5 ever was.

Nor was the non-diminishment standard supported by the voluminous record of then-recent racial discrimination that necessitated the VRA. Enacted in 1965, the VRA was the legislative centerpiece of our "Nation's commitment to confront its conscience and fulfill the guarantee" of "equality in voting." *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (quotation omitted). Its "unusual remedies" were justified by the "exceptional and unique conditions" of the Jim Crow era, *Shelby Cnty.*, 570 U.S. at 545, 549 (citation omitted), and the "overwhelming evidence" of both "unequal access to the electoral system" and then-present "effects of past purposeful discrimination," *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (citations

omitted); *see also Katzenbach*, 383 U.S. at 330 (recent "evidence of actual voting discrimination" justified the VRA).

Nothing remotely similar was true when Florida adopted the non-diminishment provision in 2010, decades after Jim Crow. By then, "voting tests" had been "abolished" nationwide, "disparities in voter registration and turnout due to race" had been "erased, and African-Americans [had] attained political office in record numbers." *Shelby Cnty.*, 570 U.S. at 553. The Supreme Court in *Shelby County* relied on those and similar developments to hold that Congress had not in 2006 validly reauthorized the preclearance formula in the VRA based on "current conditions." *Id.* at 557; *see also Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring) (identifying the live question of whether current needs justify even Section 2 of the VRA). Just so in Florida, which, by 2010, was a much different State than it had been in the decades before. *See, e.g.*, *Johnson v. Mortham*, 926 F. Supp. 1460, 1481 (N.D. Fla. 1996) (three-judge court finding that there was no substantial evidence in Florida of "any current voting practice or procedure which denies or impairs the right to vote of African-Americans" or that any "present effects of past discrimination required adoption of a race-based redistricting plan"); *see also League of*

Women Voters of Fla. Inc. v. Fla. Sec'y of State, 66 F.4th 905, 923 (11th Cir. 2023) (rejecting reliance on historical instances of voting discrimination in Florida and holding that "Florida's more recent history does not support a finding of discriminatory intent").

The trial court made no serious attempt to demonstrate otherwise. It relied upon cases about Florida's history of voting discrimination. R.12513–14. But the most recent case it cited was nearly 20 years old when the non-diminishment provision was ratified. *See id.* "[A]morphous claim[s] that there has been past discrimination" have never sufficed to justify race-based remedial schemes, *e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989), because "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980). If it could, States could impose race-based policies "that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality op.).

In sum, the differences between the VRA and the non-diminishment provision run all the way down. If the U.S. Supreme Court has balked at holding that compliance with the VRA serves a compelling

interest, *see Cooper*, 137 S. Ct. at 1469; *supra* 35 n.11, then compliance with the non-diminishment provision cannot meet that bar.

iii. One final point: Even setting aside the distinction between state and federal law, compliance with Section 5 of the VRA is likely not a compelling interest in any context after *Shelby County*, which invalidated the coverage formula that had subjected certain jurisdictions to preclearance under Section 5. Compliance with the non-diminishment standard's analogue—Section 5—is thus no longer required even under federal law, *see Shelby Cnty.*, 570 U.S. at 553–57, making it quite unlikely that States still have a compelling interest in complying with Section 5, *cf. Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015) (suggesting that continued compliance with Section 5 might no longer be a compelling interest); *see also LULAC*, 548 U.S. at 518 (Scalia, J., concurring in part and dissenting in part) (suggesting that compliance with Section 5 would be a compelling interest only because it placed *operative* burdens on the States). So too with the non-diminishment standard that echoes Section 5's inoperative framework.

* * *

No one doubts that the Florida Supreme Court adopted Benchmark CD-5 to remedy a partisan gerrymander. But even remedial "districting maps that sort voters on the basis of race are by their very nature odious." *Wis. Legis.*, 595 U.S. at 401 (cleaned up); *see Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 905 (1996). Because Benchmark CD-5 prioritized race without satisfying strict scrutiny, it violated the Equal Protection Clause. The 2016 Plan that contained Benchmark CD-5 is thus an invalid benchmark for Plaintiffs' non-diminishment claim. *See DOJ Guidance*, 76 Fed. Reg. at 7470. And since Plaintiffs' functional analysis compares the Enacted Plan only to the invalid 2016 Plan, R.8034–37, they cannot meet their burden to prove a non-diminishment violation, *see Apportionment I*, 83 So. 3d at 619. That alone warrants reversal.

3. The trial court erred in refusing to consider whether Benchmark CD-5 violated the Equal Protection Clause.

Despite the force of those arguments, the trial court declined even to consider them for two reasons, neither correct.

It first suggested that, by adopting Benchmark CD-5, the Florida Supreme Court necessarily rejected any challenge to the district's

constitutionality. R.12495 ("This Court will not second-guess the Florida Supreme Court."). But Benchmark CD-5's noncompliance with the Equal Protection Clause was "neither brought to the attention of the [C]ourt nor ruled upon" during the 2010 districting litigation. *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Because that issue "merely lurk[ed] in the record," it cannot "be considered as having been so decided as to constitute [a] precedent[.]" *Id.* (same); *see also Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality op.) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."). Nor does the Florida Supreme Court's adoption of Benchmark CD-5 shield it from constitutional scrutiny. *See Wis. Legis.*, 595 U.S. at 403 (applying strict scrutiny to court-adopted map that prioritized race).

Next, the trial court refused to consider Benchmark CD-5's constitutionality because the district is "no longer in effect," so the argument would "'unnecessarily embroil th[e] court in extended mini-trials over the moot issue of whether [Benchmark CD-5] is

constitutionally infirm.'" R.12495 (citation omitted).[12] But Benchmark CD-5's constitutionality is far from moot; if the district is an unconstitutional gerrymander, it "cannot serve as the [non-diminishment] benchmark." *DOJ Guidance*, 76 Fed. Reg. at 7470; *cf. also Allen*, 599 U.S. at 22; *Clark*, 293 F.3d at 1267, 1278; *Jacksonville Branch of NAACP*, 635 F. Supp. 3d at 1255, 1281, 1285–89. And it does not matter that the district is no longer active—the U.S. Supreme Court in *Abrams* determined that a proffered plan was an invalid benchmark even though that plan was "*never* in effect." *See* 521 U.S. at 97 (emphasis added). By the trial court's logic, the non-diminishment standard could "be used to freeze in place the very

[12] The trial court cited a single district-court case to justify its flat-out refusal to consider the constitutionality of Benchmark CD-5. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 644–45 (D.S.C. 2002). But not even *Colleton* shut its eyes to the constitutionality of the benchmark plan. In the paragraph immediately following the language cherry-picked by the trial court, *Colleton* explained that just because a "suspect district has not been formally declared unconstitutional" does not make its unconstitutionality irrelevant. 201 F. Supp. at 645. As that court saw it, a benchmark's unconstitutionality requires the court to manipulate its minority-voting-age-population percentage "down to a more acceptable and reasonable level" for purposes of a retrogression analysis. *Id.* As explained in the text, even that approach contradicts both logic and cases like *Abrams*. But it is still better than the blinkered path taken by the trial court.

aspects of a plan" that made it "unconstitutional" simply because the plan went unchallenged during its lifespan. *See id.* Florida's non-diminishment standard does not require that perverse result.

B. Alternatively, the non-diminishment standard is unconstitutional as-applied because complying with it would force the State to violate the Equal Protection Clause.

Even if Plaintiffs could point to a valid benchmark, to apply the non-diminishment provision as Plaintiffs demand here would compel both the court to order, and the Legislature to draw, an unconstitutional gerrymander. *See Cooper*, 581 U.S. at 292. By design, Section 20 commands the State to prioritize racial non-diminishment over traditional redistricting principles. Race will thus predominate in *any* North Florida district drawn to comply with non-diminishment. That is equally true for the only North Florida district that Plaintiffs have ever asserted would satisfy the non-diminishment standard: a district like Benchmark CD-5. Nor have Plaintiffs shown that any district that satisfies non-diminishment would also survive strict scrutiny. The trial court erred in holding otherwise.

1. Any North Florida district drawn to comply with non-diminishment would violate the Equal Protection Clause.

i. As noted, race predominates in redistricting when "race-neutral considerations [come] into play only after the race-based decision ha[s] been made." *Bethune-Hill*, 580 U.S. at 189 (cleaned up). That describes the non-diminishment standard to a tee. It compels the State to entrench minority voting power above traditional redistricting criteria. Art. III, § 20(a)–(c), Fla. Const. Only after that race-based box is checked may the State follow traditional redistricting principles, like compactness. *Id.* § 20(b). And if a court concludes that the State failed to tick that racial checkmark, the non-diminishment standard compels the court to strike the State's chosen map and order a new race-based one. By that very operation, the non-diminishment standard makes race the "criterion" that may "not be compromised" when drawing districts in North Florida. *Bethune-Hill*, 580 U.S. at 189.

The trial court rejected this argument because it believed that U.S. Supreme Court precedent requires the party raising an equal-protection challenge to identify a "*specific* electoral district" that constitutes a gerrymander. R.12493–94 (emphasis added) (citing

Bethune-Hill, 580 U.S. at 191; *Ala. Legis. Black Caucus*, 575 U.S. at 262–63). But neither of those cases dealt with a state law that requires the State to prioritize race *each time* it draws a district. A "specific electoral district" is unnecessary to evaluate that argument.

ii. Because race will predominate in any application of the non-diminishment provision, the provision's application must satisfy strict scrutiny. *Bethune-Hill*, 580 U.S. at 189. It falls well short in North Florida. The only interest proffered by either Plaintiffs or the trial court—compliance with the non-diminishment provision itself—is not a compelling interest. *Supra* 35–43. Applying the non-diminishment provision to North Florida would thus violate the Equal Protection Clause.

2. Adopting any variant of Benchmark CD-5 would also violate the Equal Protection Clause.

Plaintiffs have identified just one type of plan that would comply with non-diminishment: A plan that contains a North Florida district with an east-west configuration like Benchmark CD-5. Because accepting Plaintiffs' non-diminishment arguments would force the court to order, and the Legislature to draw, that unconstitutional

racial gerrymander in North Florida, those arguments should be rejected.

i. No matter the constitutionality of Benchmark CD-5 in the 2016 Plan, *but see supra* 25–46, efforts to renew Benchmark CD-5 in 2022 have made clear that race would be the "predominant factor" in perpetuating a form of the district today. *Bethune-Hill*, 580 U.S. at 187. After all, the 2022 Legislature left no doubt why it included a version of Benchmark CD-5 in Plan 8015 (the secondary plan passed before the Enacted Plan): It was an "attempt at continuing to protect the minority group's ability to elect a candidate of their choice." R.10960. That version of CD-5 was added so that, if a court struck down Plan 8019, Plan 8015 would have a North Florida district that "remain[ed] a protected black district." R.9071. Mapmaker J. Alex Kelly recognized that motive immediately: Plan 8015's CD-5 "assign[ed] voters primarily on the basis of race." R.11372.

The trial court contended, however, that Plan 8015's similar iteration of Benchmark CD-5 respected "traditional redistricting principles to an extent which suggests that race did not predominate in its drawing." R.12505. But the court offered little to support that premise. The first two factors it cited—equal population and

contiguity—are constitutionally mandated, *Preisler*, 394 U.S. at 530–31; Art. III, § 20(a), Fla. Const., so there is little chance that *any* proffered district will violate those principles. As for compactness, the trial court offered only that there is "certainly nothing more bizarre [about Plan 8015's CD-5] than what was already approved by the Florida Supreme Court." R.12507. But the Florida Supreme Court recognized that the similar district it approved was *not* compact. *Apportionment VII*, 172 So. 3d at 406. Nor did the Court consider whether the district it adopted was an unconstitutional gerrymander; the equal-protection issues were never presented. *Supra* 44. And all the compactness problems that plagued Benchmark CD-5, *supra* 30–34, would continue to ail its descendant.

Insisting on a plan that contains a variant of Benchmark CD-5 would perpetuate the racial motive that engendered the district in the first place. As explained above, the Florida Supreme Court adopted Benchmark CD-5 to meet a particular racial end. *Supra* 27–34. Propagating that map for unabashed race-based reasons would carry forward that racial predomination. *See United States v. Fordice*, 505 U.S. 717, 729 (1992). That is impermissible. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2551, 2553 (2018) (rejecting argument

that race did not predominate after Legislature "'retain[ed] the core shape' of districts that [the court] had earlier found to be unconstitutional"); *Clark*, 293 F.3d at 1267, 1278 (similar); *Jacksonville Branch of NAACP*, 635 F. Supp. 3d at 1255, 1281, 1285–89 (similar); *see also Allen*, 599 U.S. at 22 ("adherence to a previously used districting plan" cannot 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").

ii. Because race will predominate in any effort to redraw a district like Benchmark CD-5, strict scrutiny must be satisfied. *Bethune-Hill*, 580 U.S. at 189. But again, the only interest offered by either Plaintiffs or the trial court—compliance with the non-diminishment standard itself—is not a compelling interest, *supra* 35–43, so strict scrutiny has not been met.

3. None of the trial court's remaining merits arguments are persuasive.

Along with the points already discussed, the trial court rejected the Secretary's constitutional challenge on the merits for three other reasons. None was correct.

i. The trial court first placed on *the Secretary* the burden of proving that compliance with the non-diminishment provision would violate the Equal Protection Clause. R.12492. That has it backwards. Plaintiffs bear the burden to prove their non-diminishment claim. *See Apportionment I*, 83 So. 3d at 619 ("challengers" have the burden to establish Section 20 violations). That includes proving that the non-diminishment standard is in fact operative here and binding on the State. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (Courts "must not give effect to state laws that conflict with federal laws."); *see also Cipollone*, 505 U.S. at 516 (unconstitutional laws are "without effect").

The trial court held that the State had the burden because the State listed the constitutional issue as among its "affirmative defense[s]." R.12492. But the law, not the parties' positions, determines the burden of proof; and the State listed the issue as among its affirmative defenses out of an abundance of caution to make no mistake that the issue had been preserved. The Equal Protection Clause is critical to Plaintiffs' case-in-chief, so Plaintiffs shoulder the burden of assuring the Court that their theory complies with it. *E.g.*, *Hallam*

v. Gladman, 132 So. 2d 198, 210 (Fla. 2d DCA 1961) ("[T]he burden of proof [i]s on plaintiff to establish his case.").

Plaintiffs also bore the burden because the Equal Protection Clause is critical to the *relief* Plaintiffs request. A court may not order unconstitutional relief. *E.g.*, *Wis. Legis.*, 595 U.S. at 406 (reversing state court's redistricting remedy for failure to clear strict scrutiny); *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544–45 (2015) (a court's "remedial orders must be consistent with the Constitution" and "[r]emedial orders that impose racial targets or quotas might raise more difficult constitutional questions"). And in a redistricting case, "the issue of remedy" is generally "part of the plaintiff's prima facie case" and "cannot be separated" from liability. *See Nipper v. Smith*, 39 F.3d 1494, 1530–31 (11th Cir. 1994) (en banc). Plaintiffs therefore had to show that the court can order a *remedial map* that complies with both non-diminishment and the U.S. Constitution. *See Allen*, 599 U.S. at 33 (plurality op.). Plaintiffs did not and could not do so here.

ii. Compounding its error, the trial court held that the Secretary could not establish that the non-diminishment standard violated the Equal Protection Clause as-applied to North Florida because he had

not "proved that any remedial district" that complies with non-diminishment in North Florida "will necessarily bear resemblance to Benchmark CD-5." R.12495–96.

As discussed, it does not matter whether any future district will resemble Benchmark CD-5: By the non-diminishment provision's very design, race will predominate in any district drawn to comply with it. *Supra* 28–30. The trial court's reasoning also yet again flips the burden of proof. Plaintiffs must prove their non-diminishment claim. *See Apportionment I*, 83 So. 3d at 619. And throughout this litigation, they have cited only one North Florida district that they believe could comply with non-diminishment: Benchmark CD-5. *E.g.*, R.358, 8029, 8039.

In any event, the record makes clear that, given the unique demographics of North Florida and the remainder of the Enacted Plan—which per the parties' stipulation is no longer in dispute—an electoral plan can avoid retrogression only if it includes a variant of Benchmark CD-5. After all, the standard for impermissible retrogression under Florida law is a hair trigger. It allows for only "a *slight* change in percentage of the minority group's population in a given district," one that has no "cognizable effect on a minority group's ability to elect

its preferred candidate of choice." *Apportionment I*, 83 So. 3d at 625 (emphasis added). That means there are specific racial targets that any districting effort must meet in North Florida, with little room for deviation. And if the 2016 Plan is the benchmark, *but see supra* 25–46, those racial targets are the BVAP (46.2% in Benchmark CD-5), R.8313; black voter turnout rates in the Democratic primary (an average of 66.89% in Benchmark CD-5), R.8317; 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), R.8319.

Given the demographics of North Florida, the only plan that can retain even remotely similar levels of black voting strength is one with a variant of Benchmark CD-5. Nearly 83% of North Florida's population comes from Duval and Leon Counties, R.8034, and the majority of the BVAP is dispersed among Duval, Leon, and Gadsen Counties, R.8309–10. As a result, the only way to draw a map that respects both federal apportionment standards, *e.g.*, *Preisler*, 394 U.S. at 530, and the undisputed remainder of the map while also maintaining the racial electoral monopoly in North Florida is one that includes a

district spanning from Duval in the east to Gadsden in the west like Benchmark CD-5.

That is why many legislators in the 2022 redistricting cycle suggested that the only way to comply with non-diminishment was to retain a version of Benchmark CD-5. They identified the concern from the start, questioning 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. R.10856–57. Many suggested that compliance with Section 20's non-diminishment standard *required* a "minority access" district like Benchmark CD-5. *See* R.9488–89, 11500. Indeed, "[e]very draft congressional plan proposed and debated by the Legislature, until the very last one, maintained the general configuration of Benchmark CD-5." R.354. And notwithstanding mighty efforts, the last one diminished black voting strength.[13]

[13] The last congressional plan was Plan 8019, which drew CD-5 solely in Duval County (in the shape of a donut hole). R.8749. But that district diminished the ability of black voters to elect their candidates of choice. It dropped the BVAP in CD-5 from 46.20% under the 2016 Plan to 35.32%—a nearly eleven-point drop. *Compare* R.8313 (46.2% BVAP in Benchmark CD-5), *with* R.12337 (35.32% BVAP in Plan 8019's CD-5). And black-preferred candidates were

The 2022 Legislature is not the first to have tried without success to draw another district in North Florida that complies with non-diminishment. Despite years of heated redistricting litigation in which North Florida was a "focal point," *Apportionment VII*, 172 So. 3d at 402, no one has yet identified a substantially different version of CD-5 that maintains the precise racial mix that the non-diminishment standard requires. The lack of proposed alternatives is what led the Florida Supreme Court to bless Benchmark CD-5 in the first place. *See id.* at 402–06. And in the temporary-injunction phase of this case, the trial court agreed that the "legislative record includes detailed testimony that 8015's configuration of [CD 5] is *necessary* to ensure minority voters' continued ability to elect candidates of their choice." R.1174 (emphasis added).

Plaintiffs, for their part, have never proposed an alternative to a district like Benchmark CD-5. Quite the opposite, they have sought

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projected to lose nearly a *third* of elections in that district, R.10999, 12390–91, as compared to Benchmark CD-5, where black-preferred candidates were never projected to lose, R.8318–19. For just that reason, many legislators recognized that Plan 8019's CD-5 would not comply with non-diminishment. R.11070–71, 11081, 11086. That is why the Legislature adopted Plan 8015 as an alternative. And that is no doubt why Plaintiffs have never claimed in this litigation that Plan 8019's Benchmark CD-5 would suffice.

for over a year to implement a Benchmark CD-5 variant. That was so during the temporary-injunction phase of litigation, R.1134–37 (proposing temporary maps with a version of Benchmark CD-5); during expert discovery and at summary judgment, R.3500, 3586; and while preparing the parties' 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," R.8028.

All told, Plaintiffs put it best: Given the demographics of North Florida, an east-west configuration like Benchmark CD-5 is the "only alternative option" to "compl[y] with the constitutional non-diminishment standard." R.343 (quoting *Apportionment VII*, 172 So. 3d at 403). And because adopting any variant of Benchmark CD-5 would violate the Equal Protection Clause, the non-diminishment standard is "without effect" in North Florida, so the Enacted Plan need not comply with it. *Cipollone*, 505 U.S. at 516.

iii. Lastly, the trial court relieved Plaintiffs of any obligation to satisfy strict scrutiny because they are not "state actors" subject to the Fourteenth Amendment. R.12509–10. But the relevant state action is that the Florida courts are being asked by Plaintiffs to cashier

the State's electoral maps and to order the creation of a race-based district in North Florida. But the Florida courts cannot take that drastic step through means that would effectuate unconstitutional racial discrimination. *See, e.g.*, Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1688 (2d ed. 1988) ("the *rule of decision* expressly invoked or necessarily relied upon by a state's highest court . . . constitutes 'state action'" and citing cases, like *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

Plaintiffs bear the burden "to show [that the requested state action] does not violate the constitution." *T.M.H. v. D.M.T.*, 79 So. 3d 787, 793 (Fla. 5th DCA 2011), *aff'd in relevant part*, 129 So. 3d 320, 340 (Fla. 2013) ("[T]he burden falls on [proponent of the allegedly unconstitutional action] to demonstrate that" it "furthers a compelling governmental interest through the least intrusive means."). If the trial court were right, constitutional challenges could never be litigated in cases involving only private parties. *But see T.M.H.,* 129 So. 3d 320 at 339–40 (applying strict scrutiny in a parental-rights case between private parties to strike down a statute for violating the Equal Protection Clause).

Simply put, in a redistricting case, the party defending a racially gerrymandered district must typically show that the gerrymander satisfies strict scrutiny. *Miller*, 515 U.S. at 920; *see Wis. Legis.*, 595 U.S. at 403–04 (applying the burden-shifting framework for racial-gerrymandering claims to a state court). Here, that is Plaintiffs.

C. The Secretary has standing to defend the State's map based on the Equal Protection Clause.

In a final bid to grant Plaintiffs relief, the trial court also held that the Secretary's equal-protection arguments were barred under both the public-official-standing doctrine and ordinary standing principles. R.12496–501. That theory is unavailing.

1. The public-official-standing doctrine does not apply.

Florida's public-official-standing doctrine stems from the unremarkable separation-of-powers principle that only the judiciary may declare laws unconstitutional. *See State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681, 682–83 (Fla. 1922). At its core, the doctrine bars "a public official" from "defend[ing] his nonperformance of a statutory duty by challenging the constitutionality of the statute." *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 797 (Fla. 2008). The official must instead "obey the

legislature's duly enacted statute" and fulfill his statutory obligations "until the judiciary passes on [the statute's] constitutionality." *State DOT v. Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d 388, 390 (Fla. 1st DCA 2021). Below, the trial court concluded that the public-official-standing doctrine barred the Secretary from defending the Enacted Plan on the theory that the non-diminishment provision was unconstitutional as-applied. R.12496–99.

That doctrine, however, does not bar a state official from *defending* the Legislature's enacted redistricting plan. That doctrine "exists to prevent" public officials from "refus[ing] to abide by" their lawful duties based on their estimation that laws affecting those duties are unconstitutional. *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 495 (Fla. 1st DCA 2019). Yet when an official defends his performance of a statutory duty, he does not take the judicial power into his own hands; he instead respects the separation of powers by using all legal means available to fulfill the responsibilities charged to him under "the legislature's duly enacted statute." *Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d at 390. And when faced with a tension between provisions of the U.S.

and Florida Constitutions, state officials must follow federal law. *See* U.S. Const. art. VI, para. 2.

That is what the Secretary is doing here. He has not cited the U.S. Constitution to undermine his duties; he has cited it to perform his duty to enforce the Enacted Plan passed by the Legislature. Neither Plaintiffs nor the trial court has cited a precedent applying the public-official-standing doctrine to bar a public official's attempt to do his job. R.12497–98. (collecting cases involving attempts by individuals to *obviate* statutory duties).

2. The Secretary otherwise has standing.

The trial court next reasoned that the Secretary "lack[ed] standing to raise" the equal-protection issues as an "affirmative defense" because he could not "demonstrate an injury in fact." R.12500. As the court saw it, "only voters who reside in an allegedly racially gerrymandered district" have standing to challenge the district's constitutionality, and the Secretary is not a "voter" because he has been sued only in his official capacity. R.12500–01.

The Secretary obviously has "standing" to make arguments that, if accepted, would prevent the State from suffering the grievous constitutional injury of having the Legislature's duly enacted

congressional maps enjoined. *Cf. Abbott*, 138 S. Ct. at 2324 n.17 ("the inability to enforce [the State's] duly enacted plans clearly inflicts irreparable harm on the State").

That is exactly what the Secretary's constitutional arguments would do: They refute Plaintiffs' non-diminishment claim. *Supra* 25–53. "Requiring a named defendant to have standing to hold the plaintiff to its proof is quite out of line with the conventional understanding of standing that prevails in civil litigation." *Green Emerald Homes, LLC v. 21st Mortg. Corp.*, 300 So. 3d 698, 703 (Fla. 2d DCA 2019). The Secretary has standing to assert that Plaintiffs fail to satisfy the elements of their own cause of action.

Nor would it matter if the Secretary's constitutional arguments were exclusively affirmative defenses. "Affirmative defenses are not likely to raise 'standing' concerns," Wright & Miller, *Federal Practice & Procedure* § 3531 (2023), because the defendant's standing is "almost always satisfied by the plaintiff's claim for relief against that defendant," *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1265 (11th Cir. 2015). The defendant has injury—"exposure to an adverse judgment," *id.*—caused by the plaintiff's lawsuit and redressable by dismissing it.

The Secretary thus has standing to defend the Legislature's map against Plaintiffs' claim that the State must impermissibly consider race when drawing congressional districts.

3. Plaintiffs waived their standing arguments.

Merits aside, the trial court erred in even considering Plaintiffs' standing arguments. In Florida, "[s]tanding is an affirmative defense which is waived if not raised in a responsive pleading." *Collins Asset Grp., LLC v. Prop. Asset Mgmt., Inc.*, 197 So. 3d 87, 89 (Fla. 1st DCA 2016) (trial court erred in denying relief based on lack of standing, where standing had not been raised in the responsive pleading). Here, the Secretary raised his equal-protection arguments in his answer. R.2746. Plaintiffs were therefore obligated to "file a reply containing [an] avoidance" to those defenses. Fla. R. Civ. P. 1.100(a). Because their reply did not raise standing as a response, R.3107–15, they waived any standing defense.

II. The 2016 Plan is an invalid benchmark because Benchmark CD-5 does not satisfy the *Gingles* factors.

Although federal constitutional problems plague Plaintiffs' claim, this Court could avoid those constitutional concerns. Section 20 requires that Plaintiffs establish that the relevant part of their

proposed benchmark—Benchmark CD-5—satisfies the preconditions described in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Because the district does not meet those standards, Plaintiffs cannot prove a non-diminishment claim, even if the non-diminishment provision complies with the federal constitution.

Again, the models for Section 20's race-based prohibitions were Sections 2 and 5 of the VRA. *Apportionment I*, 83 So. 3d at 619–20. Section 2 provides that States may not enact voting procedures that are not "equally open" to a racial "class of citizens." 52 U.S.C. § 10301(b). In the redistricting context, that language precludes attempts to dilute minority voting strength. *See Apportionment I*, 83 So. 3d at 624.

To determine whether Section 2 applies to a particular racial group, courts apply the factors set out in *Thornburg v. Gingles*. *See Wis. Legis.*, 595 U.S. at 402. Under *Gingles*, Section 2 applies only to minority groups that (1) are "sufficiently large" and geographically "compact to constitute a majority in a reasonably configured district," *id.*; (2) are "politically cohesive," *Gingles*, 478 U.S. at 50–51; (3) live in an area where "the white majority votes sufficiently as a bloc to enable it" "to defeat the minority's preferred candidate," *id.* at 43; and

(4) do not have an "equally open" political process based on the "totality of circumstances," *id.* If a minority group satisfies this standard, the State must enact an electoral map with a district that remedies the violation. *See Allen*, 599 U.S. at 42 (affirming order compelling Alabama to enact a new electoral map).

Section 5's non-diminishment provision had a different prohibition and reach. The provision prohibited not only vote dilution, but also *any* retrogression in minority voting strength. *See DOJ Guidance*, 76 Fed. Reg. at 7471. And while Section 2 covers only minority groups that satisfy *Gingles*, Section 5's non-diminishment provision applied to any minority population in a covered jurisdiction with power to elect its preferred candidate under the last valid electoral map. *Id.* at 7470–71.

The non-diminishment standard adopted in Section 20, however, is narrower than Section 5 of the VRA in a critical respect. Unlike the VRA, Section 20 does not sequester the non-vote-dilution provision and the non-diminishment provision in different statutory sections. Quite the opposite, Section 20 *merges* the standards together in the same sentence and textually links the non-diminishment provision to the non-vote-dilution provision. It provides that:

> . . . 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**]**.

Art. III, § 20(a), Fla. Const. (brackets and emphases added).

Quite different from Section 5 of the VRA—which operated without reference to Section 2, *see* 52 U.S.C. § 10304—Florida's non-diminishment provision connects to the non-vote-dilution provision by using the pronoun "their." That pronoun refers to the subject of the non-vote-dilution standard: "racial or language minorities." And that structure suggests that the non-diminishment standard does not apply to just any minority group in Florida that has the "ability to elect representatives of their choice"; it applies only to the "racial or language minorities" covered by the non-vote-dilution standard.

The Florida Supreme Court has adopted a familiar test to determine who those "racial or language minorities" are: The *Gingles* factors. *Apportionment I*, 83 So. 3d at 623–24. And it has long suggested that those factors must be satisfied to show diminishment. In *Apportionment VIII*, for instance, the Court rejected the Legislature's attempt to justify a district's configuration based on compliance with the non-diminishment standard by concluding that the Legislature

had not made "a preliminary showing" that the minority population was "cohesi[ve]." 179 So. 3d at 286 n.11. In doing so, the Court explained that "[t]he *Gingles* preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis." *Id.*

The non-diminishment and non-vote-dilution provisions achieve different aims. The non-vote-dilution provision allows a cohesive racial or language minority group in a reasonably compact geographic area to establish that it should be housed in a district where it can elect its preferred candidates. Once that district has been drawn, the State cannot diminish that minority group's ability to elect its preferred candidate. In sum, the non-vote-dilution standard identifies when a particular district must be drawn, and the non-diminishment standard locks it into place.

With that background, Plaintiffs must show that the minority population in Benchmark CD-5—the relevant part of their benchmark plan—satisfies *Gingles*. Plaintiffs fail at *Gingles*'s first factor: The minority population in Benchmark CD-5 was never large enough to constitute a majority in a reasonably configured district. *See Wis. Legis.*, 595 U.S. at 402. The BVAP in Benchmark CD-5 was 46.2%,

R.8317, well below the majority necessary to trigger non-diminishment protection, *see Bartlett v. Strickland*, 556 U.S. 1, 15–16 (2009). Nor have Plaintiffs shown that Benchmark CD-5 (or any other district capturing a black majority in North Florida) was "reasonably shaped." *Cooper*, 581 U.S. at 305; *see supra* 30–34 (detailing the many ways in which Benchmark CD-5 violated traditional redistricting principles); *see also Allen*, 599 U.S. at 29 n.4 ("[I]n case after case, we have rejected districting plans that would bring States closer to proportionality when those plans violate traditional districting criteria."). They thus cannot establish a non-diminishment violation.

CONCLUSION

Plaintiffs would see race reign supreme in Florida's redistricting efforts. The Florida Constitution does not compel that result, and the U.S. Constitution would not permit it in any event. The Court should reverse the judgment below.

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Respectfully submitted,

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