SC23-1671

In the Supreme Court of Florida

BLACK VOTERS MATTER
CAPACITY BUILDING INSTITUTE, *ET AL.*,
Petitioners,

v.

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

On Petition for Discretionary Review from
the First District Court of Appeal
DCA No. 1D23-2252

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 2016, litigants wielded the non-diminishment clause in Florida's Constitution[1] to compel the State to concentrate far-flung black voters in a misshapen, 200-mile-wide congressional district so that black-preferred candidates win in every election. Petitioners exalt that racial gerrymander as combatting racial discrimination, but it merely "endorse[d] the disease." *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring). It "balkanize[d]" North Florida "into competing racial factions," *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 657 (1993); "lock[ed] in—on the basis of race—election futility for thousands of other district voters," A.33 (Osterhaus, C.J., concurring); and "carr[ied] us further from the goal of a political system in which race no longer matters," *Shaw I*, 509 U.S. at 657.

Because "[e]liminating racial discrimination means eliminating all of it," *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 206 (2023), the State declined to perpetuate that gerrymander in its 2022 congressional map. Instead, Florida adopted a map that brings together individuals based on

[1] Art. III, § 20, Fla. Const.

where they live. Citing the non-diminishment clause, Petitioners persuaded a trial court to enjoin that race-neutral map. But the en banc First District reversed 8-2. The non-diminishment clause, it held, does not give Petitioners "a right to have [their] candidate[s] win," nor does it require the State to group together black voters "living hundreds of miles apart in totally different communities." A.22, 28.

The First District was right. To justify invalidating the State's congressional map, Petitioners must prove that it offends the non-diminishment clause. *See League of Women Voters of Fla. v. Detzner (Apportionment VII)*, 172 So. 3d 363, 398 (Fla. 2015). To meet that burden, Petitioners must show their proposed application of the non-diminishment clause complies with the Fourteenth Amendment's Equal Protection Clause. *See* U.S. Const. art. VI, cl. 2. As Chief Judge Osterhaus explained in his concurrence, A.32–40, Petitioners have not.

The Equal Protection Clause does "away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (footnote omitted). When the State prioritizes race over other redistricting 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 Petitioners' non-diminishment theory would compel the State to perpetuate a grotesque racial gerrymander—Benchmark CD-5—Petitioners must show the gerrymander is narrowly tailored to meet a compelling interest. The only interest they cite is compliance with Florida's non-diminishment clause. But compliance with state law cannot justify denying equal protection to thousands of Florida voters.

Apart from those constitutional defects, the First District correctly held that Petitioners failed to state a claim. A.2–31 (majority op.). To prove unlawful diminishment, Petitioners needed to show that a "racial or language" minority in Benchmark CD-5 had the "ability to elect representatives of their choice." Art. III, § 20(a), Fla. Const. Florida voters "transplanted" that language from the federal Voting Rights Act and *Thornburg v. Gingles*, 478 U.S. 30 (1986), "bring[ing] the old soil with it." *See Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020). They also solidified that the non-diminishment clause incorporates *Gingles* by extending the clause's

protections to the same "racial or language minorities" protected by Florida's non-dilution clause, which mirrors the federal provision that precipitated *Gingles*. And *Gingles* teaches that for a minority group to have an "ability to elect," they must satisfy an initial "pre-condition[]," 478 U.S. at 50: They must be geographically compact, in that they can comprise an electoral majority in a reasonably configured district. Because Petitioners did not prove that black voters in Benchmark CD-5 met that standard, they failed to show diminishment.

STATEMENT OF THE CASE

A. Legal Background

1. The Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) has two main provisions: Sections 2 and 5. Section 2 prohibits voting procedures that "result[] in a denial or abridgement of the right . . . to vote on account of race." 52 U.S.C. § 10301(a). That occurs when electoral processes "are not equally open" to a race "in that its members have less opportunity . . . to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). That can happen when a State's electoral map dilutes a minority group's voting strength. *See Gingles*, 478

U.S. at 48. To establish dilution, the minority group must constitute "50 percent or more of the voting population" in a compact geographic area, but still "not [be] put into a district." *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009) (plurality op.). But if the minority group cannot constitute a majority in a reasonably configured district, Section 2 does not apply, lest Section 2 "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* at 21 (quotations omitted).

Section 5 of the VRA prescribed "strong[er] medicine" until the U.S. Supreme Court held that its automatic and mandatory application to certain jurisdictions was unconstitutional. *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013). It required "covered jurisdictions" with histories of racial discrimination to preserve minority voting strength. *See id.* at 535–37; 52 U.S.C. § 10304(a). It achieved that end by requiring covered jurisdictions to get approval from the Department of Justice or a district court before changing a voting practice. To gain approval, jurisdictions had to show the change did not cause "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United*

States, 425 U.S. 130, 141 (1976)—known as "nonretrogression." Section 5 violations resulted when a State's electoral map "diminish[ed] 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).

Unlike many southern States, "Florida [wa]s not a covered jurisdiction" even when Section 5 was active. *In re Senate Joint Resol. of Legis. Apportionment 1176 (Apportionment I)*, 83 So. 3d 597, 624 (Fla. 2012). Section 5 applied to only five Florida counties, none of which is in North Florida. *Id.* (Collier, Hardee, Hendry, Hillsborough, and Monroe).

2. The Equal Protection Clause

The VRA's race-based requirements "pull[] in the opposite direction" of the Fourteenth Amendment's Equal Protection Clause. *Abbott v. Perez*, 585 U.S. 579, 586 (2018). On one hand, the VRA "demands consideration of race" to ensure a State's districting plan does not violate its prohibitions. *Id.* at 587. On the other hand, "[t]he 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. at 585–86 (quotations omitted). It is unconstitutional for race to be "the predominant factor motivating the legislature's decision," even when the legislature does so to comply with the VRA, unless strict scrutiny is met. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The U.S. Supreme Court has never held that an unconstitutional racial gerrymander is otherwise constitutional because the federal VRA justified it. *See, e.g.*, *id.* at 920–21; *Shaw I*, 509 U.S. at 655–56. Nor has the Court suggested a State can constitutionally redistrict with race as the predominant factor simply because a state law has mandated race-based redistricting.

3. The Fair Districts Amendment

In 2010, Florida voters amended Florida's Constitution to address standards the State must meet when drawing congressional districts. Art. III, § 20, Fla. Const. (the Fair Districts Amendment, or FDA). The FDA has two "tiers." Tier 1 bans, among other things, intentional partisan gerrymanders. *Id.* § 20(a). It also enshrines two race-based requirements in Florida's Constitution.

The first racial criterion—the "non-dilution standard"—mirrors

Section 2 of the VRA. *Apportionment I*, 83 So. 3d at 619.[2] 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. The second criterion—the "non-diminishment standard"—tracks Section 5's "non-retrogression principle." *Apportionment I*, 83 So. 3d at 619–20; *see also* 52 U.S.C. § 10304(b). 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.

Beneath Tier 1, 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 Miller*, 515 U.S. at 916 (listing similar requirements as "traditional race-neutral districting principles"). Though the State need not prioritize one criterion over another within the same tier, it

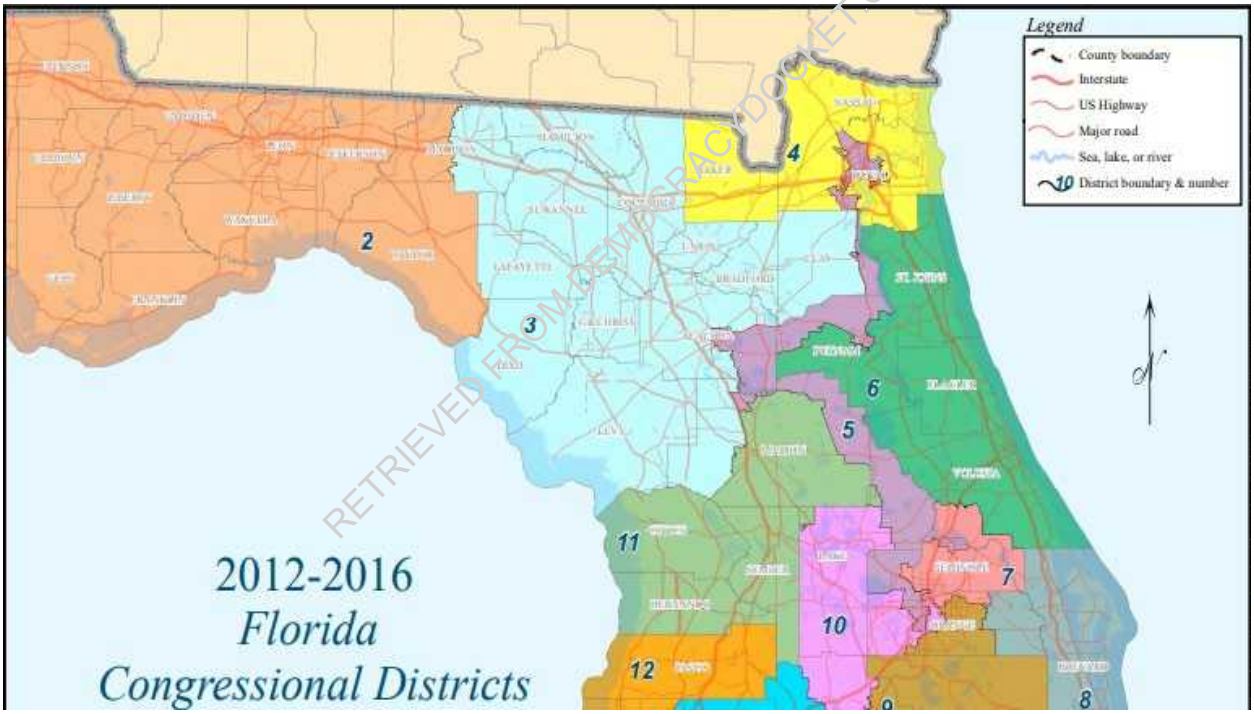
[2] *Apportionment I* dealt with an identically worded constitutional provision for state legislative districting, *see* Art. III, § 21, Fla. Const., but the case's analysis applies equally to Section 20, *see League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 139 n.2 (Fla.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

must prioritize Tier 1 standards over Tier 2 standards when "compliance with the standards in [Tier 2] conflicts with the standards in [Tier 1]." Art. III, § 20(b)–(c), Fla. Const.

B. Facts and Procedural History

1. Court-Ordered CD-5

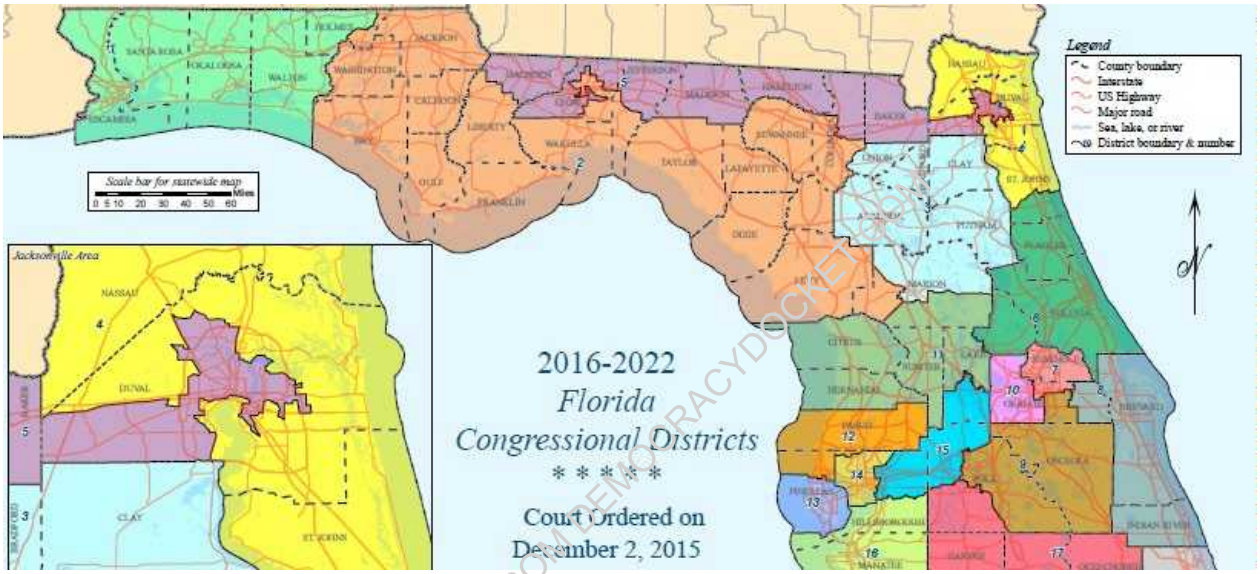
After the 2010 census, the Legislature redrew Congressional District 5 in a north-south configuration:



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

That map was invalidated for violating the FDA's restriction on intentional partisan gerrymandering. *Apportionment VII*, 172 So. 3d

at 403. As a remedy, litigants advanced a new Congressional District 5 (Benchmark CD-5). Benchmark CD-5 had a sprawling east-west configuration, spanning from Gadsden and Leon Counties to Duval County (district in purple):



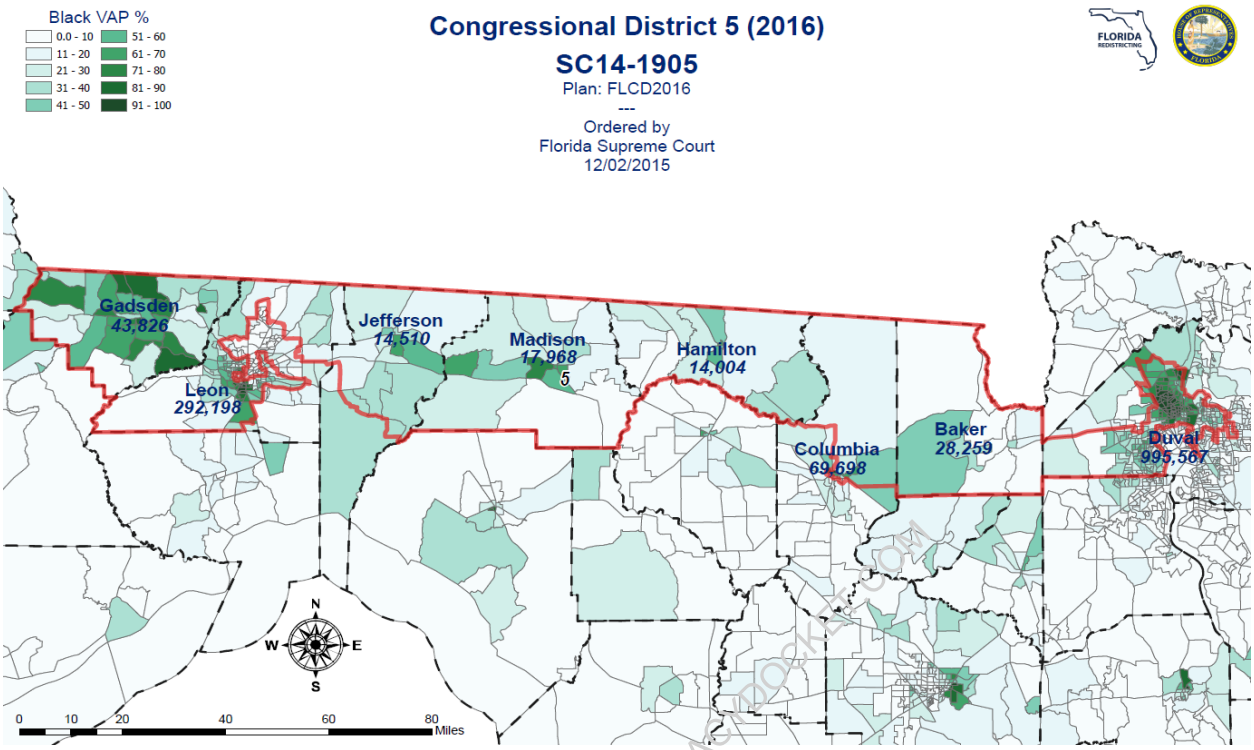
A.7; App.R.657.

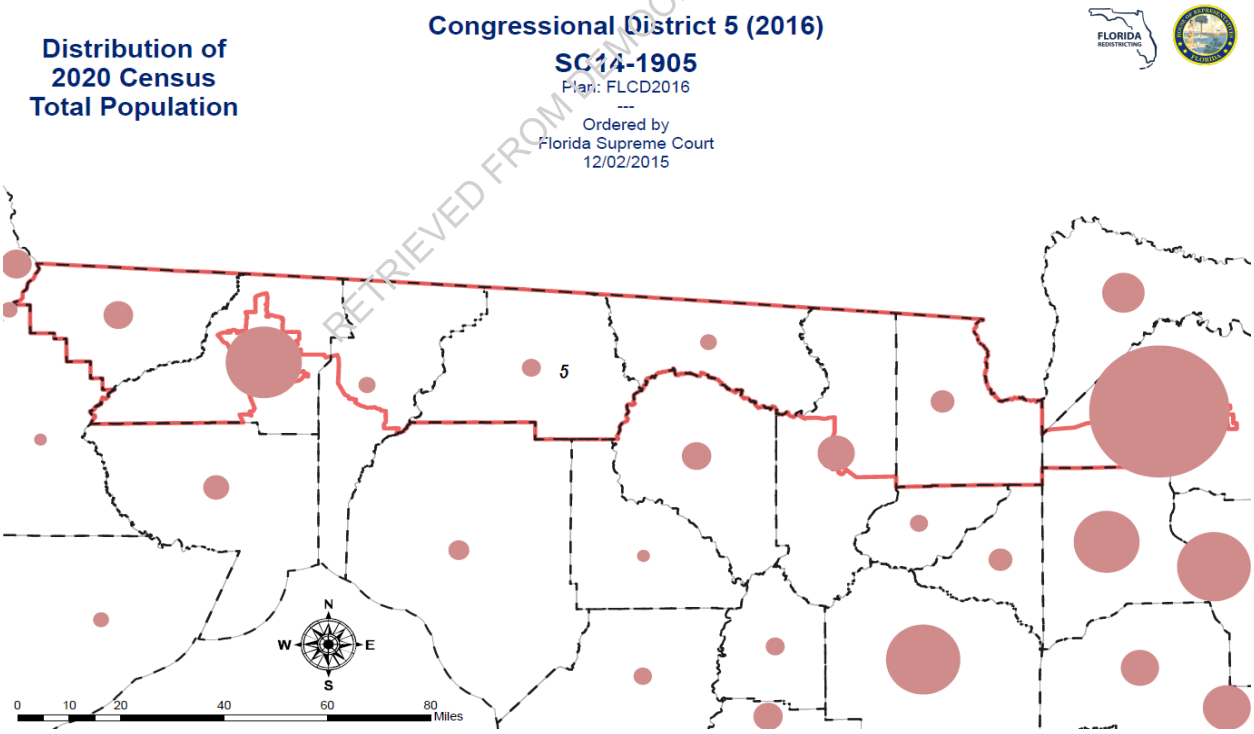
This Court acknowledged that Benchmark CD-5 was no "model of compactness." *Apportionment VII*, 172 So. 3d at 406. It stretched 200 miles, spanned eight counties, split four of them, and narrowed to a three-mile strip. *See Apportionment VIII*, 179 So. 3d at 308; App.R.657–60. But the Court believed "District 5 [had to] be redrawn in an East–West orientation" to "abid[e] by" the FDA's mandate that the State not "diminish [minority groups'] ability to elect

representatives of their choice." *Apportionment VII*, 172 So. 3d at 406. Benchmark CD-5, even with its bizarre shape, was "the only alternative option" to the north-south iteration that would remedy the partisan-gerrymandering violation and comply with the plaintiffs' construction of non-diminishment, mainly by connecting distant black populations in Gadsden, Leon, and Duval Counties. *See id.* at 403. The Court did not address, and no party raised, whether Benchmark CD-5 complied with equal-protection principles or whether the plaintiffs there had the ability to elect representatives of their choice.

2. The Enacted Plan

The 2020 census prompted Florida to draw a new congressional plan. A.7–8. But applying the non-diminishment standard to largely rural North Florida proved difficult. Roughly 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:





R.8309–10.[3]

Those dispersed racial demographics led officials to conclude Benchmark CD-5[4] had to be retained because of "Tier 1 protections" that "outrank[ed] compactness as a Tier 2 requirement." R.10841; *see* R.9488–89, 10856–57, 11500. But as deliberations progressed, Governor DeSantis expressed concern that because Benchmark CD-5's was drawn to capture disparate minority populations, it was an unconstitutional racial gerrymander. R.2025–30.

Responding to the Governor's concerns, the Legislature passed two maps: a primary plan (Plan 8019) and an alternative plan (Plan 8015).

[3] The trial court struck those maps post-trial because, in its view, they were not encompassed by the parties' joint stipulation on admissible evidence, R.12464; *see infra* 17 (explaining the joint stipulation). That was error. A post-trial motion can be used to strike only "pleadings," not evidence. Fla. R. Civ. P. 1.140(f). And the population maps are merely graphics that organize census data the parties stipulated they could rely on. R.8034.

Regardless, the data represented in the maps is available on Florida's redistricting website and is thus part of the record per the stipulation. *Id.* This Court may rely on the data the maps represent.

[4] During deliberations, an iteration of Benchmark CD-5 was sometimes called District 3. The name was purely stylistic. *See* R.3842.

Plan 8019 (the primary plan)

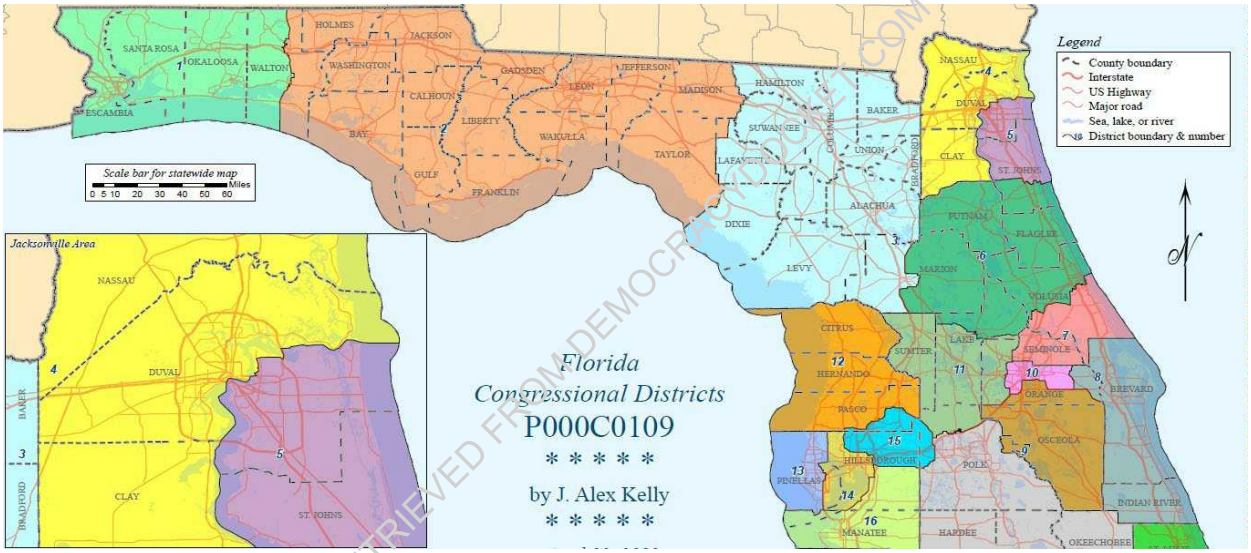
Plan 8015 (the alternative plan)

A.58–59; App.R.673–88.

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. The secondary map, Plan 8015, maintained the east-west configuration of Benchmark CD-5 "should the court find that [Plan 8019] is unconstitutional." R.8776. The Legislature drew both maps because it thought they were necessary to "continu[e] to protect the minority group's ability to elect a candidate of

their choice," as it understood the non-diminishment standard. R.10960.

The Governor vetoed both plans as unconstitutional racial gerrymanders. R.1734–36. The Legislature then passed, and the Governor approved, Plan 109 (the Enacted Plan), which was drawn without considering race:



A.9; App.R.666–72; R.9317, 10208, 11240–41.

3. Trial Proceedings

Petitioners, led by the Black Voters Matter Capacity Building Institute, sued to enjoin Respondents, including the Secretary of State and the Legislature, from enforcing the Enacted Plan. R.27–64. Among other claims, they asserted that eliminating Benchmark CD-5 unlawfully diminished black voting strength under the FDA. *Id.* The

trial court granted a temporary injunction on that ground and ordered that Benchmark CD-5's configuration be used for the 2022 election. R.1161–81. But the First District reversed on procedural grounds. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 340 So. 3d 569, 571 (Fla. 1st DCA 2022). And this Court denied 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.

The case proceeded to the merits. In pre-trial proceedings, the Secretary argued that Petitioners could not show Benchmark CD-5 was a valid benchmark. *See Apportionment I*, 83 So. 3d at 624–25. That was because Benchmark CD-5 was an unconstitutional gerrymander and because its black population did not satisfy the *Gingles* preconditions, including the requirement that they be geographically compact enough to comprise an electoral majority in a reasonably configured district. R.7084–99, 11138–64. He also argued that complying with non-diminishment in North Florida during the 2020 cycle along the lines Petitioners proposed would violate the Equal Protection Clause. R.7094–97.

As trial approached, the parties executed a stipulation narrowing the case to just the non-diminishment claim involving Benchmark CD-5 and the Secretary's *Gingles* and equal-protection arguments. R.8026–57. They agreed that, in evaluating the Secretary's arguments, the court could consider all information from the Legislature's redistricting website (floridaredistricting.gov), and other material like the legislative record for the 2022 redistricting cycle. R.8034. They also stipulated various facts related to diminishment. R.8034–37.

Given the stipulation, the circuit court dispensed with trial, held a final hearing, and entered judgment for Petitioners. R.8061, 12466–520. It determined the Enacted Plan diminished the ability of black voters in North Florida to elect their preferred candidates. R.12479–90. It ordered the Legislature to draw a remedial map that does not diminish black voting strength. R.12519–20.

4. Appellate Proceedings

The First District heard the case en banc and reversed 8-2. A.2–31. The court agreed with the Secretary that Petitioners had failed to prove unlawful diminishment. Petitioners had not established a

legally protected "ability to elect" in Benchmark CD-5, *see* Art. III, § 20(a), Fla. Const., because they had not identified a "naturally occurring, geographically compact" black "community" that could elect its preferred candidate in the district, A.29, 31. The court acknowledged this requirement derived from *Gingles*. A.23–24. It held the FDA had made geographic compactness a prerequisite for a diminishment claim, noting among other things that "reference[s] to the opportunity or ability of minority voters to elect candidates of their choice is the same in both" the federal provisions on which the FDA's racial provision were modeled. A.28. Because Petitioners "failed to submit any evidence" about the geographic compactness of black voters in Benchmark CD-5, the case "should have [been] dismissed" for "lack of proof." A.31.

Chief Judge Osterhaus concurred. He adopted Respondents' argument that Petitioners had not shown Respondents could comply with both non-diminishment and the Equal Protection Clause in North Florida. As he saw it, Petitioners' theory of non-diminishment compelled the State to perpetuate a racial gerrymander—Benchmark CD-5. A.32. The State could lawfully preserve that gerrymander only

if "current evidence" proved it necessary "to combat pervasive and purposeful discrimination." *Id.* Because the record "lack[ed]" that "evidence," Petitioners had not shown the non-diminishment clause required "vacating the [Enacted Plan]." A.38–40.[5]

STANDARD OF REVIEW

"Because this case requires [the Court] to review both the constitutionality of a statute and the interpretation of a provision of the Florida Constitution, [its] review is de novo." *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. SC2022-1050, 2024 WL 1363525, at *5 (Fla. Apr. 1, 2024) (cleaned up). De novo review also applies because the trial court's order turned on stipulated facts. R.8026–57; *McClain v. Atwater*, 110 So. 3d 892, 898 (Fla. 2013).

ARGUMENT

The First District correctly denied Petitioners' bid to replace the State's race-neutral map with a racial gerrymander. The Legislature was well within its constitutional authority to reject that effort. *See* A.32–40 (Osterhaus, C.J., concurring). But the Court can also avoid

[5] Judges Winokur and Long also wrote concurrences. A.40–53. Judge Bilbrey dissented. A.53–78.

reaching the constitutional question. To establish diminishment under the FDA, Petitioners must show that black voters in Benchmark CD-5 comprised an electoral majority within a reasonably configured district. Petitioners fell short.

I. The Equal Protection Clause forecloses Petitioners' claim.

Petitioners contend the Enacted Plan violates the FDA by diminishing black voting strength. Simply put, Petitioners claim diminishment because the State did not racially gerrymander anew, re-enacting an unreasonably configured district grouping together far-flung black voters.

The Equal Protection Clause bars Petitioners' theory for two reasons. First, Benchmark CD-5 is not a valid benchmark because it was an unlawful racial gerrymander. *See Abrams v. Johnson*, 521 U.S. 74, 95–97 (1997) (unconstitutional racial gerrymanders are invalid benchmarks); *see also Riley v. Kennedy*, 553 U.S. 406, 424–29 (2008) (similar for voting procedure that conflicted with state constitutional provision).

Second, Petitioners failed to prove the State could enforce the non-diminishment clause in North Florida during the 2020

redistricting cycle without violating both federal and state equal-protection principles. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015); *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995). Petitioners suggested below that Plan 8015—a plan proposed (but not adopted) by the Legislature—would comply with diminishment because it contained a CD-5 that mirrors the east-west configuration of Benchmark CD-5. But like its predecessor, that district is also an unlawful racial gerrymander. Petitioners thus have not shown that the non-diminishment clause provides a "legally permissible" basis to invalidate the Enacted Plan, A.40 (Osterhaus, C.J., concurring).

A. Race predominated in both Benchmark CD-5 and Plan 8015's CD-5.

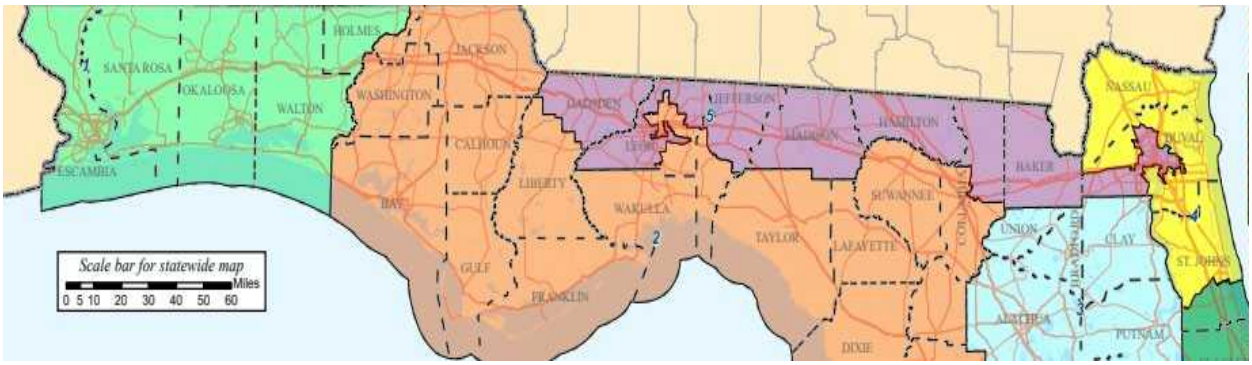
Under federal and Florida equal-protection principles, the State may not make race the "predominant factor" in drawing an electoral district unless doing so satisfies strict scrutiny. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187–89 (2017); *see Fla. Senate v. Forman*, 826 So. 2d 279, 281 (Fla. 2002) (treating Florida's Equal Protection Clause coextensively with federal clause). Race predominates in a district when "[r]ace was the criterion" that "could not be

compromised." *Bethune-Hill*, 580 U.S. at 189. So too when the State "subordinate[s] traditional race-neutral districting principles" to "racial considerations." *Id.* at 187. 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*, 515 U.S. at 916.

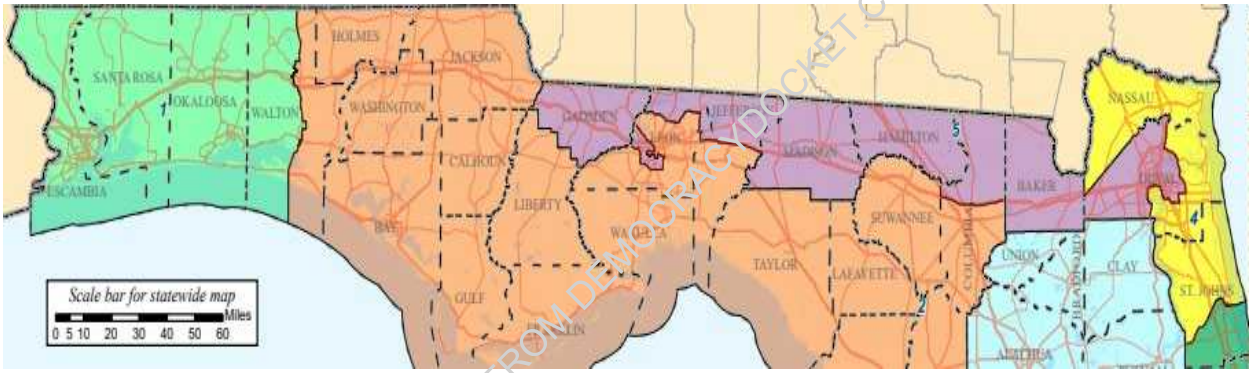
A host of direct and circumstantial evidence shows race predominated in drawing Benchmark CD-5 and would predominate in adopting Plan 8015's CD-5—the only alternative Petitioners identified below as a remedy.

1. It is not "difficult at all" to show race predominated when a district "concentrate[s] a dispersed minority population" by "disregarding traditional districting principles." *Shaw I*, 509 U.S. at 646–47; *see also Apportionment I*, 83 So. 3d at 618. Benchmark CD-5 and Plan 8015's CD-5 are classic examples:

Benchmark CD-5 (purple)



Plan 8015 CD-5 (purple)

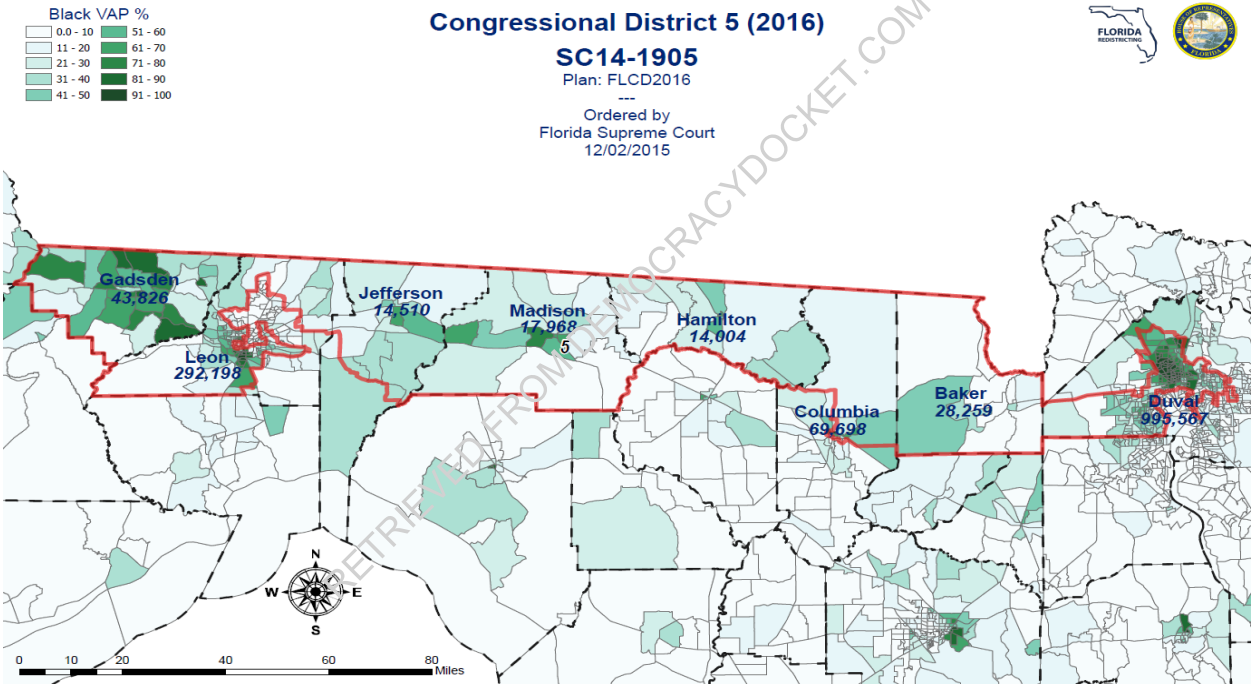


App.R.673–88.

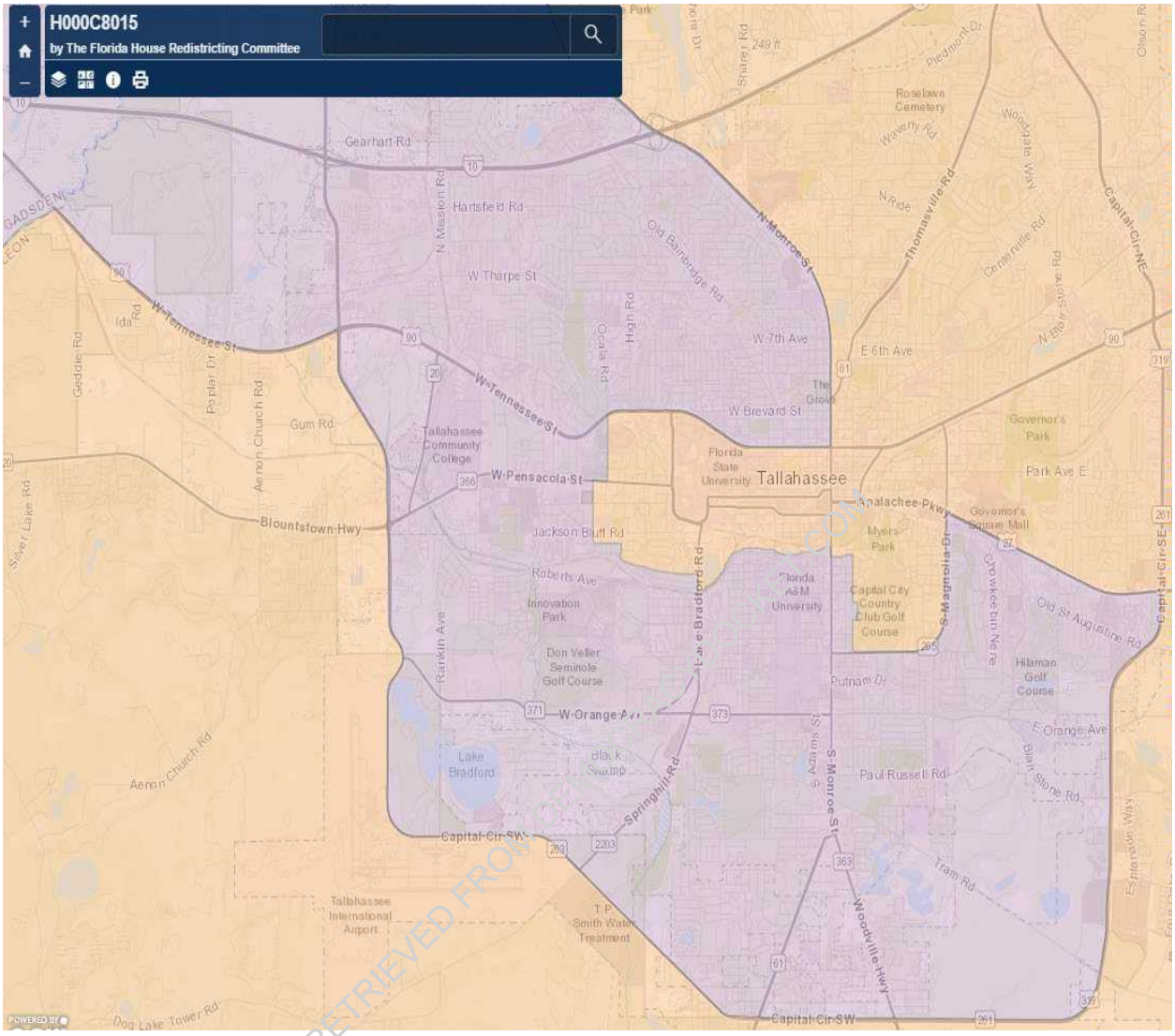
Both districts stretched 200 miles, tapered to a few miles wide, spanned eight counties, split four of them, and were among "the least compact" districts proposed in North Florida. *Apportionment VIII*, 179 So. 3d at 272. They cut Tallahassee in a "constitutionally suspect" "hook-like shape"—a telltale "indicat[or]" of a gerrymander, *Apportionment I*, 83 So. 3d at 638—and carved Jacksonville in the shape of a seahorse. Their "oddly elongated, handlebar-mustache-looking"

forms were "obviously drawn [to] separat[e] voters by race." A.34–35 (Osterhaus, C.J., concurring).

The only explanation for those unreasonable configurations was the desire to group together voters in distant North Florida locales based on their race. *See Miller*, 515 U.S. at 917. Take Benchmark CD-5:



R.8309–10. That district sliced with laser-like precision to catch distant pockets of far-flung black populations in Gadsden, Leon, and Duval Counties. And Plan 8015's CD-5 was no better. Consider how the district partitioned the city of Tallahassee:



The district joined predominately black neighborhoods in northwest, west, and south Tallahassee with black voters in Gadsden County to the northeast, skirting entirely the mostly white Florida State University campus and downtown areas surrounding the Florida Capitol. *See* R.8309–10. The district is unexplainable except by the race of voters included and excluded. *See Miller*, 515 U.S. at 917.

The districts' rock-bottom compactness scores confirm that racial motive. *See Apportionment I*, 83 So. 3d at 635 (relying on quantitative geometric measures to assess intent). Benchmark CD-5 scored 10% on the Polsby-Popper test, and Plan 8015's CD-5 scored 11%. App.R.658, 682.[6] As Dr. Popper himself testified: "That is extremely low. That is low nationally. That is the lowest in Florida. Below 20 percent for a landlocked district [is] extremely non-compact." R.8657. For comparison, the Enacted Plan's CD-5 scored 52%. App.R.666.

The districts fared no better on the Reock and Convex-Hull tests.[7] R.8042. Even though "[i]t is unusual for the Polsby-Popper and the Reock method[s] to agree," both versions of CD-5 scored an equally abysmal 12% and 11% on Reock, respectively. App.R.658, 682. The Enacted Plan's CD-5, in contrast, scored 56%. App.R.666. Both districts also notched low scores on Convex-Hull: Benchmark CD-5 scored 71%, and Plan 8015's CD-5 scored 66%. App.R.658, 682. The Enacted Plan's CD-5 scored 89%. App.R.666. That rare level

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

[7] *See Apportionment I*, 83 So.3d at 635 (explaining the Reock and Convex-Hull methods).

of statistical agreement led Dr. Popper to testify that the districts' east-west configuration was molded "to connect particular communities," R.8659, "on the basis of racial considerations," R.10846.

2. "[D]irect evidence" of intent solidifies that conclusion. *Miller*, 515 U.S. at 916. Even though Benchmark CD-5 was not "compact[]," *Apportionment VII*, 172 So. 3d at 406, this Court implemented it to avoid "adversely affecting minority voting rights protected under tier one," *Apportionment VIII*, 179 So. 3d at 272 (cleaned up); *accord* Appellants' Init. Br., *Apportionment VII*, 172 So. 3d 363 (No. SC14-1905), 2014 WL 7662310, at *73–74 (arguing for "an East-West configuration of District 5 that maintains African Americans' ability to elect their chosen candidates"). 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—also testified that Benchmark CD-5 was drawn "predominantly based on one criteria, based on race." R.11230; *accord* R.10401 (2022 legislator noting that Benchmark CD-5 "unifie[d] [black] communities into one district").

The same goes for Plan 8015's CD-5. Legislators drew the district because it would "continu[e] to protect the minority group's

ability to elect a candidate of their choice." R.10960; *see also* R.354, 9488–89 (similar). The district was a fallback so if a court struck down Plan 8019, Plan 8015 would have a North Florida district that "remain[ed] a protected black district." R.9071. J. Alex Kelly identified immediately that Plan 8015's CD-5 "assign[ed] voters primarily on the basis of race." R.11372.

All this reinforces what Petitioners have long boasted: Benchmark CD-5 and Plan 8015's CD-5 were predominantly drawn to "unite[] historic Black communities" spaced hundreds of miles apart. *See* R.344, 351.

3. Petitioners fail to refute that race drove both Benchmark CD-5 and Plan 8015's CD-5.

i. Petitioners do little to defend Benchmark CD-5 as a valid baseline from which to measure diminishment, even though the Secretary's lead argument below was that Benchmark CD-5 cannot serve as the baseline because it was an unlawful racial gerrymander. *See Abrams*, 521 U.S. at 95–97 (unconstitutional racial gerrymanders cannot serve as Section 5 benchmarks); *see also Riley*, 553 U.S. at 424–29 (procedures that violate state law cannot serve as

benchmarks). Petitioners do not dispute Benchmark CD-5 was a racial gerrymander. *Accord Common Cause v. Byrd*, No. 4:22-cv-109 (N.D. Fla. 2024), 2024 WL 1308119, at *52 (Plaintiffs in a parallel federal case challenging the Enacted Plan "d[id] not dispute that [Benchmark] CD5 was drawn predominantly for race."). And they have abandoned the procedural objections they raised below to duck Benchmark CD-5's unconstitutionality. App.R.465–73. That retreat makes sense: None of their prior objections was preserved in the parties' stipulation of issues for trial, R.8027, so all are waived, *see Esch v. Forster*, 168 So. 229, 231 (Fla. 1936).

Regardless, the technical arguments Petitioners made below to defend Benchmark CD-5 as a baseline to measure diminishment all fail. Petitioners and the dissent argued that the Secretary was precluded from challenging Benchmark CD-5's constitutionality because he was a party in the *Apportionment VII* litigation where that district was adopted. App.R.469–70; A.68. But claim preclusion applies only when the "cause[s] of action" and relevant facts in the first and second suits are "identi[cal]." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004); *Lucky Brand Dungarees, Inc. v. Marcel Fashions*

Grp., 590 U.S. 405, 410–13 (2020). These facts, however, are distinct from *Apportionment VII*. Litigants there challenged the 2015 north-south iteration of CD-5 as violating Tier 2's compactness and boundary requirements. *See* 172 So. 3d at 402. Petitioners here challenge the 2022 Enacted Plan as violating Tier 1's non-diminishment standard. The claims turn on "different conduct, involving different [maps], occurring at different times." *Lucky Brand*, 590 U.S. at 413.

Petitioners also claimed below that the Secretary did not preserve his challenge to Benchmark CD-5's constitutionality. App.R.465–68. Not so. The Secretary made the argument in opposing summary judgment, R.7090–92; Issue 2 of the parties' stipulation, R.8027; his trial brief, R.11141, 11151; and the final hearing, R.12135–36; *see* R.12128.

Finally, Petitioners argued that even if Benchmark CD-5 were unconstitutional, it is still the proper benchmark because it was the last North Florida congressional district "in force or effect." *See Riley*, 553 U.S. at 421. But state laws that violate the U.S. Constitution are "without effect" from the start. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992). And congressional districts that violate the Equal

Protection Clause cannot serve as non-diminishment benchmarks. *See Abrams*, 521 U.S. at 95–97. If they could, the non-diminishment standard would "freeze in place the very aspects of a plan" that made it "unconstitutional" simply because the plan went unchallenged during its lifespan. *See id.* The FDA does not require that perverse result. *See Riley*, 553 U.S. at 427 (rejecting construction of Section 5 that "would bind Alabama to an unconstitutional practice").

ii. Petitioners contend that Plan 8015's CD-5 was not a racial gerrymander because the trial court found it complies with "traditional redistricting criteria." Init.Br.59–63 (quoting App.R.52–55). But when direct evidence or a district's conspicuous racial sorting suggests a gerrymander, "[r]ace may predominate even when a reapportionment plan respects traditional principles." *Bethune-Hill*, 580 U.S. at 189. And the court's configuration analysis was weak. The first two factors it cited—that the district has an equalized population and is contiguous—are constitutionally mandated, *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969); Art. III, § 20(a), Fla. Const. As for compactness, the court said Plan 8015's CD-5 was compact because Benchmark CD-5 was "approved by the Florida Supreme

Court." R.12507. But this Court did not consider whether Benchmark CD-5 was an unconstitutional gerrymander and in fact said it was *not* compact. *See Apportionment VII*, 172 So. 3d at 406.

Petitioners note Plan 8015's CD-5 follows existing political and geographic boundaries, like roads. Init.Br.60–61. But as the Tallahassee map shows, *supra* 25, Plan 8015 uses roads to separate voters based on race. The superficial changes to which Petitioners point also do not show Plan 8015's CD-5 is driven by anything other than the original racial motive that spawned its predecessor. *See North Carolina v. Covington*, 585 U.S. 969, 972, 976–77 (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 v. Putnam Cnty.*, 293 F.3d 1261, 1267, 1278 (11th Cir. 2002) (similar).

Petitioners excuse Plan 8015's CD-5's sprawling length as "a factor of North Florida's rural geography and sparse population." Init.Br.62. But the Enacted Plan had no trouble allocating North Florida's population in more compact districts. Nor can Petitioners justify Plan 8015's CD-5 by pointing to a similar east-west North Florida

district in Florida's 2002 congressional map. Init.Br.62. That district was both non-compact and a notorious partisan gerrymander, *see Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340 (S.D. Fla. 2002)—exactly what the FDA was designed to eliminate.

iii. A final point: The racial motive behind Benchmark CD-5 and Plan 8015's CD-5 is distinct from the federal Section 2 claims in *Allen v. Milligan*. *Contra* Init.Br.56–57. In *Allen*, the Court rejected that race unconstitutionally predominated in alternative plans proposed by plaintiffs. 599 U.S. 1, 30–32 & n.5 (2023) (plurality op.) (The black community was districted together as a "historical feature of the State," not based on race.). Yet the Court repeated what it had often said—compliance with Section 2 "never requires adoption of districts that violate traditional redistricting principles." *Id.* at 30 (cleaned up). Benchmark CD-5 and Plan 8015's CD-5 did just that.

B. Neither Benchmark CD-5 nor Plan 8015's CD-5 survive strict scrutiny.

Because both districts "sort[ed]" voters based on race, Petitioners must show they are "narrowly tailored" to serve a "compelling interest." *Cooper v. Harris*, 581 U.S. 285, 292 (2017) (cleaned up).

Petitioners have not.[8]

Petitioners identify just one compelling interest: "Compliance with the non-diminishment provision." Init.Br.65. They say complying with that state law is *itself* "a compelling state interest" because the U.S. Supreme Court has "assumed that compliance with the [similarly worded] VRA" is a compelling state interest. *Id.* For two reasons, that is wrong.

1. The U.S. Supreme Court has "assumed"—in *rejecting* redistricting plans as racial gerrymanders, *Cooper*, 581 U.S. at 292—that compliance with the VRA could be a compelling state interest justifying race-predominant redistricting. *Abbott*, 585 U.S. at 587. But it has never *accepted* a race-predominant redistricting plan on those grounds. And it has never assumed, let alone suggested, that a State has a compelling interest in complying with a *state version* of the

[8] Below, Petitioners and the trial court asserted that Petitioners need not satisfy strict scrutiny because they are not state actors. R.12509–10; App.R.507–08. Petitioners have not revived that argument, and it is wrong—"the burden falls on [proponent of the allegedly unconstitutional action] to demonstrate that" it "furthers a compelling governmental interest through the least intrusive means." *D.M.T. v. T.M.H.*, 129 So. 3d 320, 340 (Fla. 2013); *see Miller*, 515 U.S. at 920 (same for redistricting cases).

VRA. Such an assumption would make no sense.

A straightforward premise underlies the notion that complying with the VRA may be a compelling interest in an equal-protection case. The VRA was passed under "Congress['s]" power to "enforce" the Reconstruction Amendments. U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. Because the VRA is a "presum[ptively] constitutional" application of those amendments, *Vera*, 517 U.S. at 990–92 (O'Connor, J., concurring), courts "defer[]" to Congress's judgment that complying with the VRA will not violate them, *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *LULAC v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring and dissenting in part). Courts have thus assumed that even racially motivated districts survive strict scrutiny when the State has "good reasons" to believe the VRA demanded them. *See Cooper*, 581 U.S. at 293.

That logic does not transfer to state redistricting laws passed under state police powers. State laws are not "presum[ptively] constitutional" applications of the Reconstruction Amendments. *See Vera*, 517 U.S. at 990–92 (O'Connor, J., concurring). Those amendments instead *restrain* state efforts 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]."); *Trump v. Anderson*, 601 U.S. 100, 112 (2024) (similar).

Because States lack that distinctive grant of authority to enforce the Reconstruction Amendments, the notion that complying with the FDA is itself a compelling interest boils down to the circular claim that compliance with a state law justifies racial discrimination based on that law. *See Common Cause*, 2024 WL 1308119, at *52 (Winsor, J., concurring in part and in judgment) (rejecting that argument).

2. Petitioners say the non-diminishment clause mirrors Section 5 of the VRA and is justified by a similar underlying record of voting discrimination. Init.Br.66–69. But any similarities between the laws are irrelevant—again, the Court's compelling-interest "assumption" derives from Congress's power to enforce the Reconstruction Amendments, not the VRA's statutory features or its underlying evidentiary record. *Supra* 34–36. Regardless, the FDA is critically different in both respects.

For starters, the FDA lacks many features Section 5 employed

to focus its race-based remedies and mitigate tension with the federal Equal Protection Clause. Section 5 used a rigorous coverage formula to target its "strong medicine" at jurisdictions with histories of "pervasive" voting discrimination. *Shelby Cnty.*, 570 U.S. at 535; *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). It let those jurisdictions "bail out" of coverage by meeting certain criteria. *Shelby Cnty.*, 570 U.S. at 537; *see* 52 U.S.C. § 10303. And Section 5 was "intended to be temporary." *Shelby Cnty.*, 570 U.S. at 546. It continued only if renewed by Congress, *see id.* at 547, and could last only so long as the country's "current needs" justified the law's "current burdens," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

The FDA does none of that. Its racial directives apply "statewide"—well beyond the five Florida counties previously covered by Section 5. *Apportionment I*, 83 So. 3d at 624. It offers no way to bail out of coverage. And it does not "temporar[ily]" impose its racially driven remedies, *Shelby Cnty.*, 570 U.S. at 546; it "extend[s] [them] indefinitely into the future," subject only to future constitutional amendment. *See Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring);

see also SFFA, 600 U.S. at 225 (striking down affirmative-action programs that were "not set to expire any time soon—nor, indeed, any time at all").

Nor is the non-diminishment clause buttressed by anything approaching the voluminous record of then-recent voting discrimination that necessitated the VRA. Enacted in 1965, the VRA's "unusual remedies" were justified by the "'exceptional' and 'unique' conditions" of the Jim Crow era. *Shelby Cnty.*, 570 U.S. at 545, 555. To justify its burdens, Congress marshalled "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); *see also Katzenbach*, 383 U.S. at 330 (detailing the extensive evidentiary record).

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. Just so in Florida, which, by 2010,

was a much different State than it had been decades before. *E.g.*, *Johnson v. Mortham*, 926 F. Supp. 1460, 1481 (N.D. Fla. 1996) (no evidence in Florida of "any current voting practice or procedure which denies or impairs the right to vote of African-Americans"); *see also League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 923 (11th Cir. 2023) ("Florida's more recent history does not support a finding of discriminatory intent.").

Petitioners offer "no evidence suggesting that the FDA's sponsors undergirded the 2010 initiative process with up-to-date facts comparable to Congress's work," nor do they provide that evidence themselves. A.39 (Osterhaus, C.J., concurring). They instead cite cases discussing Florida's history of voting discrimination. Init.Br.66–68. But the most recent case they mention 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. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989); *see also City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality op.); *League of Women Voters*, 66 F.4th at 923. And again, Petitioners ignore that

"Florida [wa]s not a [statewide] covered jurisdiction" even when Section 5 was active. *Apportionment I*, 83 So. 3d at 624.

C. Petitioners' remaining arguments are unpersuasive.

Petitioners' other defenses miss the mark.

1. Petitioners call the Secretary's equal-protection arguments "affirmative defense[s]," Init.Br.50–51, and say the Secretary has not proven them both because there is "no [specific] remedial district yet before the court" and because the Secretary cannot hypothesize that "*any* district" compliant with non-diminishment would also violate the Equal Protection Clause, Init.Br.59, 63–64. That argument fails three times over.

i. The Secretary's challenge to Benchmark CD-5 is not an affirmative defense. To prove diminishment, Petitioners must identify a valid benchmark district. *See Apportionment I*, 83 So. 3d at 619, 624–25; *Apportionment VII*, 172 So. 3d at 405–06; *see also Riley*, 553 U.S. at 421. Because a racial gerrymander cannot serve as the diminishment benchmark, *supra* 20, Benchmark CD-5's constitutionality is part of Petitioners' case-in-chief.

ii. So too for the Secretary's other equal-protection argument.

Again, Petitioners bear the burden to prove the Enacted Plan violates the FDA. *See Apportionment I*, 83 So. 3d at 619 ("challengers" must establish FDA violations). And as the Legislature explained below, App.R.270–76, when a State asserts that complying with a challenger's redistricting theory would demand violating other constitutional requirements (like the Equal Protection Clause), the *challengers* must offer an alternative district that complies with both their legal theory and the Constitution. The State need not prove the negative that "*any* district," Init.Br.64—of which there may be trillions of permutations, *see Allen*, 599 U.S. at 36—would not satisfy both Petitioners' legal demands and comply with other legal principles. *See Abrams*, 521 U.S. at 78–79, 96 (requiring challengers to "demonstrate[] it was possible to create a second majority-black district within constitutional bounds," and holding they failed because their proffered alternative maps were racial gerrymanders).[9]

Petitioners also bore the burden to identify a workable

[9] The trial court held the State had the burden because the State listed the constitutional issue as among its "affirmative defense[s]." R.12492. The law, not the parties' positions, determines the burden of proof. And the State listed the issue as an affirmative defense merely in an abundance of caution and to ensure preservation.

alternative map because the Equal Protection Clause is critical to their requested relief. A court may not order unconstitutional relief. *E.g.*, *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 406 (2022) (reversing court's redistricting remedy for failure to clear strict scrutiny); *see also Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 544–45 (2015). 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. *Nipper v. Smith*, 39 F.3d 1494, 1530–31 (11th Cir. 1994) (en banc). Petitioners therefore had to show the trial court could order the State to draw a remedial map that complies with both non-diminishment and the U.S. Constitution. *See Allen*, 599 U.S. at 33 (plurality op.). They failed.

iii. Lastly, even if the Secretary bore the burden to prove he could not comply with both Petitioners' non-diminishment theory and the Equal Protection Clause, he met it. That burden would not be to prove the impossible negative Petitioners demand, but would be the same burden the State faces when it seeks to prove that a race-based map was necessary to avoid violating the federal VRA: a "strong basis in evidence," that drawing the map was necessary to comply

with applicable redistricting law. *Bethune-Hill*, 580 U.S. at 193. And if Petitioners are right that Benchmark CD-5 is a valid benchmark, *but see supra* 20–40; *infra* 48–75, there is ample evidence that an electoral plan can avoid retrogression only by including a Benchmark CD-5 variant.

The non-diminishment clause allows for only "a *slight* change in percentage of the minority group's population" in the district, one that has no "cognizable effect on a minority group's ability to elect its preferred candidate." *Apportionment I*, 83 So. 3d at 625 (emphasis added). That means a new map cannot stray far from Benchmark CD-5's BVAP (46.2%), R.8313; black voter turnout rates in the Democratic primary (66.89%), R.8317; and political performance for black voters' candidate of choice in the general election (14 out of 14 victories in statewide elections), 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 Benchmark CD-5 variant. Roughly 89% of the district's population, R.8034, and most of North Florida's BVAP is concentrated in Gadsden, Leon, and Duval Counties, R.8309–10. It is therefore

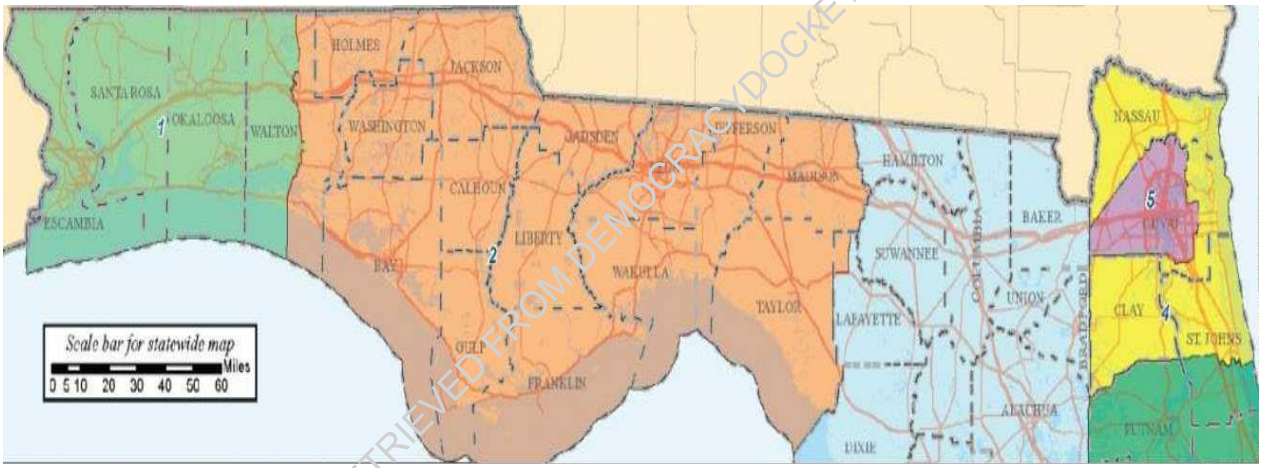
impossible, as the Enacted Plan's author J. Alex Kelly put it, to "check" the "box[]" of non-diminishment without drawing a Benchmark CD-5 variant. *See* R.11394; *see also* R.354, 9488–89, 10856–57, 11500 (2022 legislators arguing the non-diminishment clause required Benchmark CD-5).

Nor has anyone identified a substantially different version of CD-5 that hits the racial target Petitioners say the non-diminishment clause requires, despite years of heated redistricting litigation in which North Florida was a "focal point." *Apportionment VII*, 172 So. 3d at 402. The lack of proposed alternatives prompted this Court to draw Benchmark CD-5 in the first place. *See id.* at 402–06. And Petitioners have consistently argued that a Benchmark CD-5 variant is the "only alternative option" to "compl[y] with the constitutional non-diminishment standard." R.343; *see also* R.1127, 1134–37 (pressing for Benchmark CD-5 as a remedy at the temporary-injunction phase); R.3500, 3586 (summary judgment); R.8028 (pre-trial stipulation).

Petitioners now say, for the first time on appeal, that *Plan 8019's CD-5* would also comply with both non-diminishment and the

Equal Protection Clause. Init.Br.68; *but see* App.R.778–79 (noting Petitioners have conspicuously avoided arguing Plan 8019's CD-5 would satisfy non-diminishment). But that map too was an unlawful racial gerrymander, *see Common Cause*, 2024 WL 1308119, at *50 (Winsor, J., concurring in part and in judgment), which is exactly why the Governor vetoed it, R.1734–38:

Plan 8019's CD-5 (purple)



Plan 8019 turned CD-5 into a "donut-hole" and the surrounding CD-4 into a donut. Both shapes are suspiciously "bizarre." *Shaw I*, 509 U.S. at 644. The map also made CD-4's Polsby-Popper score plummet to 17%—the lowest in Plan 8019. App.R.674; *see Common Cause*, 2024 WL 1308119, at *50 (Winsor, J., concurring in part and in judgment) (Plan 8019 made CD-4 "decidedly noncompact."). And

direct evidence from the legislative debates leaves no doubt Plan 8019's CD-5 was drawn to "protect[] a black minority seat in North Florida." R.1738, 3890–91, 10960, 10981, 10996–1005.

Plan 8019's CD-5 also did not avoid diminishing black voting strength, as many legislators recognized. *See* R.11070–71, 11081, 11086; *see also Common Cause*, 2024 WL 1308119, at *49–50 (Winsor, J., concurring in part and in judgment) (recounting the Legislature's concerns with Plan 8019). It dropped CD-5's BVAP by 11%. *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 projected to lose nearly a third of elections in that district, R.10999, 12390, while black-preferred candidates were never projected to lose in Benchmark CD-5, R.8318–19. That is no doubt a "cognizable effect on a minority group's ability to elect its preferred candidate." *Apportionment I*, 83 So. 3d at 625.

2. Petitioners say the Secretary lacks public-official standing and ordinary standing to defend the Enacted Plan as necessary to comply with equal protection. Init.Br.51–55. Not even the dissenting judges below accepted those theories. A.74. Nor should this Court.

i. Florida's public-official-standing 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). That doctrine, however, does not bar state officials from *defending* the Legislature's enacted redistricting plan. The doctrine "exists to prevent" 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). But when an official defends his performance of a duty, he furthers, rather than frustrates, the purpose of the doctrine. *See State DOT v. Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d 388, 390 (Fla. 1st DCA 2021).

That is what the Secretary is doing here. Petitioners cite no precedent applying the public-official-standing doctrine to bar an official's attempt to do his job. Init.Br.52–54 (collecting cases involving attempts to *obviate* statutory duties). Nor could they. *See Apportionment I*, 83 So. 3d at 648, 650, 652–53 (allowing officials to rebut alleged FDA violations by arguing that alternative maps would violate

other FDA provisions and federal law).

ii. The Secretary also has ordinary "standing" to make arguments that, if accepted, would prevent the State from suffering the "irreparable harm" of having the Legislature's "duly enacted plans" enjoined. *Abbott*, 585 U.S. at 602 n.17. "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." *Green Emerald Homes, LLC v. 21st Mortg. Corp.*, 300 So. 3d 698, 703 (Fla. 2d DCA 2019).

* * *

Because Benchmark CD-5 and Plan 8015's CD-5 flout traditional redistricting principles for racial reasons without satisfying strict scrutiny, they violate the Equal Protection Clause. And since both districts are vital to Petitioners' non-diminishment theory, Petitioners have not shown that the Enacted Plan violates the non-diminishment clause.

II. Alternatively, Petitioners did not prove black voters in Benchmark CD-5 had the ability to elect representatives of their choice.

This Court could avoid those constitutional problems by interpreting the non-diminishment clause much like the First District did. The clause prohibits districts that "diminish the[] ability" of "racial or language minorities" "to elect representatives of their choice." Art. III, § 20(a), Fla. Const. This Court has derived a two-part test from that language: Petitioners had to (1) identify a "racial or language minorit[y]" group with the "ability to elect representatives of their choice" under a "benchmark" districting plan, and (2) show the Enacted Plan "diminish[ed]" that electoral ability. *See Apportionment I*, 83 So. 3d at 619, 624–25; *Apportionment VII*, 172 So. 3d at 405–06.

As the First District held, A.2–31 (majority op.), Petitioners failed at step one. To satisfy that element, Petitioners had to prove black voters in Benchmark CD-5 met *Gingles*'s first "precondition," *see* 478 U.S. at 49–51, nn.15–17, in that they were "geographically compact" enough to comprise an electoral "majority" in a "reasonably configured" benchmark district, *see Allen*, 599 U.S. at 18. Because Petitioners met no part of that precondition, "the trial court should

have dismissed [their] suit for lack of proof." A.31.

A. For black voters in Benchmark CD-5 to have the "ability to elect representatives of their choice," they must satisfy *Gingles* precondition one.

The FDA's text, the public discourse surrounding its adoption, and federal and state constitutional constraints all make clear that to prove black voters in Benchmark CD-5 had an "ability to elect representatives of their choice," Art. III, § 20(a), Fla. Const., Petitioners had to show they were geographically compact enough to constitute an electoral majority in a reasonably configured district.

1. Text

i. The FDA prohibits districts that deny "the equal opportunity of racial or language minorities to participate in the political process" or "diminish their ability to elect representatives of their choice." *Id.* The first clause, which protects against vote dilution, mirrors Section 2 of the VRA, and the second, which protects against diminishment, mirrors Section 5. *See Apportionment I*, 83 So. 3d at 619–20. Both clauses have a "rich legal tradition" in federal VRA case law—a tradition voters presumably drew upon in ratifying the FDA. *See Planned Parenthood*, 2024 WL 1363525, at *8; *Jackson*, 288 So. 3d at 1183;

Tomlinson v. State, 369 So. 3d 1142, 1147 n.6 (Fla. 2023). VRA precedents therefore "guide[]" this Court's "interpretation" of the FDA, *Apportionment I*, 83 So. 3d at 620, and underscore that Florida voters adopted the VRA's majority-minority and reasonable-configuration requirements as elements for both vote-dilution and diminishment claims.

That conclusion follows from how VRA redistricting cases define the degree of voting power a minority group needs to prove a vote-dilution claim under Section 2—also known as their "opportunity" or "ability to elect representatives of their choice." *See Gingles*, 478 U.S. at 50–51, 71. The U.S. Supreme Court first defined those synonyms[10]—the same terms used in the FDA—when outlining a Section 2 vote-dilution claim. *See id.* To prove dilution, minority voters must first show they have a hypothetical "ability to elect representatives of their choice," *id.* at 50, in that they have the "voting strength" necessary to ensure their preferred candidates are elected in a reasonable, conjectural electoral district, *see id.* at 90–91 (O'Connor, J.,

[10] *See Gingles*, 478 U.S. at 35, 42, 46–52, 55–56, 77 & nn.12, 15 (using terms interchangeably); *LULAC*, 548 U.S. at 446 (same).

concurring in judgment); *see also id.* at 50 n.17 (majority op.). The ability-to-elect standard, in short, denotes the *degree* of minority "voting power" that triggers electoral protections. *See* A.28–29; *Gingles*, 478 U.S. at 50–51.

A minority group shows it has amassed the requisite voting power by satisfying a "precondition[]." *Gingles*, 478 U.S. at 50. The "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Allen*, 599 U.S. at 18; *see* A.25–27.

Those sub-elements comprise "*Gingles* precondition one." A.27. Each serves a different aim. The majority-minority element reflects that the VRA protects only groups with enough voting strength to elect a representative of their "own choice," rather than "the choice [of] a [racial] coalition." *Bartlett*, 556 U.S. at 15 (plurality op.). Once the group passes "[t]he 50% threshold," it attains the necessary electoral strength, because the group has effective "control over the election." *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 240 (2007); *see also Gingles*, 478 U.S. at 50 n.17. The reasonable-configuration requirement, in turn,

ensures the minority group can acquire that voting strength "reasonabl[y]," *Holder v. Hall*, 512 U.S. 874, 887–88 (1994) (O'Connor, J., concurring in part), and without offending the Equal Protection Clause, *infra* 62–65; *see also Miller*, 515 U.S. at 917, 919 (VRA compliance does not compel unconstitutional gerrymandering). Put differently, the group's ability or opportunity to elect must reflect an honest redistricting effort that complies with traditional districting principles, not a gerrymander.[11]

ii. Tracking that legal tradition, the non-diminishment clause's text confines its remedies to minority groups that meet *Gingles* precondition one. The clause protects from diminishment "racial or language minorities" that have the "ability to elect representatives of their choice." Art. III, § 20(a), Fla. Const. That is precisely the language from which *Gingles* derived its first precondition. *See* 478 U.S. at 50. By "repe[ating] the same language" in the FDA, voters also

[11] *Gingles* identified other preconditions a voter must meet to prove vote dilution. *See* 478 U.S. at 50–51. But precondition one—alongside the requirement that the minority group be "politically cohesive," *see id.* at 51—goes toward proving the group has the ability to elect. *See Growe v. Emison*, 507 U.S. 25, 40 (1993); *Allen*, 599 U.S. at 18–19; *Gingles*, 478 U.S. at 90–94 (O'Connor, J., concurring in judgment).

"incorporate[d] [*Gingles*'s] judicial interpretation[]" of that language. *See Jackson*, 288 So. 3d at 1183; *Tomlinson*, 369 So. 3d at 1147 n.6; Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 322–23 (2012). "The protection afforded, then, by both the VRA and the FDA, through their references to the ability to elect the candidate of their choice, is of the voting power of a politically cohesive, geographically insular minority group." A.28–29 (quotations omitted). That group is identified by meeting *Gingles*'s first precondition.

Other text confirms the point. The FDA explains that the *same* minority groups are entitled to protection under both the non-dilution *and* non-diminishment provisions:

> 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. (emphasis and brackets added). By using the pronoun "their," the non-diminishment clause highlights that it protects the same "racial or language minorities" protected by the preceding non-dilution clause. And we know which "racial or language minorities" the non-dilution clause safeguards: those that

satisfy *Gingles*'s first precondition. *See* 478 U.S. at 50; *see also Apportionment I*, 83 So. 3d at 623–24.

iii. Petitioners suggest that under federal law *Gingles* precondition one is a creature of Section 2 and does not apply to Section 5. Init.Br.34–37. But this case turns on "an independent provision of the state constitution," *Apportionment I*, 83 So. 3d at 625, and the points above and below suggest the FDA's non-diminishment clause incorporated precondition one, no matter the state of federal law. *Supra* 50–55; *infra* 64. But Petitioners are also wrong about federal law. When the FDA was enacted, precondition one was *also* necessary to trigger protection under Section 5 of the VRA, underlining that the FDA's non-diminishment clause incorporated the same standard.

a. Petitioners fail to grapple with the 2006 amendments to the VRA. Those amendments changed Section 5 to preclude laws that "diminish[] the ability of [minorities] to elect their preferred candidates of choice." 52 U.S.C. § 10304(b). That comes straight from *Gingles*, 478 U.S. at 35, 50 n.17, which by then was "cemented in the Supreme Court's precedents," 152 Cong. Rec. S7949–05, S7980 (statement of Sen. McConnell). By transplanting Section 2's "ability

to elect" standard into a different section of the VRA, Congress incorporated "the body of law" construing those words. Scalia & Garner, *supra* 322–23.

b. The Supreme Court had not yet construed the 2006 amendments when *Shelby County* rendered Section 5 inoperative. But the Court has said "the revised language of § 5 may raise some interpretive questions" about whether Section 5 applies only to voters that satisfy *Gingles* precondition one. *See Ala. Legis. Black Caucus v. Alabama (ALBC)*, 575 U.S. 254, 277 (2015). And the historical context surrounding the 2006 amendments suggests exactly that: Adding *Gingles* precondition one to Section 5 was part of the "political compromise" Congress made to overturn *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* Persily, *supra* 187, 217.

In *Georgia*, the Supreme Court issued a holding that many thought would place "safe minority-controlled election districts" in jeopardy. *See* H.R. Rep. No. 109–478, at 68–69 & n.183 (2006). *Georgia* held that dismantling a minority-performing district did not violate Section 5 if the State awarded that minority group electoral "influence" elsewhere. 539 U.S. at 482. The 2006 amendments

"rejected" that holding. *ALBC*, 575 U.S. at 276. They clarified that Section 5 would no longer permit "tradeoffs between influence districts and ability-to-elect districts," Persily, *supra* at 235, but would steadfastly prohibit "diminishing" a minority group's "ability [to] elect," 52 U.S.C. § 10304(b), (d).

Yet by making Section 5 turn on voting power, many legislators understood the "ability to elect" language not only to overturn *Georgia*, but also to limit Section 5 to districts that satisfy *Gingles* precondition one. *E.g.*, S. Rep. No. 109-295, at 15–24 (2006); 152 Cong. Rec. at S7978–80; Persily, *supra* 186–89, 235–43 (chronicling congressional record).[12]

Take the Senate Report. Alluding to *Gingles*, it explained that preserving compact majority-minority districts "ha[s] long been the historical focus of the Voting Rights Act." S. Rep. No. 109-295, at 21. "[T]he goal of the amendment," *id.* at 19, was to "limit section 5 to protecting those naturally occurring, compact majority-minority

[12] The State cites the congressional record not to establish legislative intent, but to inform the original public meaning of the 2006 amendments. *See Planned Parenthood*, 2024 WL 1363525, at *10 & n.17.

districts with which section 5 was originally concerned," *id.* at 21. The "ability to elect" language, the report found, would constrain Section 5 to only districts "that would be created if legitimate, neutral principles of drawing district boundaries" were "combined with the existence of a large and compact minority population to draw a district in which racial minorities form a majority." *Id.*; *see also id.* at 19 (similar).

Many echoed that view. Senator Kyl said the "ability to elect" language "reaffirm[ed] the Voting Rights Act's historical focus on protecting naturally occurring majority-minority districts," *id.* at 24, and would "bar redistricters from breaking up a compact majority-minority district," 152 Cong. Rec. at S7978. Senator Hatch explained that the new "language does not protect just any district with a representative who gets elected with some minority votes," but "naturally occurring majority-minority districts." *Id.* at S7979. Senators McConnell and Cornyn stressed the same points. *See id.* at S7980.

Some legislators disputed that the "ability to elect" language integrated *Gingles*'s majority-minority requirement. *See* H.R. Rep. 109-478, at 71; S. Rep. No. 109-295, at 54–55; 152 Cong. Rec. at S8004

(statement of Sen. Leahy). But they gave no textual support for that position, whereas Senator McConnell noted that the amendments' text codified *Gingles*'s "ability to elect" standard and thus the majority-minority rule. 152 Cong. Rec. at S7980. And regardless, no one disputed that the 2006 amendments incorporated the geographic-compactness and reasonable-configuration requirements. In fact, the House Report acknowledged that Section 5's goals "are achieved most often when a *geographically compact minority group* is able to control the outcome of an election." H.R. Rep. 109-478, at 70 (emphasis added). And the Department of Justice later confirmed that compactness and configuration are critical to the Section 5 benchmark analysis. *See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice*, 76 Fed. Reg. 7470-01, 7472 (2011).

In sum, when the FDA was adopted in 2010, the 2006 amendments to Section 5 made clear that it protected minority voters from redistricting efforts only if they satisfied precondition one. So too of Florida's non-diminishment analogue, *see* Scalia & Garner, *supra* 323; *Tomlinson*, 369 So. 3d at 1147 n.6, though this Court can hold that Florida's unique non-diminishment clause adopted precondition

one regardless of federal law, *see Apportionment I*, 83 So. 3d at 625.

2. Public discourse

Construing the non-diminishment clause to cover only minorities that meet precondition one also tracks how the FDA was advertised to "the public." *Planned Parenthood*, 2024 WL 1363525, at *12–13.

Consider the FDA's ballot summary, which is strong evidence of how the FDA "[w]as understood by its ratifiers at the time of its adoption." *Cf. Planned Parenthood*, 2024 WL 1363525, at *6; *see also* A.48 (Long, J., concurring). The summary said the FDA would prohibit districts that "deny racial or language minorities the equal *opportunity* to participate in the political process and *elect representatives of their choice*." A.48 (emphasis added). By using "opportunity" to represent the level of voting strength protected by *both* the non-dilution and non-diminishment standards, the ballot summary underscored that "opportunity to elect" and "ability to elect" are synonyms. And because voters show a protected "*opportunity* to elect" by clearing *Gingles* precondition one, 478 U.S. at 50–51 & n.17, they must do the same to establish a protected "*ability* to elect" under the FDA.

Interpreting "ability to elect" to incorporate *Gingles* precondition one also remediates the problem the FDA was billed to address. Newspaper coverage about the FDA explained that before 2010, "districts in Florida look[ed] like a crazy quilt of lines," "snak[ing] through the state for hundreds of miles" to capture communities "that have nothing in common."[13] But according to the FDA's chief sponsor, the FDA would fix all that.[14] "The whole point [of the amendment was] to draw districts that make sense geographically."[15] It would eliminate "oddly shaped congressional districts—known as 'bugsplats' for their irregular shape"[16]—and "force [map drawers] to be more considerate of geography than demographics."[17]

Given that the FDA was understood to ensure the State would

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[13] Bob Graham & Bob Milligan, *Take the power to draw new political districts away from the pols*, S. Fla. Sun-Sentinel (Feb. 28, 2010), https://tinyurl.com/y6ej36ya.

[14] Steve Bousquet, *African-American legislators split on changing redistricting method*, St. Petersburg Times (Mar. 13, 2010), https://tinyurl.com/2w6xj885.

[15] *Id.*

[16] Keith Johnson, *Redistricting Creates Florida Alliances*, Wall St. J. (Oct. 2, 2010), https://tinyurl.com/4at4uhry.

[17] *Editorial: Assessing amendments*, NewsHerald (Oct. 24, 2010), https://tinyurl.com/3my3ntf9.

draw "geographically compact districts,"[18] it is unlikely that voters thought the FDA would permit "group[ing] together minority voices at the expense of geographic logic."[19] Because *Gingles* precondition one protects against that precise outcome, *see Allen*, 599 U.S. at 43–44 & n.2 (Kavanaugh, J., concurring in part), focusing the FDA's racial standards toward communities that satisfy precondition one best realizes the will of the voters.

3. Constitutional constraints

Reading the FDA to incorporate *Gingles* precondition one avoids serious "constitutional quandaries." *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004).

From its inception, Section 5's non-retrogression principle has "pushe[d] the outer boundaries" of Congress's power to enforce the Reconstruction Amendments. *Nw. Austin*, 557 U.S. at 224 (Thomas, J., concurring and dissenting in part). It had sweeping geographic

[18] *Democrats Divided on Redistricting*, Sunshine State News (Apr. 23, 2010), https://tinyurl.com/ymhupnzh.

[19] Cooper Levey-Baker, *According to docs, blocking Amendment 6 one of Brown, Diaz-Balart's official duties*, The Fla. Indep. (Dec. 22, 2010), https://tinyurl.com/ysa8mmz7.

reach, covering most of the southern States. *Shelby Cnty.*, 570 U.S. at 537. And it was "fundamental[ly] flaw[ed]" because it forced States to make race a "predominant factor in drawing [district] lines," contrary to the Equal Protection Clause. *See Georgia*, 539 U.S. at 491–92 (Kennedy, J., concurring); *see also Miller*, 515 U.S. at 926–27; *Veasey v. Abbott*, 830 F.3d 216, 317 (5th Cir. 2016) (en banc) (Jones, J., concurring and dissenting in part).

Those problems left many concerned during the 2006 reauthorization process that the Court would invalidate Section 5 unless Congress focused its reach. *See Shelby Cnty.*, 570 U.S. at 535, 542 (Section 5 must be reasonably tailored "to address entrenched racial discrimination in voting."). Senator Hatch emphasized that if Section 5 "forc[ed] the preservation of a noncompact majority-minority district," it "would run afoul of the Supreme Court's ruling against racial gerrymanders." 152 Cong. Rec. at S7979. And Senator Cornyn warned that "[l]ocking into place so-called coalition or influence districts would wreak havoc with the redistricting process and would stretch [Section 5] beyond the scope of the Congress's authority" to enforce the Reconstruction Amendments. *Id.* at S7980.

Congress thus invoked the VRA's time-tested "ability to elect" language to incorporate a "workable" limiting principle: *Gingles* precondition one. *See Bartlett*, 556 U.S. at 17 (plurality op.). As the Court recognized in *Allen*, *see* 599 U.S. at 29–30, *Gingles* limits "the number of mandatory districts drawn with race as the predominant factor," *Bartlett*, 556 U.S. at 21–22 (plurality op.); *see also* Persily, *supra* 241. The reasonable-configuration requirement ensures Section 5 does not force States to "group together geographically dispersed minority voters into unusually shaped districts"—the classic sign of a racial gerrymander. *See Allen*, 599 U.S. at 43–44 & n.2 (Kavanaugh, J., concurring in part); *see also id.* at 28–30 (majority op.); A.27–28. And the majority-minority requirement obviates the need "to scrutinize" whether a minority group could elect its preferred candidate with help from different races—a searching, racially charged inquiry that would "unnecessarily infuse race into virtually every redistricting." *Bartlett*, 556 U.S. at 22 (plurality op.); *LULAC*, 548 U.S. at 405.

Limiting the non-retrogression principle to groups that meet precondition one is even more important for the FDA. The FDA has only "*increased* the already significant burdens" that shrouded

Section 5 in constitutional doubt. *See Shelby Cnty.*, 570 U.S. at 558 (Thomas, J., concurring); *supra* 36–38 (describing the differences between Section 5 and the FDA). The grotesque gerrymander Petitioners claim the FDA requires here only proves the point. There are thus even "grave[r] doubts" about Florida's non-retrogression standard, *see Bolles v. Dade Cnty. Croppers*, 154 So. 848, 849 (Fla. 1934), making it even likelier that voters adopted *Gingles*'s limiting principle.

Petitioners respond that the "functional analysis" courts use to discern whether a district "performs" for minority voters sufficiently guards against racial gerrymandering. Init.Br.38–40. Not even close. Benchmark CD-5, for example, "perform[s]" for black voters under a functional analysis. *See Apportionment VIII*, 179 So. 3d at 286 n.11; R.8035. But it is still a blatant racial gerrymander. *Supra* 21–33. The population and configuration requirements in precondition one, by contrast, ensure the State need not preserve such a district to comply with non-diminishment.

4. Counterarguments

Petitioners and amici try mightily to resist the FDA's text, historical context, and constitutional backdrop, but their points are

unpersuasive.

Petitioners' chief argument is that precondition one is inapplicable in diminishment cases because it merely proves vote dilution. Init.Br.31, 35. Precondition one, they say, establishes dilution by showing "that minority voters possess the *potential* to elect their preferred candidates in a *hypothetical* plan," creating an inference that dilution has occurred in the current plan. Init.Br.31. Diminishment claims simply involve whether the State has hampered "the *actual* ability to elect minority-preferred candidates in an *existing* plan," *id.*, so the hypothetical district born from precondition one is unnecessary.

Petitioners misunderstand how precondition one fits within the "symmetr[ical]" structure of Sections 2 and 5. *See* Persily, *supra* 241. Both sections prohibit laws that "deny[] or abridg[e] the right to vote on account of race." 52 U.S.C. § 10304(a); *id.* § 10301(a). While each section guards against a different kind of "denial or abridgement"—Section 2 against dilution; Section 5 against diminishment, Init.Br.35—both prohibitions serve the same end: preserving a minority group's "right to vote," §§ 10301(a), 10304(a), or in

redistricting cases, a minority group's "voting power," A.25; *see Apportionment I*, 83 So. 3d at 620 (The FDA "safeguard[s] the voting strength of minority groups against both impermissible dilution and retrogression."). And not just any amount of voting power—both sections protect only groups with the "opportunity" or "ability" to "elect representatives of their choice." 52 U.S.C. § 10304(b); *id.* § 10301(b).

Precondition one simply establishes *when* a minority group has accumulated enough voting power to have that electoral ability. *See Gingles*, 478 U.S. at 85 (O'Connor, J., concurring in judgment); *supra* 51–53. True, in a vote-dilution claim that voting power is hypothetical, while in a diminishment claim it is realized. But the *degree* of voting power necessary to have the "ability to elect" remains the same for both—it is the degree established by meeting *Gingles*'s first precondition. Those parameters ensure the FDA, like the VRA, protects only minority voting strength obtainable through a fair and constitutional process following ordinary districting principles—not voting power obtained through a gerrymander. A.27–29.

Petitioners next say the non-diminishment clause cannot incorporate the majority-minority rule because Section 5 did "not require

a covered jurisdiction to maintain a particular numerical minority percentage" in a district. Init.Br.36 (citing *ALBC*, 575 U.S. at 275). But *ALBC* held only that Section 5 does not freeze in place a benchmark's minority-voter-population percentage. *See* 575 U.S. at 276. It said nothing of the baseline minority population needed to trigger Section 5's protection—on the contrary, it saw that as an open question. *See id.* at 277.

The Constitutional Accountability Center (CAC) claims the Supreme Court "reject[s] attempts to conflate Section 5's benchmark with Section 2's requirements." CAC.Br.17 (citing *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 480–81 (1997)). *Bossier*—decided many years before the 2006 amendments to the VRA—held that a districting plan does not necessarily diminish when it causes vote dilution. 520 U.S. at 477. That says nothing of the electoral power needed to trigger both non-dilution and non-diminishment protections.

Finally, the CAC claims "Section 5's language" was not modeled "on Section 2's vote dilution jurisprudence" because Section 5 "applied to a range of electoral practices beyond redistricting." CAC.Br.20. But Section 2 also applies beyond redistricting. *See*

Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021). In those cases, *Gingles*'s preconditions do not apply. *See id.* (no reference to *Gingles* preconditions in Section 2 challenge to ballot procedures). So too for Section 5 and the FDA—*Gingles* applies in redistricting cases.

5. Precedent

Petitioners say this Court's precedents preclude interpreting the non-diminishment clause to cover only geographically compact minority communities joined in a reasonably configured district. Init.Br.32–33. That is wrong. The Court has not yet grappled with that issue (or considered whether the U.S. Constitution would permit a contrary construction). A.20–21. Those issues "merely lurk[ed] in the record" during the 2010 redistricting cycle, but they were not "considered," let alone "so decided as to constitute [a] precedent[]." *Jackson*, 288 So. 3d at 1183.

If anything, the Court's precedent cuts the other way. It has long suggested the "*Gingles* preconditions are relevant not only to a Section 2 vote dilution analysis, but also to a Section 5 diminishment analysis." *Apportionment VIII*, 179 So. 3d at 286 n.11. And as Petitioners conceded below, this Court's precedent suggests the FDA's

"minority voting protections" are not "trigger[ed]" when the relevant district is "simply not compact." App.R.391 (quoting *Apportionment VII*, 172 So. 3d at 436).

The only part of precondition one this Court has rejected for non-diminishment claims is the majority-minority requirement. *See Apportionment I*, 83 So. 3d at 625. Of course, this Court need not hold the FDA incorporates the majority-minority rule to affirm; it can hold, as the First District did, that Petitioners failed to prove black voters were geographically compact enough to fit within a reasonably configured district. *See* A.30–31. But regardless, this Court "clearly err[ed]" in rejecting the majority-minority rule for all the reasons stated above. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020); *supra* 49–69. Petitioners must therefore identify "a valid reason *why not* to recede from that precedent." *Poole*, 297 So. 3d at 507. Their sole defense is that legislators apparently relied on the lack of a majority-minority requirement to draw the 2022 electoral maps, and candidates relied on those maps to run in elections. Init.Br.41–43.

That argument fails. "[R]eliance interests" are "at their acme in cases involving property and contract rights," *Poole*, 297 So. 3d at

507, and this case involves neither. Petitioners also have identified no district that would have been drawn differently had the majority-minority rule been in place. And other factors overwhelm any reliance interests. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). For one, the "quality of [*Apportionment I*'s] reasoning" was "exceptionally weak." *Id.* at 269–70. The Court "did not spend much time" on whether the non-diminishment clause incorporates the majority-minority rule. *See* A.21. Its holding came in a stray paragraph that did not contend with any of the above arguments. *See Apportionment I*, 83 So. 3d at 625. In addition, without the majority-minority rule, the non-diminishment provision proves "unworkable." *See Dobbs*, 597 U.S. at 286. If the FDA protects "crossover districts"—districts in which a minority can combine with another race to elect a candidate—it would "place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Bartlett*, 556 U.S. at 17 (plurality op.). The majority-minority rule, by contrast, "draws clear lines for courts and legislatures alike." *Id.*

* * *

Petitioners had to establish that black voters in Benchmark CD-5 met *Gingles* precondition one. They thus had to show black voters were geographically compact in that they formed an electoral majority in a reasonably configured benchmark district.

B. Petitioners failed to show black voters in Benchmark CD-5 satisfied *Gingles* precondition one.

Petitioners failed to prove that black voters in Benchmark CD-5 comprised the type of "geographically compact community" protected by the non-diminishment clause. A.31.

1. To start, Benchmark CD-5 was not a majority-minority district. R.8317 (BVAP was 46.2%). That alone defeats Petitioners' claim.

Petitioners also failed to show that Benchmark CD-5 was reasonably configured. Though "no precise rule" governs the compactness of a minority group's surrounding district, "traditional districting principles" like geographic proximity and cultural identity often drive the inquiry. *See LULAC*, 548 U.S. at 433; *see also Robinson v. Ardoin*, 37 F.4th 208, 218 (5th Cir. 2022). In *LULAC*, for instance, the Court held a district's Latino population was not "reasonably compact" when its surrounding district lumped together "disparate"

Latino communities that had "different characteristics, needs, and interests" and were spaced hundreds of miles apart. 548 U.S. at 434–35; *accord Miller*, 515 U.S. at 908, 923–27 (Section 5 did not require district connecting "black neighborhoods . . . 260 miles apart in distance and worlds apart in culture.").

So too for the black population in Benchmark CD-5. Its black voters are scattered across a 200-mile stretch that twists through eight counties and splits four of them. *Supra* 23–24. That "enormous geographical distance" undercuts Petitioners' compactness claim, *see LULAC*, 548 U.S. at 435, as do Benchmark CD-5's paltry compactness scores, *supra* 26–27. Nor does the record show that Benchmark CD-5's voters are "culturally compact." *See Robinson*, 37 F.4th at 219. As the First District recognized, Petitioners offered no evidence of a "shared history or shared socio-economic experience among the Black voters in [Benchmark CD-5]." A.10; *contra Robinson*, 37 F.4th at 219 (plaintiffs offered "extensive" evidence to show black population "share[d]" interests).

Petitioners instead rely on "cold statistical data" showing the district's black voters vote cohesively. A.10; Init.Br.49–50. But black

voters are not fungible. *See Shaw I*, 509 U.S. at 647. Nor did Petitioners establish that the district's black voters shared particularized socio-economic experience. *See LULAC*, 548 U.S. at 434–35 (groups with similar political preferences were not a community when they had different "needs[] and interests"). "[C]ombin[ing] two farflung segments of a racial group with disparate interests" but similar political preferences is not what "the first *Gingles* condition contemplates." *Id.* at 433. If it were, "a district would satisfy [the FDA] no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes." *Id.* at 432. That premise has been rejected. *See id.* at 435.

Petitioners say this Court "previously held" the black community in Benchmark CD-5 was "reasonably geographically compact." Init.Br.49. It said the opposite: Benchmark CD-5 was *not* compact, the Court held, but was at least more compact than the meandering north-south version of the district. *See Apportionment VII*, 172 So. 3d at 406. Also, the compactness of a population is measured at the time of the challenged redistricting. *See* App.R.387–89. So this Court's statements about Benchmark CD-5's demographics in 2015 have no

bearing on those demographics in 2022.[20]

2. Petitioners say the Court should ignore that Benchmark CD-5's black voters failed precondition one because the parties supposedly stipulated that they had the "ability to elect." Init.Br.44–47. Petitioners misconstrue the stipulation. The parties agreed only that black voters, with crossover help, statistically could elect a preferred candidate in North Florida. R.8035–36. But the parties did not agree on whether black voters had to meet precondition one to have a constitutionally protected ability to elect, or on whether they had done so. That issue was reserved for trial. R.8027 (reserving "[w]hether Plaintiffs must satisfy the preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for the non-diminishment provision to apply").

[20] Recognizing the dearth of record evidence, several North Florida politicians go well beyond it to argue that black residents in Benchmark CD-5 have shared interests and history. *See* Politicians' Br.4–25. But those points cannot overcome "the enormous geographical distance separating the [black] communities." *See LULAC*, 548 U.S. at 435; *Miller*, 515 U.S. at 908, 923–27. And this Court does not consider historical facts outside of the record. *Tyson v. Aikman*, 31 So. 2d 272, 273 (Fla. 1947); *Altchiler v. Dep't of Pro. Regul.*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983).

CONCLUSION

Petitioners 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 anyway. The Court should approve the decision below.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to counsel for all parties of record on this **29th** day of April 2024.

/s/ Henry C. Whitaker
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CERTIFICATE OF COMPLIANCE

I certify that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman font and contains 12,999 words, excluding sections exempted from the word count under Florida Rule of Appellate Procedure 9.210(a)(2)(E).

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