Filing # 199941755 E-Filed 06/05/2024 07:59:59 PM

IN THE SUPREME COURT OF FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA, EQUAL GROUND, FLORIDA RISING TOGETHER, et al.,

Petitioners,

v.

CORD BYRD, in his official capacity as Florida Secretary of State, et al.,

Respondents.

Case No.: SC23-1671
L.T. No.: 1D23-2252
2022-ca-000666

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PETITIONERS' REPLY BRIEF

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INTRODUCTION

It is beyond dispute that Florida's Enacted Plan eliminates a North Florida district in which Black voters were previously able to elect their candidate of choice. Under this Court's binding precedent, that alone is sufficient to prove unlawful diminishment under Article III, Section 20(a) of the Florida Constitution.

Respondents have known this from the start. After the Governor vetoed two congressional plans that the Legislature believed complied with the non-diminishment provision, the Legislature enacted the Governor's proposed plan knowing it did not comply with the Florida Constitution or with existing precedent, on the expectation that Respondents could strongarm this Court into sanctioning their conduct. Their gambit requires reinventing this Court's non-diminishment standard, warping the racial predominance standard beyond recognition, and turning the state constitution against the Florida voters Respondents are charged with protecting. This Court should not stand for it.

This Court's job is simple. It should resolve this appeal by recognizing a textbook violation of this Court's existing diminishment

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precedent and by declining to referee what are currently hypothetical disputes about a future remedial plan.

ARGUMENT

I. The Enacted Plan violates Article III, Section 20(a) of the Florida Constitution.

Respondents do not dispute that *Apportionment I* and its progeny created binding precedent on the non-diminishment provision. Indeed, the Secretary expressly recognizes that this Court would have to overturn existing precedent to adopt his arguments. *See* Sec'y Br. at 69-70. This Court should do no such thing.

In *Apportionment VIII*, this Court held the non-diminishment standard requires the State to preserve an existing district in which (1) "the minority group votes cohesively," (2) "the minority candidate of choice is likely to prevail in the relevant contested party primary," and (3) "that candidate is likely to prevail in the general election." 179 So. 3d at 286 n.11. The Parties' Stipulation confirms that each of these elements is satisfied as to Benchmark CD-5, in which Black Floridians cohesively voted to nominate and elect their preferred candidates, and that the Enacted Plan eliminates any such district.

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R. 8026-8037.[1] That alone establishes a non-diminishment violation, *see* Pet. Br. at 47-48, and should end the inquiry. *See Troup v. Bird*, 53 So. 2d 717, 721 (Fla. 1951) (explaining, "when a case is tried upon stipulated facts[,] the stipulation is binding not only upon the parties but also upon the trial and appellate courts"). None of Respondents' arguments to evade the effect of the Stipulation have merit.

A. Benchmark CD-5 is the proper benchmark.

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Although he failed to preserve the issue for appeal, the Secretary contends that Benchmark CD-5 cannot serve as the benchmark because it was an unconstitutional racial gerrymander. *See* Sec'y Br. at 20. The Secretary is procedurally barred from raising this argument. In any event, Benchmark CD-5 is the proper benchmark as a matter of law.

1. The Secretary is barred from challenging Benchmark CD-5's constitutionality.

Appellate courts do not entertain issues on appeal that were not preserved at the trial court. *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985). "In order to be preserved for further review by a higher court,

[1] "R." refers to the trial court record. "A.R." refers to the appellate record.

an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation." *Id.*

Here, the Secretary affirmatively disclaimed any challenge to Benchmark CD-5 at the final hearing before the trial court. After the Secretary repeatedly criticized Benchmark CD-5, the Secretary's counsel and the trial court engaged in the following colloquy:

> **MR JAZIL**: As you can see, Your Honor, with surgical precision, the Benchmark District captures Black population in Duval; with surgical precision, it captures the Black population in Leon.
>
> **THE COURT**: Well, let me ask you this. Are you challenging the map that is -- was the law in the State of Florida? Are we looking back and you challenging what the Supreme Court did prior?
>
> **MR. JAZIL**: ***Your Honor, I am not.***

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R. 12127 (emphasis added). Thus, even if the Secretary had preserved this issue in the stipulation, which Petitioners contest, *see* R. 8034-8035 (stipulation referring to the "Benchmark Plan" as the "districts used for the 2016-2020 congressional elections"), the Secretary ultimately abandoned the issue in the final hearing before the trial court. The Secretary's contention that Petitioners were

required to affirmatively address an issue he had disclaimed below is thus nonsensical. *See* Sec'y Br. at 28-29.

But even if the Secretary had not waived his constitutional challenge to the Benchmark Plan in *this* litigation, the doctrine of res judicata precludes his challenge now given his failure to contest the constitutionality of the Benchmark Plan when it was litigated and adopted last cycle. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013) ("[R]es judicata . . . is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to *every other matter which might with propriety have been litigated and determined* in that action." (quotations omitted) (emphasis added)). The Secretary, House, and Senate were parties to last decade's congressional redistricting litigation, yet none of them challenged the federal constitutionality of Benchmark CD-5 when this Court adopted it. *See Apportionment VIII*, 179 So. 3d at 272-73 (noting that "none of the parties in th[e] case"—including all three Respondents here—"object[ed] to" Benchmark CD-5's adoption).

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For all of these reasons, this Court should decline to consider the Secretary's belated arguments as to the Benchmark Plan's constitutionality.

2. Benchmark CD-5 is the benchmark district as a matter of law.

The Secretary's argument that Benchmark CD-5 cannot serve as the benchmark also fails as a matter of law. "[T]he benchmark plan for purposes of measuring retrogression is the last 'legally enforceable' plan used in the jurisdiction." *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 644 (D.S.C. 2002), *opinion clarified* (Apr. 18, 2002) (citation omitted); 28 C.F.R. § 51.54(b)(1) (same standard).

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The Benchmark Plan, used in the 2016, 2018, and 2020 congressional elections, was Florida's "last legally enforceable" congressional plan when Petitioners filed suit. R. 8034. Because courts presume the previous map is the appropriate benchmark unless the district was previously "formally declared" unconstitutional, Benchmark CD-5 is the proper benchmark. *See McConnell*, 201 F. Supp. 2d at 644; *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470-71 (Feb. 9, 2011) ("DOJ Guidance") (noting that absent a federal court ruling that the previous plan was unconstitutional, the "question of whether the benchmark plan is constitutional will

not be considered during the Department's Section 5 review"); *see also Abrams v. Johnson*, 521 U.S. 74, 97 (1997) (holding Georgia's 1992 plan, which was previously declared unconstitutional by a federal court, could not serve as the benchmark). Unlike the district in *Abrams*, Benchmark CD-5 went unchallenged for its six-year lifespan, and thus is the proper benchmark for the present diminishment inquiry.[2]

For the same reason, this case is distinguishable from *Riley v. Kennedy*, 553 U.S. 406, 428 (2008), *see* Sec'y Br. at 20, 28-31. The practice in *Riley*—the method of appointing county commissioners—could not serve as the baseline for diminishment because it had been "challenged in state court at first opportunity," the only election in which the practice was implemented was "held in the shadow of that legal challenge," and the practice was quickly invalidated by the Alabama Supreme Court. 553 U.S. at 425. The Court contrasted the circumstances in *Riley* with circumstances in which "the practices at

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[2] Indeed, because the Benchmark Plan is no longer operative law, *see* Fla. Stat. Ann. § 8.0002 (establishing Enacted Plan as of January 3, 2023), it would be "inappropriate" to render a judgment on its constitutionality "now that the statute has been repealed." *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972).

issue were administered without legal challenge of any kind" and thus *did* serve as the benchmark practice, *see id.*, just as Benchmark CD-5 was not challenged during the six years it was in effect.

Measuring diminishment against the last legally enforceable plan does not mean, as the Secretary portends, that allegedly unconstitutional districts would be frozen in perpetuity. *See* Sec'y Br. at 31. Just as any party could have challenged Benchmark CD-5 while it was in effect, any party could challenge a remedial CD-5 once adopted.

Notably, even if Benchmark CD-5 *were* an unconstitutional racial gerrymander, which Petitioners staunchly contest, *see infra* II(B), and this Court held (contrary to the stipulation, contrary to the Secretary's abandonment of this issue, and contrary to U.S. Supreme Court precedent) that it could not serve as the baseline district, the last legally enforceable district would then be Florida's 2002 congressional plan, which this Court has held—and no party disputes—*also* allowed Black voters to elect their candidates of choice in North Florida. *See Apportionment VII*, 172 So. 3d at 385; *see also Abrams*, 521 U.S. at 98 (after Georgia's 1992 congressional plan was ruled an unconstitutional racial gerrymander, holding

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Georgia's 1982 congressional plan would serve as the benchmark). No matter which benchmark is at issue, the Enacted Plan eliminates a historically performing Black district and thus violates the non-diminishment provision.

Finally, the Secretary's contention that this Court never addressed whether Black voters in Benchmark CD-5 "had the ability to elect representatives of their choice," Sec'y Br. at 11, is demonstrably false. As this Court explicitly found in ordering its adoption, Benchmark CD-5 preserved "the ability of black voters to elect a candidate of their choice." *Apportionment VIII*, 179 So. 3d at 273. Moreover, the Secretary himself signed a stipulation agreeing to the same. *See* R. 8034-36 (stipulating that "Black voters had the ability to elect the candidate of their choice in [Benchmark CD-5]"). The Secretary's attempt to walk away from both this Court's explicit findings and the facts to which he already stipulated evinces a stunning lack of candor and serves only to waste judicial resources.

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B. The Secretary's novel test for diminishment should be rejected.

The Secretary's proposed remaking of the diminishment test—which would require minority voters to comprise an "electoral

majority" (50%) in a "reasonably configured" area to qualify for protection from diminishment, as Section 2 plaintiffs are required to show, Sec'y Br. at 50—would require this Court to overturn its precedent and wreak havoc on minority representation in Florida. The Secretary's proposed test was rejected by the trial court, the First DCA, and even the Legislature. This Court should do the same.

As the Secretary himself concedes, *see* Sec'y Br. at 69, this Court's existing precedent does not require that the minority group constitute 50% of the voting-age population for the non-diminishment provision to apply. Instead, this Court has held that the Legislature "cannot eliminate majority-minority districts or weaken ***other historically performing minority districts*** where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Apportionment I*, 83 So. 3d at 625 (emphasis added). Because a "majority-minority" district is, by definition, a district in which a minority group comprises a numerical majority (50%), *see id.* at 622-23, "other historically performing minority districts" necessarily refers to districts in which the minority group does *not* comprise 50%. *Id.* at 625. Indeed, as it relates to CD-5 specifically, this Court previously determined that Benchmark CD-

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5's predecessor—with a 46.9% Black voting-age population (BVAP)—was protected from diminishment. *Apportionment VII*, 172 So. 3d at 404-05.

Notably, the Secretary stands alone in his attempt to apply *Gingles'* first precondition to the non-diminishment test. In 2022, in asking this Court to uphold the state's legislative districts, the Florida House pre-emptively rejected the Secretary's test and argued to this Court that any "suggest[ion] that the non-diminishment standard incorporates . . . the *Gingles* prerequisites" would directly conflict with U.S. Supreme Court precedent and would eliminate "the line between vote dilution (section 2) and non-diminishment (section 5)." R. 7885 n.10, 7878-79. Consistent with this position, the Legislature collectively protected ***fifteen*** legislative districts with BVAPs under 50% from diminishment in the 2022 redistricting cycle, *see* R. 7882 (11 House districts); R. 7968 (4 Senate districts)—districts this Court held complied with the non-diminishment provision. *See Apportionment IX*, 334 So. 3d at 1289-90. The Legislature has remained consistent on this point. In its answer brief, the Legislature maintains that a minority group's "ability to elect" is "measured by a holistic review of voting and elections data, not by any single

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numerical metric such as black voting-age population." Leg. Br. at 26 n.6. Indeed, even the First DCA refused to limit diminishment claims to majority-minority districts, rejecting the Secretary's test. *See* R.A. 837-38.

Undeterred, the Secretary now argues—for the first time in this litigation—that the 2006 VRA amendments adopted *Gingles*' first precondition into the retrogression standard, *see* Sec'y Br. at 55-57, a requirement found nowhere in the text of the statute, *see* 52 U.S.C. § 10304. The Secretary identifies no court adopting his preferred interpretation, and in fact both courts and DOJ, which oversaw Section 5 litigation and preclearance, have explicitly rejected it. *See, e.g.*, *Texas v. United States*, 831 F. Supp. 2d 244, 253-55, 260-65 (D.D.C. 2011) (rejecting Texas's argument that the VRA as amended in 2006 protected only majority-minority (50%+) districts from retrogression); Determination Letter from Assistant Atty. Gen., U.S. Dep't of Justice (Aug. 27, 2012) (available at https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120827.pdf) (finding district with a BVAP under 50% was an ability-to-elect district protected from retrogression); *DOJ Guidance*, 76 Fed. Reg. at 7471 (explaining post-2006 Amendments that the

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ability-to-elect determination "does not rely on any predetermined or fixed demographic percentages" and instead relies on "a functional analysis" of minority voting strength). Nor does DOJ guidance suggest that the 2006 Amendments imported *Gingles*' affirmative compactness requirement, as the Secretary contends. *See* Sec'y Br. at 59. To the contrary, the guidance explicitly acknowledges that "a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression." *DOJ Guidance*, 76 Fed. Reg. at 7472; *see also Apportionment I*, 83 So. 3d at 626 (holding the same for Florida's non-diminishment provision).

That the Secretary's best support for his interpretation is a fractured Senate Report, signed by only half the Senate Judiciary Committee and issued a week after the 2006 Amendments, is itself telling. *See* S. Rept. No. 109-295 at 54-55 (eight Senators writing, "this Report does not reflect our views or those of scores of other cosponsors" and that "[a]ny after the-fact attempts to re-characterize the legislation's language and effects should not be credited"); *see also* H.R. Rep. No. 109-478 at 71 (companion House Report rejecting the Senate Report's standard). As Justice Scalia cautioned, because Committee Reports are "increasingly unreliable evidence" of

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congressional intent, reliance on the report of "a single committee of a single house" to purport to reflect Congress's intention in passing a statute would reflect a remarkable "unrestrained use of legislative history." *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring).

Adopting the Secretary's proposed test would have catastrophic consequences for Black representation in Florida. The Enacted Plan already eliminated a historically performing district for Black voters in CD-5. The Secretary's new test would open the door to further obliteration of districts in which Black voters do not comprise a majority, but the Legislature has found nonetheless reliably elect a candidate of their choice. This would include one of Florida's last two-remaining congressional districts in which Black voters have sufficient political strength to elect a candidate of choice (CD-24, with a BVAP of 42%, *see* A.R. 670), and all fifteen of the legislative districts the Legislature protected under the non-diminishment standard with BVAPs of less than 50%, *see supra* I(B). That would have disastrous consequences for Black representation in Florida, the exact opposite outcome that Florida voters intended in passing the Fair Districts Amendments.

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C. Even if Petitioners were required to put forward an alternative district as part of their case-in-chief, Petitioners did so.

Although the Legislature conceded before the trial court that the Petitioners had proved a non-diminishment violation, R. 8027 (stipulation); R. 12176 (House concession); R. 12250 (Senate concession), the Legislature argues on appeal that Petitioners were required to prove (and defend) an alternative district in their case-in-chief. Leg. Br. at 30. This supposed requirement finds no support in the caselaw.

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This Court has established a simple test to prove diminishment: a showing that a district which previously afforded minority voters the ability to elect their candidate of choice no longer does so. *Apportionment I*, 83 So. 3d at 620, 624-25. This requires a comparison of two maps: the Benchmark Plan and the Enacted Plan. *Id.* at 624-25. It does not require plaintiffs to identify and defend a hypothetical remedial map to establish liability, and the Legislature cites no precedent holding that it does, instead citing wholly inapplicable case law. *See* Leg. Br. at 31-37. Unlike Section 2 claims, for example, which seek to create an entirely *new* minority district and therefore require a showing that such a district can be drawn,

see Thornburg v. Gingles, 478 U.S. 30, 46-51 (1986), diminishment claims seek to preserve *existing* districts. No new map is required to show what the old map already demonstrated.

But even if Petitioners were required to prove a remedial district, they did so here. Both Plan 8015 and 8019, passed by the Legislature, include a remedial version of CD-5 which the trial court found complies with traditional redistricting criteria just as well—and sometimes better—than both the Enacted Plan and Benchmark CD-5, which this Court blessed last cycle. R. 12567-12571. On this record, and for the reasons discussed below, there is no basis to conclude that either would not be a lawful remedy. *See infra* II(B)(2).

II. Respondents failed to prove a remedial district would violate the Equal Protection Clause.

At the outset, the Secretary has apparently abandoned any contention that the Fair Districts Amendments are facially unconstitutional. *See* Sec'y Br. at 20-21 (addressing only Respondents' as-applied defense as it pertains to CD-5).[3]

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[3] The Legislative Respondents have never argued in this litigation that the Fair Districts Amendments are facially unconstitutional.

Respondents' remaining as-applied equal protection clause defense fails both procedurally and on the merits.

A. Respondents' as-applied equal protection defense is not properly before this Court.

Respondents' constitutional defenses are both barred under the public official standing doctrine and wildly premature.

In arguing the public official standing doctrine does not apply, Respondents mischaracterize Petitioners' arguments rather than engage with them. Petitioners *agree* that Respondents may, of course, defend the Enacted Plan. What Respondents cannot do, however, is defend it by challenging the restrictions imposed by Florida law as unconstitutional. Under Florida's strict separation of powers principles, the question of whether applying the non-diminishment provision to CD-5 would violate the federal constitution is reserved solely for the judicial branch. *See* Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

Neither executive *nor* legislative officers may pick and choose which constitutional duties to comply with based on their own view of what the law should be. *See Mil. Park Fire Control Tax Dist. No. 4*

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v. DeMarois, 407 So. 2d 1020, 1021 (Fla. 4th DCA 1981) ("Powers constitutionally bestowed upon the courts may not be exercised by the legislature."). Indeed, this Court has not limited the public official standing doctrine's applicability to the executive branch. *See State ex rel. Atl. Coast Line R.R. Co. v. State Bd. of Equalizers*, 94 So. 681, 682 (Fla. 1922) (explaining that the public official standing doctrine "involves the right of a branch of the government, other than the judiciary" to determine a law's constitutionality).[4]

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Ultimately, both the Secretary and the Legislature must assume that duties assigned to them by law are constitutional "*until* judicially declared otherwise." *Atl. Coast Line*, 94 So. at 683 (emphasis added). To that maxim, Respondents have no response.

But even if Respondents had standing to mount a constitutional as-applied challenge to the Florida Constitution's non-diminishment provision, their arguments are premature because they are aimed at a remedial district that simply does not yet exist. Here, the trial court

[4] Case law belies the Legislative Respondents' claim that the public official standing doctrine applies only to "ministerial officers." *See Atl. Coast Line*, 94 So. at 682, 684-85 (applying doctrine to Governor, Attorney General, and State Treasurer); *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019) (applying doctrine to a school district).

returned the matter to the Legislature "to enact a remedial map in compliance with Article III, Section 20 of the Florida Constitution." R. 12520. It did not order adoption of Plan 8015, Plan 8019, or any other specific map, but rather deferred to the Legislature to redraw CD-5 in a manner that complies with the non-diminishment standard.

As it stands, Respondents ask this Court to referee a hypothetical dispute about unenacted maps. This Court's only job, at this stage, is to determine whether the Enacted Plan results in diminishment in violation of the Florida Constitution, and if it does, to affirm the trial court and return the matter to the Legislature.

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B. Respondents fail to demonstrate racial predominance.

If this Court nonetheless reaches the equal protection question, it should find, just as the trial court did, that Respondents failed to show race must predominate to remedy the diminishment in the Enacted Plan.

1. Intentional compliance with the non-diminishment standard shows only racial consciousness, not racial predominance.

Both the Secretary and the Legislature's arguments are grounded in the false assumption that intentionally drawing CD-5 to

comply with the non-diminishment standard equates to racial predominance. *See* Sec'y Br. at 27-28; Leg. Br. at 43. To the contrary, as Petitioners already explained, *see* Pet. Br. at 56-57, and Respondents did not address, a mapmaker's intentional compliance with the VRA or other minority voting protections—here, the non-diminishment provision—does not itself demonstrate that race predominated in the redistricting process. *See Allen v. Milligan*, 599 U.S. 1, 29-31 (2023) (holding race did not predominate even though "it was necessary for [mapmaker] to consider race" to meet VRA requirements and where the VRA in fact "demands" that "consideration of race"); *Bush v. Vera*, 517 U.S. 952, 958, 962 (1996) (plurality opinion) (holding the intentional creation of majority-minority districts to comply with Section 2 of the VRA does not itself mean race predominated). This is because "race consciousness does not lead inevitably to impermissible race discrimination," and racial consciousness is entirely permissible in redistricting, *see Shaw v. Reno*, 509 U.S. 630, 646 (1993), a proposition of law the U.S. Supreme Court explicitly reaffirmed last year in *Allen,* 599 U.S. at 29, 33. For this reason, statements that state actors sought to comply with the VRA (or here, the non-diminishment provision) are

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consistent with a proper consideration of race, and do not automatically trigger heighted scrutiny.

2. Circumstantial evidence negates an inference of racial predominance.

The remaining evidence strongly cuts against an inference that race predominated in the drawing of Benchmark CD-5 or any of the identified proposals for a remedial district.

a. Benchmark CD-5

Although Benchmark CD-5's constitutionality is not properly before this Court, *supra* I(A)(1), Respondents fail to demonstrate race predominated in its creation.

While the burden on the party alleging a racial gerrymander is always demanding, *see* Pet. Br. at 55-56, it is "exponentially more difficult" to show that race predominated "in a *court-ordered* redistricting plan." *King v. State Bd. of Elections*, 979 F. Supp. 582, 605 (N.D. Ill.), *vacated sub nom. King v. Illinois Bd. of Elections*, 519 U.S. 978 (1996); *see also Abbott v. Perez*, 585 U.S. 579, 610 (2018) (in racial gerrymandering case, presuming court acted lawfully and without invidious intent when it adopted remedial district plan). Respondents can hardly establish that race *predominated* in the

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drawing of Benchmark CD-5 where this Court ordered it to "remed[y] the improper partisan intent found in the prior version of District 5," *Apportionment VIII*, 179 So. 3d at 272, and expressly disavowed the use of any racial targets, *see Apportionment VII*, 172 So. 3d at 405. Indeed, according to the Legislature, Benchmark CD-5 was not a racial gerrymander, but a partisan one. *See* Leg. Br. at 5. If true, "politics, not race, predominated." R. 12495 n.9. In any event, in adopting Benchmark CD-5, this Court simultaneously decreased the BVAP and increased the district's Tier II compliance, *see Apportionment VII*, 172 So. 3d at 404-06; *Apportionment VIII*, 179 So. 3d at 271-73, negating any inference of racial predominance.

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b. Remedial Plan 8015

The trial court's factual finding that race did not predominate in the drawing of CD-5 in Plan 8015 merits deference. Although Respondents argue *de novo* review is warranted, that standard is proper only where *all relevant facts* before a trial court were undisputed such that an appellate court need only review "pure issues of law." *Humana Med. Plan, Inc. v. Reale*, 180 So. 3d 195, 201 (Fla. 3rd DCA 2015). But where, as here, the trial court went beyond the stipulation to "resolve . . . factual disputes," its "determination

should be upheld absent an abuse of discretion." *Evans v. State*, 800 So. 2d 182, 188 (Fla. 2001).

But even if this Court reviewed the issue *de novo*, it would reach the same conclusion. A district's compliance with traditional redistricting criteria "may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 509 U.S. at 647; *see also Allen*, 143 S. Ct. at 1510-11 (plurality opinion) (finding that race did not predominate where mapmaker considered race but also considered traditional redistricting criteria).

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To begin, the statistics negate any claim that the Legislature intended to maximize Black voting strength at the expense of race-neutral criteria in this district. To the contrary, the objective measures show the Legislature *improved* nearly all of the Tier II metrics in Plan 8015's CD-5 as compared to Benchmark CD-5, while at the same time *decreasing* the BVAP from 46.2% in Benchmark CD-5 to 43.4% in Plan 8015. *Compare* A.R. 658 *with* A.R. 682.

Respondents' claim that CD-5 in Plan 8015 "wholly abandons" traditional districting principles, Leg. Br. at 58, falls flat upon review of the district's objective metrics. Here are just a few examples of the district's impressive Tier II performance:

City Splits. CD-5 keeps 16 cities whole and splits only two (Tallahassee and Jacksonville, the latter of which *must* be split because it is too large to fit in one district). *See* A.R. 682. Several districts in the Enacted Map split more cities, including one district with as many as eight city splits. *See* A.R. 666.

Political and Geographic Boundaries. CD-5 in Plan 8015 performs extraordinarily well on adherence to utilizing "existing political and geographic boundaries," Fla. Const. art. III, § 20(b), relying on "non-political or geographic boundaries" for only 2% of its boundaries (meaning that it follows an existing city, county, road, water, or rail boundary 98% of the time) as the graphic below shows. Notably, only one district in the Enacted Map performs better on this measure. *See* A.R. 682; A.R. 666.

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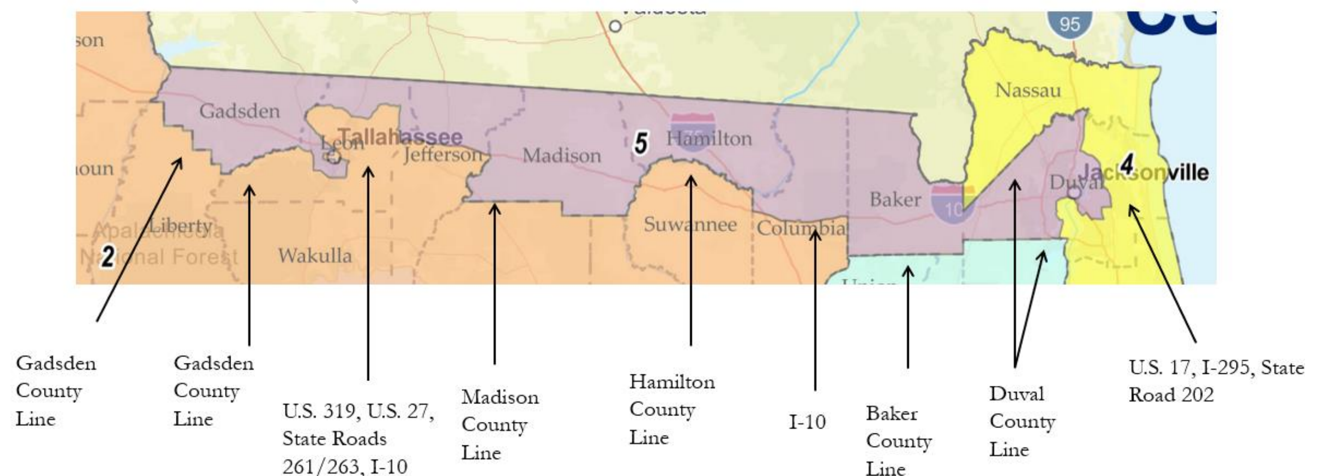

Compactness and Shape. CD-5 in Plan 8015 smooths the boundaries of Benchmark CD-5—a configuration this Court approved in *Apportionment VII*, 172 So. 3d at 406. Although Respondents criticize the district for retaining Benchmark CD-5's East-West shape, "preserving the cores of prior districts" is a "legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

While CD-5 in Plan 8015 does have a lower Polsby-Popper score (.11) than other districts in the Enacted Plan, the district still "has a higher Polsby-Popper compactness score, indicating a higher degree of compactness, than 65 congressional districts in the United State[s]." R. 1175. Moreover, the district's Polsby-Popper score (.11) is *eleven times better* than the districts from *Shaw*, *Vera*, or *Mortham* where race was found to predominate on the basis of the district's shape, *see infra*, and which Respondents repeatedly attempt to compare to CD-5. Even a quick inspection of the districts from those cases show how different CD-5 is.

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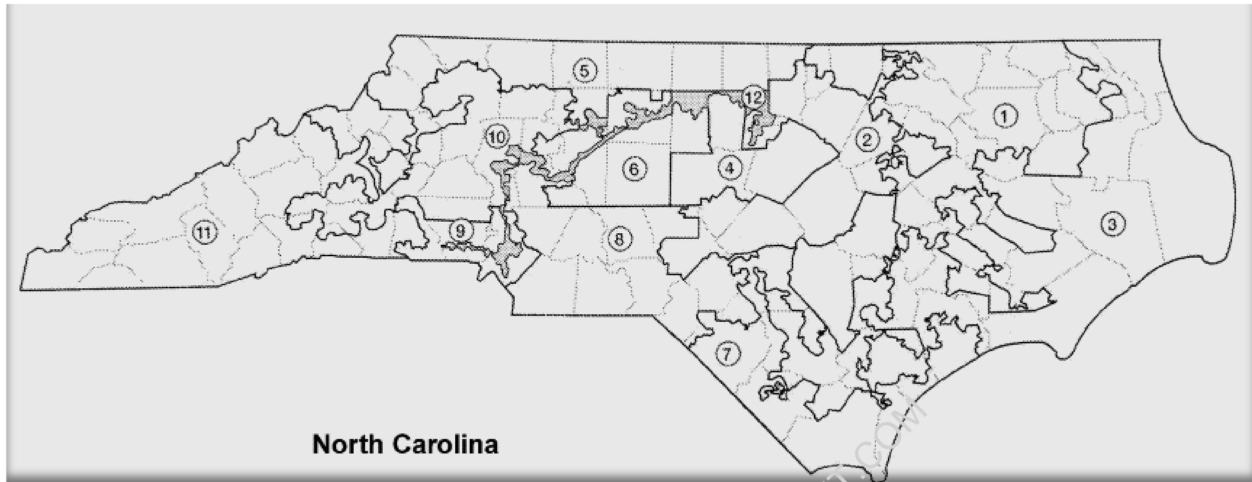
North Carolina's 12th Congressional District (Race Predominates). When the Court addressed North Carolina's 12th congressional district in *Shaw*, which the Secretary invokes as if it

were about CD-5 itself, *see* Sec'y Br. at 1, it was referring to the following district:[5]



This district was "for much of its length, no wider than the I-85 corridor." *Shaw*, 509 U.S. at 635. "At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them." *Id.* at 636. The district's Polsby-Popper score was just .01.[6]

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Texas's 18th, 29th, 30th Congressional Districts (Race Predominates). When the Court spoke about the "bizarrely shaped"

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[5] This image appears in Appendix C in *Miller v. Johnson*, 515 U.S. 900 (1995).

[6] The Polsby-Popper scores (unless otherwise noted) come from Richard H. Pildes & Richard G. Niemi, *Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 562 (1993).

districts in *Vera*, 517 U.S. at 979, the Court was referring to these districts:

See id. at 986 (Appendices A-C). These districts were "formed in utter disregard for traditional redistricting criteria." *Id.* at 976. "[V]oters did not know the candidates running for office because they did not know which district they lived in." *Id.* at 974 (cleaned up). These districts had Polsby-Popper scores of .01 and .02. *Id.* at 973.

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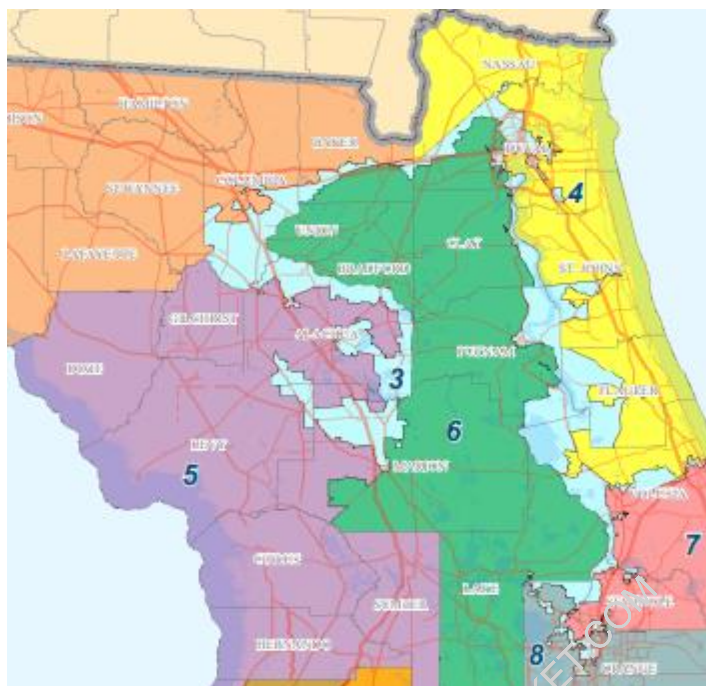
Florida's 3rd Congressional District (Race Predominates). In *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995), the court held that race predominated in Florida's 3rd congressional district, shown below, *see* R. 11658:



The district resembled "an elongated Rorschach ink blot," with "some parts of it no wider than 50 yards or the length of a city block." 915 F. Supp. at 1555-56. This district had a Polsby-Popper score of .01.

Florida's 3rd Congressional District (Race <u>Does Not</u> Predominate). In Florida's next redistricting cycle, a three-judge court found that race *did not* predominate in the drawing of Congressional District 3 (the last legally-enforceable predecessor to Benchmark CD-5), even though it was drawn to perform for Black-preferred candidates. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1301 (S.D. Fla. 2002). As the court wrote, "[r]ace was considered" in the drawing of District 3 but "[t]raditional districting principles were

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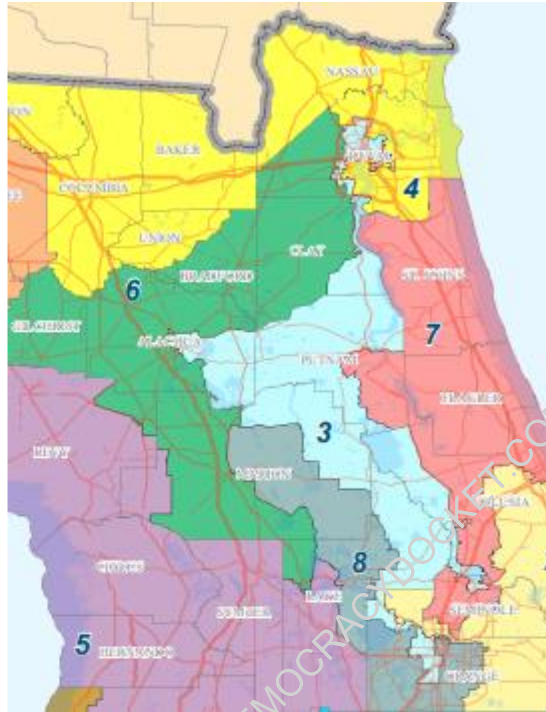
also considered." *Id.* The district, which was in place in Florida from 2002-2012, appears below. *See* R. 11651.



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Plan 8015's CD-5, shown below, *see* A.R. 681, not only bears no resemblance to the bizarre configurations of the unconstitutional racial gerrymanders in *Shaw*, *Vera*, or *Mortham*, it is far more compact than the district upheld in *Martinez*.

c. Remedial Plan 8019

Respondents' argument that CD-5 in Plan 8019 would also be unconstitutional only underscores how out-of-touch their equal protection arguments are. The district, located entirely within Duval County, is impressively compact, having "higher compactness scores than the average district in the Enacted Plan on all three compactness measures." R. 12508 n.14.

That the Secretary nonetheless derides this district as unconstitutional simply because the Legislature took race into account in drawing it, *see* Sec'y Br. at 44-45, shows just how badly he misunderstands basic equal protection principles. Such evidence shows only racial consciousness, not predominance, which is entirely permitted in redistricting, *see supra* II(B)(1).

While Respondents now suggest that Plan 8019 may not comply with the non-diminishment standard, it was the *Legislature*—not Petitioners—that originally concluded that the district passed muster. *See* Pet. Br. at 11. On this record, it would be premature to conclude that Plan 8019 could not comply with the non-diminishment provision, particularly given the Legislature's prior representations to the Florida public to the contrary.

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C. A remedial CD-5 would pass constitutional muster even if subject to strict scrutiny.

Even if the Court were to entertain the constitutionality of one or more of these districts (contrary to the posture of this case), and even if the Court were to find racial predominance (contrary to the statistics and governing precedent), it should hold that compliance with the non-diminishment provision is a compelling state interest. Respondents' contention that compliance with the very state constitution they vowed to uphold is not a compelling state interest would not be countenanced by the Florida voters who enshrined the non-diminishment provision into Florida law and should not be countenanced by this Court.

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Although Respondents contend that Florida may only act to protect its minority citizens when Congress mandates it to, courts routinely recognize states' power to impose their own solutions to race-based problems. "In any given state, the federal Constitution [] represents the floor for basic freedoms; the state constitution, the ceiling." *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992). The U.S. Supreme Court's "established practice, rooted in federalism, allow[s] the States wide discretion, subject to the minimum requirements of

the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000) (Thomas, J.). In the redistricting context, in particular, the U.S. Supreme Court has long given states *more* leeway to protect racial minorities than what is required under federal law. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[T]he federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true." (citation omitted)).

Faced with similar arguments, other courts have upheld state minority-protection provisions like Florida's as consistent with the Equal Protection Clause. *See Higginson v. Becerra*, 363 F. Supp. 3d 1118, 1128 (S.D. Cal. 2019) (rejecting Equal Protection Clause challenge to California Voting Rights Act), *aff'd* 786 Fed. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020); *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1011 (Wash. 2023) (en banc) (rejecting racial gerrymandering challenge to the Washington Voting Rights Act), *cert. denied*, 2024 WL 1607746 (Apr. 14, 2024).

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Respondents' repeated invocation of the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard College* ("*SFFA*"), 600 U.S. 181 (2023), an affirmative action case, does nothing to undermine the Court's clear decision in *Allen*—a case from the same term—authorizing "race-based redistricting as a remedy for state districting maps that violate [the VRA]," 599 U.S. at 41. Indeed, in *SFFA* the U.S. Supreme Court confirmed that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is a "compelling interest[] that permit[s] resort to race-based government action," 600 U.S. at 207 (citation omitted).

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Finally, the Legislature is wrong that Petitioners' arguments have no "logical endpoint"—that is, their concern that the Legislature would have to draw increasingly bizarre districts to capture a dwindling minority population if Petitioners prevailed. Leg. Br. at 57. The non-diminishment test is well-designed precisely to respond to such concerns. For example, the Legislature posits that "[i]f the 2020 census had revealed that Black population of former District 5 had decreased by 50%, Petitioners' approach would require the state to draw an even more sprawling district with tendrils stretching

perhaps as far as Panama City and Orlando to ensure non-diminishment." *Id.* Not so. If Benchmark CD-5's Black population had decreased this dramatically, a functional analysis would reveal that Black voters in that district could no longer exercise enough political power to elect a candidate of choice. *Apportionment VIII*, 179 So. 3d at 286 n.11. As a result, the district would not be protected from diminishment under the Florida Constitution, and a minority-performing district would not be required going forward.

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CONCLUSION

Plaintiffs respectfully request that this Court enter judgment on their claim that the Enacted Plan results in diminishment in contravention of Article III, Section 20(a) of the Florida Constitution.

Respectfully submitted,

Dated: June 5, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 5, 2024, a copy of the foregoing was filed via electronic means through the Florida Courts E-Filing portal and was served via electronic mail on the parties registered to receive notifiations.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2)(B) and this Court's May 13, 2024 Order permitting Petitioners to file a reply brief not exceeding 6,000 words, the undersigned certifies that this initial brief complies with the word limit and contains 5,973 words.

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