IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC23-1671

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

v.

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

Discretionary Proceeding to Review
Decision of the First District Court of Appeal

Lower Tribunal Nos. 1D23-2252, 2022-CA-666

BRIEF OF *AMICUS CURIAE* CONSTITUITONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the U.S. Constitution's text and history. CAC works to improve understanding of the U.S. Constitution and to preserve the rights and freedoms that our nation's charter guarantees. CAC has an interest in the questions this case raises about the Fourteenth Amendment and about state constitutional protections for voters of color that were modelled on the federal Voting Rights Act and thus has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Florida voters enshrined the Fair Districts Amendment ("FDA") into the Florida Constitution, creating state constitutional safeguards for equal representation that are not contained in the U.S. Constitution. *See* Fla. Const. art. III, §§ 20-21. This new language added to the Florida Constitution a prohibition against drawing congressional district boundaries "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." *Id.* § 20(a). This Court has held that these provisions are modelled after Sections 2 and 5 of the federal Voting Rights Act ("VRA"), 52 U.S.C. §§ 10301, 10304, and were designed to "prevent[]" "impermissible vote dilution" and "impermissible diminishment of a minority group's ability to elect a candidate of its choice," *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 619 (Fla. 2012) ("*Apportionment I*"); *see also In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d 1282, 1288 (Fla. 2022) ("*Apportionment IX*").

In 2022, the Florida Legislature enacted a congressional redistricting plan ("Enacted Plan") that cracked Black voters in preexisting Congressional District 5—where Black voters were able to elect their chosen candidate in the 2016, 2018, and 2020 elections—into four congressional districts. ROA.817-18.[1] Before the trial court, Respondents did not dispute that Black voters in North Florida no longer had the ability to elect a candidate of their choice under the Enacted Plan, *id.*, and the trial court correctly held

[1] "ROA" refers to the appellate court record.

that, under this Court's precedents, the Legislature violated the FDA's non-diminishment provision, *id.* at 819.

The First District Court of Appeal ("First DCA"), however, disagreed. Flouting this Court's ruling that the benchmark district for a non-diminishment claim is the existing district, *Apportionment I*, 83 So. 3d at 624, the First DCA held that a benchmark district must include a geographically compact community of color because otherwise the district is not, in its view, one in which a community of color can "elect representatives of their choice," Fla. Const. art. III, § 20; ROA.839.

This construction of the non-diminishment provision is at odds not only with this Court's precedent, but also with the text and history of the FDA.

As this Court has consistently recognized, the FDA's non-diminishment provision was modelled after Section 5 of the VRA, which prohibits plans that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Apportionment I*, 83 So. 3d at 624 (quoting *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 478 (1997) ("*Bossier I*")). In other words, Section 5 prevents "the Legislature" from

"eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625.

Both this Court and the U.S. Supreme Court have long evaluated retrogression by comparing the new election law or practice with the existing one, that is, the law that was in place before the new practice was enacted. *See, e.g.*, *Bossier I*, 520 U.S. at 478 ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan."); *Apportionment I*, 83 So. 3d at 624 ("The existing plan of a covered jurisdiction serves as the 'benchmark' against which the '"effect" of voting changes is measured.'" (quoting *Bossier I*, 520 U.S. at 478)). Thus, voters of color do not need to constitute a geographically compact community to prove diminishment. So long as "a 'functional analysis' of voting behavior within [a] district[]" demonstrates that voters of color were able to elect their chosen candidate, the non-diminishment provision prevents the Legislature from "weaken[ing] [that] historically performing district[]."

Apportionment IX, 334 So. 3d at 1289 (quoting *Apportionment I*, 83 So. 3d at 625, 627).

The First DCA concluded otherwise because it relied on Section 2 precedent to define diminishment. But Sections 2 and 5 serve distinct purposes and operate under different standards. *See infra* at 8. Using a Section 2 standard to define the scope of the non-diminishment provision contravenes the text and history of the FDA and this Court's precedents.

Respondents argued below that compliance with the non-diminishment provision here requires racial predominance in violation of the Fourteenth Amendment. But there is nothing constitutionally suspect about the consideration of race to comply with the non-diminishment provision. As the U.S. Supreme Court recognized just last year in *Allen v. Milligan*, "[t]he contention that mapmakers must be entirely 'blind' to race has no footing" in the law. 599 U.S. 1, 33 (2023) (plurality opinion). After all, state constitutional remedies to protect the voting strength of communities of color help realize, not flout, the constitutional guarantee of equality.

ARGUMENT

I. The Non-Diminishment Provision—Modelled After Section 5 of the VRA—Does Not Require Petitioners to Establish Geographic Compactness.

A. The non-diminishment provision codifies the VRA's non-retrogression principle statewide.

"In 2010, with the passage of the [FDA], the people of Florida increased the instructions to their representatives to provide additional constitutional imperatives for their elected representatives to follow when drawing the senatorial and representative districts." *Apportionment I*, 83 So. 3d at 603. These new "dual constitutional imperatives"—the non-dilution provision and the non-diminishment provision—track "almost verbatim" the text of Sections 2 and 5 of the federal VRA. *Id.* at 619 (quoting *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1280 (11th Cir. 2012)).

This similarity was intentional. "Before its placement on the ballot and approval by the citizens of Florida, sponsors of this amendment . . . acknowledged that Florida's provision tracked the language of Sections 2 and 5 and was perfectly consistent with both the letter and intent of federal law." *Id.* at 620. "The first

imperative, 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,'" protects against "impermissible vote dilution." *Id.* at 619 (quoting Fla. Const. art. III, § 21(a)).[2] "Florida's second imperative, that 'districts shall not be drawn . . . to diminish [racial or language minorities'] ability to elect representatives of their choice,'" protects against "impermissible retrogression in a minority group's ability to elect a candidate of choice." *Id.* at 619-20 (alteration in original) (quoting Fla. Const. art. III, § 21(a)). Thus, both of these fundamental safeguards of the right to vote contained in the VRA are part of the fundamental law of Florida.

This Court's interpretation of the non-dilution and non-diminishment provisions has been "guided by prevailing United States Supreme Court precedent" construing Sections 2 and 5 of the VRA. *Id.* at 620. Consistent with that precedent, this Court

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[2] *Apportionment I* concerned the Legislature's redistricting of state legislative districts, and therefore this Court analyzed the section that governs redistricting for those districts: Article III, Section 21. The section governing congressional redistricting—Article III, Section 20—uses identical language. *See Apportionment I*, 83 So. 3d at 598 n.1.

has concluded that each provision provides a distinct protection for voters of color in Florida, and that each provision is therefore governed by a different standard. *See id.* at 619; *see also Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion) (Sections 2 and 5 "differ in structure, purpose, and application"); *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard."); *Bossier I*, 520 U.S. at 477 ("[Section 2 and Section 5] combat different evils.").

The non-dilution provision mirrors Section 2 of the VRA, which prohibits voting standards, practices, or procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). It is governed by the federal Section 2 vote dilution standard, which the U.S. Supreme Court established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and has consistently applied in every vote dilution case it has heard "[f]or the past forty years," *Allen*, 599 U.S. at 17; *see id.* at 19 (collecting cases). A Section 2 violation is "established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation

by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

The non-diminishment provision, by contrast, "codifie[s]" Section 5's non-retrogression principle. *See Apportionment I*, 83 So. 3d at 624. In relevant part, Section 5 prohibits covered jurisdictions from enacting voting standards, practices, or procedures that "ha[ve] the purpose of or will have the effect of *diminishing* the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 52 U.S.C. § 10304(b) (emphasis added). In other words, it prevents "the Legislature" from "eliminat[ing] majority-minority districts or weaken[ing] 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. "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the '"effect" of voting changes is measured.'" *Id.* at 624 (quoting *Bossier I*, 520 U.S. at 478).

While the express statutory protection against diminishment was added to the VRA in 2006, the provision is deeply rooted in Section 5's history. Since it was first enacted, Section 5 has protected against the retrogression of the voting strength of communities of color, working to ensure that state and local officials do not reduce their strength through annexation and redistricting. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.").

To ensure that Section 5 can achieve this goal, the U.S. Supreme Court has long evaluated retrogression by comparing the new election law or practice with the existing one, that is, the law that was "in force or effect," 52 U.S.C. § 10304(a), before the new practice was enacted. *See, e.g.*, *Bossier I*, 520 U.S. at 478 ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan."); *Holder*, 512 U.S. at 883 (plurality opinion) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change."); *id.* at 888 (O'Connor, J., concurring in part and

concurring in the judgment) ("[I]n a § 5 case . . . the benchmark is simply the former practice employed by the jurisdiction seeking approval of a change."); *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 495 (1992) ("To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted.").

In comparing a new election law or practice with an existing one, the key question is whether the new law diminishes the ability of a minority group to elect its candidate of choice. In *Beer v. United States*, 425 U.S. 130 (1976), the Court first articulated the non-retrogression standard, holding that Section 5 permits the preclearance of voting procedures that would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. Almost three decades after *Beer*, however, the Supreme Court narrowed the retrogression inquiry and held that "the comparative ability of a minority group to elect a candidate of its choice" was not a "dispositive" factor for determining retrogression, counseling courts to consider as well whether minority groups were able to "influence" electoral outcomes in a district. *Ashcroft*, 539 U.S. at 480, 482.

In 2006, Congress amended the VRA to "protect the ability of such citizens to elect their preferred candidates of choice," 52 U.S.C. § 10304(d), and "explicitly *reject*[]" *Ashcroft*'s contention that other factors—namely, a minority group's ability to *influence* an election—may be considered in the retrogression inquiry, H.R. Rep. No. 109-478, at 71 (2006) (emphasis in original). The 2006 amendment made clear that any voting change that "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote." 52 U.S.C. § 10304(b). Importantly, this language clarified the harm that the retrogression inquiry targeted (ability to elect) without changing the benchmark used to determine retrogression (the existing plan). *See* H.R. Rep. No. 109-478, at 71 (emphasizing that the "relevant analysis" is "a comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change").

The sponsors of the FDA used the language from the 2006 amendment to "codif[y] the non-retrogression principle of Section 5" and impose its requirement "statewide." *Apportionment I*, 83 So. 3d

at 624. The U.S. Supreme Court has since affirmed that Section 5's non-retrogression principle "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice," *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015), the determination of which necessitates a "functional analysis of the electoral behavior within the particular jurisdiction or election district," *id.* at 276 (quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (2011)); *see also Apportionment I*, 83 So. 3d at 625 ("To undertake a retrogression evaluation requires an inquiry into whether a district is likely to perform for minority candidates of choice."). Section 5's text and history underscore that the question of whether a redistricting plan diminishes minority voters' ability to elect a candidate of their choice is grounded in the non-retrogression standard.

Thus, when the FDA's framers chose to protect voters of color against diminishment, they understood that diminishment referred to the specific harm of retrogression under Section 5, wholly independent of the FDA's prohibition against vote dilution. Any construction that weakens the non-diminishment's retrogression

principle contradicts this essential history and subverts the text of the FDA.

B. The First DCA's construction of the non-diminishment provision is contrary to this Court's precedents and the text and history of the FDA.

Relying on the text and history of the FDA and Section 5, this Court has held that the non-diminishment provision "adopted the retrogression principle as intended by Congress in the 2006 amendment" of Section 5. *Apportionment I*, 83 So. 3d at 625. Since the FDA's enactment, this Court has repeatedly reaffirmed and applied the non-diminishment provision's retrogression principle by comparing the ability of voters of color to elect their candidates of choice in the existing, benchmark district and the new district. *See, e.g.*, *Apportionment IX*, 334 So. 3d at 1289; *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 285-86 (Fla. 2015) (comparing a district proposed by the map's challengers to "the benchmark district in the 2002 plan" for purposes of retrogression); *id.* at 284 (critiquing an expert's use of the challenger's proposed plan and the Legislature's proposed plan for comparison "rather than the benchmark map of 2002"); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 405 n.13 (Fla. 2015) ("*Apportionment VII*")

("[O]ur [retrogression] analysis is consistent with the standard set forth by this Court in *Apportionment I*."); *id.* at 404-05 (comparing a proposed configuration for CD-5 to the previous district to analyze diminishment).

The First DCA, however, treated this Court's precedents as nonbinding and concluded that the non-diminishment provision's protection of the ability of voters of color to "elect representatives of their choice" only protects geographically compact communities of color. ROA.838-39. The First DCA's decision was flawed in at least three respects.

First, the First DCA erroneously relied on Section 2 jurisprudence on vote dilution to interpret the non-diminishment clause, even though vote dilution is fundamentally distinct from retrogression. *See Holder*, 512 U.S. at 883 (plurality opinion).

According to the First DCA, a benchmark district must include a geographically compact community of color. ROA.839. Relying on *Gingles*, the First DCA reasoned that because geographic compactness is necessary to determine whether voters of color in a vote dilution case would have had the ability to elect a candidate in a single-member district absent dilution, geographic compactness

must therefore be a necessary criterion for the ability to elect for retrogression purposes. *Id.* at 835-37. But *Gingles* was a Section 2 vote dilution case and, critically, plaintiffs bringing a vote dilution claim must show that a single-member, majority-minority district can be created such that voters of color can effectively exercise their voting power. In this way, vote dilution entails a comparison between the enacted redistricting plan and "a hypothetical alternative." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). *Gingles* thus requires that plaintiffs establish that the class of voters is "sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Allen*, 599 U.S. at 18 (alteration in original) (quoting *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022)). Both elements of the first precondition are inextricable from *Gingles*' remedy of a single-member, majority-minority district.

But *Gingles* has no bearing on Section 5 because retrogression is not concerned with the creation of a new, hypothetical district. Instead, all the retrogression analysis requires is a comparison between the voting power of voters of color in a district before and after redistricting. The benchmark, therefore, is the district that

existed before redistricting. *See Apportionment I*, 83 So. 3d at 624; *Holder*, 512 U.S. at 883 (plurality opinion). Indeed, the U.S. Supreme Court has squarely rejected attempts to conflate Section 5's benchmark with Section 2's requirements because the latter are incompatible with retrogression. *Bossier I*, 520 U.S. at 480-81 (declining to "call [its Section 5 precedent] into question" by "chang[ing] the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan"). This Court should do the same.

Second, the First DCA's justifications for disregarding this Court's precedents on retrogression are baseless. To start, the First DCA suggested that this Court's decision in *Apportionment I* and other decisions issued pursuant to its duty under Article III, Section 16 ("Section 16") to review the constitutionality of the Legislature's apportionments are not binding precedent. ROA.826. This is plainly incorrect, as this Court's prior decisions make clear. *See, e.g.*, *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So. 3d 198, 209-10 (Fla. 2013) (describing as "precedent" previous decisions by this Court in a Section 16 posture regarding the preclusive effect of Section 16 decisions); *Apportionment VII*, 172

So. 3d at 405 n.13 (applying *Apportionment I*'s retrogression test on direct review of a lower tribunal).

On top of that, the First DCA "assume[d]" that this Court's precedents on retrogression relied on federal regulations explaining that the benchmark for retrogression is the last legally enforceable plan, which was typically one that had been precleared. ROA.829. The court then observed that that benchmark "makes no sense in the FDA context" because retrogression was "designed with preclearance in mind," and the FDA does not include Section 5's preclearance regime. *Id.* at 829-30.

But the First DCA misunderstood how retrogression interacts with preclearance. When holding that the existing plan is the appropriate benchmark, this Court was guided by the U.S. Supreme Court's Section 5 jurisprudence, which makes clear that the existing election practice is the baseline from which retrogression will be measured. *See Apportionment I*, 83 So. 3d at 624. Section 5's preclearance regime does not change this straightforward principle; it only means that under Section 5, the existing practice in covered jurisdictions will be either one that had been precleared or one that had been in place since the VRA's coverage began. *See*

Riley v. Kennedy, 553 U.S. 406, 421 (2008); *Presley*, 502 U.S. at 495. The First DCA's suggestion that under Section 5, an existing plan had to have been precleared, *see* ROA.830, is incorrect. If a jurisdiction had not changed the relevant practice since the date on which Section 5 coverage was triggered, then the existing practice would be one that had not been precleared. *See Riley*, 553 U.S. at 421.

Thus, the non-retrogression principle simply mandates that, in jurisdictions covered by its protection, the existing ability of voters of color to elect their preferred candidate cannot be weakened. Under Section 5, that applied only to jurisdictions subject to preclearance; under the FDA, as this Court has held, non-retrogression applies "statewide." *Apportionment I*, 83 So. 3d at 624.

Third, the First DCA relied on Section 2 cases because, in its view, Congress inserted the phrase "elect representatives of their choice" against the "legal landscape" of Section 2 cases such as *Gingles*. ROA.836. Not so. As described earlier, this language—specifically, the word "elect"—was used to return to the *Beer* retrogression standard and reject the Supreme Court's decision in

Ashcroft, which permitted preclearance even if voters of color could not *elect* their chosen candidate so long as they could *influence* electoral outcomes. H.R. Rep. No. 109-478, at 71; *see Ala. Legis. Black Caucus*, 575 U.S. at 275-77 (relying on this history to interpret Section 5). In doing so, Congress made clear that retrogression requires "a comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change." H.R. Rep. No. 109-478, at 71. Indeed, it would have been odd for Congress to model Section 5's language on Section 2's vote dilution jurisprudence because, unlike *Gingles*' vote dilution framework, Section 5 and retrogression applied to a range of electoral practices beyond redistricting, such as the closure of polling locations and candidate qualifications. *See Presley*, 502 U.S. at 502-03. Thus, Section 5's "ability to elect" language has no bearing on the benchmark for retrogression, which has always been the existing practice.

* * *

As this Court has held, the non-diminishment provision codifies Section 5's non-retrogression principle across Florida, including its comparison of Black voters' electoral power between

the existing plan and the new plan. The First DCA's subversion of the retrogression principle cannot be reconciled with this Court's precedents and the text and history of the FDA.

II. The Fourteenth Amendment Does Not Prevent the Legislature from Complying with the Non-Diminishment Provision.

Respondents argued below that the non-diminishment provision cannot be constitutionally applied in this case because the provision necessitates a racial gerrymander in violation of the Fourteenth Amendment of the U.S. Constitution. This is wrong. The Fourteenth Amendment does not prohibit race-conscious voting protections for voters of color, as the U.S. Supreme Court made clear just last year.

A. The Fourteenth Amendment does not prohibit race-conscious protections for minority voters.

When redistricting, legislatures must "almost always be aware of racial demographics." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). But "it does not follow that race predominates in the redistricting process." *Id.*; *see also Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.");

Shaw v. Reno, 509 U.S. 630, 646 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination."); *cf. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015) (noting that, under the Fourteenth Amendment, "race may be considered in certain circumstances and in a proper fashion"). Indeed, the retrogression inquiry at the heart of Section 5 "obviously demanded consideration of race," *Abbott v. Perez*, 585 U.S. 579, 587 (2018), and compliance with Section 2 "involves a 'quintessentially race-conscious calculus,'" *Allen*, 599 U.S. at 31 (plurality opinion) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). But the VRA is not constitutionally suspect just because it requires the consideration of race. Neither is the FDA.

Significantly, the U.S. Supreme Court rejected that argument just last year in *Allen v. Milligan*. There, Alabama argued that it could not constitutionally comply with Section 2's long-standing requirements because Section 2's remedy would require Alabama to "take race into account." *Id.* at 30. The Supreme Court concluded otherwise. In his opinion for a plurality of the Court, Chief Justice Roberts emphasized the difference between race consciousness and

racial predominance: "[t]he former is permissible; the latter is usually not." *Id.* Reviewing the illustrative maps at issue, a plurality of the Court concluded that the consideration of race alongside other factors "such as compactness, contiguity, and population equality" did not pose an equal protection problem. *Id.* at 31. The Chief Justice underscored that, under *Gingles*, the consideration of race required to draw a majority-minority district as a remedy for a Section 2 violation "is the whole point of the enterprise." *Id.* at 33; *see also id.* at 44 (Kavanaugh, J., concurring) ("[T]he effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters so as to prevent the cracking or packing—whether intentional or not—of large and geographically compact minority populations."). And a plurality of the Court expressly rejected the dissent's position that race predominated in the illustrative maps just because they were designed to include two majority-Black districts. *Id.* at 32-33 (plurality opinion). Thus, just as compliance with Section 2 raises no constitutional concern, compliance with Florida's non-diminishment provision does not violate the equal protection command.

Equal protection concerns arise in redistricting only when race "*predominates* in the drawing of district lines." *Id.* at 31 (emphasis added). Under Supreme Court precedent, to prove that a district is a racial gerrymander, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legis. Black Caucus*, 575 U.S. at 266-67 (quoting *Miller*, 515 U.S. at 916). "[T]he 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, 'traditional' factors when doing so." *Id.* at 273 (emphasis in original). As *Allen* stresses, this is a highly-fact specific, contextual inquiry that depends on the totality of the circumstances surrounding the district's creation, the very opposite of Respondents' insistence that race would predominate in every case where a legislature acted to prevent retrogression.

B. Compliance with the non-diminishment provision presents no equal protection problem.

In certain cases, "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller*, 515 U.S. at 916; *see also Allen*, 599 U.S. at 31 (plurality opinion). Respondents' position, however, elides this distinction, asserting instead that any attempt to draw a district that preserves Black Floridians' ability to elect a representative of their choice in North Florida constitutes racial predominance. This argument is irreconcilable with the Fourteenth Amendment, as construed by the Supreme Court. That position might be supported by the *Allen* dissent, but it was certainly not the view of the Court.

Just as the requirement to heed the non-dilution command did not make race predominate in *Allen*, taking account of non-diminishment, alongside the traditional districting principles also included in the FDA, does not make race predominate here. The Legislature must hew to traditional redistricting principles while it considers the consequences of its line-drawing choices on voters of

color, but there is nothing unconstitutional about that, and the FDA requires nothing more.[3]

Indeed, that is exactly what this Court did when it ruled in 2015 that CD-5 must be drawn in an East-West configuration to cure its constitutional defects. *See Apportionment VII*, 172 So. 3d at 402. This Court considered diminishment, compactness, the district's shape, city and county splits, and the region's geography to assess the district. *See id.* at 406. Nothing in that thorough analysis, in which a district's impact on minority voters was properly considered alongside traditional redistricting criteria, constitutes racial predominance.

[3] Because the non-diminishment provision can be applied without racial predominance, applying it does not trigger strict scrutiny. *See Allen*, 599 U.S. at 31 (plurality opinion). Thus, contrary to Chief Judge Osterhaus's concurrence below, Petitioners are not required to prove ongoing racial discrimination and establish a compelling remedial interest to justify the legislature's compliance with the FDA. ROA.848. Moreover, to the extent that the concurrence relied on U.S. Supreme Court precedents about the scope of Congress's authority to enact Section 5 under the Fifteenth Amendment, *see id.* at 844, and the constitutionality of the VRA's preclearance formula, *see id.* at 845-46 (discussing *Shelby County v. Holder*, 570 U.S. 529 (2013)), those precedents have no bearing on a state's ability to enforce race-conscious constitutional protections of voters of color.

In short, efforts by this Court and the Legislature to preserve the ability of Black Floridians to elect a representative of their choice are entirely permissible under the Equal Protection Clause, and this Court should reject any attempt by Respondents to manufacture a conflict between the Fourteenth Amendment and the FDA.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2024, a true and correct copy of the foregoing will be furnished via the Florida Court's E-Filing Portal to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, under Florida Rule of Appellate Procedure 9.045(e), that this Brief complies with the applicable font and word-count requirements. It was prepared in Bookman Old Style 14-point font, and it contains 4,997 words.

/s/ Linda K. Clark
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