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SC23-1671; 1D23-2252

IN THE SUPREME COURT OF FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, ET AL.,

Petitioners,

v.

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

Respondents.

FLORIDA LEGISLATURE'S ANSWER BRIEF

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INTRODUCTION

This case concerns the constitutionality of Florida's congressional district plan (the "Enacted Plan"). Petitioners claim the Enacted Plan unconstitutionally diminishes the ability of black voters in North Florida to "elect representatives of their choice" as compared to the congressional district plan imposed by this Court in 2015, which included a sprawling East-West district stretching across eight counties from downtown Jacksonville to Chattahoochee. The trial court agreed and declared that the Enacted Plan violated the Florida Constitution. On appeal, the en banc First District reversed.

This Court should affirm the First District's ruling in favor of Respondents. To establish a non-diminishment violation, Petitioners bore the burden in the trial court to prove that an alternative district configuration could be drawn that complies with both the state constitution's non-diminishment provision and the federal constitution's prohibition against racial gerrymandering. Petitioners failed to carry their burden of proof as to either of the two alternative district configurations proffered to the trial court. The trial court also erred as a matter of law in evaluating the Legislature's defense of the Enacted Plan. Either of these grounds is sufficient to reverse the trial

court's decision and order judgment to be entered in favor of Respondents.

STATEMENT OF THE CASE AND FACTS

I. The Facts[1]

A. Florida's Congressional Plan before the 2022 Redistricting Cycle

Florida's congressional elections in 2016, 2018, and 2020 were conducted under a plan imposed by this Court in 2015. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402–06 (Fla. 2015) ("*Apportionment VII*"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271–73 (Fla. 2015) ("*Apportionment VIII*"). That plan included a new "East-West" configuration of District 5 stretching from downtown Jacksonville to rural Gadsden County. *Id.*; *see Byrd v. Black Voters Matter Capacity Bldg. Inst.*, 375 So. 3d 335, 341 (Fla. 1st DCA 2023) (en banc) (image of "East-West" District 5 in purple[2]):

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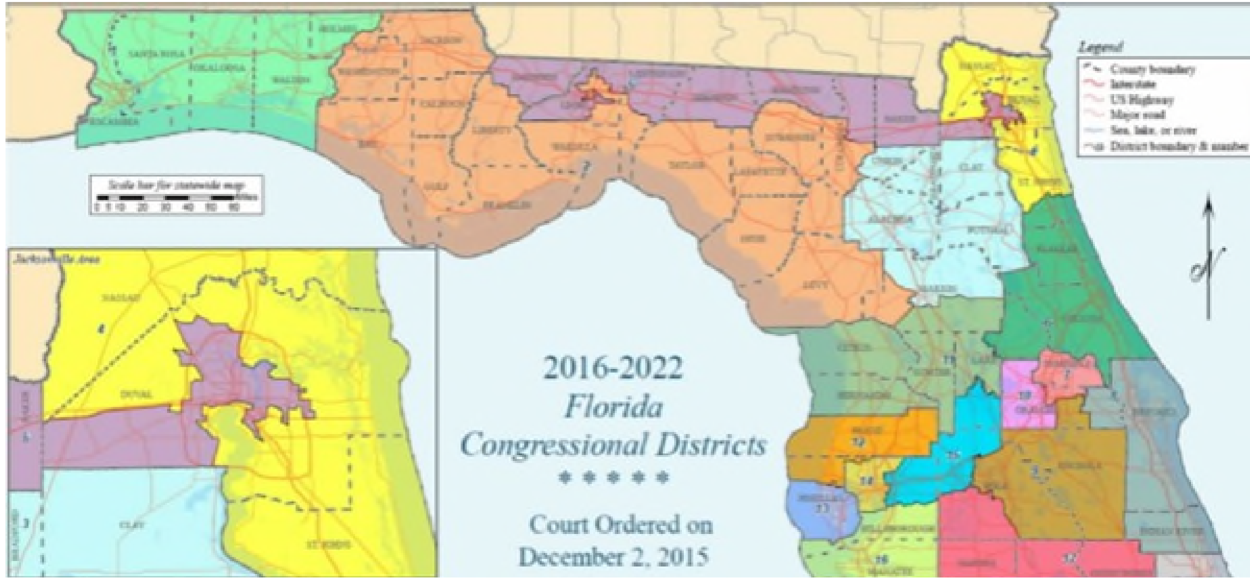
[1] References to the trial court record are indicated by R.###. References to the appellate record before the First District are indicated by AR.###.

[2] To aid the Court's review, the Legislature's brief includes high-resolution insets from maps contained in the Joint Appendix filed with the First District. AR.654-90.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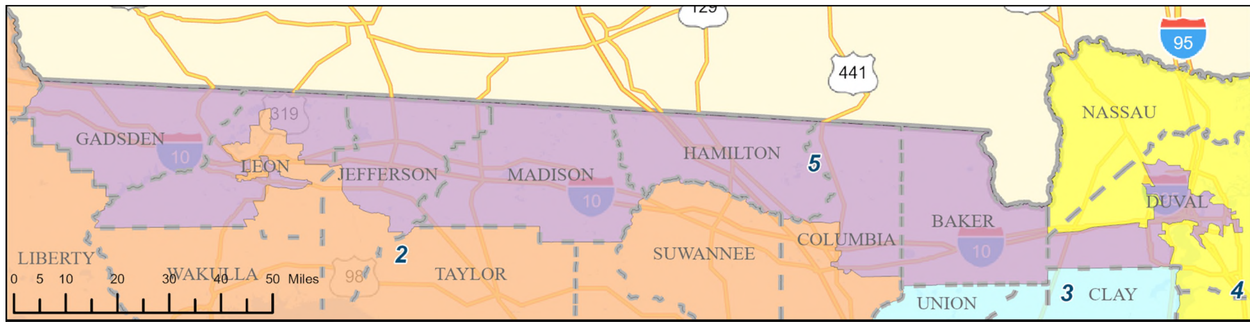
December 2, 2015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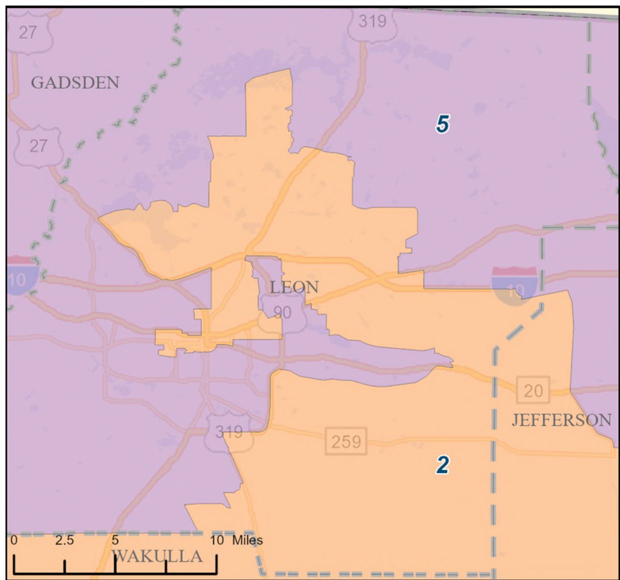
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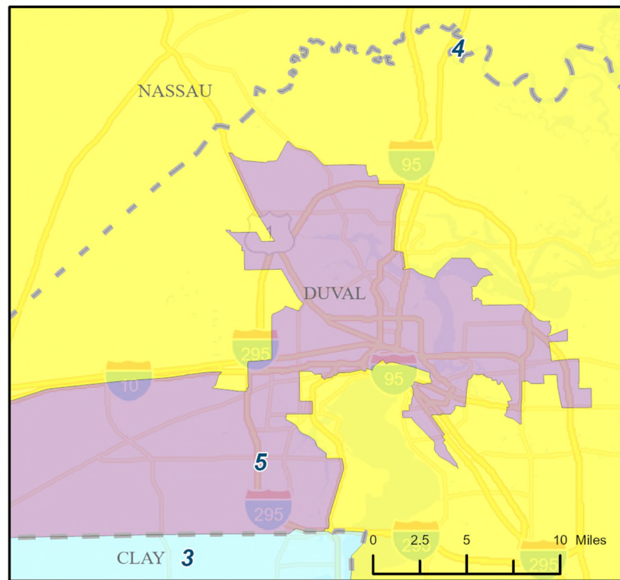
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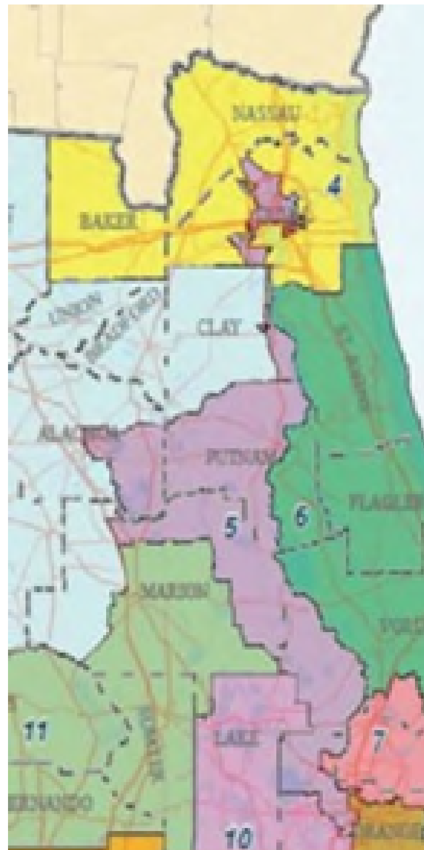
This Court ordered the Legislature to draw District 5 in an East-West configuration based on its conclusion that the “North-South” configuration of the district adopted by the Legislature in 2012 (and a similar remedial map adopted in 2014) was intended to favor the Republican Party and incumbent Democrat Congresswoman Corrine Brown in violation of the Florida Constitution’s prohibition against intentional partisan gerrymandering. *Apportionment VII*, 172 So. 3d at 403; *see also id.* at 420 (Canady, J., dissenting) (image of 2014 remedial “North-South” District 5 in purple (“Remedial District 5”):



This Court's 2015 decision to mandate the adoption of an East-West District 5 was not without controversy. By objective numerical measures, the East-West district imposed by the Court was "significantly less compact" than the North-South version of the district adopted by the Legislature in 2014 and also caused adjoining District 2 to become "significantly less compact." *Apportionment VII*, 172 So. 3d at 420–21. (Canady, J., dissenting). The partisan origins of the East-West configuration of District 5 also concerned some members of this Court:

> [T]he ironic result is that districts drawn by professional committee staff, who were insulated from partisan influence in the drawing of the districts, are effectively displaced by districts drawn—as evidenced by deposition testimony—under the auspices of the National Democratic Redistricting Trust in cooperation with the Democratic Congressional Campaign Committee. There is something dreadfully wrong with this picture. As the Legislature argues: "To discard the work product of the Florida Legislature, which the trial court carefully considered and upheld, and substitute the partisan handiwork of the DCCC and the Democratic Trust, would be an indelible stain."

Id. at 422 (Canady, J., dissenting).

Because the plaintiffs in *Apportionment VII* asserted *political* gerrymandering claims against the North-South iterations of District 5, this Court's decision did not address whether the East-West

configuration complied with the Equal Protection Clause's prohibition against *racial* gerrymandering.

B. The Enacted Plan

The 2020 Census data reflected Florida's substantial growth over the past decade. Florida's statewide population grew by more than 14%, from 18,801,310 to 21,538,187. As a result, Florida was entitled to a 28th congressional district. Uneven population growth across the state also meant that the existing districts were malapportioned and required modification to comply with the one-person, one-vote principle. In short, Florida required a new congressional district plan.

Early in the 2022 legislative session, it became apparent that the status of District 5 presented significant legal questions not present elsewhere in the map. The Governor sought an advisory opinion from this Court as to whether the Florida Constitution "requires the retention of a district in northern Florida that connects the minority population in Jacksonville with distant and distinct minority populations." *Adv. Op. to Gov. re: Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1107–08 (Fla. 2022) ("*Adv. Op. to Gov. 2022*"). The Governor's request cited intervening precedent from the United States Supreme Court

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

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

answering the complex federal and state constitutional issues implicated by the Governor's request").

On March 4, 2022, the Legislature passed Committee Substitute for Senate Bill 102 to apportion the State into 28 congressional districts. CS/SB 102 included two alternative configurations of the congressional districts in North Florida. The primary map in CS/SB 102 (Plan 8019) contained a congressional district located entirely within western Duval County. R.8757–64. The secondary map in CS/SB 102 (Plan 8015) included a district that, like the configuration of District 5 imposed by this Court in 2015, connected portions of Duval County with Gadsden County and portions of Leon County. R.8749–56.

The Governor's constitutional concerns ultimately led him to veto CS/SB 102. A legal memorandum accompanying the Governor's veto letter concluded that the primary map (Plan 8019) violated the Florida Constitution's non-diminishment requirement by reducing District 5's black voting-age population from 46.20% to 35.32%, with an associated diminishment of the ability of black voters to elect representatives of their choice as measured by past election history results. R.9225–33. The memorandum also explained why the

secondary map, although it would satisfy the Florida Constitution's non-diminishment provision, would nevertheless violate the federal Equal Protection Clause by allowing racial considerations to predominate over traditional redistricting criteria without a compelling interest. *Id.*

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

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

II. The Case

A. Complaint and Temporary Injunction Proceedings

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

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

Petitioners initially sought and received a trial court ruling temporarily enjoining the Secretary from implementing the Enacted Plan for the 2022 congressional elections based solely on a purported violation of the Florida Constitution's non-diminishment standard in the configuration of the North Florida districts. R.331–35, 1161–81. After Respondents appealed the non-final order granting injunctive relief, the trial court entered an order vacating the automatic stay. R.1484–87. The First District reinstated the automatic stay. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070 (Fla. 1st DCA 2022), *writ denied*, 340 So. 3d 475 (Fla. 2022). After this Court

denied Petitioners' request for a constitutional writ, *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, 340 So. 3d 475 (Fla. 2022), the First District issued a merits decision vacating the temporary injunction and concluding that the trial court abused its discretion by granting a temporary injunction that altered the status quo. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 340 So. 3d 569, 571 (Fla. 1st DCA 2022).

B. Motion Practice Narrows the Scope of the Litigation

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

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

C. Legislative Privilege Dispute

On October 10, 2022, a group of eleven non-party legislators and current or former legislative staff members moved for a protective order to prevent their compelled videotaped depositions by Petitioners. R.2049–78. Among other arguments, the non-parties preserved a claim that the Florida Constitution's separation-of-powers provision affords an absolute legislative privilege in civil cases, and that this Court should overrule its contrary holding in *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013) ("*Apportionment IV*"). R.2057–58.

After expedited briefing and a hearing, the trial court entered an order granting in part and denying in part the non-parties' motion for protective order. R.2504–10. The non-parties filed a timely appeal of that order to the First District on November 28, 2022. *Rodrigues v. Black Voters Matter Capacity Bldg. Inst., Inc.*, No. 1D22-3834 (Fla. 1st DCA). That appeal remains pending.

D. Amended Complaint and Responsive Pleadings

Petitioners filed an amended complaint on February 8, 2023, which would serve as the operative complaint at trial. R.2677–2713. The amended complaint substituted certain individual plaintiffs, removed defendants and claims that had been dismissed from the action, and added factual allegations involving the 2022 midterm elections. R.2626. The Secretary (R.2733–48), House (R.2714–32), and Senate (R.2749–76) filed timely answers and affirmative defenses to the amended complaint. Petitioners filed a reply denying Respondents' affirmative defenses and asserting claims of avoidance. R.3107–15.

E. Petitioners Abandon Additional Claims; Pre-Trial Briefs; Trial Court Enters Judgment

Through a series of pre-trial motions and a joint stipulation, the Petitioners’ claims were eventually narrowed to a single theory: that the Enacted Plan diminishes the ability of black voters in the former District 5 to elect the representative of their choice in violation of Article III, section 20(a), of the Florida Constitution. R.7076–81, R.8026.

The parties filed trial briefs and response briefs on the outstanding legal issues. *See* R.8334–10376 (Petitioners’ trial brief);

11121–37 (Legislature's trial brief); 11138–66 (Secretary's trial brief); 11569–89 (Legislature's response brief); 11590–603 (Secretary's response brief); 11604–60 (Petitioners' response brief).

The Legislature argued in its trial brief that the Enacted Plan is constitutional because the Equal Protection Clause precludes the drawing of a North Florida congressional district that would satisfy the Florida Constitution's non-diminishment provision as to the former configuration of District 5. R.11121–37. The unique geography and population demographics in North Florida ensure that the only way to satisfy the non-diminishment requirement would be through the creation of a sprawling and non-compact congressional district in which racial considerations predominate over race-neutral redistricting criteria in violation of federal law. R.11125. Because the Supremacy Clause requires conflicts between state and federal constitutional requirements to be resolved in favor of the federal-law requirements, the Legislature argued that Petitioners' non-diminishment claim necessarily fails. *Id.*

The Legislature's trial brief also explained why the Equal Protection concerns raised by the application of the non-diminishment provision are limited to North Florida: the configuration of District 5

imposed by this Court in 2015 was an extreme outlier, with an egregiously non-compact configuration that abandoned traditional race-neutral districting principles to connect disparate pockets of minority voters in downtown Jacksonville, portions of Tallahassee, and Gadsden County. R.11129–30. Drawing a new district that would satisfy the non-diminishment provision in comparison to the court-imposed District 5 would likewise require the elevation of racial considerations to the predominant factor and the subordination of traditional districting principles. *Id.* These irreconcilable conflicts between state and federal districting standards in North Florida are not present elsewhere in the State; the Legislature's trial brief contains numerous examples of congressional districts in the Enacted Plan in which the requirements of the Florida Constitution, federal Voting Rights Act (the "VRA"), and the Fourteenth Amendment can all be harmonized. *See* R.11131 (identifying Districts 9, 24, and 27 as examples of extremely compact districts drawn with respect for political and geographical boundaries that also do not diminish the ability of racial or language minorities to elect representatives of their choice in comparison to their corresponding districts in the 2015 congressional district plan).

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

The parties presented arguments to the trial court on a stipulated written record at a final hearing in August 2023. R.12089–323. One week later, the trial court entered a final judgment in favor of Petitioners. R.12466–520. The final judgment concluded that Petitioners proved the Enacted Plan violates the non-diminishment provision of the Florida Constitution because the Enacted Plan results in a diminishment of the ability of black voters to elect their representatives of choice as compared to the prior configuration of District 5. R.12479–90.

The final judgment also rejected Respondents' Equal Protection arguments. R.12490–520. The trial court analyzed the Equal Protection arguments not as justifications for the State's chosen configuration of the Enacted Plan, but as though Respondents had asserted a cause of action: "a racial gerrymandering claim" or "racial gerrymandering challenge" in the form of a counterclaim or cross-claim. R.12493–94. Under this analytical framework, the trial court

concluded that Respondents could not bring a "racial gerrymandering challenge" against an unenacted district (R.12493–96) and lacked standing to assert an Equal Protection violation under both federal law and the public official standing doctrine (R.12496–12501). The trial court also ruled that Respondents had "not proven race would necessarily predominate in the drawing of any district in North Florida" (R.12501–508) and that a district that remedies the diminishment in the Enacted Plan would be "narrowly tailored to address a compelling state interest": "[c]ompliance with the Florida Constitution's non-diminishment provision." (R.12508–18).

Respondents promptly appealed to the First District. R.12521–83.

F. First District Proceedings

The parties jointly requested the First District to certify the case for immediate resolution by this Court under its "pass-through" jurisdiction. AR.82–93. The parties explained that the Legislature was set to convene on January 9, 2024, and that there was " 'insufficient time for [the First District] to provide a first-tier review prior to the issues being heard by [this Court]' if the appeal was going to be resolved in time for the 2024 election." *See* AR.87 (quoting *Am. Civil*

Liberties Union of Fla. v. Hood, 881 So. 2d 664, 666 (Fla. 1st DCA 2004)). Rather than certifying the case, the First District ordered initial hearing en banc. AR.94–96.

The Legislature's merits briefing at the First District highlighted Petitioners' failure to carry their burden to prove the Enacted Plan unconstitutional. *See* AR.268–76, 283–91 (initial brief arguments); AR.731–48 (reply brief). The Legislature specifically argued, based on this Court's precedent and analogous federal cases, that Petitioners' burden to prove a violation of the Florida Constitution's redistricting provisions includes the burden to prove that an alternative, constitutionally compliant district configuration could have been enacted—and could therefore serve as a lawful remedy. AR.268–76, 731–38. And the Legislature's briefs demonstrated why neither of the two alternative plans proffered by Petitioners (effectively, the primary and secondary plans that were vetoed by the Governor) satisfied their burden to show that it was possible to draw a district in North Florida that complies with both the Florida Constitution's non-diminishment standard and the Equal Protection Clause. AR.283–91, 738–48.

The parties presented oral argument to the en banc court on October 31, 2023. One month later, the First District issued its

decision reversing the trial court by an 8-2 margin. AR.809–86. A majority opinion for seven judges held that the non-diminishment provision requires plaintiffs to establish that they are part of a "geographically compact" and "naturally occurring" community that has "achieved some cohesive voting power under a legally enforceable district." AR.837–39. Plaintiffs who establish this "benchmark" can prove a non-diminishment claim with evidence showing that their community's voting power has decreased under a new districting enactment. *Id.*

Petitioners here failed to prove their non-diminishment claim, the First District held, because there was no evidence that former District 5 contained a "naturally occurring" and "geographically compact community" as a "proper benchmark or baseline from which to assess an alleged diminishment in voting power." AR.839.

Petitioners timely petitioned this Court to exercise its discretionary jurisdiction to review the First District's decision. AR.973–76. On January 24, 2024, this Court entered an order accepting jurisdiction.

SUMMARY OF ARGUMENT

The Enacted Plan is constitutional. This Court should affirm the First District's conclusion that Petitioners failed to prove a violation of the Florida Constitution's non-diminishment provision.

The First District properly reversed the trial court's determination that Petitioners carried their burden to prove the Enacted Plan unconstitutional under the Florida Constitution's non-diminishment provision. Under this Court's precedent and analogous federal case law, Petitioners bore the burden to prove that the Legislature *could have drawn* a North Florida district that complies with both the non-diminishment provision and the Federal Constitution. The trial court erroneously shifted the burden to Respondents to prove the non-existence of a lawful remedy, and further erred in concluding that either of the two alternative district configurations proffered by Petitioners below could satisfy their burden to prove a non-diminishment violation. Other errors by the trial court in evaluating the Legislature's defense of the Enacted Plan also serve as a basis to affirm the First District's disposition.

STANDARD OF REVIEW

Where, as here, a trial court's decision is based on stipulated facts, an appellate court's review is de novo. *Fla. Dep't of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 911 (Fla. 2016); *McClain v. Atwater*, 110 So. 3d 892, 898 (Fla. 2013); *Humana Med. Plan*, *Inc. v. Reale*, 180 So. 3d 195, 201 (Fla. 3d DCA 2015).

This Court also reviews the constitutionality of statutes and the interpretation of provisions of the Florida Constitution de novo. *Planned Parenthood of Sw. & Cent. Fla. v. State*, 49 Fla. L. Weekly S73, 2024 WL 1363525, at *5 (Fla. Apr. 1, 2024); *see also Crews v. Fla. Pub. Emp'rs Council 79*, 113 So. 3d 1063, 1068 (Fla. 1st DCA 2013) (applying *de novo* review to interpretation of statutes and provisions of the Florida Constitution and application of those laws to undisputed facts); *Cnty. of Volusia v. DeSantis*, 302 So. 3d 1001, 1003 (Fla. 1st DCA 2020) (reviewing *de novo* questions of constitutional interpretation).

ARGUMENT

Nearly half of Petitioners' initial brief is devoted to criticism of the First District's conclusion that Petitioners failed to establish former District 5 as a proper benchmark for evaluating their non-

diminishment claim. IB.22–43. The Secretary's separate brief offers a thorough discussion of the merits of the First District's decision, and of Petitioners' criticism of that decision.

In this brief, the Legislature addresses flaws in Petitioners' case and errors by the trial court that would provide an alternative basis to affirm the First District's disposition. Petitioners failed to carry their burden to prove that a constitutionally-compliant congressional district satisfying the non-diminishment provision *could be drawn* in North Florida without resorting to racial gerrymandering in violation of the Equal Protection Clause. The trial court also erred by concluding that the public official standing doctrine precluded the Legislature from defending the constitutionality of the Enacted Plan, and then by misconstruing the Legislature's defense of the Enacted Plan as though it were a counterclaim asserting racial gerrymandering in a hypothetical district. For any of these reasons, the trial court's order should be reversed and remanded with instructions to enter judgment for Respondents.

I. Petitioners failed to prove a non-diminishment violation.

A. Overview of state and federal redistricting standards

The Supreme Court acknowledged in *Abbott v. Perez* that "[r]edistricting is never easy." 585 U.S. 579, 585 (2018). States must comply with the Equal Protection Clause of the Fourteenth Amendment and the VRA, which sometimes pull in opposite directions on racial issues and leave states attempting to produce a lawful districting plan vulnerable to "competing hazards of liability." *Id.* at 2315 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). Some states, including Florida, impose additional restrictions on the redistricting process as a matter of state law.

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

1. The Florida Constitution's redistricting standards

The Florida Constitution prescribes "standards for establishing congressional district boundaries." Art. III, § 20, Fla. Const. The constitutional provision is organized into two "tiers," each with its own distinct standards. The tier-one standards take precedence over those in tier two when in conflict; but the order of the standards within each

tier "shall not be read to establish any priority of one standard over the other." Art. III, § 20(c), Fla. Const.

The first of the tier-one standards prohibits intentional political favoritism: "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(c), Fla. Const.; *In re Sen. Jt. Resol. of Leg. Apportionment 100*, 334 So. 3d 1282, 1286 (Fla. 2022) (*"Apportionment 2022"*).[3] The next set of tier-one standards protects racial and language minority voters: "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Art. III, § 20(c), Fla. Const. The final tier-one standard requires districts to "consist of contiguous territory." *Id.*

This Court has held that the minority voting standards of the Florida Constitution "identify and proscribe two types of

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

discrimination: 'impermissible vote dilution' and 'impermissible diminishment of a minority group's ability to elect a candidate of its choice.'" *Apportionment 2022*, 334 So. 3d at 1288 (quoting *In re Sen. Jt. Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 619 (Fla. 2012) ("*Apportionment I*")). These provisions "were modeled on and 'embrace[ ] the principles' of key provisions of the federal Voting Rights Act of 1965, section 2 (vote dilution)[4] and section 5 (diminishment, or retrogression)." *Id.* (quoting *Apportionment I*, 83 So. 3d at 619–21).

The non-diminishment provision "means that 'the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred

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

candidates.'" *Id.* at 1289 (quoting *Apportionment I*, 83 So. 3d at 625).[5] The non-diminishment standard requires a comparison between the former redistricting plan—the benchmark plan—and the new districts. *Apportionment I,* 83 So. 3d at 624. Evaluating the extent to which benchmark and new districts perform for minority voters requires a "functional analysis" of voting behavior within the districts at issue that considers population data, voter turnout and registration data, and election results. *Apportionment 2022*, 334 So. 3d at 1289.

As its plain language suggests, the non-diminishment standard protects against any diminishment—not merely against a total elimination of the ability to elect.[6] As then-Chief Justice Canady explained, "diminish" means "to make less or cause to appear less." *Apportionment I*, 83 So. 3d at 702 (Canady, C.J., concurring in part and dissenting in part) (quoting Webster's Third International

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

[6] The "ability to elect" protected from diminishment by the Florida Constitution is measured by a holistic review of voting and elections data, not by any single numerical metric such as black voting-age population.

Dictionary 634 (1993)). Thus, in *Apportionment I*, this Court recognized that new districts may not "weaken" historically performing districts, 83 So. 3d at 625, and that the non-retrogression standard adopted by Congress, and more recently by Florida, asks whether the minority population is "more, less, or just as able to elect a preferred candidate of choice after a change as before," *id.* at 624–25 (quoting H.R. Rep. No. 109-487, at 46 (2006)); *see also id.* at 655 (concluding that the Senate's newly enacted minority districts maintain "commensurate voting ability").

The tier-two standards address districts' "population, shape, and boundaries." *Apportionment 2022*, 334 So. 3d at 1286. Districts "shall be as nearly equal in population as is practicable"; they "shall be compact"; and they "shall, where feasible, utilize existing political and geographical boundaries." Art. III, §20(b), Fla. Const. Where compliance with the tier-two standards would conflict with the standards in tier one or with federal law, the latter provisions prevail. *Id.*

2. Federal constitutional standards

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution also constrains States when drawing

congressional districts. The Equal Protection Clause provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, § 1, U.S. Const. The Supreme Court has interpreted this provision to require precise mathematical equality of population among a state's congressional districts. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

In addition to the requirement for population equality among a state's congressional districts, the Equal Protection Clause restricts the use of race in the redistricting process. A State ordinarily violates the Equal Protection Clause when it makes race the predominant factor in drawing an electoral district. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). In other words, a State may not "subordinate[] traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Race predominates in establishing district boundaries when "race-neutral considerations [come] into play only after the race-based decision had been made," *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023) (quoting *Bethune-Hill v. Va. State Bd. of*

Elections, 580 U.S. 178, 189 (2017)), or when race furnished "the overriding reason for choosing one map over others," *Cooper*, 581 U.S. at 301 n.3 (quoting *Bethune-Hill*, 580 U.S. at 190).

When race predominates over traditional race-neutral districting principles, then, to survive constitutional scrutiny, the district must be narrowly tailored to serve a compelling governmental interest. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Apart from a State's interest in prison safety, the only compelling interest the Supreme Court has ever recognized to justify race-based government action is the remediation of "specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023). The Supreme Court has only assumed, but not decided, that a State's compliance with the VRA advances a compelling interest. *Bethune-Hill*, 580 U.S. at 193.

3. Federal standards control when redistricting standards conflict.

The Florida Constitution expressly provides that the tier-two standards apply to congressional redistricting unless compliance with their requirements would conflict with the tier-one standards or with

federal law. Art. III, § 20(b), Fla. Const. In the event of a conflict between the Florida Constitution and federal law, the Supremacy Clause provides a clear answer as to priority: the "Constitution . . . of the United States" is "the supreme Law of the Land." Art. VI, cl. 2, U.S. Const. Since at least *McCulloch v. Maryland*, 17 U.S. 316 (1819), "[i]t has been settled that state law that conflicts with federal law is without effect." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (internal marks omitted).

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

B. To prove their non-diminishment claim, Petitioners had the burden to demonstrate the existence of a lawful alternative district configuration.

This Court's decisions from last decade's redistricting cycle and analogous federal cases confirm that Petitioners' burden in attempting

to prove the Enacted Plan unconstitutional included the obligation to prove the existence of a potential remedy—an alternative district configuration that complies with *both* the Florida Constitution's non-diminishment provision *and* the federal constitutional prohibitions against racial gerrymandering. Petitioners' efforts to disregard that burden—or try to shift it to Respondents—are squarely foreclosed by precedent.

1. *This Court's precedents required Petitioners to prove the existence of a lawful alternative district configuration.*

The Enacted Plan—like all legislation—is presumed valid. *Apportionment 2022*, 334 So. 3d at 1285; *Apportionment I*, 83 So. 3d at 606. To overcome that presumption, Petitioners had the obligation to prove that the Legislature erred in enacting a race-neutral congressional map in North Florida. They could do that only by showing that the Legislature could have drawn a district in North Florida that complies with the non-diminishment standard in the Florida Constitution without violating the Equal Protection Clause. Without accounting for the requirements of both constitutional provisions, Petitioners cannot show that the Legislature should have done something differently when drawing congressional district lines.

This Court's precedents confirm that, when asserting a claim under the Florida Constitution's redistricting provisions, a plaintiff's burden includes the burden to prove that an alternative, constitutionally compliant district configuration *could have been* enacted—and could serve as a lawful remedy. Challengers presented alternative plans throughout last decade's redistricting cycle as a part of their prima facie case, and this Court held that a challenger who failed to present an alternative, constitutionally compliant district configuration in support of a district-specific claim failed to carry its burden of proof.

For example, in *Apportionment I*, a challenger argued that House District 70 "could have been drawn differently to be more compact and to better utilize boundaries." 83 So. 3d at 648. The Court upheld the district, explaining that the challenger had "not demonstrated that this can be done without causing retrogression." *Id.* The Court upheld House districts located in South Florida on the same ground, again placing the burden on the challenger to demonstrate that compliance could have been achieved consistent with all other requirements. *Id.* at 650 ("The FDP does not assert or demonstrate that the district can be drawn more compactly while also adhering to Florida's minority

voting protection provision.”); *id.* at 652 (“The FDP has not shown that it was feasible for the Legislature to keep more municipalities together in this heavily populated area while comporting with Florida’s minority voting protection provision.”); *id.* at 653 (“The FDP has not demonstrated that it was feasible for the Legislature to configure District 105 differently while comporting with Section 5 of the VRA and Florida’s minority voting protection provision.”); *id.* (“The FDP does not allege how either district could be drawn differently to be more compact without violating Florida’s minority voting protection provision. Accordingly, the FDP has failed to satisfy its burden of proof with respect to these two districts.”).

Meanwhile, this Court invalidated several other districts on compactness grounds because the challenger established that it was possible to draw compact districts without violating a superior, tier-one requirement. *Id.* at 669 (“Thus, the Coalition has demonstrated that District 6 can be drawn much more compactly and remain a minority-opportunity district.”); *id.* (“[T]here is no constitutional impediment to the alternatives set forth in the Coalition plan, which comply with the constitutional requisites. Accordingly, we conclude that Districts 6 and 9 are constitutionally invalid.”); *id.* at 678 (“[T]he

Coalition's plan demonstrates that the Senate was able to draw districts in this region of the state to better comply with Florida's compactness requirement while, at the same time, maintaining a black majority-minority district.").

Similarly, this Court assessed whether specific Senate districts were motivated by improper partisan intent by looking to "alternative plan[s]" to assess whether "it was possible" to draw districts that complied with tier-two standards. *Apportionment I*, 83 So. 3d at 640, 664; *see also id.* at 641 ("[A]n alternative plan that achieves all of Florida's constitutional criteria without subordinating one standard to another demonstrates that it was not necessary for the Legislature to subordinate a standard in its plan."); *In re Sen. Jt. Resol. of Legis. Apportionment 2-B*, 89 So. 3d 872, 889–90 (Fla. 2012) (*"Apportionment II"*) (concluding that challengers "have not carried their burden of proof" where their alternative plans "do not demonstrate that the redrawn Orlando districts are invalid" but alternative plans instead "raise[d] concerns" under the non-diminishment provision and contained "potential Section 2 issues").

The challengers in last decade's redistricting litigation proffered alternative maps as part of their initial burden of proof on invalidity.

Petitioners bore the same burden here. In fact, evidence that a legally compliant alternative is available is far more critical when evaluating a results-based claim than a claim that alleges partisan intent. Because it is *always possible* to draw a district without improper intent, it is unnecessary to prove that it *could have* been done. Where, however, a challenger asserts a results-based claim—such as the non-diminishment claim Petitioners assert here—the challengers must prove that the *result* they seek was achievable, both legally and practically. That is precisely the burden this Court placed on challengers during the last redistricting cycle—a burden that proved dispositive time and time again.

2. Analogous federal case law also requires challengers to prove the existence of a lawful alternative district configuration.

The requirement that a redistricting plaintiff prove the existence of a lawful alternative remedy as a part of its prima facie case is also well-established in federal redistricting litigation under Section 2 of the VRA. In those situations, courts require a plaintiff to present an alternative map showing that it was *possible* to draw an appropriate remedy that satisfies Section 2. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 155–56 (1993); *White v. Regester*, 412 U.S. 755, 766 (1973);

Davis v. Chiles, 139 F.3d 1414, 1419, 1425 (11th Cir. 1998) ("As part of any prima facie case under Section Two, a plaintiff must demonstrate the existence of a proper remedy. . . . [O]ur precedents *require* plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate." (emphasis in original)); *Nipper v. Smith*, 39 F.3d 1494, 1530–31 (11th Cir. 1994) (en banc) ("[T]he issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases. . . . The inquiries into remedy and liability, therefore, cannot be separated: A district court must determine as part of the *Gingles*[7] threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system."). Petitioners' claim here that the State was required to include a North Florida district that satisfies the non-diminishment requirement is analogous to a claim under the VRA in which a plaintiff asserts that Section 2 required a state to draw

[7] *Thornburg v. Gingles*, 478 U.S. 30 (1986)

additional minority districts.[8]

Contrary to Petitioners' arguments (IB.50-51), their burden to prove the existence of an alternative district that avoids diminishment and is otherwise legally compliant did not shift to Respondents merely because Respondents acknowledged the relevance of the Equal Protection Clause in their affirmative defenses. A cautious defendant does not assume a burden of proof that it would not otherwise bear when, to ensure the preservation of an argument, it pleads as affirmative defenses matters on which the plaintiff properly bears the burden as part of its prima facie case.

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[8] In assessing Petitioners' burden on a non-diminishment claim, Section 5 of the VRA is not a proper analogue. Section 5 was not left to private enforcement; rather, covered jurisdictions were required to submit election-law changes to a federal court or the United States Department of Justice and then bore the burden to prove that those changes were not retrogressive. *Georgia v. United States,* 411 U.S. 526, 538 & n.9 (1973); *cf. Bethune-Hill*, 580 U.S. at 194 (describing application of Section 5 before coverage formula was invalidated). Section 5 itself therefore says nothing about the proper allocation of the burden of proof in a declaratory judgment action brought by private plaintiffs under a presumption of validity outside of Section 5's special burden-shifting mechanism. *See Apportionment I,* 83 So. 3d at 624 n.26 ("While Florida's provision borrows language from Section 5, it does not incorporate the portion of Section 5 placing the burden of proof on the covered jurisdiction . . . .").

The presumption of validity means that the Legislature's determination that the non-diminishment standard conflicts with and must yield to the requirements of the Equal Protection Clause in North Florida is presumed correct until a challenger proves that the legislative judgment was erroneous and that both standards could have been harmonized. To overcome the presumption here, Petitioners bore the burden to demonstrate that the Legislature *could have* drawn an alternative congressional district in North Florida that *complies* with both the state and federal constitutional standards. Neither of the two alternative maps proffered by Petitioners below demonstrates that such a district could have been drawn.

C. Petitioners failed to satisfy their burden to demonstrate the existence of a lawful alternative district configuration.

Although Petitioners claim that any evaluation of a potential alternative plan is "premature," IB.59, they presented two plans before the trial court containing different configurations of District 5: the "East-West" district in Plan 8015 and the "Duval-only" district in Plan 8019. IB.60–64. Neither of these districts could serve as a constitutionally compliant alternative district configuration. First, the East-West district in Plan 8015 does not comply with the federal

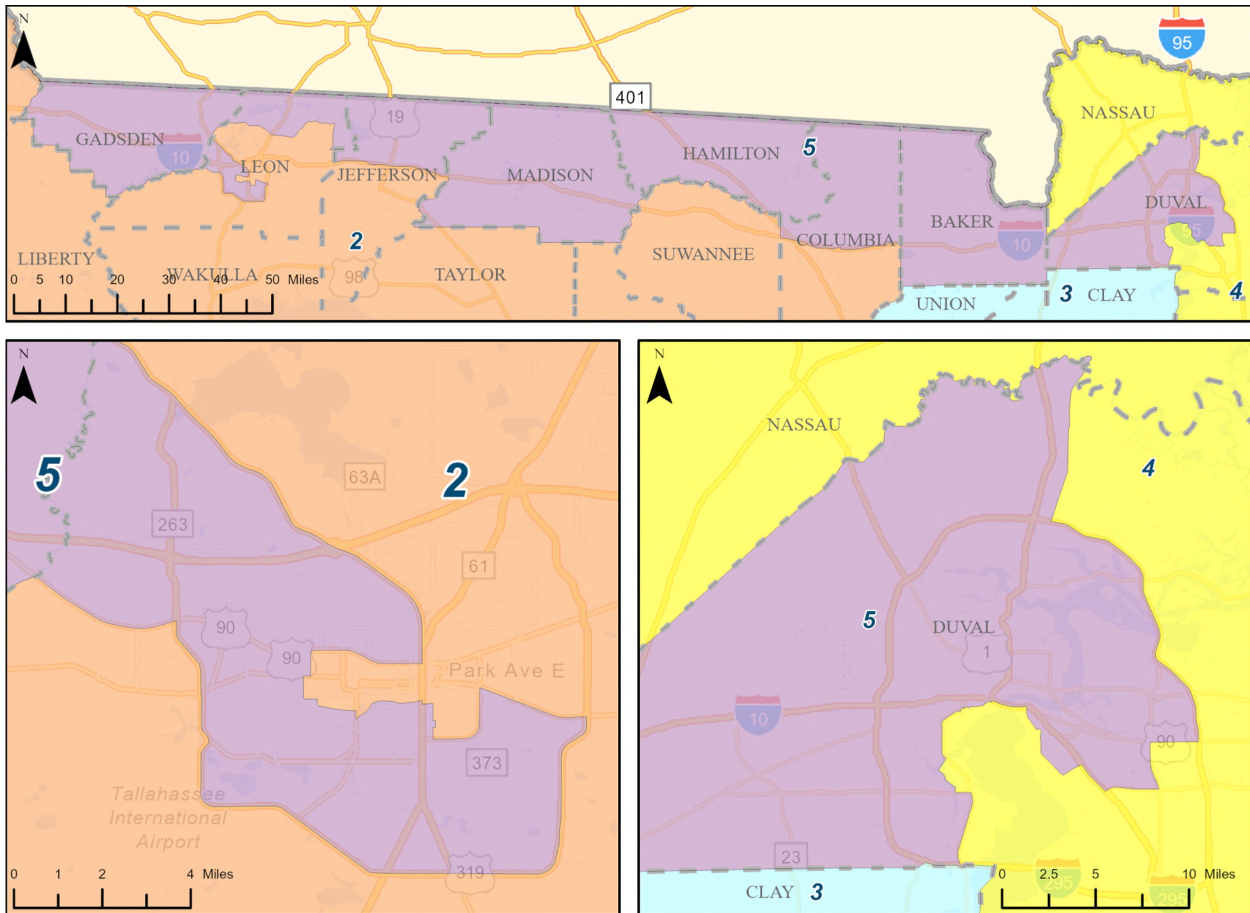
constitution's Equal Protection Clause because racial considerations predominate in its sprawling and irregular configuration. Second, on appeal to this Court, Petitioners appear to have abandoned their argument that the "Duval-only" district in Plan 8019 complies with the non-diminishment requirement. But even if they had not abandoned this argument, the Duval-only district does not comply with the Florida Constitution because it violates the very non-diminishment provision Petitioners are suing to enforce.

1. *The East-West version of District 5 in Plan 8015 would violate the Equal Protection Clause.*

Racial considerations predominate in the East-West version of District 5 in Plan 8015. Under the Florida Constitution, *only* race can justify a departure from the tier-two requirement that districts "be compact." Art. III, § 20, Fla. Const. The object of the compactness criterion is that a district "should not yield bizarre designs." *Apportionment I*, 83 So. 3d at 634.

Plan 8015's version of District 5, like the former version of District 5 imposed by this Court in 2015, is visually bizarre and egregiously non-compact by mathematical measures. AR.681–82. The district strings eight counties or portions of counties together in a line,

combining some of the state's most densely populated urban areas with some of its most sparsely populated agrarian counties. *Id.* District 5 in Plan 8015 resembles a horizontal seahorse stretching along the Florida-Georgia border, with its head in downtown Jacksonville and its tail hundreds of miles to the West extending narrowly across the top of Leon County into Gadsden County before curling back around with a hooked tail piercing deep into portions of Tallahassee from the Northwest. AR.681. The Leon County appendage captures FAMU, Frenchtown, and much of Tallahassee's Southside while leaving FSU, Southwood, Killearn Estates, and Capital City Country Club in District 2. *Id.*



Id. The district scores poorly on quantitative compactness measures as well, with the lowest Polsby-Popper (0.11) and Reock (0.11) scores of any district in either Plan 8015 or the Enacted Plan. AR.666, 682.

The circumstantial evidence confirms that the configuration of the East-West district in Plan 8015—like the version of District 5

imposed by this Court in 2015—was based predominantly on race.[9] Neither Petitioners nor the trial court suggested any legitimate basis for a congressional district stretching from Jacksonville to Gadsden County *other than* race.

Although circumstantial evidence is enough to establish racial predominance, *Miller*, 515 U.S. at 916 (explaining that predominance may be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence"), direct evidence confirms what the circumstantial evidence alone proves. In ordering the creation of an East-West district in 2015, this Court focused solely on the district's performance for racial minorities. *Apportionment VII*, 172 So. 3d at 402–05. The ability to elect candidates preferred by minority voters was the one affirmative virtue cited by the Court in support of the district's adoption. *Id.* As to race-neutral criteria, the Court suggested only that the district is "less unusual and bizarre"

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[9] Petitioners assert that the 2015 district was "drawn by legislative staff" and "passed by both the House and Senate," IB.8-9 (quoting *Apportionment VIII*, 179 So. 3d at 272), but the House and Senate drew that district only because this Court directed them to, *see Apportionment VII*, 172 So. 3d at 403 ("[W]e hold that District 5 must be redrawn in an East-West manner.").

than its predecessor, divides "fewer" political subdivisions than the North-South configuration, and is not a "model of compactness." *Id.* at 406. Like the Florida Supreme Court, Petitioners in this case have cited one—and *only* one—reason for the East-West district's reinstatement: race. Race is all that an East-West configuration of this district has ever been about.

Statements of legislators and legislative staff made clear that the overriding purpose of the East-West district proposed in Plan 8015 was to maintain the voting ability of one racial group. R.11683 at 16:4–9 (explaining that the district "is a protected black district that was drawn to protect the black population's ability to elect a candidate of their choice"); R.11926 at 13:7–16 (explaining that the district "is a performing black district that was recreated similarly to the benchmark district" and that "the functional analysis on this district that was conducted by staff ensures the minority group's ability to elect is not diminished"); R.11981 at 68:16–21 (explaining that the district "has Tier 1 protections" and that "Gadsden County is Florida's only majority-minority black county in the entire state, which goes into part of that Tier 1 consideration, which, again, outranks compactness as a Tier 2 requirement"). While Petitioners note the

"evidentiary difficulty" of proving racial predominance in most cases, IB.56 (quoting *Miller*, 515 U.S. at 915–16), that difficulty vanishes when a court draws a district with a shape that cannot be justified on race-neutral principles—with express, race-based motivations—and the district is later recreated for precisely the same avowed purpose. *See Johnson v. Mortham*, 926 F. Supp. 1460, 1466 (N.D. Fla. 1996) (invalidating, as a racial gerrymander, a bizarrely shaped, court-drawn congressional district in North Florida).[10] *See also Callais v. Landry*, Case No. 3:24-CV-00122, 2024 WL 1903930 at *6 (W.D. La. Apr. 30, 2024) (three-judge court) (invalidating, as a racial gerrymander, a Louisiana congressional district that "stretches some 250 miles from Shreveport in the northwest corner of the state to Baton Rouge in southeast Louisiana, slicing through metropolitan areas to scoop up pockets of predominantly Black populations from Shreveport, Alexandria, Lafayette, and Baton Rouge").

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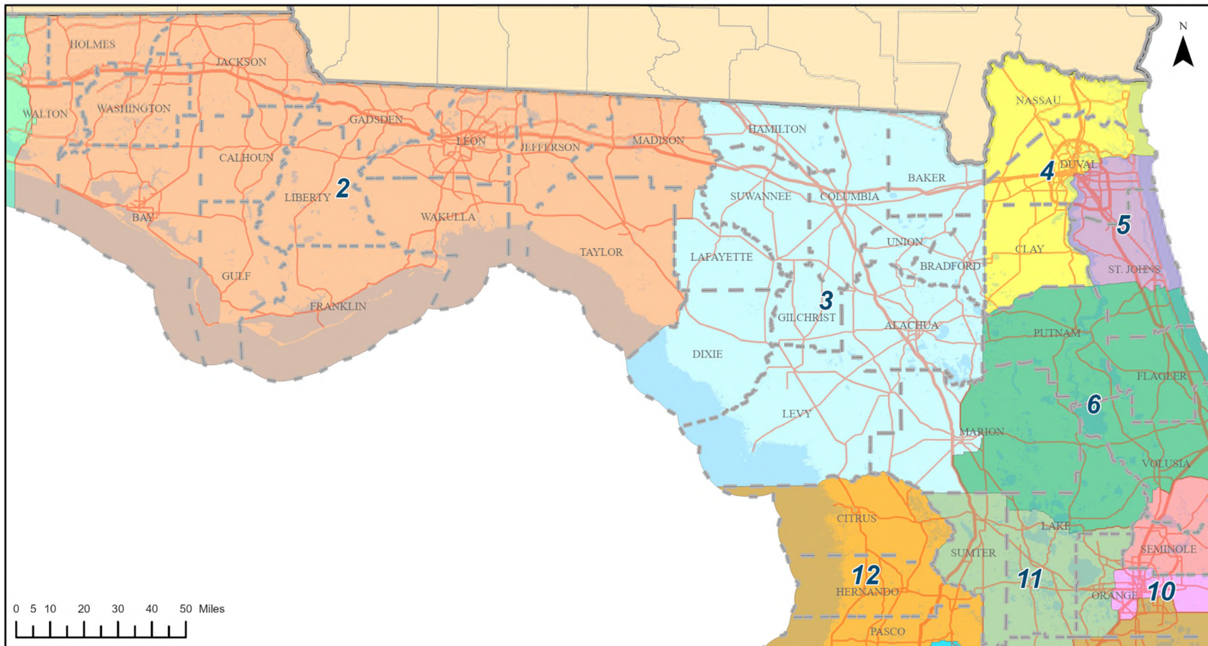
[10] The non-diminishment provision's functional analysis does not respond to "present-day conditions" in the way that Petitioners claim it does. IB.57–58. While the functional analysis determines whether a racial group has the ability to elect the candidates of its choice, it does not determine whether, under present-day conditions, identifiable race discrimination persists and continues to justify race-based government action.

Petitioners emphasize the trial court's "factual finding" that race did not predominate in the drawing of District 5 in Plan 8015 and suggest that this determination is reviewed only for "clear error." IB.60. That standard of review yields, however, when the "trial court rules on the basis of a written record and not on testimony requiring credibility determinations." *Town of Jupiter v. Alexander*, 747 So. 2d 395, 399 (Fla. 4th DCA 1998). In those circumstances, "the appellate court has before it everything the trial court reviewed, and [has] the same opportunity to weigh it as the trial court did." *Id.*; *see also McClain*, 110 So. 3d at 898 ("[A]s the order at issue is based entirely on written evidence, we examine the ruling in the same manner as any other order determining an issue of law on settled facts—whether the applicable issue of law was correctly decided, a de novo standard of review."); *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 610 (Fla. 5th DCA 2007) ("The evidence upon which the lower court based its ruling was in the form of a verified motion and a stipulated fact. The trial judge's ruling was expressly based entirely on the application of the law to these undisputed facts; thus, our review is de novo."). Here, this Court has everything before it that the trial court reviewed.

The trial court's conclusions as to racial predominance were based, in part, on its misallocation of the burden of proof to Respondents (R.12503–08). And its findings rest on clearly erroneous premises. The trial court's conclusion, for example, that "[t]here is nothing bizarrely shaped about the district" (R.12507) is patently incorrect; the district is grossly misshapen by any reasonable standard, as this Court can determine from a visual inspection alone. Even the incorrect "clear error" standard of review proposed by Petitioners does not require this Court to defer blindly to a trial court's findings based on an examination of the same stipulated facts.

Petitioners perpetuate other errors in the trial court's reasoning, such as the conclusion that the length of the East-West District 5 in Plan 8015 "is largely a factor of North Florida's rural geography and sparse population." IB.62. But the Enacted Plan shows it is possible to draw congressional districts in North Florida without odd, elongated shapes:



AR.665. As a member of the three-judge federal district court that recently upheld the Enacted Plan against a Fourteenth Amendment challenge, Judge Winsor contrasted the "jagged edges," "curious appendages," and "fingers poking into or out of urban areas" in the former District 5 with the "boring" District 2 in the Enacted Plan: "the two districts are both long, but they are nothing alike." *Common Cause Fla. v. Byrd*, 4:22-CV-109-AW-MAF, 2024 WL 1308119, at *51 (N.D. Fla. Mar. 27, 2024) (three-judge court) (Winsor, J., concurring in part and concurring in the judgment). Indeed, District 2 must move through the Panhandle until it reaches the required population for a congressional district. It cannot go anywhere else. In contrast, the

East-West District 5 that Petitioners advocate is not compelled by population equality and the Panhandle's geography.

Finally, Petitioners point to a non-compact East-West district spanning from Leon to Duval County in the 2002 congressional map. IB.62 (citing map at R.11651). But the 2002 district that Petitioners and the trial court treat as an appropriate historical exemplar was an *acknowledged partisan gerrymander* drawn to favor a Republican incumbent (Ander Crenshaw) a decade before the Florida Constitution was amended to require compact districts and to prohibit intentional political favoritism. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340 (S.D. Fla. 2002) ("[W]e have no trouble at all finding that the intent of the Florida legislature, comprised of a majority of Republicans, was to draw the congressional districts in a way that advantages Republican incumbents and potential candidates. Indeed, at trial, the defendants stipulated as much."). The whole point of the redistricting standards that voters enshrined in the Florida Constitution in 2010 was to ensure that districts are logically drawn and that bizarrely shaped districts are avoided. To rely on misshapen pre-amendment districts to support the validity of post-amendment districts ignores the will of the voters.

Nowhere in their brief do Petitioners suggest any legitimate, *non-racial* basis for the configuration of a 200-mile East-West district in North Florida. Their suggestion that the district's odd configuration may have arisen from a desire to adhere to political and geographic boundaries (IB.60–61) does not explain such features as the seahorse tail thrusting into Leon County to pull tens of thousands of predominantly black voters into District 5. Petitioners cannot carry their burden of proof by pointing to the East-West version of District 5 in Plan 8015 as a constitutional alternative in support of their non-diminishment claim.

2. The Duval-only district in Plan 8019 would violate the Florida Constitution because it diminishes the ability of black voters to elect representatives of their choice.

Petitioners continue to mention the Duval-only District 5 in Plan 8019 as a potential remedial district for their non-diminishment claim, but now do not even argue that the district satisfies the non-diminishment standard. IB.63–64. Even if Petitioners had not abandoned this position, the data confirm that the black voting-age population in the Duval-only district was approximately 11 percent lower than in former District 5. *Compare* AR.658 (46.2% BVAP in prior District 5), *with* AR.674 (35.32% BVAP in Plan 8019's District 5).

Other indicators of minority voting strength, such as minorities' share of turnout and registration within the district, show comparable reductions. AR.661–64, 677–80. Whereas the candidates preferred by black voters prevailed in 14 out of 14 statewide elections under former District 5 (AR.664), the comparable figure under the Duval-only district in Plan 8019 is 9 out of 14 statewide elections. R.680. The majority-white Duval-only district in Plan 8019 would have elected Republican Marco Rubio over Democrat Patrick Murphy in the 2016 U.S. Senate race; Republican Rick Scott over Democrat Charlie Crist in the 2014 Gubernatorial race; and Republicans Jeff Atwater, Pam Bondi, and Adam Putnam over their Democrat opponents in the 2014 Cabinet races. *Id.* Even when it was presented in the Legislature, the House Redistricting Committee Chair described the Duval-only district not as a district that *complied* with the non-diminishment provision, but as a "singular exception to the diminishment standard." R.10959.

Under the plain language of the Florida Constitution and this Court's precedent, this undisputed statistical evidence establishes that, as compared to the prior version of District 5, the Duval-only district would diminish the ability of black voters in North Florida to

elect representatives of their choice. These voters would be "less able" to elect preferred candidates of choice than under the 2015 congressional plan imposed by this Court. *Cf. Apportionment I*, 83 So. 3d at 624–25.[11] Because the Duval-only district would violate the non-diminishment provision, it cannot be considered a lawful alternative district configuration for purposes of establishing Petitioners' non-diminishment claim.

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[11] To the extent Petitioners argue that the non-diminishment provision tolerates diminishment, as long as the district still *performs* for minority voters, the non-diminishment provision's plain language refutes their argument. The non-diminishment standard asks whether the ability to elect has been diminished—not whether it has been wholly eliminated. *See* Art. III, § 20(a), Fla. Const. If the ability to elect has been diminished, then the district is non-compliant, even if it still performs. Petitioners correctly described that standard below:

> Plaintiffs must show that a minority group is "less able" to elect their candidate of choice under the new plan than it was under the old plan. [*Apportionment I*, 83 So. 3d] at 624-25. [T]hey must establish that (1) the Benchmark district . . . allowed Black voters the ability to elect the candidate of their choice, and (2) the Enacted Map weakens Black voters' ability to elect the candidate of their choice.

R.3497.

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

The Petitioners and the trial court also erred in concluding that the drawing of a congressional district in North Florida whose lines were predominantly based on race would serve a compelling interest. IB.64–69. The *only* interest Petitioners ever advanced as justification for the predominance of race in a North Florida district was the State's interest in compliance with the non-diminishment standard in the Florida Constitution. Thus, the record contains no evidence that the maintenance of a minority district in North Florida is necessary to eradicate the ongoing effects of specific, identifiable instances of past discrimination. *See*, *e.g.*, *Bush*, 517 U.S. at 982 (plurality opinion) (explaining that a State's interest in remedying past discrimination is "compelling" when the discrimination is "specific" and "identified," and the State had a "strong basis in evidence" to conclude that its remedial action was necessary) (internal quotation marks and citation omitted); *Miller*, 515 U.S. at 920–22. Nor does any party claim that Section 2 of the VRA protects the former District 5 and requires its preservation. Absent a compelling interest in its preservation, the subordination—and outright abandonment—of traditional race-neutral districting

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

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

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

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

Moreover, even if compliance with the VRA serves a compelling state interest, it does not automatically follow that compliance with Florida's non-diminishment standard does too. There are important differences between the VRA and Florida's non-diminishment standard. The VRA's mandates are narrow in scope; section 5 of the VRA, which prohibited retrogression, was both time-limited and geographically limited to "covered" jurisdictions in which Congress found evidence of race discrimination in elections. 52 U.S.C. §§ 10303(a)(8), (b), 10304; *Shelby Cnty. v. Holder*, 570 U.S. 529, 537–39 (2013). In 2011, section 5 applied to only nine States, 57 counties, and 12 municipalities across the entire country—none of which were in North Florida. Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239, 21,250 (Apr. 15, 2011); *see also South Carolina v. Katzenbach,* 383 U.S. 301, 328 (1966) (explaining, in finding section 5 constitutional, that the VRA "confines these remedies to a small number of States and political subdivisions which in most instances

were familiar to Congress by name”). Section 5 was also expressly time-limited—at its last reauthorization, to a period of 25 years. *Shelby Cnty.,* 570 U.S. at 537–38.

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

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

Moreover, the Florida Constitution’s non-diminishment standard does not share the VRA’s storied legacy as landmark civil-rights legislation, and, unlike the VRA, Florida’s non-diminishment

standard finds no express constitutional warrant in the Fourteenth Amendment. Congress and the States do not stand on equal footing when it comes to race. Section 5 of the Fourteenth Amendment entrusts Congress with express responsibility to enforce equal protection. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 490 (1989) (plurality opinion). The Reconstruction Amendments thus "worked a dramatic change in the balance between congressional and state power over matters of race," limiting the authority of States and expanding the authority of Congress. *Id.* Congress may, therefore, impose remedies that States may not, *id.* ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate."), while States "might have to show more than Congress before undertaking race-conscious measures," *id.* at 489. Even if compliance with the VRA serves a compelling interest, it does not follow that compliance with a *state-law* provision requiring "race-conscious measures" would serve a compelling interest as well.

The final judgment fails to explain why Petitioners' absolutist approach would not require Florida to ensure non-diminishment no

matter how much the resulting district would subordinate traditional redistricting criteria to predominate racial considerations. Petitioners offer no limiting principle or logical endpoint to their argument. *Cf. Students for Fair Admissions*, *Inc.*, 143 S. Ct. at 2170–73, 2175 (holding that race-based admissions programs could not be reconciled with the Equal Protection Clause, in part, because they lacked any meaningful endpoint). If the 2020 census had revealed that the 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. The Equal Protection Clause does not tolerate the total abandonment of traditional race-neutral districting principles in favor of the single-minded pursuit of racial considerations in redistricting. And in regions of the State where application of the Florida Constitution's requirements would necessarily conflict with the requirements of the Fourteenth Amendment, the Supremacy Clause requires the former to yield.

When racial considerations outrank race-neutral considerations in redistricting, the resulting district is subject to strict scrutiny. Here, the non-diminishment standard, as Petitioners interpret it, would

require not only the elevation of racial over race-neutral considerations, but also the adoption and perpetual preservation of a district so focused on race that it wholly abandons—and does not even minimally advance—traditional race-neutral districting principles. Because the maintenance of former District 5 would have violated the Equal Protection Clause, the non-diminishment standard could not compel its preservation in the Enacted Plan. The trial court committed reversible error in concluding otherwise.

III. The trial court erred in evaluating the Legislature's defense of the Enacted Plan.

Finally, the trial court erred in evaluating the Legislature's defense of the Enacted Plan. The arguments discussed above were at the heart of the Legislature's defense: Petitioners failed to establish that a valid alternative congressional district could be drawn that would satisfy both the Florida Constitution's non-diminishment provision and the Fourteenth Amendment's prohibition against racial gerrymandering. Rather than ruling on that contention, the final judgment determined that the Legislative Respondents lacked standing to defend the Enacted Plan and failed to plead the elements necessary to prevail on a counterclaim or cross-claim for racial

gerrymandering against a hypothetical congressional district. R.12490–519. These rulings constitute reversible error.

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

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

"The public official standing doctrine . . . provides that 'a public official may not defend his nonperformance of a statutory duty by challenging the constitutionality of the statute.'" *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019) (quoting *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 797 (Fla. 2008)). "The doctrine, grounded in the separation of powers, recognizes that public officials

are obligated *to obey the legislature's duly enacted statute* until the judiciary passes on its constitutionality." *Id.* (emphasis added); *accord id.* at 496 ("the public official standing doctrine broadly prohibits ministerial officers from challenging legislative enactments").

As a threshold matter, this executive-branch doctrine does not apply to the Legislature; the judgment in this case appears to be the first time in the doctrine's 100-year existence that a Florida court has ever applied it against the Legislature. The Legislature, of course, is not a "public official" or a "ministerial officer" in the first place; it is the lawmaking branch of state government. The power to evaluate the needs of the people of Florida and to amend or enact new laws necessarily involves an enormous amount of discretion. And no governmental function could be less "ministerial" than the creative power to originate new legislation.

As the seminal *Atlantic Coast Line* decision demonstrates, moreover, the doctrine's purpose is to preclude "ministerial officers" from exercising a purported "right and power to nullify *a legislative enactment.*" *State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681, 683 (Fla. 1922) (emphasis added); *accord id.* at 682 (describing "the question here presented" as one involving "the right

of a branch of the government, other than the judiciary, to declare *an act of the Legislature* to be unconstitutional" (emphasis added)). The Legislature's defense of the Enacted Plan does not implicate any purported "power of the ministerial officer to refuse to perform a statutory duty because in his opinion the law is unconstitutional." *Id.* at 684.

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

In addition to the prohibition on initiating constitutional challenges to statutory enactments, the public official standing

doctrine also provides that a public official "may not defend his nonperformance of a statutory duty by challenging the constitutionality of the statute." *Crossings at Fleming Island*, 991 So. 2d at 797 (citing *Atl. Coast Line*, 94 So. 681). In this respect, the doctrine exists "to prevent public officials from nullifying legislation through their refusal to abide by the law and requires them instead to defer to the judiciary's authority to consider the constitutionality of a legislative act." *Santa Rosa Dunes*, 274 So. 3d at 495. For example, in *Crossings at Fleming Island*, a property appraiser who denied tax exemptions to the plaintiff sought to defend the non-performance of his statutory duties by asserting, as an affirmative defense, the unconstitutionality of the statute that entitled the plaintiff to those tax exemptions. 991 So. 2d at 794–95.

Petitioners (and the trial court) turn the public official standing doctrine on its head by arguing that it should be applied to preclude the *Legislature* from *defending* the constitutionality of Florida's legislation adopting congressional districts against a constitutional challenge *brought by Petitioners*. IB.52–54; R.12497–99. No case cited by the trial court or Petitioners has applied the doctrine to prohibit a defendant—let alone the Legislature—from *defending* the

constitutionality of legislation. The doctrine has no application here, and that conclusion does not change merely because the Legislature's defense of its legislation encompasses the uncontroversial proposition that state constitutional provisions yield to competing federal constitutional provisions.

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

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

The trial court appears to have considered the Legislature's defenses as though they represented an unpleaded counterclaim or cross-claim seeking a determination that an unenacted congressional district should be stricken as a racial gerrymander. The final judgment

fundamentally misconceives the Legislature's invocation of the Equal Protection Clause.

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

The final judgment nonetheless faults Respondents for failing to identify a "specific and *existing* electoral district" as a racial gerrymander (R.12493–96) and concludes that Respondents lacked standing "to assert an Equal Protection violation" without demonstrating personal harm (R.12496–501). Those requirements might apply if the Legislature had asserted a claim in this action asking the Court to invalidate an existing district as a racial gerrymander. But that's not this case. Instead, the Legislature argued that Petitioners had not established the existence of a lawful alternative—and therefore had not established the existence of a lawful remedy—*in defense of* the Enacted Plan. The trial court's erroneous analysis requires reversal.

CONCLUSION

The trial court's judgment should be reversed and this case remanded with instructions to enter judgment for Respondents.

Respectfully submitted,

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I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.210(a)(2) because it was prepared using Bookman Old Style 14-point font and because the word count from the word-processing system used to prepare this document is 11,702.

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