

**IN THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA**

BLACK VOTERS MATTER CAPACITY  
BUILDING INSTITUTE, INC.,  
et al.,

Plaintiffs,

vs.

**CASE NO. 2022 CA 000666**

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

Defendants.

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**TRANSCRIPT OF PROCEEDINGS**

(FINAL TRIAL ON THE ISSUES)

DATE TAKEN: August 24, 2023

TIME: 9:00 a.m. to 1:00 p.m.

PLACE: Leon County Courthouse  
301 South Monroe Street, Room 3G  
Tallahassee, Florida 32301

BEFORE: J. LEE MARSH  
CIRCUIT JUDGE

This cause came on to be heard at the time and  
place aforesaid, when and where the following  
proceedings were stenographically reported by:

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1 The following proceedings began at 9:00 a.m.

2 **THE COURT:** We'll go ahead and go on the  
3 record.

4 Good morning. We're here today in the  
5 Leon County Case 2022-CA-666, Black Voters  
6 Matter Capacity Building Institute,  
7 Incorporated, and others, versus Cord Byrd in  
8 his official capacity as the Florida Secretary  
9 of State, and others.

10 We're here today for final trial on the  
11 issues. Now, that being said, on the 11th of  
12 August 2023, the parties entered into a joint  
13 stipulation to narrow the issues for  
14 resolution, thereby replacing our two-week  
15 nonjury trial with legal argument today. The  
16 parties have made a number of factual  
17 stipulations, and the like, and they'll  
18 obviously talk about those a little more as we  
19 proceed. But it is the parties' belief that  
20 that will leave the remaining issues to be --  
21 legal issues to be decided by this Court.

22 Then, to the extent there are some other  
23 agreements, the enforceability of which is not  
24 in front of this Court, and we'll deal with  
25 that when need to or the appropriate entities

1 will, but they've agreed to some certain flow  
2 paths after this Court enters a ruling whenever  
3 that may be.

4 So without further ado, I'll let the  
5 parties announce their appearances today, and  
6 then we'll proceed, but I'll let them announce  
7 that for the record first.

8 **MS. KHANNA:** Good morning, Your Honor.  
9 Thank You. Abha Khanna on behalf of the  
10 plaintiffs. With me at counsel table are  
11 Christina Ford, Jyoti Jasrasaria, and Fritz  
12 Wermuth.

13 **THE COURT:** Okay. Thank you, Counsel.

14 **MR. JAZIL:** Good morning, Your Honor.  
15 Mohammad Jazil on behalf of Secretary Byrd.  
16 With me are Michael Beato and Joshua Pratt,  
17 also on behalf of Secretary Byrd, and Deputy  
18 Secretary McVay.

19 **MR. BARDOS:** Your Honor, thank you. Andy  
20 Bardos with the GrayRobinson law firm on behalf  
21 of the Florida House of Representatives.

22 **MR. NORDBY:** Good morning, Your Honor.  
23 Daniel Nordby from Schutts and Bowen on behalf  
24 of the Florida Senate. With me are Kyle Gray  
25 and Carlos Rey, in-house counsel for the

1 Florida Senate.

2 **THE COURT:** All right. And with that,  
3 Ms. Khanna.

4 **MS. KHANNA:** Thank you. I believe we are  
5 waiting for one question on the tech. I will  
6 need the screen.

7 And with Your Honor's permission, I will  
8 be using a PowerPoint during the presentation.  
9 We have a copy in front of you, we'll have a  
10 copy for defendants' counsel as well.

11 **THE COURT:** All right. I've got both a  
12 paper copy and then I've got right here on this  
13 video screen.

14 **MS. KHANNA:** Thank you. Good morning,  
15 Your Honor.

16 May it please the Court, Abha Khanna on  
17 behalf of the plaintiffs.

18 This is a case about the Florida  
19 Constitution. In 2010, an overwhelming  
20 majority of Floridians voted to adopt the Fair  
21 District Amendments to the Florida  
22 Constitution. Pursuant to those amendments,  
23 Article III, Section 20(a), specifically  
24 prohibits redistricting plans drawn with the  
25 intent or the result of diminishing the ability

1 of racial minorities to elect representatives  
2 of their choice.

3 Plaintiffs claims that the Congressional  
4 map passed by the Florida legislature and  
5 signed into law by Governor DeSantis violates  
6 the nondiminishment provision of the Florida  
7 Constitution by eliminating the ability of  
8 Black voters to elect a representative of their  
9 choice in North Florida.

10 The facts relevant to plaintiffs'  
11 diminishment claim are not in dispute.  
12 Defendants have stipulated that plaintiffs have  
13 standing to bring their claim. Defendants have  
14 stipulated that Black voters in North Florida  
15 had the ability to elect their candidate of  
16 choice under the preexisting map in  
17 Benchmark CD-5. And defendants have stipulated  
18 that the Enacted Map eliminates the ability of  
19 Black voters in North Florida to elect their  
20 candidates of choice.

21 These facts, Your Honor, track precisely  
22 the elements of a diminishment claim under the  
23 Florida Constitution. The Florida  
24 Supreme Court has required nothing more and  
25 nothing less.



1           Now, in his initial brief, the Secretary  
2           tried to suggest that this Court could  
3           interpret the nondiminishment provision to add  
4           an extra threshold, a 50 percent Black voting  
5           age population requirement, before the  
6           nondiminishment provision is even triggered.  
7           But defendants have since run away from any  
8           such argument. And that's for good reason. It  
9           is simply false.

10           The Florida Supreme Court and the Florida  
11           legislature have disavowed any such standard.  
12           In fact, in asking the Florida Supreme Court  
13           whether its nondiminishment precedent would  
14           apply to North Florida even without a majority  
15           Black population, even Governor DeSantis had to  
16           acknowledge that the answer is yes. As a  
17           result, under the governing legal standard,  
18           plaintiffs have proven their diminishment  
19           claim.

20           Now, defendants don't really argue  
21           otherwise. Instead, rather than defend the  
22           Enacted Map under the legal standard  
23           established by the Florida Supreme Court, they  
24           seek to upend that standard altogether, turning  
25           a straightforward claim by Florida voters

1 against Florida officials for violating the  
2 Florida Constitution into an affirmative  
3 assault on the constitution itself by those  
4 same state officials.

5 This Court should have none of it.  
6 Defendants' dispute is not with plaintiffs, but  
7 with the Florida Supreme Court. And their  
8 argument boils down to little more than that  
9 the Florida Supreme Court got it wrong.

10 But that is not for this Court to decide.  
11 As far as this Court is concerned, the law is  
12 clear and binding, and the facts are  
13 undisputed. The Court should, therefore, enter  
14 a judgment in favor of plaintiffs on their  
15 diminishment claim in North Florida.

16 So the question remains what exactly are  
17 we arguing about today if the facts and the law  
18 about diminishment are now beyond dispute? As  
19 we've made clear in our briefs, defendants are  
20 here arguing an entirely different case, on an  
21 entirely different claim, about a very  
22 different map.

23 Defendants' story is that even though they  
24 have violated the Florida Constitution, to do  
25 otherwise would have required a racial

1 gerrymander in violation of the  
2 U.S. Constitution.

3 Now, defendants' story moves us away from  
4 the diminishment standard under Florida law  
5 toward the racial gerrymandering standard under  
6 federal law.

7 So what is the racial gerrymandering  
8 standard? In order to establish a racial  
9 gerrymander under the Equal Protection Clause  
10 of the 14th Amendment, the challenger must show  
11 that they have -- that they are challenging a  
12 specific electoral district, that they have  
13 standing to challenge that district based on  
14 their residence in the district, and that race  
15 predominated in configuration of those district  
16 lines. The defendants fall hopelessly short at  
17 every step and failure at any one of these  
18 steps dooms any racial gerrymandering claim.

19 Let's talk first about that first element,  
20 specific electoral district. The U.S.  
21 Supreme Court has made clear that racial  
22 gerrymandering claims must not be diffuse or  
23 hypothetical or even about maps as a whole.  
24 Instead, racial gerrymandering claims can only  
25 be brought against one or more specific

1 electoral districts. The basic unit of the  
2 racial gerrymandering inquiry is the district  
3 lines itself.

4 But what is the specific district being  
5 challenged here? Throughout the four briefs  
6 submitted by the defendants over the last  
7 couple of weeks, even they appear to be  
8 confused about this very basic question. At  
9 some point they seem to be challenging  
10 Benchmark District 5. But Benchmark CD-5 is  
11 not the law. None of these defendants actually  
12 objected to it when it was the law. And this  
13 Court has no basis or authority to strike down  
14 a district that no longer exists.

15 Now, at some points defendants seem to be  
16 challenging Plan 8015's CD-5, but that also is  
17 not the law. Governor DeSantis vetoed that  
18 district and that map.

19 Now, in their most recent brief, the  
20 legislature seems to be attacking, quote, the  
21 east-west district that plaintiffs seek.

22 **THE COURT:** Counsel, let me ask you -- and  
23 it's something I noticed, and eventually  
24 they'll have to answer this question, the  
25 legislature's brief, the Senate didn't have an

1 affirmative defense in this case that survived,  
2 did they?

3 **MS. KHANNA:** No, Your Honor.

4 **THE COURT:** So is this the House's brief?

5 **MS. KHANNA:** Correct, Your Honor. Only  
6 the House can be affirmative defense.

7 **THE COURT:** All right. Continue.

8 **MS. KHANNA:** Thank you, Your Honor.

9 In our most recent brief, the legislature  
10 seems to be attacking this east-west district  
11 that plaintiffs seek, but nowhere in Count 1 of  
12 their complaint do plaintiffs seek a specific  
13 district.

14 Now, while in our summary judgment  
15 briefing we do point to CD-5 in Plan 8015 that  
16 the legislature actually passed as one example  
17 of a compliant map, at no point have plaintiffs  
18 said there is only one remedy to the  
19 diminishment violation.

20 And in his most recent brief, the  
21 Secretary seems to be challenging any Black  
22 performing district in North Florida. Now that  
23 refers to any number of unknown districts and  
24 would appear to include even CD-5 as drawn by  
25 the legislature in Plan 8019, which is entirely

1 contained in Duval County.

2 The Chair of the House Congressional  
3 Districting Committee asserted that the  
4 configuration of this district, although very  
5 visually different than the Benchmark District,  
6 is still a protected Black performing district.  
7 And these are just some examples of potential  
8 North Florida districts that could be at issue  
9 in a potential racial gerrymandering claim.

10 But in order for this Court to rule for  
11 defendants on their racial gerrymandering  
12 claim, Your Honor would have to be confident  
13 that every potential district that complies  
14 with the nondiminishment provision, including  
15 any number of districts not identified here, is  
16 necessarily a racial gerrymander, without  
17 knowing what the district actually looks like,  
18 who drew it and under what criteria.

19 At the end of the day, plaintiffs and the  
20 Court are left to guess what actual district  
21 defendants purport to be challenging as a  
22 racial gerrymander. And that is because the  
23 defendants' racial gerrymandering claim is  
24 shadowboxing against any number of hypothetical  
25 districts that simply are not before this

1 Court.

2 So defendants' racial gerrymandering claim  
3 fails at step one because it fails to challenge  
4 a specific electoral district. Now, based on  
5 that alone, their affirmative defense fails.

6 But even if they were challenging a  
7 specific district, they would still have to  
8 establish that they have standing to do so.

9 Now, the U.S. Supreme Court has made clear  
10 who has standing to bring racial gerrymandering  
11 claims. And it is the individual voters who  
12 reside in the challenged district and who  
13 allege that they have been subject to the  
14 unlawful racial classification.

15 Defendants have provided no information  
16 whatsoever to establish their standing to even  
17 raise a racial gerrymandering claim, and that  
18 is hardly a surprise. The district or  
19 districts that they appear to be challenging  
20 don't actually exist, so nobody actually  
21 resides in them.

22 And defendants are not even here before  
23 the Court in their personal capacity as voters  
24 who they allege have been subject to some  
25 racial classification. They are here in their

1 official capacity as state officials. The only  
2 voters before this Court are among the  
3 plaintiffs, Black voters from North Florida who  
4 saw their ability to elect their preferred  
5 candidates eliminated under the Enacted Map in  
6 violation of their constitutional rights.

7 Now, this fact, the -- the fact that it is  
8 the defendants here who are -- who are here in  
9 their official capacity is also the reason why  
10 their racial gerrymandering defense is barred  
11 by the Florida -- by Florida's Public Official  
12 Standing Doctrine.

13 I know the Court has already heard  
14 argument and read extensive briefing on the  
15 Public Official Standing Doctrine. So with  
16 Your Honor's permission, I'll just highlight  
17 one key point here, although of course I'll be  
18 happy to answer any questions.

19 The doctrine was developed precisely to  
20 avoid what is happening in this case, for the  
21 political officials have highjacked or are  
22 highjacking the judicial process to  
23 preemptively nullify their own duties under  
24 Florida law by picking and choosing to comply  
25 only with the laws they like, while



1           disregarding the others. Florida's elected  
2           officials have no standing to challenge the  
3           constitutionality of the laws and duties that  
4           they took an oath to uphold.

5           So whether under state law or federal law,  
6           defendants' racial gerrymandering claim fails  
7           for lack of standing to be asserted in the  
8           first place.

9           **THE COURT:** Let me ask you, though,  
10          Counsel, as it -- as it relates -- as it  
11          relates -- because it was a nonfinal order that  
12          the Court previously issued. As it relates to  
13          the Secretary of State, though, it's not saying  
14          I'm not going to follow the law. He says I am  
15          going to follow the law, he's saying duly  
16          enacted by the legislature. So -- and signed  
17          into law by the Governor.

18          So he's not -- he's saying I intend to  
19          follow the law. Isn't the -- isn't the  
20          official standing is that he can't say I'm not  
21          going to follow the law because the law is  
22          unconstitutional?

23          It's different than the legislature who is  
24          saying we're going to -- we're not going to go  
25          with this restriction that the people have put

1 on us in districting because it is  
2 unconstitutional.

3 The Secretary's argument is a little  
4 different. It's, I'm going to follow the law  
5 as passed, and so it's not challenging the  
6 action that is allegedly unconstitutional.

7 Talk to me about that distinction.

8 **MS. KHANNA:** Yes, Your Honor. And I think  
9 that -- so, yes, the Secretary has decided to  
10 follow the law as passed by the Florida House  
11 and Senate and enacted into law there. But in  
12 bringing the matter before this Court, the  
13 Secretary is challenging the law of Florida, is  
14 challenging the constitution that the Secretary  
15 took an oath to uphold, and is basically saying  
16 that any other law, any law that actually  
17 complies with the Florida Constitution is not  
18 one that the Secretary believes is one worth  
19 following, the Secretary believes is  
20 constitutional.

21 And the Public Official Standing Doctrine,  
22 and the principle that is meant to address  
23 these separation of powers concerns, that  
24 executive and legislative branches don't get to  
25 decide in advance what laws are constitutional

1 and what laws are not; that is solely the  
2 purview of the judiciary. And by very -- and  
3 by even bringing the claim, whether they were  
4 to raise it as a -- you know, as a lawsuit on  
5 their own or in their attempt to raise it as an  
6 affirmative defense, they have no ability, no  
7 standing -- frankly, no juris -- the Court has  
8 no jurisdiction to hear their dispute with the  
9 Florida Constitution.

10 The First DCA has made clear that there's  
11 just no justiciable controversy there when it  
12 comes to public officials who take issue with  
13 their own constitutional duties. And that is  
14 the standing that the -- that's what the  
15 Secretary's offering here.

16 The Secretary, in fact, is leading the  
17 charge against the Florida Constitution and, as  
18 a legal matter, he and all the defendants, we  
19 believe, are precluded from that.

20 But even if we set aside the Public  
21 Official Standing Doctrine, there's no getting  
22 around the fact that the Racial Gerrymandering  
23 Doctrine requires -- says -- Black letter  
24 law -- you have to be an actual resident of the  
25 district you're challenging and you've got

1 to --

2 **THE COURT:** Do you have to be a voter or  
3 just a resident?

4 **MS. KHANNA:** I believe, in most cases,  
5 they are voters. Usually, if we're talking  
6 about the affected voters, I think sometimes  
7 you can be -- I actually don't know the  
8 distinction sitting here, Your Honor. But  
9 certainly you have to be a resident and you  
10 have to be a resident in your individual  
11 capacity who is then saying, I've been subject  
12 to a racial classification --

13 **THE COURT:** Does the case law say it has  
14 to be a resident in their individual capacity  
15 or can it be a -- because, you would agree, I  
16 mean, there's no issue with the Court noting  
17 that the House and the Senate and the Secretary  
18 of State, the offices all reside right here in  
19 Tallahassee, Florida, in the affected district  
20 here, correct?

21 **MS. KHANNA:** Well, I guess the question  
22 is --

23 **THE COURT:** Arguably -- well, I know the  
24 districts -- I get the district argument, but  
25 arguably in the affected North Florida, when

1 we're talking about -- this is about what has  
2 now been limited to plaintiffs' limited Count 1  
3 in their amended complaint to North Florida.  
4 You would agree that the House, the Senate and  
5 the official office of the Secretary of State  
6 are in North Florida, Tallahassee in  
7 particular?

8 **MS. KHANNA:** Yes, Your Honor. And the  
9 case law does -- it does, indeed, talk about  
10 voters and individuals in their individual  
11 capacity as residents who they believe have  
12 been subject to a racial classification. And I  
13 don't -- I'm not aware of a single racial  
14 gerrymandering case that has ever been brought  
15 by a government entity because a government  
16 entity is not the one saying that you treated  
17 me as subject of my race and, therefore, I have  
18 a claim.

19 And, certainly, none of the defendants  
20 have put forward any facts, as would be their  
21 burden, to establish that they have that  
22 capacity here, and none of them have been sued  
23 in their individual capacities.

24 So, again, they're arguing a different  
25 case that's not even theirs to bring in the

1 first place.

2 So whether under a state law or federal  
3 law the defendants' racial gerrymandering claim  
4 fails for lack of standing to even assert it in  
5 the first place -- again, on this basis  
6 alone -- their affirmative defense fails.

7 But even if they were challenging a  
8 specific district that they actually reside in,  
9 they would still have to establish that race  
10 predominated in the drawing of actual district  
11 lines.

12 Now, this is no easy feat. As the  
13 U.S. Supreme Court has said, racial  
14 predominance is an intensely fact-based inquiry  
15 that relies on a host of factors. And the  
16 Court has made clear that it is not enough that  
17 race was one of the factors that informed the  
18 map.

19 In fact, just this summer, the  
20 Supreme Court reaffirmed its well-established  
21 distinction between race consciousness and  
22 racial predominance in a case called *Allen v.*  
23 *Milligan* out of Alabama, despite Governor  
24 DeSantis' prediction that the Court would  
25 eradicate that distinction in that case.

1           So again, the racial predominance inquiry  
2           is made all the more difficult here because of  
3           the guessing game that defendants are playing  
4           about what district is actually being  
5           challenged.

6           But for the present purposes, for the  
7           purposes of this presentation, Your Honor, we  
8           will assume that we're talking about CD-5 as  
9           drawn in Plan 8015, one of the plans actually  
10          passed by the legislature and the only  
11          potential remedy that the parties have even  
12          analyzed at this stage of the litigation.

13          Now, under the predominance inquiry, the  
14          Supreme Court has instructed that we examine a  
15          variety of race neutral objective criteria  
16          known as the traditional districting principles  
17          to determine if a district is unexplainable on  
18          grounds other than race. And an examination of  
19          those criteria here indicates that CD-5, as  
20          drawn in Plan 8015, falls squarely within the  
21          norm of Florida districts.

22          Now defendants' main gripe with this  
23          district is that they say it's over 150 miles  
24          long. But Florida is no stranger to long  
25          districts, particularly in the northern rural

1 parts of the state where many counties are  
2 sparsely populated.

3 In 2002, the Florida legislature drew CD-2  
4 to span from Leon County to Duval County in a  
5 district that is not unlike CD-5. Defendants  
6 also complain about the size of CD-5's  
7 footprint. But CD-5 has a smaller footprint  
8 than at least six districts in the Enacted Map,  
9 several of which are two to three times larger  
10 in area.

11 Defendants also make much of the number of  
12 counties spanned and split by CD-5. But the  
13 Enacted Map passed by the legislature, signed  
14 by the Governor, includes several districts  
15 with similar county configurations. CD-5 is  
16 hardly an outlier. The same goes for the --

17 **THE COURT:** Counsel, I want to make sure  
18 the record is clear which CD-5 we're talking  
19 about. This is the CD-5, Plan 8015, not CD-5,  
20 the one that was the result of the last  
21 redistricting case that the Florida  
22 Supreme Court ultimately approved, correct?

23 **MS. KHANNA:** Yes, Your Honor. The  
24 statistics that I'm providing today are for the  
25 Plan 8015's CD-5 on the assumption that that is



1 perhaps one of the districts being challenged  
2 here.

3 So when it comes to county splits and  
4 county dis -- and the number of counties, it is  
5 hardly outlier.

6 And the same goes for city splits. It is  
7 well within the norm of enacted districts when  
8 it comes to how many cities it splits and, in  
9 fact, in some cases, the Enacted Map splits far  
10 more county -- far more cities.

11 Now, in fact, when we look at the actual  
12 lines of the district, it undermines any  
13 contention that they are only explainable by  
14 race.

15 Let's start from left to right on this  
16 map. These first two boundaries over here,  
17 these kind of squiggly lines, that is the  
18 Gadsden County line. Nearly all of the  
19 district then in Leon County coincides with  
20 major highways and interstates such as I-10.  
21 That is the line that's being followed.

22 Next, it follows to the T the Madison  
23 County line. Then it follows to the T the  
24 Hamilton County line. Again, that curve is the  
25 county line.

1           Then it follows I-10 in Columbia, it  
2 proceeds to take all of Baker County, and then  
3 it follows the Duval County lines at the bottom  
4 and the top of the district, while the rest of  
5 the district primarily tracks major highways in  
6 Jacksonville.

7           In fact, Your Honor, CD-5 in Plan 8015  
8 does better at adhering to political and  
9 geographic boundaries than all but one  
10 district, in the Enacted Map. With only  
11 2 percent of its boundaries not following these  
12 established race-neutral lines.

13           The defendants also complain about the  
14 shape of the district in Jacksonville. Well,  
15 let's take a closer look at that.

16           This here on the left, this is the  
17 Benchmark District that was adopted and blessed  
18 by the Florida Supreme Court under the Florida  
19 Constitution last cycle.

20           This here in the middle is Plan 8015,  
21 which significantly smooths out the district  
22 lines to more closely follow the Duval County  
23 boundaries and major roadways in Jacksonville.

24           Indeed the legislature also drew Plan 8019  
25 to track those boundaries even more closely.

1 Now, if that on the left was acceptable to the  
2 Florida Supreme Court under the compactness  
3 principle, surely these other two would have  
4 been as well.

5 In short, Your Honor, defendants tried to  
6 paint CD-5 as this monstrous district, this  
7 extreme outlier that defies all traditional  
8 criteria, but the facts tell a very different  
9 story. And, in fact, the law tells a different  
10 story as well.

11 The defendants are quick to parrot the  
12 language from U. S. Supreme Court racial  
13 gerrymandering cases, but these are the  
14 districts where the Court found race  
15 predominated in those cases.

16 Starting with North Carolina. The  
17 original Shaw District, CD- 12 is that  
18 shaded-in district right there (indicating),  
19 that kind of long and skinny district that  
20 snakes around to the -- from the middle of the  
21 state to the west.

22 As one legislator remarked, if you drove  
23 down the interstate with both car doors open in  
24 this district, you would kill almost all the  
25 people in the district. That is -- that is the

1 original racial gerrymander on what the whole  
2 doctrine is built on, that is the Shaw  
3 District.

4 I'd also like to take a look at CD-1 in  
5 this map. It's hard to tell because it's not  
6 shaded in, but CD-1 is over there in the  
7 northeast. And if you look closely, you'll see  
8 it has one, two, three, at least three, and  
9 maybe four tendrils that stick out in  
10 appendages that basically span the entire state  
11 from north to south.

12 This also was challenged as a racial  
13 gerrymander in this case, and the lower court  
14 found that race predominated in this district  
15 as well. But the U.S. Supreme Court dismissed  
16 that racial gerrymandering claim because none  
17 of the plaintiffs actually resided in that  
18 district.

19 Let's look at Bush v. Vera. These are the  
20 three Texas districts where the Court, U.S.  
21 Supreme Court found that race predominated.  
22 The Court found in these cases -- in these  
23 districts the candidates had to carry around a  
24 map when campaigning because the district  
25 boundaries changed from block to block and

1 voters had no idea what district they resided  
2 in, whether they were across the street from a  
3 neighbor who resided in an entirely different  
4 district. Those were the racial predominant  
5 districts at issue in Texas.

6 Let's go back to Louisiana. In Louisiana,  
7 looking at this black shaded district here, the  
8 federal court likened this District 4 to the  
9 mark of Zoro, slashing a jagged Z across almost  
10 the entire statement.

11 Now, notably, the U.S. Supreme Court, once  
12 again, dismissed this racial gerrymandering  
13 claim for lack of standing because nobody, none  
14 of the plaintiffs, challenging the district  
15 actually resided in the district. That's in  
16 the U.S. v. Hays case.

17 Next, turn to Florida's map from the  
18 1990s. The federal court found that race  
19 predominated in CD-3, that light blue district  
20 that forms that horseshoe across -- around  
21 CD-6, the court referred to this district as an  
22 elongated Rorschach inkblot that zigzags its  
23 way from Orlando to Jacksonville.

24 Now CD-5, as drawn in Plan 8015, by  
25 contrast, comes nowhere close to the bizarre

1 districts struck down by these courts. As a  
2 result, even if this Court were to consider  
3 whether defendants have established that race  
4 predominated in a nonexistent district that  
5 they don't live in, the answer would be  
6 resoundingly no.

7 As a result, even defendants -- defendants  
8 attempt to piece together some racial  
9 gerrymandering claim out of plaintiffs'  
10 diminishment case fails literally every  
11 applicable legal standard.

12 And at bottom, Your Honor, the case that  
13 defendants want to argue before this Court that  
14 is their case against the Florida Constitution  
15 is built on a series of mischaracterizations,  
16 and misrepresentations about the law at issue.

17 To highlight just a few. Defendants  
18 mischaracterize the nondiminishment provision  
19 as a permanent entitlement, regardless of the  
20 size and geography of the minority population.

21 Not true. The test articulated by the  
22 Florida Supreme Court imposes clear limits on  
23 when and where a minority group is protected  
24 from diminishment. Specifically, only when  
25 they vote cohesively and only where they're

1 able to elect their preferred candidates in the  
2 Benchmark District.

3 Pursuant to these limiting principles,  
4 Your Honor, the Florida Supreme Court has  
5 rejected diminishment claims where the minority  
6 population is insufficiently cohesive. And  
7 just this cycle, the legislature itself  
8 determined that Congressional District 10, a  
9 previously protected district, is now exempt  
10 from coverage under the nondiminishment  
11 provision based on demographic changes.

12 The Secretary also misrepresents that the  
13 nondiminishment provision requires the state to  
14 hit a numerical racial target, a specific  
15 population percentage of Black voters.

16 Not true. The Florida Supreme Court has  
17 stated in no uncertain terms we reject any  
18 argument that the minority population  
19 percentage in each district is somehow fixed to  
20 an absolute number under Florida's minority  
21 protection provision.

22 In fact, it went on to explain that the  
23 reason it rejected any numerical racial target  
24 was specifically to avoid running the risk of  
25 permitting the legislature to engage in racial

1 gerrymandering in the name of nondiminishment.

2 The defendants further misrepresent that  
3 in the event that defendants could establish  
4 standing in a specific district, and racial  
5 predominance, that then plaintiffs would have  
6 to satisfy strict scrutiny under the racial  
7 gerrymandering standard.

8 Again, not true. Strict scrutiny is a  
9 legal standard that evaluates the  
10 constitutionality of state action. I'm not  
11 aware of a single case in Florida or federal  
12 law where private plaintiffs have had to bear  
13 the burden of strict scrutiny. And defendants'  
14 upside down burden shifting approach just  
15 illustrates how nonsensical their procedural  
16 posture is, trying to force plaintiffs to  
17 defend hypothetical districts that don't exist  
18 and that plaintiffs have no authority to enact  
19 into law.

20 Finally, defendants misrepresent that  
21 Florida does not have a race-based problem that  
22 needs to be resolved.

23 Not true. The record of racial  
24 discrimination in Florida voting systems, and  
25 in particular against Black voters in North



1 Florida, has been well documented in U. S.  
2 Supreme Court case law, in Florida  
3 Supreme Court case law, and in the 11th Circuit  
4 case law.

5 The defendants' willingness to shrug --  
6 shrug this off as a problem that's not  
7 compelling enough to solve is a stick in the  
8 eye of the Florida voters who enshrined this  
9 provision into their constitution to prevent  
10 their elected officials from ignoring and  
11 suppressing minority voting rights as had been  
12 the case for far too long.

13 These misrepresentations, Your Honor, tell  
14 an important story, the story that defendants  
15 need to sell this Court for their racial  
16 gerrymandering narrative to hold water. They  
17 need to make the nondiminishment provision into  
18 something it is not. They need to twist the  
19 plain language of Supreme Court precedent into  
20 something other than what it says; to prop up  
21 their claim that actually adhering to that  
22 provision and actually abiding by that  
23 precedent would violate federal law.

24 That story, Your Honor, is the only reason  
25 we are here continuing to argue this case even

1 after the only remaining claim is essentially  
2 undisputed.

3 But defendants' story, Your Honor, is just  
4 that. It is a story, with no basis in law or  
5 fact. It is a yarn that defendants are  
6 spinning in an effort to convince this Court to  
7 follow their lead and turn its back on the  
8 Florida Constitution, on the Florida voters who  
9 ratified this provision into their  
10 constitution, and on the Florida Supreme Court  
11 precedent interpreting that constitution.

12 This Court should reject defendants'  
13 narrative and enforce the law as written.

14 I'm happy to answer any other questions  
15 the Court has or, otherwise, I can wait for  
16 rebuttal as well.

17 **THE COURT:** Likely when we talk on the  
18 part of plaintiffs' comments.

19 **MS. KHANNA:** Thank you, Your Honor.

20 **THE COURT:** Anything for the defense?  
21 Who's going to go first? I see Mr. Jazil here.

22 **MR. JAZIL:** Yes, Your Honor.

23 Your Honor, with the Court's permission,  
24 I'll use an easel rather than the screen.

25 **THE COURT:** All right. I do like how

1 counsel had a backup plan as, obviously, you  
2 guys are well prepared. Technology always does  
3 what technology does or half the time it does  
4 what it does.

5 That will work just fine.

6 If we can either black out or kill the  
7 blue screen there so we're not projecting on.  
8 If you want to bring up your presentation, hit  
9 the B, and it will black it out.

10 **MR. JAZIL:** Thank you, Your Honor. And  
11 may it please the Court, Mo Jazil on behalf of  
12 Secretary Byrd.

13 Your Honor, this is the Enacted Plan.  
14 This is the plan the plaintiffs are  
15 challenging. In Count 1 of their complaint,  
16 the plaintiffs are asking for declaration from  
17 this Court saying that that Enacted Plan  
18 violates the Florida Constitution.

19 To get that declaration, what they need to  
20 show the Court, their burden as the plaintiffs,  
21 what they need to show the Court is that  
22 Article III, Section 20A, requires the creation  
23 of a Black performing district in North Florida  
24 and that the U.S. Constitution allows the  
25 creation of a --

1           **THE COURT:** How does -- where do you get  
2 that from the text that said you can't  
3 diminish? It doesn't say it requires creation.  
4 So talk to me about where in the text it says  
5 that.

6           **MR. JAZIL:** Sure, Your Honor. And that  
7 gets to a broader concern about what it is  
8 we're looking at.

9           To figure out how nondiminishment works,  
10 we first have to figure out where  
11 nondiminishment is applying. Right? What is  
12 the district to which we're applying  
13 nondiminishment? What is the district that  
14 Article III, 20A, is saying that cannot have  
15 the ability to elect a candidate of choice  
16 produced? That's this district, Your Honor,  
17 Benchmark CD-5.

18           So this is the district we're arguing  
19 about. This is the district the plaintiffs are  
20 saying the nondiminishment standard applies to;  
21 this is the district they're saying is the one  
22 that needs to be protected. That's the  
23 Benchmark District. That's the one that needs  
24 to be protected under the nondiminishment  
25 standard.

1           That's also the district their expert put  
2 forward the last redistricting cycle, that's  
3 the district in substantially the same form  
4 their expert put together in this redistricting  
5 cycle during the temporary injunction stage and  
6 the summary judgment stage. It's the only  
7 remedy that the parties could agree would be a  
8 viable way to comply with the Florida  
9 Constitution if it also complied with the  
10 Federal Constitution. It's the one that the  
11 plaintiffs said in their temporary injunction  
12 motion needed to be the remedy in substantially  
13 the same form.

14           And I'm quoting here from the plaintiffs'  
15 April 26th, 2022 filing, Your Honor, page 8:  
16 Until the very last moment, every single  
17 Congressional plan proposed by the House and  
18 Senate redistricting committees maintain the  
19 general configuration of Benchmark CD-5.  
20 Page 15, every -- every is emphasized in their  
21 filing -- every draft Congressional plan  
22 proposed and debated by the legislature until  
23 the very last one maintains the general  
24 configuration of Benchmark District 5.

25           And most significantly, Your Honor, on

1 page 4 of that filing from the temporary  
2 injunction stage, this is what the plaintiffs  
3 say: The Court -- referring to the Florida  
4 Supreme Court -- ordered the legislature to  
5 redraw Congressional District 5 in this  
6 east-west manner, concluding that this  
7 configuration was the only alternative option  
8 that complied with the constitutional  
9 nondiminishment standard; the only alternative  
10 option, their words, not mine. The legislative  
11 record --

12 **THE COURT:** Was that option this map or  
13 east-west was the only one that complied?

14 **MR. JAZIL:** Your Honor, it was an  
15 east-west configuration, is the only one that  
16 would comply.

17 And let's look, Your Honor, at what that  
18 east-west configuration would be like. And,  
19 for the record, Your Honor, the legislature  
20 confirmed during its various committees that  
21 the east-west configuration is really the only  
22 one that is workable.

23 Alex Kelly testified in front of the  
24 legislature, said he tried as well, the  
25 east-west configuration is the only way to

1 comply with the nondiminishment test.

2 This is a closeup of the east-west  
3 configuration, that is the Benchmark District,  
4 Your Honor. You'll note the odd shapes in  
5 Duval County, the odd shapes in Leon County.  
6 This is relying on the demographic information  
7 from the Florida redistricting website, a heat  
8 map showing where the Black population is in  
9 the very census blocks in the area. The dark  
10 green tells us that that is where the Black  
11 population is.

12 As you can see, Your Honor, with surgical  
13 precision, the Benchmark District captures  
14 Black population in Duval; with surgical  
15 precision, it captures the Black population in  
16 Leon.

17 **THE COURT:** Well, let me ask you this.  
18 Are you challenging the map that is -- was the  
19 law in the State of Florida? Are we looking  
20 back and you challenging what the Supreme Court  
21 did prior?

22 **MR. JAZIL:** Your Honor, I am not. Here's  
23 what I am saying.

24 If we're going to go from an Enacted Plan  
25 that is race neutral to something else that

1 requires an east-west configuration that is  
2 compelled by the Florida Supreme Court, as they  
3 put it, how do we do that?

4 We do that by first saying that this is a  
5 benchmark to which the nondiminishment test  
6 applies, and this is a benchmark worth  
7 protecting.

8 How do you protect it? And that's what  
9 I'm trying to show, Your Honor, that the only  
10 way to protect it, the only viable option, in  
11 their words, is an east-west configuration that  
12 picks up the population centers, and the  
13 population centers, Your Honor, are in Duval  
14 and are in Leon.

15 **MS. KHANNA:** Your Honor, I just want to --  
16 for the record, I want to lodge our objection.  
17 We've made defendants aware we object to these  
18 heat maps as demonstratives. They are not  
19 anywhere in any of the exhibits. We are not  
20 aware of where they came from, who drew them.  
21 They are usually the subject of an expert  
22 report. That's not at issue here.

23 **THE COURT:** All right, Counsel, that's --  
24 that's one of the things that I was going to  
25 talk to both of you about more procedurally.



1           I want to get through the arguments first,  
2           but, you know, we're not here for two weeks,  
3           and this is the stuff we would have been doing  
4           for two weeks. So, again, what this Court  
5           plans to consider as facts are in paragraph 3A,  
6           B, C and D of the stipulation.

7           Now, I have a big question as to all of  
8           you, you say certain other things are  
9           judicially noticeable and -- you know, because  
10          I'm looking at the stipulation of facts, and  
11          Exhibit 1 is five pages, but then it talks  
12          about all these numbers, all this data that --  
13          does the Court just go searching and I can  
14          rummage through that?

15          I don't really intend to do that. But, I  
16          mean, when you start talking about  
17          judiciably -- judicially noticeable, transcript  
18          of legislative committee and floor proceedings.  
19          Well, which ones and how extensive is that?

20          When you start talking about the  
21          Governor's vetoed messages, that's easy enough,  
22          but Florida's prior Congressional plans. Well,  
23          how far back does that go? And where does the  
24          Court find that and where does, more  
25          importantly, the Appellate Court find that?

1           And so these -- these are the questions I  
2           have as far as what I'm allowed to consider and  
3           what I'm not.

4           What I can -- what is a lot more easy for  
5           the Court to understand and quantify as  
6           evidence is paragraph 3, that it gives specific  
7           voting age populations, paragraph 3B,  
8           population breakdown by county, you know, all  
9           of -- all of paragraph 3 of Exhibit 1, all of  
10          paragraph 4. Those are easy, it's all this  
11          other stuff.

12          So with that in mind, the objection is  
13          overruled as far as, you know, he can argue  
14          what he wants, but whether that's actually  
15          something the Court can rely on in coming to a  
16          decision, you have to tell me where I can cite  
17          that in any factual capacity.

18          With that, Mr. Jazil, you may proceed.

19          **MR. JAZIL:** Thank you, Your Honor. And I  
20          will note that the stipulation also talks about  
21          taking into account demographic information  
22          from the Florida redistricting website. This  
23          all comes from the redistricting website.  
24          Should the Court so desire, it can turn on the  
25          appropriate layers for heat maps, and this is

1 what will come out.

2 **THE COURT:** Well, I guess that gets me  
3 back to, Counsel, these are judicially  
4 noticeable. I don't have to take judicial  
5 notice of any of that stuff, do I?

6 **MR. JAZIL:** Your Honor, there are a line  
7 of federal cases from the Northern District of  
8 Florida from two cycles ago where the Court  
9 said you don't have to ignore the obvious  
10 either. The demographic numbers are obvious,  
11 where the racial concentrations are is obvious.

12 **THE COURT:** Well, then why are we having  
13 this? Because then, when you get to the  
14 Appellate Courts and get to the Supreme Court,  
15 you start bringing up stuff you never showed  
16 me.

17 Well, you know, I can take judicial notice  
18 of it. That's the reason we had this set for a  
19 two-week trial, folks, so that this Court is  
20 very clear on what facts it's going to use in  
21 reaching a decision. Not today, I'm not  
22 issuing -- I don't plan on ruling from the  
23 bench today.

24 But again, am I just going to go rummaging  
25 through this and deciding what is what? I

1 mean, that -- that was the -- that's the reason  
2 I blocked two weeks of this Court's schedule,  
3 canceled everything else, put 900 cases on  
4 hold, so that we could talk about the facts in  
5 this case.

6 **MR. JAZIL:** Sure, Your Honor. And I would  
7 commend for the Court's consideration the  
8 Florida Supreme Court's discussion in  
9 Apportionment 1. In Apportionment 1, the  
10 Florida Supreme Court had a facial challenge to  
11 the state House and state Senate maps. And the  
12 Florida Supreme Court, without any fact  
13 finding, without any witness credibility  
14 determinations, said that certain maps from the  
15 Florida Senate were unconstitutional.

16 How did the Florida Supreme Court do that?  
17 Precisely by doing this exercise, relying on  
18 material that was available in the Maptitude  
19 application at the time and making its  
20 conclusions that way.

21 Your Honor, we presented this in our  
22 papers. We've highlighted the --

23 **THE COURT:** Didn't they do that through a  
24 Special Master?

25 **MR. JAZIL:** No, they did not, it's my

1 understanding.

2 **THE COURT:** Okay. Well, we can look that  
3 up later. Okay.

4 Proceed.

5 **MR. JAZIL:** Your Honor, the stipulation  
6 does, however, show this; that when you take a  
7 look at Benchmark CD-5, it cuts across eight  
8 counties, it splits Florida. 60.5 percent of  
9 the population is drawn from Duval,  
10 22.2 percent of the population is drawn from  
11 Leon, so 60 percent from Duval, 22 percent from  
12 Leon. We've got the cuts into south  
13 Tallahassee to try to capture the population,  
14 we've got the cuts in Leon County to try to  
15 capture the population.

16 I would suggest that in drawing this  
17 Congressional district, Benchmark CD-5, the one  
18 that we're supposed to protect, the one I can't  
19 talk about, the one they like, they're race  
20 predominant. And we know this because the U.S.  
21 Supreme Court case law from Shaw talks about  
22 how deviation from traditional redistricting  
23 criteria is one way to figure out whether or  
24 not race predominated.

25 And how do we know we have deviation here?

1 Look at the shape, Your Honor. This is not  
2 how --

3 **THE COURT:** This gets me back to -- I  
4 mean, if you're -- if you're laying a record to  
5 have the Supreme Court throw out its own  
6 ruling, you can do that. You know, Crawford v.  
7 Washington is a prime example of that. I cite  
8 that to folks all the time.

9 You had a criminal defense attorney that  
10 said they're getting it wrong and they've got  
11 it wrong for hundreds of years, but that fight  
12 was at the U.S. Supreme Court.

13 Again, what you're talking about here is,  
14 if I'm hearing you correctly -- and if not,  
15 please correct me -- you're saying the Florida  
16 Supreme Court violated the U.S. Constitution in  
17 doing what it did; in fact, I'm not going  
18 there. I'm not -- I don't think I have the  
19 power to say, you know what, the Florida  
20 Supreme Court got it wrong. That's their  
21 business or the U.S. Supreme Courts to do.

22 But why am I not stuck -- and that's not a  
23 good word, I'm not trying to use that  
24 pejoratively. But why am I not bound -- how  
25 about that as better word -- bound by

1 Congressional District 5 as done in the last  
2 apportionment -- reapportionment cycle? Why am  
3 I not bound with that as a benchmark?

4 That's the problem I'm -- I'm saying I  
5 understand your argument. But I don't see  
6 where this Court has the power to not go back  
7 and use Congressional District 5 from the last  
8 reapportionment cycle, and why am I'm not bound  
9 to use that as my benchmark?

10 **MR. JAZIL:** Sure, Your Honor. So CD-5  
11 from the last redistricting cycle, no one  
12 raised the issue of it possibly violating the  
13 Equal Protection Clause of the Federal  
14 Constitution. The issue was never presented to  
15 the Court, it was never decided. It's an issue  
16 lurking in the background, so there is no  
17 specific holding in regards --

18 **THE COURT:** Why is that not waived then?  
19 Weren't some of the same parties -- wasn't  
20 this -- wasn't the Secretary, I know it's a  
21 different person, but wasn't the Secretary, or  
22 the League of Women Voters, who are both  
23 parties in this case, weren't they both parties  
24 in the last case? Shouldn't the -- aren't --  
25 isn't there some waiver there?

1           **MR. JAZIL:** No, Your Honor, there isn't.

2           The issue before this Court is whether or  
3 not the Enacted Plan is or isn't  
4 constitutional. And to conclude that the  
5 Enacted Plan isn't constitutional, where do we  
6 start?

7           We start with assessing what the benchmark  
8 is and whether or not the nondiminishment test  
9 applies to that benchmark.

10           So this is a whole new proceeding, we're  
11 judging whether or not the Florida legislature  
12 had an obligation to use CD-5 in the benchmark  
13 as something worthy of protection under the  
14 nondiminishment case. That's the fundamental  
15 question.

16           No one disagrees, Your Honor -- another  
17 way to put it is this, no one disagrees that  
18 there's not a Black performing district in  
19 North Florida. The question is whether or not  
20 a Black performing district is required in  
21 North Florida. Right? Because if the  
22 nondiminishment test applies to the former  
23 CD-5, and the nondiminishment test requires the  
24 preservation of a district like CD-5, then  
25 there needs to be something like the former



1 CD-5 in North Florida.

2 That, in a nutshell, is what we're arguing  
3 about.

4 And my point, then, is, okay, if we agree  
5 that there is no Black performing district in  
6 North Florida, and the question is, is one  
7 required? How do we get it? How do we show  
8 that a Black performing district is, indeed,  
9 required in North Florida?

10 And the way we get there is to show that  
11 the nondiminishment standard applies to the  
12 benchmark, right; that the nondiminishment  
13 standard hasn't been met for the benchmark and  
14 that the Federal Constitution allows for the  
15 nondiminishment test to be applied in some  
16 manner in North Florida.

17 And it's the question of, does it apply to  
18 CD-5 that we disagree with? And the question  
19 of is it required under the Equal Protection  
20 Clause? Is it -- pardon me. Is it allowed  
21 under the Equal Protection Clause that we  
22 disagree with?

23 On the first question of does it apply,  
24 the answer we believe is no; because we think  
25 that, though the issue was never presented to

1 the Florida Supreme Court, we put forward a  
2 textural argument of Article III,  
3 Section 20(a). It's one that allows this Court  
4 to avoid a constitutional issue, it's one that  
5 we believe is consistent with Apportionment 8.

6 **THE COURT:** This is the Gingles test.

7 **MR. JAZIL:** Yes, Your Honor.

8 **THE COURT:** Let's talk about that.

9 **MR. JAZIL:** Sure.

10 **THE COURT:** Talk to me about why in re:  
11 Senate Joint Resolution of Legislative  
12 Apportionment 100 that this Supreme Court  
13 issued that opinion in March 3rd of 2022 --  
14 that's at 334 So.3d of 1282 -- why they used  
15 the words -- because when I go back to the  
16 text, and this -- they talk about -- I want to  
17 give you the page, it looks like it's  
18 page 1289 -- why they talk about the  
19 nondiminishment -- now, granted, this is --  
20 this is not Article III, Section 20. This is  
21 the companion that is worded almost  
22 identically, and they say that the  
23 nondiminishment protection afforded talks about  
24 majority-minority districts or weak and other  
25 historically performing minority districts.

1           So doesn't that preclude Gingles right  
2 there, that Gingles requires majority-minority  
3 districts? Isn't that surplusage language? I  
4 mean, they've readopted that language from  
5 their 2012 opinion, but why is that a -- why  
6 would they put both of those, if it had to be  
7 majority-minority as Gingles holds?

8           **MR. JAZIL:** Sure, Your Honor.

9           And so, number 1, this specific argument  
10 was presented by the Governor in his request  
11 for an advisory opinion. The Florida  
12 Supreme Court specifically said it's not  
13 deciding it one way or the other.

14           Number 2, Your Honor, what I'm suggesting  
15 about applying the Gingles' test to figure out  
16 whether or not the nondiminishment standard  
17 applies is not mutually exclusive with  
18 nondiminishment applying to cross over a  
19 coalition district, right; it's something  
20 that's not a majority-minority district.

21           And my analysis is this: Once you  
22 identify a majority-minority district, using  
23 the nonvote dilution provision, you specify a  
24 race-based problem that needs a race-based  
25 solution. And you've got specific evidence of

1 it and you've got that provision, the nonvote  
2 dilution provision, that creates the district.

3 And then our argument is that the  
4 nondiminishment provision preserves that  
5 district so if that district continues  
6 performing for Black voters, for example, but  
7 it over time becomes a crossover district, you  
8 can continue protecting it under the  
9 nondiminishment test because it was created  
10 under the nonvote dilution provision with a  
11 specific identified problem and it created a  
12 solution, a district for it; and then as the  
13 BVAP goes down, but it's still a Black  
14 performing district, it continues being  
15 protected.

16 There is some point at which -- and we  
17 don't need to reach that in this case. There  
18 is some point at which the BVAP goes down so  
19 much that you can't continue justifying the  
20 application in the nondiminishment test of what  
21 was once a majority Black district.

22 And that's how I reconcile our reading of  
23 what the Florida Supreme Court has said,  
24 because our reading would then apply to  
25 crossover districts and coalition districts,

1 but it would apply in a way that puts the  
2 Article III, Section 20(a) requirement on a  
3 firmer footing.

4 Your Honor, take the Article III,  
5 Section 20(a), race requirements out of the  
6 analysis that I've just explained where I'm  
7 using the Gingles test. Section III, 20(a) at  
8 that point would be saying that race must  
9 predominate in redistricting decisions, right?  
10 Because if you look at Section 20(a) and then  
11 you look at Section 20(b), the Florida  
12 Constitution says, Section 20(b) has a  
13 traditional redistricting right here,  
14 compactness, political geographical boundaries,  
15 et cetera, where they can conflict with the  
16 race-based provisions, the race-based  
17 provisions must prevail. Right?

18 And think about that, Your Honor. It's  
19 saying that the race-based provisions must  
20 prevail. But unlike the Voting Rights Act,  
21 which had a voluminous record to support its  
22 creation, there isn't something like that for  
23 Article III, Section 20(a). And unlike the  
24 Voting Rights Act, Your Honor, where the 15th  
25 Amendment specifically said that Congress is

1 authorized to implement this, there is no  
2 specific authorization for the states to do  
3 something similar, so you're divorced from a  
4 specific federal constitutional power to  
5 implement the amendment and you're divorced  
6 from a specific record that justifies the  
7 existence of a race-based problem, yet you  
8 have --

9 **THE COURT:** How are we divorced from that  
10 record? Don't -- don't originalists argue what  
11 do the words mean at the time of passing? At  
12 the time of passing this, didn't the voters of  
13 Florida and the Fair Districts folks that  
14 proposed this, wasn't Section 2 of the Voting  
15 Rights Act there? Wasn't Section 5 of the  
16 Voting Rights Act there? Isn't that -- doesn't  
17 that all -- weren't those -- those terms,  
18 weren't they defined, all that was known at the  
19 time of passing?

20 **MR. JAZIL:** I'm glad you bring that up,  
21 Your Honor.

22 So the fair districting amendments came  
23 about when the Voting Rights Act was in place,  
24 right? The Voting Rights Act, Section 5, is  
25 the one that's usually used to justify the

1 existence of provisions like this, and  
2 Section 5 had a preclearance formula.

3 The preclearance formula was very  
4 specific. It highlighted jurisdictions with  
5 persistent racism, problems that were so  
6 persistent that federal intervention through  
7 the Section 5 non-retrogression standard was  
8 necessary.

9 Florida had five counties that were  
10 subject to preclearance. Never the state as a  
11 whole, none of those five counties are in the  
12 affected area here in North Florida, Your  
13 Honor.

14 So then I -- so then I again ask, where is  
15 the specific record of a race-based problem in  
16 North Florida that justifies a race-based  
17 solution in North Florida?

18 **THE COURT:** Well, let me ask you, then,  
19 Counsel, because I had that same question. I  
20 went back -- and I know this is an elections  
21 clause case, but Brown versus Secretary of  
22 State -- and I think, if I'm not mistaken, I  
23 think one or two Counsel from here was involved  
24 in that case. That's at 668 Federal Third  
25 1271, that's from back in 2012, the U.S. Court

1 of Appeals for the 11th Circuit -- again, I  
2 know it's -- I know it's an elections clause  
3 case, but they talk about -- this is on  
4 page 1284. They said, again, it is irrelevant  
5 that only five Florida counties are subject to  
6 Voting Rights Act preclearance requirement.  
7 More generally, if the appellate's arguments  
8 were correct, then no state would be allowed to  
9 consider the effect of its Congressional  
10 districts on minorities, even if the entire  
11 state were subject to Section 5 preclearance.

12 So haven't they kind of talked about that  
13 argument? I know it's a -- I know it's an  
14 elections clause case, but haven't they talked  
15 about that very argument, and that's from the  
16 U.S. Court of Appeals for the 11th Circuit  
17 dealing with that very argument.

18 **MR. JAZIL:** Your Honor, I refer you to a  
19 more recent U.S. Court of Appeals case, League  
20 of Women Voters versus -- from 2023. It  
21 details how Florida has continued to make  
22 voting easier, how Florida is no longer tied to  
23 its past, how things have improved in Florida,  
24 and Florida should -- in reversing a Federal  
25 District Court -- should not be subject to



1 preclearance requirement. And implicit in that  
2 is that the past discrimination cannot be used  
3 to justify some kind of extraordinary  
4 race-based intervention now.

5 **THE COURT:** But that's how many years  
6 after -- I mean, the Fair Districts was passed  
7 before all this. So this is -- we've got more  
8 contemporaneous from the 11th Circuit back --  
9 again, if we're locking in the words at the  
10 time of passage.

11 **MR. JAZIL:** Sure, Your Honor.

12 And so, my position is this, Your Honor.  
13 There was no record at the time of the passage  
14 of the Fair Districting amendments that's  
15 analogous to the Voting Rights Act. Even if  
16 there were -- let's remember, the Voting Rights  
17 Act, the Section 5 provision, every 25 years,  
18 you need new material to justify it.

19 Section 2 of the Voting Rights Act,  
20 non-vote dilution, you have a very specific  
21 test to identify a problem on the ground now  
22 that needs a solution. Article III,  
23 Section 20(a) requirements, no such  
24 limitations.

25 My friends for the other side suggest that

1 the functional approach might be a solution to  
2 this, that it may impose some kind of temporal  
3 limit. Because, remember, if you're going to  
4 have a race-based solution, you need a  
5 geographic limit. There is none in Article  
6 III, Section 20(a); it applies everywhere,  
7 apparently. And you need some kind of temporal  
8 limit; there is none in Article III,  
9 Section 20(a). There's no sunset provision as  
10 in Section 5 of the Voting Rights Act.

11 My friends for the other side say that a  
12 functional analysis can be a substitute for a  
13 temporal limit, is my understanding of their  
14 papers.

15 But it isn't really, Your Honor. The  
16 functional analysis looks at, is the minority  
17 community voting cohesively? Is there a person  
18 winning the primary election? Is there a  
19 person winning the general election?

20 We can do a thought experiment, Your  
21 Honor. In the former Congressional District 5,  
22 let's assume that the BVAP goes down 5 percent  
23 but it's still a solidly blue county, right?  
24 So BVAP goes down to 5 percent, solidly blue  
25 county. President Obama decides he's going to

1 run for Congress in that seat. He gets  
2 90 percent of the Black vote in the Democratic  
3 primary. He gets 70 percent of the white vote  
4 in that primary, he wins. He then wins in the  
5 general because it's a solidly blue district.

6 And so, under the functional analysis with  
7 a BVAP of 5, you check the box for the Black  
8 communities candidate of choice winning the  
9 primary, winning the general, yet it's under  
10 the functional analysis still a performing  
11 district that needs to be protected even though  
12 the BVAP is 5 percent?

13 That, to me, doesn't make sense. And  
14 again, there's no inherent geographic limit in  
15 using the functional analysis as a way to hem  
16 in this race-based solution.

17 Your Honor, I'd like to next move on to  
18 the burden of proof. My friend noted that this  
19 is an unusual procedural posture because  
20 ordinarily it's someone challenging a state  
21 map. Right?

22 Here we have a state map that's neutral  
23 and my friends for the other side are saying  
24 that that state map is unconstitutional. My  
25 friends are the ones who are saying that based

1 on the Florida nondiminishment standard, you  
2 need to use race as a component to draw a  
3 district somewhere in North Florida that's  
4 Black performing.

5 So my friends are the proponents for this  
6 race-based solution. Logically, they would  
7 have the burden then to show that race would  
8 not predominant in the drawing of some district  
9 in North Florida, and if it did, that there  
10 isn't a compelling interest in narrow  
11 tailoring.

12 Your Honor, I go back to the points I made  
13 about this district being 200 miles long  
14 connecting the first coast to the Big Bend,  
15 splitting counties being 3 miles wide at its  
16 dip, and, to me, that shows that race  
17 predominates.

18 Another way to look at it, Your Honor, is  
19 this. Unlike North Carolina, unlike Texas,  
20 unlike all the other states, Florida does have  
21 Article III, Section 20(b) which lays out  
22 standards like compactness. You must draw  
23 things that are compact. The only way you can  
24 deviate from that is if you are taking race  
25 into account, the partisanship incumbency

1 things don't really matter because they're sort  
2 of a negative.

3 **THE COURT:** Wait, wait. What? You're  
4 saying words in the Constitution don't matter?

5 **MR. JAZIL:** No, no, no. No, Your Honor.

6 My point is this: The partisanship and  
7 the incumbency provisions, it's a direction for  
8 the legislature not to take partisanship into  
9 account, it's a direction not to take  
10 incumbency into account. So if you're  
11 deviating from the Article III, Section 20 (b)  
12 requirements of compactness adherence to  
13 political geographical boundaries, the race  
14 factor would be the only reason why you would  
15 deviate from compactness; because you can't  
16 deviate if you're trying to get Democrats  
17 together in a district and you can't deviate if  
18 you're trying to get Republicans into a  
19 district.

20 So when we take a look at this map, Your  
21 Honor, here (indicating), there's no way  
22 someone could say that we're adhering to  
23 compactness principles. Here, there is no way  
24 we can say that we're adhering to compactness  
25 principles, which are --

1           **THE COURT:** Wait, wait, wait. That map  
2 you're holding up is the one the Florida  
3 Supreme Court said met the compactness  
4 threshold.

5           **MR. JAZIL:** Your Honor, it said that the  
6 map was the best alternative. And remember,  
7 the Florida Supreme Court --

8           **THE COURT:** It said -- it said it was okay  
9 with compactness, and I'm bound by that, am I  
10 not?

11          **MR. JAZIL:** Yes, Your Honor.

12          **THE COURT:** I mean, they looked at  
13 compactness for that one. They said it was  
14 fine for compactness. Am I not bound by the  
15 Florida Supreme Court decision that says that  
16 map, as far as compactness, is fine?

17          **MR. JAZIL:** They said it's not a model of  
18 compactness, but it's better than the  
19 alternatives.

20          **THE COURT:** So, let me ask that question  
21 again. Is that map -- does that map meet the  
22 compactness standards that the Florida  
23 Supreme Court has set out?

24          **MR. JAZIL:** Pardon me, Your Honor, the  
25 compactness standards that the Florida

1 Supreme Court has set out or the compactness  
2 standards that would apply to any map that  
3 needs to comply with both the Florida  
4 Constitution and the Federal Constitution?

5 **THE COURT:** Both.

6 **MR. JAZIL:** And so that second part, the  
7 Federal Constitution, the Federal Constitution  
8 issue, again, wasn't before the Court.

9 Second, Your Honor, the point I'm trying  
10 to get to, just overall, is this: They're the  
11 ones who want to draw a map that replaces the  
12 race-neutral map; they are the ones who want to  
13 inject race into it. As proponents of that,  
14 they have the burden, they have to show  
15 compelling interest and narrow tailoring.

16 **THE COURT:** Well, wait. Let's go back.  
17 And this is the case we talked about last time.  
18 I said we might get some guidance from the  
19 Supreme Court.

20 So doesn't Allen versus Milligan  
21 specifically talk about that when it talks  
22 about when it comes to considering race in the  
23 context of districting? We have made clear  
24 that there is a difference between being aware  
25 of racial considerations and being motivated by

1           them. The former is permissible, the latter is  
2           usually not. That's because -- that is because  
3           redistricting legislatures will almost always  
4           be aware of racial demographics.

5           And so, what we're really arguing about is  
6           that split, are we not? Whether their  
7           awareness and using race is okay, according to  
8           the U.S. Supreme Court, as long as it doesn't  
9           predominate.

10          So let's stick only on the predomination  
11          because they're allowed to use race, and  
12          they're saying that it -- that it meets that  
13          standard. So you're saying -- you're saying  
14          it's not and, therefore, there's strict  
15          scrutiny. But you've got to show that it's  
16          not, do you not? That it does predominate;  
17          don't you have to show that race predominates?

18          **MR. JAZIL:** No, Your Honor. I'm not the  
19          one asking for a new map. They're the ones  
20          asking for a new map; they're the ones saying  
21          that there needs to be some kind of replacement  
22          for the race-neutral map that is race  
23          conscious, right?

24          I'm saying that this map (indicating), the  
25          Enacted Map, is perfectly constitutional. We



1 don't need to do anything more.

2 They're the ones who are saying that,  
3 look, this map violates Article III,  
4 Section 20(a), and so we need to replace it  
5 with something. That something is race  
6 conscious. But that race --

7 **THE COURT:** Well, that something is up to  
8 the legislature, is it not? Nobody expects me  
9 to put a map in place -- and that was where  
10 this Court erred back on a temporary  
11 injunction, is it -- is it solved the problem.

12 The Constitution is very clear, the  
13 legislature is the one that draws the map, and  
14 even the prior redistricting says, you got to  
15 give them a chance and, ultimately, if you  
16 can't, then the Florida Supreme Court, in  
17 essence, does that.

18 **MR. JAZIL:** Sure, Your Honor.

19 Now you're getting to another point that  
20 my friends were making, the distinction between  
21 the liability and remedy phase of this.

22 And my position is this, Your Honor --

23 **THE COURT:** Yeah, I was going to talk to  
24 them about that on rebuttal.

25 **MR. JAZIL:** Your Honor, my position is

1 this. If there's no valid remedy, there can be  
2 no liability. And let me illustrate that more  
3 concretely.

4 What the plaintiffs are asking for is the  
5 Court to ignore the presumption of validity  
6 that applies to legislative enactments and  
7 declare this law that created this Enacted Plan  
8 invalid. And let's suppose that the Florida  
9 Supreme Court affirms this Court. The Florida  
10 Supreme Court says that the nondiminishment  
11 standard has been violated, go back down, come  
12 up with a remedial plan and see if it passes  
13 muster.

14 So we go through the remedial phase, we  
15 figure out that there's no workable remedy  
16 because, again, in their words, the only  
17 workable alternative is to combine Duval with  
18 Leon 200 miles away.

19 If we, on a remand, come to the conclusion  
20 that there's no workable remedy, what happens?  
21 The courts give the legislature an apology  
22 saying, you know, we declared this to be  
23 unconstitutional, it turns out there's no  
24 remedy, so go back to the Enacted Plan? Is  
25 that how it would play out?

1           So, fundamentally, Your Honor, I don't  
2 think we can divorce remedy from liability in  
3 this instance. If they can't show there is a  
4 viable remedy that passes Federal  
5 Constitutional muster but there's a viable  
6 race-conscious remedy or race either does not  
7 predominate or race predominates but there's a  
8 compelling interest in narrow tailoring, the  
9 presumption of validity applies and the Enacted  
10 Plan should be upheld.

11           **THE COURT:** All right. But there's a  
12 presumption of validity as to the statute, I  
13 agree. Isn't there a presumption of validity  
14 to the Florida Constitutional provision enacted  
15 by the voters of this state?

16           **MR. JAZIL:** Sure, there is, Your Honor.  
17 And what I'm saying is, there is a presumption  
18 of validity that applies to the Enacted Plan  
19 and there should be presumption of validity  
20 that applies to the Florida constitutional  
21 provision.

22           But again, what is the fundamental task  
23 we're being asked to do here? We're being  
24 asked to take the race-neutral map, the Enacted  
25 Map, and insert in there a race-based district.

1           At that point, how do we do that? We do  
2           that by complying with both the Florida  
3           Constitution and the Federal Constitution so  
4           long as the two don't conflict. If they do,  
5           the Florida Constitution has no --

6           **THE COURT:** But that's where the burden  
7           issue is. Isn't it then your burden to show  
8           that you cannot meet both the Florida  
9           Constitution and the Federal Constitution?  
10          Would that not -- because -- and again, this  
11          Court hasn't made any decisions, but step one,  
12          they've got to show it doesn't comport -- under  
13          their -- under their complaint, step one,  
14          they've got to show it does not comport with  
15          the Florida Fair District Amendment. Step one.

16          And if they show that, why is that not  
17          a -- then it becomes your burden to show -- and  
18          they can show -- here's a map, this Plan 8015,  
19          that will -- that will comport with the Florida  
20          Constitution.

21          Why is it not your burden to show it does  
22          not comport with the Federal Constitution and  
23          there's no possibility of comporting with the  
24          Federal Constitution?

25          **MR. JAZIL:** Because, Your Honor, we're not

1 the ones who are the proponents of this  
2 race-based plan under the Federal Constitution.  
3 And we cite cases for the proposition that the  
4 proponent of the race-based solution needs to  
5 bear the burden.

6 And, admittedly, as my friend pointed out,  
7 there's no case directly on point where if  
8 someone challenging the state's race-neutral  
9 test can mandate the creation of a  
10 race-conscious or race-based district, however  
11 you characterize it.

12 And so our position is, they have the  
13 burden 1A and 1B of saying that the Florida  
14 Constitution requires the creation of a  
15 race-based district up here and the Federal  
16 Constitution allows for their creation of a  
17 race-based district here.

18 **THE COURT:** Okay.

19 **MR. JAZIL:** Your Honor, we've been talking  
20 a bit about the Public Official Standing  
21 Doctrine as well in this case. The Court has  
22 made some oral rulings. The Court has  
23 previously denied the plaintiffs' motion to  
24 strike our affirmative defenses untimely.  
25 We've made the waiver arguments in our papers.

1 It's a reading of the rules.

2 I'll let that stand for what it is, and we  
3 maintain those. I'd like to make just a more  
4 fundamental point about the Public Official  
5 Standing Doctrine, Your Honor.

6 The first case, the Atlantic Railroad's  
7 case from 1922, the most recent case, it's the  
8 Miami-Dade Expressway Authority case from the  
9 First District where Mr. Nordby and I tried.

10 In both those cases, you had a situation  
11 where there was an executive branch official,  
12 in the railroad case it was the Attorney  
13 General, saying, hey, I think a statute passed  
14 by the legislature is just unconstitutional so  
15 we're not going to implement it.

16 In the Miami-Dade Expressway Authority  
17 case it was a state agency and local expressway  
18 challenging a state constitution -- a state  
19 statute -- saying that, look, we can't be  
20 dissolved because this is violative of other  
21 provisions of law.

22 In both instances you had executive branch  
23 officials taking issue with state statutes.  
24 Here, the Secretary is simply saying, as Your  
25 Honor pointed out, we're going to enforce the

1 Enacted Plan. If someone wants us to enforce  
2 something else, they need to tell us that that  
3 something else comports with all available law,  
4 the Florida Constitution and the U.S.  
5 Constitution; because we cite cases in our  
6 briefs, Your Honor, going back to McCulloch  
7 versus Maryland. If a federal law is in  
8 conflict with a state law, the state law has no  
9 effect and we're not obligated to follow it.

10 And requiring the Secretary of State to  
11 sit idly by and implement a map that may  
12 violate the Federal Constitution just doesn't  
13 seem consistent with his duties and  
14 obligations.

15 **THE COURT:** But -- okay, but why is that  
16 pertinent in this case? Why is it the  
17 Secretary -- in the event this Court were  
18 ultimately to grant relief, how does that harm  
19 the Secretary in any way? Why doesn't the  
20 Secretary wait until whatever comes out comes  
21 out at the end of the thing?

22 Then wouldn't the Secretary have a basis  
23 to challenge it and say, now what's in place  
24 violates the Constitution. Because the remedy,  
25 likely here -- and again, I've got questions

1 for the plaintiffs. The remedy is just throw  
2 out -- throw out the bill, throw out the  
3 statute and say, legislature, do it again.

4 And they very well may come up with  
5 something that may or may not offend the  
6 Secretary's feelings on constitutionality.

7 So why is this not an advisory opinion as  
8 far as that goes for the Secretary? This Court  
9 wouldn't be requiring the Secretary to do  
10 anything, other than to not use this map. That  
11 would be the only remedy I think that,  
12 realistically, this Court can order. Don't use  
13 this map. I'm not telling you which one to  
14 use. The legislature will do that.

15 So why can the Secretary challenge them  
16 challenging this? That's what -- that's the  
17 part that's a little sticky, and it's not like  
18 the other cases, because they -- we've got this  
19 state constitutional provision and a federal  
20 constitutional provision.

21 **MR. JAZIL:** So if I understand the Court  
22 correctly, the point is this; that if the Court  
23 requires the Secretary simply to not implement  
24 this map, what exists for the Secretary to  
25 challenge is possibly unconstitutional under



1 the Federal Constitution?

2 **THE COURT:** Well, that's the issue. Isn't  
3 that best laid at the feet of the legislature  
4 and the Governor?

5 But I will note, the Governor asked to be  
6 removed from this case and this Court did  
7 remove him. He might have had the ability to  
8 say, you're requiring me to either enact --  
9 although the legislature is free to enact  
10 legislation over his veto, if they so choose,  
11 so I'm not sure the Governor could make that.

12 We are not there. I'm not issuing  
13 advisory opinions. But aren't the people  
14 constrained -- or the groups, I shouldn't say  
15 the people because that's an awkward word here  
16 we'll talk about later, but aren't the groups  
17 constrained by Section 20 of Article III?  
18 Isn't -- aren't the groups constrained, the  
19 House and the Senate and the Governor? Those  
20 are the ones constrained by this, correct?  
21 Tells them how they are to redistrict?

22 **MR. JAZIL:** Yes, Your Honor.

23 **THE COURT:** How is the Secretary  
24 constrained in any way by Article III,  
25 Section 20?

1           **MR. JAZIL:** Well, the Secretary ends up  
2 implementing whatever is passed. The  
3 Secretary, the House, the Senate are also all  
4 constrained by the Federal Constitution.

5           And I go back, Your Honor, to my point  
6 about there being a false distinction between  
7 liability and remedy in this case. If a remedy  
8 simply is not possible, how then can you have  
9 liability?

10           And here again, Your Honor, I point the  
11 Court to what the plaintiff said in their  
12 temporary injunction filings, the only  
13 alternative is to combine Duval with Leon and  
14 Gadsden.

15           **THE COURT:** I get that. But why does the  
16 Secretary get to make that argument instead  
17 of -- or in addition to the House? Isn't that  
18 the House's argument? And I'll hear from the  
19 House shortly.

20           I don't think the Senate has properly  
21 raised it. I'm not so sure. We're going to  
22 talk to Counsel about that in a moment, because  
23 that's not their affirmative defense. They  
24 don't have any left.

25           So the question is, why does the Secretary

1 get to raise this argument? This is that legal  
2 technicality stuff, but why does the Secretary  
3 get to raise this, that's properly raised by  
4 the House that says, we can't comply with the  
5 remedy. The Secretary doesn't have to comply  
6 with any remedy. The remedy is -- other than  
7 you can't enforce that. When you have an  
8 operative map, then you use it.

9 **MR. JAZIL:** Sure, Your Honor. And so,  
10 just taking a step back.

11 The Secretary is your appropriate  
12 executive branch official who would be  
13 implementing any remedial map, right? I mean,  
14 the county of Volusia case goes through this  
15 and talks about how the Secretary of Elections  
16 are ever implicated is on the hook. And so the  
17 Secretary would be the only executive branch  
18 official whose duties would be implicated at  
19 the state level because the Secretary would be  
20 responsible for implementing any remedy.

21 **THE COURT:** So why doesn't the Secretary  
22 now have the burden to show that there isn't  
23 any remedy that is workable?

24 **MR. JAZIL:** Because, Your Honor, again,  
25 the Secretary is not the one who is saying that

1           there needs to be a race-based remedy here.

2           If the Secretary were the one -- if we had  
3           separate elections for Secretary of State as we  
4           used to before the executive branch was  
5           reorganized and the Secretary were in that  
6           position advocating for a race-based district  
7           saying essentially what the plaintiffs are  
8           saying, right, that there needs to be some kind  
9           of district here that comports with the  
10          nondiminishment test and we think it's  
11          possible, then the Secretary would have that  
12          burden.

13          The Secretary isn't doing that. All the  
14          Secretary here is doing is defending the  
15          Enacted Plan as enacted. The Secretary isn't  
16          saying that you should shoehorn a district from  
17          Duval to Leon that captures Gadsden and call it  
18          a day. That's -- if the Secretary were doing  
19          that, it'd be the Secretary's burden, Your  
20          Honor.

21          **THE COURT:** This takes me back to that  
22          rummaging through the record that the parties  
23          have asked. And isn't that exactly what the  
24          legislature had said, is taking all these  
25          different factors into account, here's one that

1 we think works? And so how does race  
2 predominate when they're saying we've taken all  
3 these factors into account? And I'm  
4 paraphrasing.

5 **MR. JAZIL:** Sure. If you go through the  
6 legislative record, Your Honor, the argument  
7 was in a nutshell this: That if we draw a  
8 district from Duval to Leon, we can justify it  
9 because trying to comply with the State  
10 Constitution is a compelling interest. That  
11 argument gave way as the proceedings went  
12 forward, and I believe my friends are in  
13 agreement with me that saying that we're trying  
14 to comply with the State Constitution isn't a  
15 compelling interest, number 1.

16 Number 2, there is that district in 8019,  
17 Your Honor, this was a Duval district,  
18 Mr. Gallo, we point this out in our papers --  
19 pardon me, Representative Geller, I believe --  
20 was pointing out that if you had run the  
21 functional analysis on that district, it  
22 doesn't perform a third of the time for Black  
23 voters in the 14 test elections that were used.

24 So, you can take the Florida  
25 Supreme Court's language over slight changes

1 making it less likely that you elected a  
2 candidate of the minority choice. Regardless  
3 of how you read it, not performing in a third  
4 of elections means you're not complying with  
5 the nondiminishment test. You're making it a  
6 less likely.

7 The word diminish, what's it mean? To  
8 make less likely. You're diminishing the  
9 minorities' ability to elect a candidate of  
10 their choice. So every configuration the  
11 legislature had was Duval to Leon, except for  
12 one. That one configuration didn't actually  
13 perform for Black voters.

14 And finally, Your Honor, you saw how  
15 things were fixed at the edges of Leon and  
16 Duval in 8015. I refer the Court to  
17 Apportionment 7, page 403. In Apportionment 7,  
18 the Florida legislature put forward a  
19 configuration of a district that was a lot like  
20 the one that the trial Court found had improper  
21 partisan impact. And the Florida Supreme Court  
22 said it was error to have a district that  
23 retained the same basic shape or merely  
24 tweaking of a few aspects of the district where  
25 80 percent of the district was retained, when

1           judged against the benchmark.

2           So my point with the legislature's valiant  
3 effort to try to take away the most egregious  
4 forms of gerrymandering in Duval and Leon is  
5 this: You're still retaining pretty much the  
6 same district and tweaking on the edges, which  
7 for partisan gerrymandering, the Florida  
8 Supreme Court said in Apportionment 7 was  
9 inappropriate and shouldn't be used to come up  
10 with a remedy.

11           Your Honor, a couple final points about  
12 race predominating here. Again, I'd ask you to  
13 consider the following points.

14           Why was that district drawn the way it  
15 was? Race. Florida Supreme Court said so.  
16 But no one questioned the equal protection  
17 issues.

18           Why do the plaintiffs want to preserve  
19 that district? Race.

20           What's the basis for their claim? Race.

21           Heck, Your Honor, the caption of this case  
22 is Black Voters Matters versus Byrd. It's not  
23 Concerned Citizens for Compactness versus Byrd.

24           And what can't the legislature do, Your  
25 Honor? You can't take race as a predominant

1 factor when it's drawing a district, whether  
2 the one enacted in the special session or any  
3 remedial.

4 And so, Your Honor, I would ask that the  
5 Court enter judgment for the defendants in this  
6 case, and I'll cede the remainder of my time to  
7 Mr. --

8 **THE COURT:** All right. I'm going to --  
9 one, I'm going to let -- we're going to answer  
10 a couple more questions, or maybe one or two,  
11 we'll see, and then we'll take a break because  
12 we've been in here for a while.

13 But talk to me about the difference --  
14 because this is going to be different for  
15 Mr. Bardos, the facial challenge versus the --

16 **MR. JAZIL:** As-applied.

17 **THE COURT:** As-applied -- well, the facial  
18 versus the as-applied, because -- and stick  
19 with the as-applied because the facial  
20 challenge, unless you need to add anything,  
21 Mr. Bardos is going to be talking about that, I  
22 would imagine. Maybe he's not.

23 But talk to the distinction because he  
24 doesn't have -- he doesn't have the as-applied  
25 to challenge. He has facial challenge.



1           **MR. JAZIL:** Your Honor, I think it's the  
2 other way around. I think he has the  
3 as-applied challenge and not the facial  
4 challenge.

5           **MR. BARDOS:** That's right, Your Honor.

6           **THE COURT:** That's right, he does have the  
7 as-applied. Okay.

8           **MR. JAZIL:** Sure, Your Honor. And so I've  
9 been focusing on the as-applied one, that  
10 there's no conceivable way to draw a district  
11 in North Florida where race doesn't predominant  
12 because you have to connect the Black  
13 population in Duval to the Black population in  
14 Tallahassee and Gadsden.

15           The facial argument is this, Your Honor:  
16 Article III, Section 20(a), right, on its face,  
17 race predominant. There's no durational limit,  
18 there's no geographic limit, there is no record  
19 showing that Article III, Section 20(a) was  
20 adopted to fix some kind of specific racial  
21 problem and that its racial solution was  
22 narrowly tailored, i.e. there was a --

23           **THE COURT:** All right. Where's the  
24 standing, though? Because when you -- what  
25 language in the 14th Amendment are you saying

1 applies here?

2 **MR. JAZIL:** What language am I saying  
3 applies?

4 **THE COURT:** Yes.

5 **MR. JAZIL:** It's a requirement that people  
6 be treated alike.

7 **THE COURT:** Yeah, but doesn't it start  
8 with all persons born or naturalized in the  
9 United States? Isn't that a quantifier on the  
10 persons involved there?

11 The Secretary of State, in the official  
12 capacity, was not born and naturalized in the  
13 United States, doesn't that -- wouldn't that go  
14 to an individual person, not a government  
15 entity person --

16 **MR. JAZIL:** Your Honor, I'd have to go --

17 **THE COURT:** -- or a corporation or --

18 **MR. JAZIL:** True, Your Honor. I'd have to  
19 go back and see what happens when someone  
20 raises an affirmative defense of facial  
21 unconstitutionality, right, because if I'm  
22 raising it as an affirmative defense, I'm being  
23 hauled into Court, I'm being told to do  
24 something that would, in my view, not comply  
25 with federal law.

1           **THE COURT:** All right. But where is it,  
2 no state shall make or enforce any law which  
3 shall bridge the privileges or immunity of the  
4 citizens of the United States? Is the office  
5 of a Secretary of State a citizen? It's not,  
6 is it?

7           **MR. JAZIL:** It's not, Your Honor, but I  
8 believe that the language you're reading says  
9 that the state official can't do something that  
10 abridges equal opportunities for --

11           **THE COURT:** Right. And so it gets back to  
12 standing. How does the Secretary of State have  
13 the standing to assert that on behalf of the  
14 other individuals?

15           **MR. JAZIL:** On behalf of the House and  
16 Senate members and the Governor?

17           **THE COURT:** Well, no, that's all official  
18 capacity. So, again, and it talks about a  
19 person of life, liberty or property.

20           Again, what liberty interest -- again, is  
21 that in association with standing argument for  
22 the Secretary of State that they're able to  
23 argue that? We don't have individuals that  
24 came in and said -- and let's say individuals  
25 from this district that intervened said, hey,

1           it's -- they're discriminating against me based  
2           on my race. So how can the Secretary raise  
3           that argument?

4           **MR. JAZIL:** Your Honor, I understand the  
5           point of this lawsuit to be this: Come up with  
6           a new map for North Florida. My client is  
7           saying that that would require him to violate  
8           the Federal Constitution, the 14th Amendment.  
9           And my client would like not to violate the  
10          14th Amendment.

11          **THE COURT:** How would it -- how would it  
12          make him -- that's the part --

13          **MR. JAZIL:** Because he would be  
14          implementing a map that sorts people based on  
15          race without having a compelling reason or  
16          narrow tailoring for doing so.

17          That's the point. You can't force a state  
18          official to go and violate the Federal  
19          Constitution. And the state official surely  
20          has the ability to say, look, you can't compel  
21          me to do this, you can't compel me to take  
22          official action that would sort people based on  
23          race and, therefore, violate the Equal  
24          Protection Clause. And that's the basis for  
25          the Secretary putting this argument forward.

1           **THE COURT:** All right. Thank you,  
2 Mr. Jazil.

3           **MR. JAZIL:** Thank you, Your Honor.

4           **THE COURT:** All right. With that, folks,  
5 why don't we take about 10 minutes.

6           (A recess took place from 10:30 a.m. to  
7 10:45 a.m.)

8           **THE COURT:** Mr. Bardos, you may proceed.

9           **MR. BARDOS:** Good morning, Your Honor,  
10 thank you. Andy Bardos representing the  
11 Florida House.

12           Your Honor, I would like to start by  
13 placing this in practical terms and taking  
14 ourselves back into the position that the  
15 legislature was in when it was undertaking  
16 redistricting. So I will address what the  
17 legislature had to consider, and then I will go  
18 back and address some of the issues that the  
19 plaintiffs raised as to why the Court shouldn't  
20 consider what the legislature had to consider.

21           Redistricting is governed by a hierarchy  
22 of standards, beginning with the Federal  
23 Constitution, federal statutes, the VRA, and  
24 the State Constitution; and within the State  
25 Constitution there is a hierarchy of standards

1 as well, Tier 1 and then we have Tier 2.

2 In the legislative process, the  
3 legislature does not have the luxury of taking  
4 them one at time. It has to consider them all,  
5 and it has to come up with a map that it thinks  
6 accommodates all of those legal obligations and  
7 reconciles them in the best possible way.

8 It doesn't have the luxury of doing what  
9 the plaintiffs are asking this Court to do,  
10 which is to take them one standard at a time,  
11 render a ruling on them seriatim, and then  
12 address the others later in a remedial case or  
13 perhaps some other case in the future.

14 That's why our affirmative defense is so  
15 essential, because it asks the Court to  
16 consider all of the standards in combination,  
17 just like the legislature had to do when it was  
18 drawing the map. And there is no other good  
19 way to adjudicate the validity of a map than to  
20 do it simultaneously, considering all the  
21 standards.

22 And we saw this play out during the last  
23 cycle, not in a conflict between the Federal  
24 Constitution and the State Constitution, but in  
25 a conflict between the two tiers.

1           We saw frequently where there were  
2 districts that were less than compact; they  
3 didn't satisfy the Tier 2 criteria. And the  
4 legislature asserted in litigation, we did that  
5 because the higher standard, Tier 1, required  
6 it. We did it because we had an obligation to  
7 not diminish in that district.

8           And the Court considered that. And the  
9 Court always weighed that, the Florida  
10 Supreme Court did it, even in imposing this  
11 district that we are here about today. It  
12 didn't say no, we are just focused on the  
13 compactness standard. You can't assert  
14 nondiminishment rights in this litigation. You  
15 don't have standing. And that has to be done  
16 later.

17           Let's start with a map that has compact  
18 districts throughout the state, and if someone  
19 has a problem with that, we can deal with that  
20 in subsequent litigation. It didn't do that.

21           The Courts adjudicated these claims in a  
22 practical way, just like the legislature has to  
23 address redistricting in a practical way,  
24 taking everything together, not splitting them  
25 up, not kicking cans down the road.

1           So from our perspective, Your Honor, we  
2           have asserted one defense here, and that is the  
3           as-applied equal protection claim or defense.  
4           And we think that's a two-step inquiry.  
5           There's the predominance inquiry, and then we  
6           get to the question of whether there's a  
7           compelling interest.

8           We are not making an argument on the  
9           narrow tailoring branch of that analysis.

10          So starting with predominance, what is the  
11          evidence for predominance? It's a number of  
12          things.

13          One, we took at the shape of the district.

14          **THE COURT:** Hold on, Counsel, you are  
15          starting the affirmative defense.

16          **MR. BARDOS:** Yes, Your Honor.

17          **THE COURT:** And that's fine. Is there any  
18          concession that they make out their primary  
19          case based on facts before this Court?

20          **MR. BARDOS:** Yeah, there is no district in  
21          North Florida that performs for minority voters  
22          in the Enacted Map. We think that's justified  
23          because of equal protection requirements. So  
24          that where we think the dispute is.

25          **THE COURT:** Okay.



1           **MR. BARDOS:** So we begin with  
2           predominance. And we look at the shape of the  
3           district and we see that there is a district  
4           that is very unlike what we typically see in  
5           any sort of redistricting map, where we would  
6           expect to see a compact district more like  
7           District 3. District 2 takes in counties as it  
8           moves through the Big Bend area, as it must to  
9           reach its population threshold.

10           But District 5 is a very unusually shaped  
11           district. It has eight counties, but it  
12           strings them in a line, instead of like  
13           District 3 where it combines those districts  
14           into a compact shape. It strings it in a line  
15           from Jacksonville all the way up to Gadsden  
16           County, which runs 200 miles, with a height of  
17           20 miles. So it's basically a 10-by-1  
18           district. And then at the two ends is where  
19           the population is. So it's clearly trying to  
20           combine two very far-flung communities with  
21           each other, and it gets very little of its  
22           population from the five counties in between.

23           So we see in Tallahassee and Jacksonville  
24           the district has some unusual features. It has  
25           some fingers and some arms, so it's contoured

1 to capture certain communities there. And it  
2 goes out even further to Gadsden.

3 The plaintiffs said they don't know  
4 exactly what district is at issue and they are  
5 too confused to know which district we are  
6 challenging, whether it's the Benchmark  
7 District or the districts consider during the  
8 legislative process. But every district that  
9 went from east to west and that anyone  
10 purported did not diminish looks something like  
11 that, very much like that, in fact. There is  
12 very little difference between these districts.  
13 Some of them might have been contoured, some  
14 are differently in Leon County or Jacksonville,  
15 where it captured certain position populations,  
16 but they all looked very much the same.

17 And so we know what district we are  
18 talking about. It's that district, the  
19 district that includes Gadsden and the district  
20 that includes portions of Tallahassee and that  
21 stretches to Jacksonville. All of the  
22 districts that we were talking about look like  
23 that.

24 This is visually, at least, a very  
25 noncompact district, and there is no other

1 district quite like it in the map. So we know  
2 that there is something happening here. There  
3 is something motivating this district other  
4 than compliance with simple Tier 2 criteria.

5 I don't think the Florida Supreme Court  
6 ever held that this district is compact. I  
7 think it was responding to the dissent's  
8 argument that going from a north-south district  
9 to an east-west district makes the map less  
10 compact. So the Court was simply saying this  
11 does not make the map less compact; what it was  
12 doing was putting a district in place that  
13 would not diminish.

14 The second indication that we have is that  
15 the population is at the two ends of the  
16 district, so we know that there is something  
17 going on there that is trying -- where the map  
18 drawer is trying to capture population that is  
19 at a great distance from the two -- that the  
20 two population centers are a great distance  
21 from each other.

22 The stipulation that we entered into shows  
23 82.7 percent of the district's population comes  
24 from two counties that are 150 miles apart,  
25 Leon County and Duval County. 11.5 percent of

1 the district's population, just over 1/9th of  
2 it comes from the five counties in between, so  
3 those counties really are serving simply as a  
4 corridor to connect two population centers that  
5 are 150 miles apart.

6 **THE COURT:** If I drive down I-10, don't I  
7 see a lot of empty space there?

8 **MR. BARDOS:** Yes, Your Honor. That's the  
9 point. So why would a map drawer try to  
10 connect two very populous areas, 150 miles  
11 apart, that have pretty much empty space in  
12 between?

13 **THE COURT:** And again, I know this is a  
14 very, very diverse state. Don't the people all  
15 along the noncoastal Florida northern border of  
16 Georgia have a lot more in common with one  
17 another than, say, the people that live on the  
18 Florida Gulf Coast? Isn't that -- somebody  
19 from Gadsden, don't they have a lot more in  
20 common with somebody in Baker County than maybe  
21 they do from somebody that is a shrimp  
22 fisherman in Gulf County?

23 **MR. BARDOS:** Well, we don't have those  
24 sorts of facts in the record, Your Honor, but  
25 what I can say is that this very clearly

1 combines different types of communities.

2 We know that Jacksonville is a highly  
3 urban, densely populated area. It's much like  
4 Orlando or Tampa, it's one of Florida's major  
5 urban centers.

6 And then in between we have counties that  
7 are at the opposite end of that spectrum. They  
8 are among Florida's most rural counties.

9 So I think that any sort of argument based  
10 on a commonality of interest on its face I  
11 think is refuted by the way this district is  
12 constructed.

13 What does someone living in downtown  
14 Jacksonville have in common with someone who is  
15 living out in Quincy? I think those are two  
16 very different communities, and Tallahassee  
17 itself is a very different community from  
18 either.

19 So I don't think that the community of  
20 interest argument stands either.

21 We saw in the maps that Mr. Jazil put here  
22 that the district line very closely follows  
23 those communities where there is a high  
24 concentration of minority voters. So we see  
25 that, that data comes from census data that's

1 also available in the Florida legislature's  
2 redistricting website.

3 In looking at additional Tier 2  
4 indications, this district splits four counties  
5 as it goes from Gadsden to Jacksonville. It  
6 contains eight counties. And again the unusual  
7 feature is that it strings them in a line  
8 instead of putting them together in a compact  
9 shape.

10 We know from the constitution the only  
11 factor that can justify a deviation from  
12 compactness is race. It's the only standard in  
13 the Tier 1 set of standards that would justify  
14 a deviation from compactness, so right there is  
15 a strong indicator as to why the district was  
16 drawn the way that it was.

17 We know from the history of this district,  
18 going back to 1992, what has been the big issue  
19 in this district. This district has been  
20 litigated now four decades. It was drawn  
21 originally by the Courts back in 1992, the  
22 Johnson versus Mortham case that we cited sets  
23 forth that history.

24 It was initially drawn by the Court and  
25 then invalidated as a racial gerrymander by the

1 Court. It was litigated in 2002 in Martinez  
2 versus Bush, last decade, and Voters versus  
3 Detzner, and here we are again. And the issue  
4 every time was race. That has been the  
5 defining issue in all of the litigation that  
6 has surrounded this district for four decades,  
7 another indication that race is a predominant  
8 factor in the design of this district.

9 We also don't have to look much beyond  
10 what the Florida Supreme Court said about this  
11 district when it ordered this district be put  
12 in place in 2015. In the Court's discussion  
13 decision of this district, the one affirmative  
14 virtue that it stated that this district has  
15 was that it avoided diminishment for racial  
16 minorities. So that was the Florida  
17 Supreme Court's reason, stated reason for  
18 ordering this district to be put in place.

19 And what it said is that the legislature  
20 cannot prove that the north-south configuration  
21 is necessary to avoid diminishing the ability  
22 of Black voters to elect candidates of their  
23 choice, therefore we hold that District 5 must  
24 be drawn in an east-west manner.

25 So if the Court believed that there was

1 some other way to avoid diminishment for  
2 minority voters, they likely would not have  
3 ordered this particular configuration of it.  
4 And in fact it went on to say that an east-west  
5 orientation is the only alternate option.

6 What the plaintiff said about that in  
7 their memorandum of law according to their  
8 temporary injunction motion early in this  
9 litigation is that the Florida Supreme Court  
10 ordered the legislature to redraw CD-5 in an  
11 east-west manner, concluding that this  
12 configuration was the only alternative option  
13 that complied with the constitutional  
14 nondiminishment standard.

15 So we know the stated reason from the  
16 Florida Supreme Court was to avoid diminishment  
17 on the basis of race. And so all of the  
18 indications that we have point to race being  
19 the predominant consideration.

20 And it is also telling that the plaintiffs  
21 don't point out what the predominant  
22 consideration was, if it wasn't race. We  
23 didn't hear anything about that today. If it  
24 wasn't race, what was it? What caused somebody  
25 to draw a district from Gadsden County, a very



1 rural district in the Big Bend Area, to  
2 Jacksonville?

3 **THE COURT:** Again -- and I asked this  
4 question of Mr. Jazil. So are you asking this  
5 Court to find that the Florida Supreme Court  
6 violated the Federal Constitution when they put  
7 this in place? Is that -- at the end of the  
8 day, is that what you are asking?

9 **MR. BARDOS:** I think, Your Honor, I think  
10 more directly what we are asking is that the  
11 Court find that the legislature was right in  
12 its analysis in 2022, that drawing a district  
13 that goes from east to west would violate the  
14 Equal Protection Clause.

15 **THE COURT:** What you just said --

16 **MR. BARDOS:** Yes. So does it follow that  
17 the Florida Supreme Court's district was  
18 contrary to the Equal Protection Clause? I  
19 don't think the Court has to address that  
20 directly. Like the plaintiffs said, that  
21 district is not the law anymore, but I think  
22 that would be the fair inference.

23 **THE COURT:** It is the Benchmark. So what  
24 I am hearing -- you are not saying it, and  
25 that's why I am asking you very pointedly, I've

1 got to go with the Benchmark. That is the one  
2 that was there before.

3 And you are telling me that it was done --  
4 it was predominated by the racial  
5 considerations. And you are telling me that a  
6 map drawn with predominated racial  
7 considerations violates the U.S. Constitution.

8 So it logically follows, are you asking me  
9 to say that the Florida Supreme Court violated  
10 the U.S. Constitution back in the prior  
11 redistricting cycle? Because if they didn't, I  
12 am stuck with this. If I did, you need to tell  
13 me that is exactly what you are asking me to  
14 do.

15 **MR. BARDOS:** Again, I don't think that the  
16 relief we are requesting requires the Court to  
17 say that.

18 I think that the question is whether the  
19 legislature, in the here and now, drawing the  
20 map when it's considering the 2022, what it  
21 needs to do and what its obligations are, that  
22 at that time the legislature was right in its  
23 evaluation of this district.

24 I agree with Your Honor, though, that it  
25 logically follows that that district as well

1 would have been a racial gerrymander.

2 **THE COURT:** If it's not, if I don't have  
3 to decide that, isn't it the burden of the  
4 legislature to show that there is no district  
5 that could be drawn that would preserve, so  
6 that there is no racial diminishment based on  
7 this Benchmark District?

8 **MR. BARDOS:** Yeah, I think, Your Honor,  
9 that is what the record shows. I think what --

10 **THE COURT:** I want you to be very specific  
11 with what you mean by the record. This goes  
12 back to my admonishment of counsel that appears  
13 they have agreed on the facts, but they really  
14 haven't. The only facts I have -- I talked to  
15 you about the ones that are very articulate.

16 But when we start going off to you can  
17 find it on a website, I don't know, when was  
18 that last changed; whenever you cite things,  
19 it's when it was last visited, and what it  
20 says, et cetera, et cetera.

21 So again, I want you to be very precise on  
22 what you mean by the record shows.

23 **MR. BARDOS:** Yes. And I will do that,  
24 Your Honor. And we'll walk through from 2015,  
25 when the Florida Supreme Court itself said the

1 east-west orientation is the only alternative  
2 option.

3 **THE COURT:** It was back then. But you are  
4 trying to say now it's not. So --

5 **MR. BARDOS:** That's right, Your Honor.  
6 And we'll walk through from there to the  
7 current time all of the evidence that supports  
8 our position.

9 So back in 2015 the Court said that was  
10 the only alternative option. Since then, what  
11 has happened?

12 In the legislative process, this  
13 configuration, this basic configuration, is the  
14 only one that was ever proposed; that's the one  
15 that would diminish the ability to elect.  
16 There was a district that was drawn entirely in  
17 Duval County which the legislature hoped would  
18 perform, but we also said that was a singular  
19 exception to the diminishment standard.

20 You can have a district that minimally  
21 performs, while at the same time diminishing  
22 the district from where it was before, and that  
23 was the position we took with that.

24 Throughout the legislative process there  
25 was never another district proposed by anybody

1 on either side of the aisle that did not  
2 diminish besides that one. I think that's very  
3 strong evidence that there is no other district  
4 out there that does it. And why is that?

5 Well, for the same reason that the  
6 district runs 200 miles. You have to connect  
7 the population in Jacksonville to the  
8 population in Tallahassee in order to get to a  
9 district that doesn't diminish. There is no  
10 other way to do it because, as Your Honor said,  
11 there is nothing in between. There is no  
12 significant population centers in between.

13 So that's why there is no other way to do  
14 it. That's why the Florida Supreme Court said  
15 there is no other way to do it; that's why the  
16 legislative process --

17 **THE COURT:** Again, this rummaging through  
18 the record, I saw that -- this is the great  
19 thing about computers, but I will note I think  
20 all populations were exactly equal or within  
21 plus or minus one. That's not required under  
22 the law, is it? Couldn't you have gone a  
23 hundred or a thousand this way or that way and  
24 maybe come up with something different but  
25 nobody proposed this?

1           **MR. BARDOS:** In drawing districts,  
2 Congressional districts specifically, plus or  
3 minus one is the standard. The Court, U.S.  
4 Supreme Court has allowed some minimal  
5 deviation where some exceptional justifications  
6 have been shown, but absolute mathematical  
7 quality has otherwise been the standard --

8           **THE COURT:** Did anybody do that here or  
9 there to propose something different?

10          **MR. BARDOS:** Well, I think what we have is  
11 the legislative record that shows this was the  
12 only district that was drawn.

13          The other part of that, Your Honor, is  
14 this very litigation. Never in this litigation  
15 have plaintiffs proposed anything else that  
16 they say --

17          **THE COURT:** Again that's -- I get that.  
18 That's a big argument on whether they have to  
19 propose it or you do. And we are getting  
20 there.

21          **MR. BARDOS:** Right. I am simply saying  
22 that's part of our evidence, that this is the  
23 only way to draw this district. So we have the  
24 Florida Supreme Court saying it's the only way  
25 to do it. Nobody in the legislative process

1 proposed a way to do it that doesn't diminish.  
2 Nobody in this litigation has proposed another  
3 way to do it that doesn't diminish.

4 They talk about the east-west district in  
5 their pleading. They talk about it in their  
6 temporary injunction papers as what they wanted  
7 before. It's what was in their expert  
8 disclosures. It's what they presented in their  
9 summary judgment papers. And it's the only  
10 remedy that's stipulated to in the stipulation  
11 the parties entered into.

12 One would think that if we have the  
13 Florida Supreme Court, every member of the  
14 legislature, and these plaintiffs in this case  
15 and nobody ever proposes an alternative to  
16 this, I think that's very strong evidence that  
17 this is what we are talking about; that this is  
18 what was really the choice before the  
19 legislature when it had to choose between that  
20 district and its equal protection obligations.

21 **THE COURT:** I guess what I am saying is  
22 not that exact district. Obviously things have  
23 changed, but some of this is a problem when you  
24 talk about up in Tallahassee, whether that can  
25 be solved by pushing around some things.

1           **MR. BARDOS:** Well, we have seen --

2           **THE COURT:** That would change a lot of  
3 compactness, wouldn't it?

4           **MR. BARDOS:** We have seen different  
5 iterations in the legislative process.  
6 Tallahassee was drawn a little bit differently  
7 in different versions, Jacksonville was drawn a  
8 little bit differently.

9           In terms of compactness scores, it might  
10 move the needle a little bit. That district  
11 though would never qualify as being compact in  
12 itself.

13           If race were not an issue with this  
14 district, that district would be invalidated on  
15 its face if someone brought a compactness  
16 challenge, because its compactness scores don't  
17 measure up to what the Florida Supreme Court  
18 has always insisted on for compactness.

19           It's not visually compact, now matter how  
20 Tallahassee and Jacksonville are contoured.  
21 Its compactness scores, the Reock score is  
22 around .12, which is extraordinarily low.  
23 Its Polsby-Popper score is extraordinarily low.

24           If there were not Tier 1 considerations in  
25 place, that district would be invalidated on



1 Tier 2 grounds. And I think that's hardly  
2 disputable. That's not -- if that's the  
3 district that's permitted under Tier 2 and the  
4 legislature can draw the entire state that way,  
5 then Tier 2 really doesn't have teeth and  
6 Tier 2 doesn't really mean much.

7 I don't think that any alternative  
8 consideration of Tallahassee or Jacksonville  
9 really changes that. The district basically  
10 remains the same.

11 So what was the predominant motive? We  
12 didn't hear it today, but in their papers  
13 plaintiffs proposed certain alternative  
14 explanations. They say, well, the legislature  
15 was simply trying to preserve the benchmark,  
16 and preservation is an end in itself.

17 We see that refuted in cases like the City  
18 of Jacksonville and the District Court in  
19 Bethune Hill where the Court said, well, that  
20 would simply be a loop hole that allows the  
21 jurisdiction to draw a racial gerrymander once,  
22 and then the second time, when it comes along  
23 and simply asserts that it's simply preserving  
24 that district that it drew before, for whatever  
25 reason, then that immunizes that district

1 against challenge going into the future.

2 We still have to ask why was that district  
3 drawn? Why are we preserving it? Why was it  
4 drawn that way in the first place?

5 Racial gerrymanders don't become immunized  
6 the second they are enacted.

7 Legal compliance, our attempts to comply  
8 with the Tier 1 standard is an end in itself  
9 and that's the predominant motive. The  
10 Supreme Court has never reasoned that way.  
11 Jurisdictions frequently have said we drew this  
12 to comply with the Voting Rights Act.

13 Well, the U.S. Supreme Court has still  
14 said, okay, your predominant motive was race,  
15 then we'll figure on the back end whether your  
16 efforts to comply with the VRA justifies that.  
17 So efforts for legal compliance don't mean that  
18 that the district was drawn for reasons other  
19 than race.

20 Third is litigation avoidance. They say  
21 that we were simply trying to avoid litigation.

22 Number 1, there is no evidence that that  
23 was the motivation for that particular district  
24 which ultimately we didn't enact anyway. But  
25 that -- really, that motivation would be

1 available to all states. All states hire  
2 outside counsel to help them through the  
3 redistricting process. All states try to avoid  
4 litigation. That has never been recognized,  
5 and they don't cite any case where that has  
6 been recognized as an interest.

7 I think we explain in our response brief  
8 why Abbott versus Perez is not on point.

9 So they, we don't think, cite any  
10 precedent to support any of those as  
11 predominant motives in a racial gerrymandering  
12 case.

13 So we are left with no alternative  
14 explanation as to why that district has been  
15 drawn if not for racial reasons, and a  
16 significant volume of evidence showing that it  
17 was drawn for racial reasons.

18 They show you districts, Your Honor, like  
19 this, District 30, one of the images that they  
20 have shown the Court, and they say well, this  
21 district doesn't quite look like that. And  
22 sure, they can cherrypick examples of districts  
23 that look like Rorschach blocks and say that  
24 this might be a little bit better than those,  
25 but that doesn't that mean to prevail on a

1 racial gerrymandering defense we have to show  
2 the district looks like this.

3 That, in the Bethune Hill, the United  
4 States Supreme Court said that there doesn't  
5 even have to be any conflict between  
6 traditional redistricting principles and  
7 race-based motivation in order to find a  
8 race-based motivation.

9 You can have a district that doesn't look  
10 ungamely and still have a predominantly  
11 racially motivation. The Supreme Court  
12 explained that in Bethune versus Hill, and it  
13 explained that in Miller versus Johnson when it  
14 said that our original decision in Shaw versus  
15 Reno really emphasized the bizarre shape of the  
16 district; that's not so much what racial  
17 gerrymandering is necessarily about; that can  
18 definitely be powerful evidence of a  
19 raced-based motive, but it's not required in  
20 order to show a race-based district.

21 So we don't think that the fact that Texas  
22 drew a district that looks like this means that  
23 that district necessarily is not drawn  
24 predominantly on the basis of race.

25 So your Honor, that's the evidence on

1           predominance. We think that that evidence is  
2           very much well cited, it supports a finding  
3           that this district was drawn on the basis of  
4           race.

5           So that brings us to the second part of  
6           the inquiry, and that is the compelling state  
7           interest. And this, Your Honor, is where we  
8           think they bear the burden of proof, because  
9           our constitution -- there are certain things  
10          that the United States Constitution abhors.  
11          One is speech restrictions, another one is  
12          raced-based government decision-making.

13          And in those cases we apply strict  
14          scrutiny. And strict scrutiny is basically a  
15          shifting of the burden to the proponent of  
16          those measures, that the Constitution disfavors  
17          so strongly that we are going to put the burden  
18          on the proponent, the party that proposes, say,  
19          speech restrictions, or is the proponent of  
20          race-based government action; they have to bear  
21          the burden on that to show that's consistent  
22          with the Constitution.

23          It's not the party that opposes race-based  
24          government decision-making or the party that  
25          opposes speech restrictions that has to show

1 that nothing could possibly justify that.

2 **THE COURT:** Their point, Counsel, and this  
3 is the question I have, is the plaintiffs  
4 aren't imposing that. The state is through its  
5 constitution.

6 And again, prior litigation aside, in this  
7 case, why isn't the Attorney General here  
8 defending the constitutionality of the Florida  
9 Constitution?

10 Isn't the government is imposing this  
11 restriction upon itself through -- this  
12 provision is in the Florida Constitution. Why  
13 does an individual citizen or a group, in this  
14 case -- well, what we got both -- why do they  
15 have to justify the actions of the State of  
16 Florida, because the State of Florida has  
17 imposed this upon its own legislature?

18 **MR. BARDOS:** Your Honor --

19 **THE COURT:** Why do they have to defend the  
20 constitutional provision? Why isn't that upon  
21 the government to defend its own constitution?

22 **MR. BARDOS:** First of all, I think it's  
23 important that we are not -- at least the House  
24 is not bringing a facial challenge in this  
25 case. All we are saying in this case is that

1 this particular district was drawn  
2 predominantly on the basis of race, and then  
3 there has to be a showing of a compelling  
4 interest in order to justify that. That part  
5 is black letter law.

6 And so the predominance inquiry is a  
7 district-by-district inquiry. So it's not a  
8 matter of us challenging our State  
9 Constitution. It's a matter of us saying that  
10 that state constitutional provision doesn't  
11 apply in that circumstance because we have a  
12 federal provision that prevails.

13 It's just like if there were a conflict  
14 between Tier 1 and Tier 2 within the State  
15 Constitution, and we have to deviate from  
16 compactness in order to serve the Tier 1  
17 interest. That's the balancing.

18 So from the House's perspective here, I  
19 think once we show racial predominance, which I  
20 think we have done in space, I think that at  
21 that point, under our Federal Constitution,  
22 which is the supreme law of the land, we then  
23 have -- they then bear the burden to show a  
24 compelling interest, because we get into that  
25 strict scrutiny analysis.

1           And so have they shown that compelling  
2 interest? I don't think so. They only cite  
3 one compelling interest for this district.

4           And I think it's very telling, Your Honor,  
5 that the one compelling district interest they  
6 cite really has nothing to do with the sorts of  
7 considerations that typically go into  
8 redistricting.

9           They are not saying there is a community  
10 of interest here. They are not saying this is  
11 a compact district. They are really simply  
12 saying that complying with the nondiminishment  
13 standard in itself is a compelling interest,  
14 period, no matter what the circumstance, no  
15 matter what the district. Simply legal  
16 compliance with that nondiminishment standard  
17 is in itself a compelling state interest.

18           And what that would mean is that the State  
19 could establish in its constitution its own  
20 compelling interest. If any state could put a  
21 nondiminishment standard in its constitution,  
22 and then any district that it draws pursuant to  
23 that nondiminishment standard gets a free pass  
24 under equal protection, because it's got that  
25 compelling interest built in the State



1 Constitution.

2 If only Texas had thought of that, then  
3 this district would be constitutional, because  
4 if Texas had had a nondiminishment provision in  
5 its constitution and this district had  
6 preexisted, and the legislature drew this, then  
7 according to their theory, there would be a  
8 compelling interest in Texas' case --

9 **THE COURT:** Wouldn't a challenge then be  
10 the -- if the Florida House or the Florida  
11 Senate felt that the State Constitution  
12 improperly restrained them under the Federal  
13 Constitution, for them to go sue in Federal  
14 Court and get a declaratory action that the  
15 State Constitution provision was not violating  
16 the U.S. Constitution prior to districting,  
17 wouldn't that --

18 Again, I am having a problem seeing where  
19 the plaintiffs have to show -- the compelling  
20 interest is to follow the presumably -- and  
21 again, this gets into your colleague's  
22 argument. If this Court were to find it  
23 facially not to violate the Equal Protection  
24 Clause, then if it doesn't facially violate  
25 equal protection, why is it not a compelling

1 interest to follow it?

2 **MR. BARDOS:** I think that's a great  
3 question, Your Honor.

4 I don't think -- and this is what they do  
5 in their papers. They basically make the case  
6 that the plaintiffs do, that this is facially  
7 constitutional. That's the argument that they  
8 made.

9 **THE COURT:** Well, has any Court found  
10 nondiminishment to be facially  
11 unconstitutional, whether that be from the  
12 Voting Rights Act or a state provision? There  
13 is a number of states that have had placed  
14 similar things in their constitution.

15 Has there been any single case that has  
16 found nondiminishment to be facially  
17 unconstitutional?

18 **MR. BARDOS:** No, I am not aware of that,  
19 Your Honor, but I don't think that that equates  
20 to having a compelling interest. Simply  
21 showing that something is barely facially  
22 constitutional, it's simply valid, doesn't show  
23 that the State has a compelling interest in  
24 pursuing that.

25 A compelling interest is an

1           extraordinarily high bar. Facial validity is a  
2           low bar. Until it's declared unconstitutional,  
3           every statute is presumed facially valid. That  
4           doesn't mean that every one of them establishes  
5           a compelling interest.

6           **THE COURT:** The argument here by the House  
7           is we just decided it was not valid, this  
8           provision of the Florida Constitution, and so  
9           we disregard it, as opposed to getting it found  
10          unconstitutional.

11          **MR. BARDOS:** Which is precisely what the  
12          legislature has to do in every redistricting  
13          process because of that hierarchy of standards.

14          Think about again -- and I will analogize  
15          the Tier 1 and Tier 2 hierarchy within the  
16          State Constitution.

17          The legislature has to make those  
18          judgments countless times in drawing its state  
19          legislative and congressional maps. To what  
20          extent do we have to sacrifice Tier 2  
21          considerations in order to satisfy Tier 1?

22          Should the legislature have to go to a  
23          Court in advance and get a declaratory judgment  
24          every time it has to deviate from Tier 2 to  
25          serve Tier 1, or every time it has to deviate

1 from the State Constitution to comply with a  
2 Federal statute, or every time it has to comply  
3 with the State -- Federal Constitution? That  
4 would be entirely unworkable.

5 All of these factors, all of these  
6 criteria are in play at the same time, and the  
7 legislature has to figure out which one takes  
8 precedence, or can they be reconciled; and it's  
9 simply unworkable to require the legislature to  
10 pursue a DAC action every time that that sort  
11 of tension exists between those standards.

12 The Florida Supreme Court recognized,  
13 there will always be tension between these  
14 standards. Sometimes they will conflict. The  
15 State Constitution itself expressly assumes  
16 that.

17 **THE COURT:** So thus your argument that --  
18 or not joining the argument of the Secretary  
19 that there is no facial -- there is no facial  
20 unconstitutionality of the Florida provisions?

21 **MR. BARDOS:** We have not asserted that  
22 defense, Your Honor. We are asserting --

23 **THE COURT:** If it were facially, then  
24 that's when you would need to go ahead. It is  
25 facially, at the time Florida voters put it in,

1 then if you know it's facially improper, if the  
2 voters of Florida were to put something into  
3 the constitution saying you can discriminate  
4 based on race, sex, et cetera, then that would  
5 be incumbent to go ahead and take care of that  
6 right then.

7 **MR. BARDOS:** Yeah. And our focus in this  
8 litigation, speaking for the House, has been  
9 the as-applied challenge, is simply just say  
10 that district doesn't satisfy equal protection,  
11 and that's why we had to go with the different  
12 configuration.

13 And that's the sort of  
14 district-by-district analysis of what -- which  
15 standards take precedence, how to balance those  
16 standards, that the legislature has to make;  
17 those judgment calls the legislature has to  
18 make throughout the legislative process. And  
19 it simply can't pursue a declaratory judgment  
20 action every time it has that sort of conflict  
21 to resolve.

22 So the compelling interest, Your Honor,  
23 they assert only the one, which is compliance  
24 with the nondiminishment standard. And again,  
25 that would afford a blanket safe harbor to

1 every district in the state that's drawn  
2 pursuant to the diminishment standard. It  
3 would say this district is basically  
4 untouchable by equal protection because it has  
5 its own built-in compelling interest.

6 I think that sort of approach, Your Honor,  
7 is unprecedented, especially given the fact  
8 that --

9 **THE COURT:** Or is the corollary that that  
10 means nondiminishment is constitutional?

11 **MR. BARDOS:** I am sorry, Your Honor?

12 **THE COURT:** Would the corollary mean that  
13 the nondiminishment provision is constitutional  
14 and that is a compelling interest to avoid  
15 nondiminishment?

16 **MR. BARDOS:** So again, we are not  
17 challenging the facial validity. We are  
18 accepting that for purposes of this argument.

19 But again, I think there is a difference  
20 between saying it's constitutional, which is a  
21 relatively low bar, facially constitutional,  
22 versus being a compelling interest.

23 The compelling interest is an  
24 extraordinary high bar, and that's why the  
25 strict scrutiny test has been described as

1 strict in theory and fatal in fact, because it  
2 is an extraordinarily high bar.

3 And one doesn't get there simply by saying  
4 it's facially valid. Facially is a minimal  
5 bar. Showing compelling interest is much more  
6 difficult. That's why the U.S. Supreme Court,  
7 in evaluating even the Federal Voting Rights  
8 Act, has never held that the compliance with  
9 the Voting Rights Act is a compelling state  
10 interest.

11 It has always said we simply assume this.  
12 And I don't want to gloss over that. I think  
13 that's very significant. We have never -- if  
14 this Court --

15 **THE COURT:** Why shouldn't this Court  
16 assume?

17 **MR. BARDOS:** Why should the Court? Well,  
18 this Court would have to decide that. The U.S.  
19 Supreme Court has been able to avoid making a  
20 decision on this issue, a preliminary decision  
21 on this issue on different grounds. For  
22 example, it says -- in some cases it has said,  
23 okay, you are citing the Voting Rights Act but  
24 you are misinterpreting it. It didn't require  
25 this district; or okay, even if that were a

1 compelling interest, you didn't narrowly tailor  
2 the district.

3 So there have always been alternative  
4 grounds on which the Court has been able to  
5 dispose of those sorts of cases. It has never  
6 come to the point where it has actually had to  
7 decide is this a compelling interest or is it  
8 not.

9 This Court is being asked to make that  
10 decision, and in a sense get out ahead of the  
11 U.S. Supreme Court, which has never decided  
12 that, even as to the Voting Rights Act; and I  
13 think what really makes a difference on the  
14 compelling interest analysis is the significant  
15 differences between the Voting Rights Act and  
16 the nondiminishment provision.

17 So the Voting Rights Act, let's look at  
18 Section 5, which is what the nondiminishment  
19 provision was based on. There are significant  
20 differences, not necessarily in substantive  
21 application of it, but in other respects.

22 One is that the Section 5 was clearly  
23 designed to be a very narrow targeted remedial  
24 provision. When it was enacted, it had both  
25 geographical limits and durational limits. It



1 applied only to certain states, certain  
2 counties, and it was based on Congressional  
3 findings, and then data showing where are the  
4 jurisdictions in this country that have  
5 exceptionally low voter turnout rates and voter  
6 registration rates among minority voters. And  
7 those are the specific areas of the country  
8 that were targeted by Section 5 and subjected  
9 to Section 5.

10 In 2011, when Section 5 was -- it was the  
11 last redistricting cycle to which Section 5  
12 applied. There were only nine states in the  
13 country to which it applied and a handful of  
14 counties and municipalities in addition.

15 In Florida, it applied to only five  
16 counties, none of them in the North Florida  
17 area. So it was very much targeted to certain  
18 areas.

19 It was also subject to durational limits.  
20 Congress reauthorized Section 5 multiple times,  
21 each time for a limited period of time. It was  
22 never meant to be a long-term open-ended  
23 provision that continued on into the future  
24 indefinitely.

25 And why are these things important? They

1 are important because the only -- apart from  
2 prison riots, you know, a very niche type of  
3 compelling interest, the only compelling  
4 interest the United States Supreme Court has  
5 ever actually held justifies racial  
6 discrimination is the remediation of a specific  
7 identified instance of race discrimination.

8 And that's why I think the U.S.  
9 Supreme Court has been willing to assume that  
10 the Voting Rights Act serves as a compelling  
11 interest, is because it was designed to  
12 remediate specific identified instances of  
13 race discrimination. It was narrowly drawn  
14 that way. It was designed to do that.

15 Plaintiffs say that the functional  
16 analysis essentially achieves that purpose,  
17 because you could have a district where  
18 suddenly the minority voters move away from the  
19 district and no longer has the ability to  
20 elect -- or the minority voters suddenly are no  
21 long politically cohesive, and so there is no  
22 candidate of choice in that district.

23 But that's not the sort of time limit  
24 limitation or restriction on remediation that  
25 the U.S. Supreme Court has insisted on in equal

1 protection cases.

2 Just this last June, for example, the U.S.  
3 Supreme Court struck down the higher ed  
4 admission policies that favored certain races  
5 over others. The Supreme Court could have  
6 said, well, it's possible, we suppose, that  
7 minority applicants who will no longer apply to  
8 Harvard, and so there is a built-in limitation.  
9 Maybe one day this racial preference will no  
10 longer apply to anyone. So there is an  
11 inherent built-in limitation, but that's not  
12 the sort of limitation that the U.S.  
13 Supreme Court has ever --

14 **THE COURT:** Counsel, isn't -- again, this  
15 goes back to that rummaging through the record,  
16 again to the extent it is a record; and we  
17 talked again -- I want to know more about that  
18 as we wrap up.

19 But isn't that apples and oranges? You  
20 got, at least in the Harvard case according to  
21 the opinion, a certain number of slots every  
22 year and lots and lots and lots of extra people  
23 applying, whereas at least the data that drew  
24 the numerous filings you guys have sent over,  
25 you see a shift, say even in the White

1 population of Florida, the amount by which they  
2 are a majority is going down, at least  
3 according -- I am not making that a finding.  
4 It just seems anecdotally it shows at some  
5 point Caucasians may be a minority in this  
6 state. There may not be a majority race.  
7 There may be plurality.

8 You look at some of the other districts in  
9 Florida -- 25, 26, 27, et cetera, like that --  
10 you have got -- I don't know if you call them  
11 majority-minority; you may call them that now.  
12 They may not be. Eventually they may just be  
13 majority districts.

14 So why are those the same, the college  
15 admissions, where they get to select who they  
16 put in their population, whereas the population  
17 of Florida, no individual, no group, nobody  
18 gets to decide what makes up that population.

19 **MR. BARDOS:** I think one thing, too, to  
20 keep in mind is that the purpose here is to  
21 find a compelling interest of remediating  
22 racial discrimination. And so because of that,  
23 there have to be limitations on the government  
24 action, and the nondiminishment provision  
25 doesn't have the sorts of limitations that the

1 Voting Rights Act has.

2 To your point, Your Honor, in 1992 in the  
3 Johnson versus Mortham case, when the districts  
4 were created, '92 is when districts were first  
5 drawn that would enable minority voters to  
6 elect the candidates of their choice, there  
7 were three, just like now. So that hasn't  
8 changed.

9 And so those sorts of changes, that's not  
10 a real durational limit. Sure, can it happen?  
11 Will there be population changes? There will  
12 be population changes. Can it be that perhaps  
13 one day we might find that it's not possible to  
14 redraw that district? It's possible.

15 **THE COURT:** How many times since '92 have  
16 the Courts thrown out the districts that were  
17 originally enacted?

18 **MR. BARDOS:** Well, the original district  
19 that was drawn in North Florida was thrown  
20 about by the Court itself just a few years  
21 after it was drawn. When it was first drawn,  
22 it was the district the plaintiff shows that  
23 looked like a horseshoe, went up from Orlando  
24 to St. Augustine and around to Gainesville, and  
25 a few years later the Court threw out its own

1 district as a racial gerrymander.

2 **THE COURT:** How many times has it thrown  
3 out the ones the legislature has enacted?

4 **MR. BARDOS:** On specifically racial  
5 gerrymandering grounds?

6 **THE COURT:** No, just thrown it out for  
7 violating the Florida or Federal Constitution  
8 as it relates to the standards in place at the  
9 time.

10 **MR. BARDOS:** That happened last cycle.  
11 There were a number of districts the Florida  
12 Supreme Court found to be invalid in the  
13 Congressional map.

14 It happened during the -- with some of the  
15 state legislative districts last cycle as well,  
16 not this cycle with any district yet. So, yes,  
17 it has happened.

18 **THE COURT:** How about going further back  
19 into the '60s, hasn't there been a number of  
20 maps thrown out?

21 **MR. BARDOS:** I don't recall the exact  
22 history, Your Honor, but there have been. I  
23 can't give you a precise number, but there have  
24 been on various grounds. But I think the  
25 important --

1           **THE COURT:** Isn't that a compelling  
2 interest to tell the legislature how to get it  
3 right?

4           **MR. BARDOS:** How to get it right, sure,  
5 but is there a compelling interest in drawing  
6 this district with racial predominance? And  
7 again, is it a blanket compelling interest in  
8 every single case to draw a district that  
9 doesn't diminish? And what do they cite in  
10 support of that compelling interest?

11           They say, well, there is a long history of  
12 race discrimination in Florida. They cite the  
13 white primaries from the 1940s. They cite  
14 various decisions that invalidated at large  
15 districting on a local basis from 1982 to 1990.

16           So they have to go back that far. That's  
17 the history of race discrimination that they  
18 say justifies the nondiminishment standard.

19           But exactly how the nondiminishment  
20 standard remediates the white primaries from  
21 the 1940s or the at-large districting in local  
22 elections in the 1980s, they don't quite  
23 explain.

24           And I think, Your Honor, the League of  
25 Women Voters case that the 11th Circuit decided

1 very recently at 66 Fed. 4th 905 is telling.  
2 It was not a racial gerrymandering claim, but  
3 it was an intentional discrimination claim.  
4 And the Court said there is not an unlimited  
5 look back. We don't look back forever to what  
6 happened in 1865 in determining whether there  
7 is a need for race-based remediation of a  
8 history of race discrimination. If that were  
9 so, every state certainly in the southeastern  
10 part of the United States would have a  
11 compelling interest in these provisions  
12 forever.

13 But the plaintiffs don't cite anything  
14 more recent than 1990 to support their history  
15 of race discrimination that they say makes the  
16 nondiminishment standard a compelling interest.

17 So I don't think that they have shown  
18 remediation. And I think the way the  
19 nondiminishment standard is drafted in a  
20 blanket way, I don't think that's comparable to  
21 the remedial provisions that are in the Voting  
22 Rights Act.

23 I think there are other differences  
24 between the Voting Rights Act and the  
25 nondiminishment provision. The Voting Rights



1 Act is considered perhaps the most successful  
2 piece of Civil Rights legislation in the  
3 country. It was enacted a hundred years after  
4 the Civil War in the midst of the Civil Rights  
5 movement to bring the Jim Crow era to an end  
6 and it was based on significant Congressional  
7 findings.

8 None of that is applicable to the  
9 nondiminishment standard. The nondiminishment  
10 standard was put into the constitution in 2010  
11 without that same pedigree.

12 **THE COURT:** How could it have that  
13 pedigree, because it was obvious that -- and  
14 they are not required to, but the legislature,  
15 which develops that kind of pedigree, chose not  
16 to act, so people under the Florida  
17 Constitution chose to act. And they are not  
18 able to have that kind of -- but don't they  
19 have all of that history that goes behind the  
20 Voting Rights Act when they make a decision to  
21 put a provision in the constitution?

22 I mean, we got -- we have pregnant pigs,  
23 that's where it all started in the  
24 constitution. Aren't the people limited by the  
25 constitution on what background they are able

1 to show in a record?

2 **MR. BARDOS:** And I would say I don't think  
3 pregnant pigs is a compelling interest  
4 either --

5 **THE COURT:** Well, it made the  
6 constitution.

7 **MR. BARDOS:** -- officially valid, but it's  
8 not a compelling interest.

9 But I think, Your Honor, to your point,  
10 so, yes, there is -- we have the history of the  
11 Voting Rights Act. Well, as the U.S. Supreme  
12 Court said in the City of Richmond case, a  
13 state cannot simply lean on Congressional  
14 findings from what Congress has done, for  
15 example, in the Voting Rights Act and say,  
16 okay, that justifies what we are going to do.

17 And I think that leads into the third  
18 thing.

19 **THE COURT:** The state can't, as in the  
20 state through its elected legislature, or the  
21 people of the state can't even rely on that?

22 **MR. BARDOS:** The state. So the Equal  
23 Protection Clause applies to the states. It  
24 says no state shall.

25 And so whether it's enacted in this method

1 or that method, the U.S. Supreme Court has made  
2 clear that the states cannot simply enact what  
3 they consider to be perhaps benign race-based  
4 provisions leaning on Congressional findings.

5 And I think that leads into the third  
6 point that differentiates the Voting Rights Act  
7 from the nondiminishment provision, and that is  
8 the expressed authority that the federal  
9 government has, Congress specifically has with  
10 respect to race.

11 And this is discussed in the City of  
12 Richmond case as well. And what the 14th  
13 Amendment says is that no state shall deny to  
14 any person within its jurisdiction the equal  
15 protection laws.

16 So it places that limit on states. And  
17 then it says that Congress shall have the power  
18 to enforce the provisions of this article, so  
19 it grants power to Congress.

20 And what the U.S. Supreme Court in the  
21 plurality portion of its opinion said in the  
22 City of Richmond case is that that effected a  
23 dramatic change in the balance of power between  
24 the federal government and the states with  
25 respect to race.

1           And so what that provision, the 14th  
2 Amendment embodies, Your Honor, is a policy of  
3 deference towards Congress with respect to race  
4 and a policy of skepticism towards the states  
5 with respect to race.

6           The federal government does not place  
7 states and Congress on the same footing when it  
8 comes to race. It trusts Congress more than it  
9 trusts the states. And that's what the City of  
10 Richmond case says.

11           It says, a state might not be able to  
12 enact under the Equal Protection Clause the  
13 very same provision that Congress might, or the  
14 state might have to make a greater showing than  
15 the federal government does in order to justify  
16 the same provision.

17           **THE COURT:** Hasn't this group also  
18 recently just said that the states have the  
19 primary function of apportionment in making  
20 sure that they get -- they get to do that, they  
21 get to control that, because there was a school  
22 of thought that independent legislature and  
23 State Constitution and state courts couldn't  
24 touch it. And that didn't go through.

25           **MR. BARDOS:** That's true, Your Honor. So

1 that is a general principle applicable to  
2 redistricting. It's a matter primarily for the  
3 states, the states take the lead on it, state  
4 legislatures take the lead on it.

5 But within that, we have specific federal  
6 restrictions. We have federal limitations.  
7 And so the general principle that states are  
8 responsible for redistricting doesn't somehow  
9 limit or supplant what the Equal Protection  
10 Clause tells us.

11 There are certain things that are carved  
12 out, and the supremacy clause makes those  
13 primary. The plaintiffs cited a couple of  
14 cases in their response brief where the courts  
15 have said states has leeway in drawing minority  
16 districts.

17 I will note that both of the cases that  
18 they cite predate Shaw versus Reno, which  
19 established the racial gerrymandering cause of  
20 action, that line of cases.

21 So Your Honor, we think that they have not  
22 shown a compelling interest, and for all those  
23 reasons, the district that they propose was --  
24 is unconstitutional and the legislature made  
25 the right judgment, and the Court should

1 validate that judgment.

2 Now to go back to some of the issues that  
3 they say barred this Court's consideration of  
4 equal protection, one that they raise is  
5 standing. And what they seem to be arguing now  
6 is the basic standing concept that we are  
7 familiar with -- injury, traceability,  
8 redressability, that type of standing, rather  
9 than Public Official Standing Doctrine.

10 I will note that that injury-based  
11 standing doctrine that they are advancing here  
12 is not in their reply that they filed for our  
13 affirmative defenses, and it's not one of the  
14 issues that was identified in the parties'  
15 stipulation as one that remains at issue in  
16 this case.

17 The stipulation identified four issues  
18 that this Court has to decide. And the  
19 defendants' standing to assert their defense is  
20 not one of the four issues that is identified  
21 in that stipulation.

22 But the other thing I think is the real  
23 clincher, Your Honor, they don't cite any case  
24 for the proposition that before a defendant can  
25 assert an affirmative defense, the defendant

1 must prove that type of standing, an  
2 injury-based standing. That is a standing  
3 doctrine that applies to claims that are  
4 brought by plaintiffs, claims that --  
5 counterclaims perhaps.

6 But I have not yet seen the Florida case  
7 that says that a defendant, in order to assert  
8 an affirmative defense, must satisfy  
9 requirements of that sort of injury-based  
10 standing doctrine.

11 And, in fact, we know that the Florida  
12 Supreme Court entertained very similar defenses  
13 during the last cycle when it was again a  
14 conflict between the two provisions within the  
15 state constitutional hierarchy. And we said,  
16 well, we introduced these districts because we  
17 were trying to avoid diminishment, so we didn't  
18 draw a compact district; we drew it to avoid  
19 diminishment. Florida Supreme Court  
20 entertained those defenses and decided those  
21 defenses.

22 So we think the standing doctrine doesn't  
23 apply here. It is not in the stipulation, it  
24 wasn't pleaded, and it's not something the  
25 defendants have to prove to assert an

1 affirmative defense.

2 They argue, well, it's speculative. We  
3 are not sure what district we are talking  
4 about, we discussed that. They are not left to  
5 guess, all of the districts that were ever at  
6 issue as potential nondiminishing districts in  
7 North Florida are the same.

8 **THE COURT:** Let's talk about that, though.  
9 This is what I round about talked about it,  
10 that the district we are talking about is this  
11 benchmark that is no longer in effect.

12 And so isn't that what they are talking  
13 about? And again, I think you answered the  
14 question, but are you challenging this  
15 Benchmark District?

16 **MR. BARDOS:** Again, technically no, we are  
17 not challenging the Benchmark District,  
18 recognizing though that any district -- so the  
19 legislature had a choice to make. It could  
20 either preserve a district that is that  
21 district or very much like that district, or it  
22 could draw something different.

23 And so the challenge is not to that  
24 specific district, but the challenge is to the  
25 district that would be a nondiminishing



1 alternative, which is the same basic  
2 configuration. Everybody agreed on that basic  
3 configuration. Every district that they would  
4 to show you as a nondiminishing alternative  
5 adopts that very same configuration.

6 And so, again, it's not the specific  
7 Benchmark District that we are challenging.  
8 But again, I think it's helpful if the Court  
9 puts itself in the legislature's shoes. It's  
10 having to make a decision about whether to  
11 reenact a district like that one, that runs  
12 from Gadsden to Duval. And it had to make a  
13 decision about that.

14 So the district line is a little bit  
15 different in Tallahassee, that's not the issue.  
16 The issue is did we have to preserve a district  
17 like that?

18 The Court --

19 **THE COURT:** What is the Court to make that  
20 you didn't pass one? I get that it was vetoed,  
21 and the Governor was perfectly within his  
22 constitutional rights to do that. That is what  
23 the people elected him to do, is to make those  
24 kind of calls. But you didn't pass one.

25 **MR. BARDOS:** Right. And I think that

1 reflects, Your Honor, the complexity of the  
2 task of redistricting. As the U.S.  
3 Supreme Court has said, redistricting is not  
4 easy. We have a hierarchy of standards,  
5 beginning with the Federal Constitution and  
6 going down to Tier 2 in our State Constitution.  
7 It's a balancing.

8 And the other thing that makes  
9 redistricting so difficult and complex is all  
10 of the population, demographics and the  
11 geography of the state, there is an infinite  
12 number of ways to divide the state into 28  
13 districts. And so until someone spends a lot  
14 of time moving district lines around, which we  
15 did throughout the process, you really don't  
16 know what's possible and what's not possible.

17 **THE COURT:** Allen versus Milligan kind of  
18 dealt with that and the computers and the  
19 craziness, didn't it?

20 **MR. BARDOS:** Yeah, but it is still the  
21 fact. So the question Your Honor asked is then  
22 didn't the legislature pass a district like  
23 that? But that is part of the complexity of  
24 the task. We are always grappling with these  
25 issues. The thought process is always

1 developing throughout every redistricting  
2 process. That's true in every redistricting  
3 process.

4 So ultimately, we came to the same  
5 conclusion that the Governor did, and that is  
6 that equal protection does not permit the  
7 creation of that district because race  
8 predominates and because we didn't see the  
9 compelling interest in preserving that  
10 district. And I think the facts in the record  
11 bear it out.

12 Now Your Honor expressed I believe some  
13 perhaps reservation about the Florida  
14 Supreme Court perhaps having validated that  
15 district and the Court second guessed that.

16 I think it's important to keep in mind  
17 that the racial gerrymandering claim or defense  
18 was not presented in that case. And Appellate  
19 Courts operate on a principle that is often  
20 called a party presentation principle.

21 Appellate courts will decide the issues  
22 that the parties present to them and they won't  
23 go outside of that, unless it's something that  
24 affects subject matter jurisdiction or  
25 something of that nature.

1           But because it wasn't presented, it wasn't  
2 something that was considered. We saw this in  
3 the Johnson v. Mortham cases where the Federal  
4 District Court established this district  
5 originally in '92 and then struck it down a  
6 couple of years later.

7           So it is not unprecedented, and certainly  
8 courts, appellate courts don't generally decide  
9 issues that are not presented to them and it  
10 wasn't presented to them.

11           I think Your Honor also asked, well, isn't  
12 the right remedy to simply hold on the  
13 nondiminishment piece that the Enacted Map  
14 diminishes? Let's just declare the Enacted Map  
15 unconstitutional and then send it back for  
16 remediation.

17           But if the Court's order doesn't address  
18 the equal protection defense, then there is no  
19 reason to think that the legislature would  
20 reach a different conclusion about what equal  
21 protection requires of it.

22           And so if the Court limits itself to  
23 nondiminishment and says this district  
24 diminishes, end of story, judgment for the  
25 plaintiffs, the Court hasn't really told us

1 anything that we don't already know.

2 We already know that there is no  
3 performing district in North Florida. And so  
4 when we go back to the drawing board, we still  
5 have to consider the Equal Protection Clause  
6 because we took an oath to do that. Your Honor  
7 did as well, as Your Honor mentioned in the  
8 hearing on the Public Official Standing  
9 Doctrine. So then we have to go back to the  
10 drawing board without any guidance on the equal  
11 protection issue.

12 **THE COURT:** This gets us back to what we  
13 have in the record. What do we have in the  
14 record, and specifically where, about all this,  
15 what is equal protection, what is not, because  
16 there is a big opaque portion of this record,  
17 and it's justified -- we litigated the  
18 privileges here -- but there is a big opaque  
19 portion of this record as to okay, yes, we  
20 have -- we have some veto messages regarding  
21 this, this does not reach equal protection.

22 But there is a big gap there. And that's  
23 allowable. I am not saying that's bad or good  
24 or otherwise. That's our constitution, and the  
25 principles of privilege and separation of

1 powers.

2 But where do we have in the record all  
3 this extensive trying to find something else  
4 that says equal protection is -- we can't get  
5 there without violating equal protection?

6 Where do we have that, because again, I  
7 haven't considered anything until you guys give  
8 me specifics, but the little bit I have seen is  
9 I don't like these maps, they are vetoed, they  
10 violate equal protection.

11 That very well may be right. That's one  
12 of the things the Court is asking -- the Court  
13 is being asked, but not the -- but -- here's  
14 how we try to satisfy both conditions.

15 I need to know specifically page, line,  
16 where in the record that is?

17 **MR. BARDOS:** Again, I would point Your  
18 Honor to what the Florida Supreme Court said in  
19 2015 when it adopted this district, 172  
20 Southern 3rd 363 at page 403, when it says this  
21 is the only alternative option.

22 **THE COURT:** That was back in 2015.

23 **MR. BARDOS:** Yes, Your Honor.

24 **THE COURT:** So you are telling me that I  
25 am not finding that to be unconstitutional. So

1 where is it that that was attempted in 2022 to  
2 not violate equal protection. I have -- this  
3 is what -- we don't have people sitting in here  
4 giving testimony when I move these lines here,  
5 there and yonder, and I was not able to come up  
6 with something that did not diminish, but at  
7 the same time was not racially predominated, I  
8 was unable to do it in an east-west  
9 configuration. Where do I have that?

10 **MR. BARDOS:** I think answer the record  
11 gives Your Honor is the uniformity beginning  
12 with Florida Supreme Court's decision of going  
13 through the legislative process and through  
14 this litigation, nobody --

15 **THE COURT:** How do you know where in the  
16 legislative process, because the House and  
17 Senate passed things that looked similar to  
18 this. That was vetoed, and that's -- again, I  
19 am not questioning the veto, that is the  
20 Governor's prerogative to veto any legislation  
21 he wants to, and then it again leaves those  
22 tough policy choices to the House and Senate.

23 Do they let the veto go or do they  
24 override the veto. That's a policy decision  
25 that the people that elect them.

1           But then we had basically one map, this is  
2           it. So at least -- again, I am not finding  
3           that, I am -- because I don't know exactly  
4           where all that is in the record based on the  
5           stipulation you have given me.

6           But that's my general understanding to  
7           guide the Court's questions.

8           **MR. BARDOS:** Right. And I think, Your  
9           Honor, the answer is simply that throughout the  
10          legislative process, this was the one  
11          alternative that anybody ever proposed. It's  
12          the only alternative the plaintiffs proposed.  
13          I think that's the answer that the record  
14          furnishes.

15          I don't think anyone has ever proposed a  
16          different district that does not diminish  
17          with -- obviously with somewhat different lines  
18          in Leon County and Duval County.

19          **THE COURT:** That doesn't mean it's not  
20          possible. That goes back to the Allen versus  
21          Milligan, well, we showed you 2 million and the  
22          Court specifically addressed that, and they  
23          said but what about the other 14 trillion, or  
24          whatever numbers were.

25          So just because somebody moved those



1 specific ones around differently doesn't mean  
2 it doesn't exist.

3 **MR. BARDOS:** Yeah. So I think the record  
4 provides that consistency, and I think that's a  
5 very strong -- that's very strong evidence that  
6 that is -- otherwise, it would have been  
7 proposed. I think that's very strong evidence  
8 that that's the option that we had before us.

9 And I think that sort of argument comes up  
10 in the sorts of claims that this Florida  
11 Supreme Court adjudicated the last cycle when  
12 it was finding that, okay, you had to draw this  
13 district to avoid diminishment, or whatever the  
14 other arguments were within the hierarchy  
15 within the State Constitution. It had to make  
16 judgments about --

17 **THE COURT:** But didn't -- I was going to  
18 go back -- this is why, when we are done today,  
19 I am going to ask for proposed orders so that  
20 you can cite exactly where that shows it,  
21 because at least in those, you had weeks-long  
22 trials, you had experts testify, you had  
23 documentary evidence, you had something the  
24 Court could go back and look at.

25 All I've got is a couple of pages and then

1 you can go troll the record for the rest of it,  
2 and read these things. I don't necessarily  
3 plan to do that -- party presentation  
4 principles.

5 So where is the presentation of -- you  
6 know, that there is no other way to do this?

7 **MR. BARDOS:** We'll be happy in the  
8 proposed order to be as specific as we can be  
9 about where the record would reveal that.

10 So -- but I think, Your Honor, that unless  
11 Your Honor has any additional questions, I  
12 think that I touched on everything that I  
13 wanted to cover.

14 And so again, for us it's a very practical  
15 inquiry. We had a choice to make, do we  
16 preserve the district or do we not?

17 Race predominates. We think the evidence  
18 is very strong on that. Is there a compelling  
19 interest? We don't think the plaintiff  
20 demonstrated that and we would ask Your Honor  
21 to uphold the Enacted Map.

22 **THE COURT:** All right. Thank you.  
23 Mr. Nordby.

24 **MR. NORDBY:** Good morning, Your Honor, Dan  
25 Nordby for the Florida Senate.

1           I want to address first the issue you  
2           raised earlier about the affirmative defenses.  
3           I think the point there is the difference  
4           between a legal defense and something that  
5           might be pled as an affirmative defense or  
6           otherwise is waived.

7           We believe that constitutional compliance  
8           of the sort that has been discussed here is not  
9           an affirmative defense that must be pleaded or  
10          is otherwise waived.

11          Sometimes parties raise those sorts of  
12          things as an affirmative defense in an  
13          abundance of caution to ensure that there is  
14          not a waiver, but we don't think in this case  
15          compliance with the 14th Amendment is something  
16          that must be pleaded as an affirmative defense.

17          Similarly, separation of powers is  
18          sometimes pled as an affirmative defense by a  
19          party. A failure of a defendant to plead  
20          separation of powers as an affirmative defense  
21          certainly doesn't mean that Your Honor can  
22          start exercising executive or legislative power  
23          simply because it was not raised in that  
24          particular manner. So we certainly join the  
25          arguments of --

1           **THE COURT:** Hold on. Doesn't one have to,  
2           like you have done in this case, assert  
3           privilege; if you don't assert privilege, then,  
4           yes, the Court can absolutely go there?

5           **MR. NORDBY:** We have asserted privilege.

6           **THE COURT:** Right. But that was required  
7           to be asserted. If the Senate had not or the  
8           Governor or the House had not asserted  
9           privilege, then wouldn't that be waived and the  
10          Court could have ordered these things that  
11          normally would have been separation of powers?

12          **MR. NORDBY:** Oh, I agree with that. What  
13          I am saying here is the difference between a  
14          legal defense or legal arguments in defense of  
15          the Enacted Map and something that must be  
16          separately pleaded as an affirmative defense.

17                 We think the claims that are being made  
18          here, the as-applied arguments, are arguments  
19          in defense of the Enacted Map rather than  
20          affirmative defenses.

21                 Your Honor, to the extent necessary, I  
22          suppose I can make an ore tenus motion to amend  
23          our answer to align with the arguments that  
24          have been made. As Your Honor knows, the rules  
25          of Court say that leave to amend should be

1 freely granted, unless there is futility of use  
2 of the amendment process or prejudice.

3 I don't see where the plaintiffs here  
4 would be prejudiced in any way by the Senate  
5 aligning its arguments with the House on these  
6 particular points. If it's necessary to make  
7 that motion, I will be happy to do so.

8 **THE COURT:** I am not going to tell you  
9 what motions to make and which ones you don't.

10 You may proceed.

11 **MR. NORDBY:** Okay. I will try not to  
12 replot a lot of the same ground Mr. Bardos did  
13 because, as you mentioned, we filed a joint  
14 brief here. But I do want to hit on a few  
15 highlights.

16 I thought the argument Mr. Bardos made  
17 about Tier 2 being the standard that always  
18 applies, unless Tier 1 requires otherwise, in  
19 the Florida Constitution is an important point  
20 here, because it illustrates that within the  
21 Florida Constitution, there are contradictions  
22 and trade-offs that must be made.

23 Sometimes a Tier 1 requirement may  
24 supersede the requirement for compactness in  
25 Tier 2.

1           The essence of our equal protection  
2           argument here is that the supremacy clause  
3           creates a Tier 0, above Tier 1 and Tier 2,  
4           which say that federal law and Federal  
5           Constitution always supersedes the requirements  
6           of the State Constitution; and that they must  
7           be considered when the legislature is weighing  
8           all of these competing considerations.

9           So the legislature, going through these  
10          trade-offs, tries to clarify with Tier 2 by  
11          drawing compact districts, by drawing districts  
12          that respect political and geographical  
13          boundaries. If there is a superseding  
14          requirement in Tier 1, however, those  
15          requirements yield to. Requirements of Tier 2  
16          yield to Tier 1, and the requirements of Tier 1  
17          as well yield to Tier 0, the Equal Protection  
18          Clause and the federal Voting Rights Act  
19          provisions that apply in the case of  
20          redistricting.

21          So the essence of our claim here is that  
22          it's not possible in weighing all of these  
23          competing considerations in their appropriate  
24          hierarchy, it's simply not possible to draw a  
25          Congressional district in North Florida that

1 both satisfies the nondiminishment requirement  
2 of the Tier 1 Florida Constitution and  
3 satisfies the Equal Protection Clause of the  
4 Federal Constitution, which is the superior law  
5 under the supremacy clause.

6 Your Honor asked for the evidence for why  
7 is it not possible. Of course, that raises the  
8 difficult question of proving a negative. But  
9 I think we do have in this legislative  
10 record -- and we can point to you certainly in  
11 proposed orders -- we have what the Senate's  
12 professional redistricting staff tried to do to  
13 accomplish nondiminishment as compared to  
14 benchmark Congressional District 5. It looked  
15 a lot like that.

16 The House's professional redistricting  
17 staff separately tried to draw maps that would  
18 satisfy the nondiminishment requirement as  
19 compared to Benchmark District 5. It also  
20 looked like a lot like that.

21 The plaintiffs in this case have not  
22 proposed anything else that would satisfy the  
23 nondiminishment requirement as compared to  
24 Benchmark District 5.

25 **THE COURT:** This gets back to the burden

1 of who is going to show that?

2 **MR. NORDBY:** I think they have the burden.

3 I agree with Mr. Bardos, the party that is  
4 asserting a race-based justification has the  
5 burden to show that is something that is  
6 justified by the Federal Constitution.

7 We are in an unusual situation here with a  
8 race-neutral North Florida that is being  
9 challenged on the basis that race should be  
10 considered, contrary to the usual standard  
11 which is that race is a suspect class for the  
12 legislature to consider.

13 **THE COURT:** Let me ask this. In that  
14 Congressional record that you are going to  
15 point out to me, you said, well, the House, the  
16 Senate tried to satisfy the constitution  
17 provision of the Florida Constitution. But at  
18 the time, weren't they operating under the  
19 premise -- they weren't operating under the  
20 premise that that violated the Equal Protection  
21 Clause.

22 So is there anywhere in the record that  
23 says we are operating under the premise that it  
24 violates the Equal Protection Clause, and we  
25 tried to still satisfy Tier 1 and Tier 2



1 criteria of Florida redistricting?

2 **MR. NORDBY:** Speaking for the Senate, the  
3 Senate did not presume that the Benchmark  
4 District violated the Equal Protection Clause.  
5 The Senate took the Benchmark District as a  
6 premise, accepted it and tried to draw a  
7 district in a new map, accounting for the 2020  
8 census, that accomplished nondiminishment as  
9 compared to that. And what the Senate was able  
10 to come up with, something that looked a lot  
11 like it.

12 And I think that's really a function, more  
13 than anything else, of the population. If you  
14 were attempting to satisfy nondiminishment in  
15 North Florida, you by necessity have to join  
16 downtown Jacksonville with downtown Tallahassee  
17 and Gadsden County. And that's a function in  
18 the Congressional district of trying to achieve  
19 that ideal population of 769,221 people.

20 The population in North Florida and down  
21 to Central Florida has always reflected that  
22 you need to join Jacksonville with either  
23 Tallahassee or, what was done originally last  
24 decade, with downtown Orlando in order to  
25 accomplish nondiminishment and these Tier 1

1 requirements.

2 I haven't seen plaintiffs proposing a  
3 district that goes down to Orange County again.  
4 We have been talking about districts that goes  
5 east-west in this.

6 The plaintiffs have not, at any point in  
7 this, attempted to show a district that would  
8 satisfy nondiminishment in a manner that  
9 complies with the Equal Protection Clause.

10 Your Honor, there are other places in the  
11 Enacted Map that it is possible to satisfy both  
12 nondiminishment and the Equal Protection  
13 Clause. If I can approach the easel, Your  
14 Honor --

15 **THE COURT:** Go ahead.

16 **MR. NORDBY:** We have District 9, District  
17 24, District 27, District 28. These districts  
18 are compact districts that also satisfy the  
19 nondiminishment requirement and the Equal  
20 Protection Clause. Those districts, District  
21 27, looks like a circle. That's a district  
22 that's explainable on grounds other than race  
23 in a manner that contrasts sharply with the  
24 sprawling district across the northern half of  
25 the state.

1           **THE COURT:** Isn't that a function of  
2 population density? I could draw probably a  
3 perfect circle if I got enough people.

4           **MR. NORDBY:** That's exactly right, though,  
5 because the population density and the  
6 demographics in North Florida are very  
7 different from where they are separately in the  
8 state.

9           And that's why the Senate is asserting  
10 this an as-applied argument; because it may be  
11 possible to comply with nondiminishment and  
12 equal protection elsewhere in the state, and to  
13 draw districts that are explainable on grounds  
14 other than race that consider race but where  
15 race does not predominate.

16           But it's simply not possible in North  
17 Florida, for the same reasons that it's  
18 probably not possible in North Florida to draw  
19 a district that performs for Native Americans  
20 or for Asians Americans.

21           **THE COURT:** Okay. I understand it, but  
22 why isn't this whole population density, in  
23 just getting enough people, enough to say that  
24 that is not a predomination? We are going to  
25 have to stretch to get the Tallahassee -- we

1 are going to have to stretch it somewhere. So  
2 why is that not a nonpredomination of race?  
3 We've got to stretch -- that district is going  
4 to stretch in some way, shape or form.

5 **MR. NORDBY:** The districts in North  
6 Florida are larger than the districts in South  
7 Florida, I agree with that.

8 But if you are looking at a district  
9 that's large and rectangular, taking in  
10 counties going from west to east, that's very  
11 different from a district that joins the  
12 downtown of one major metropolitan area and the  
13 downtown of a different major metropolitan area  
14 in the manner that east-west CD-5 does.

15 **THE COURT:** I get that, and this is the  
16 very reason -- I don't want to say I prejudge,  
17 but this came back in this case when there was  
18 a Motion for Summary Judgment on the earlier,  
19 now abandoned, compactness. And I said that's  
20 a geometry problem.

21 And ultimately, sure, when you are looking  
22 at compactness. But when you are looking at  
23 other factors about making sure that there is  
24 the same number of people in a district, you  
25 are going to have to lose compactness. So

1           sure, you can have a more compact, but that  
2           doesn't mean it's an overriding factor that  
3           raises the predominant, does it?

4           **MR. NORDBY:** I think it does, and here's  
5           why.

6           The Florida Supreme Court, in its initial  
7           review of the legislative maps last cycle, said  
8           that where a district's configuration is  
9           irregular, where it has appendages, that raises  
10          a presumption that there was something else  
11          going on here.

12          So what is that something else that's  
13          going on in this North Florida district? If  
14          not race, what is it? Is the argument being  
15          made that there was a partisan purpose in  
16          combining downtown Jacksonville with downtown  
17          Tallahassee?

18          **THE COURT:** That's been abandoned. That  
19          was initially --

20          **MR. NORDBY:** Well, the plaintiffs have  
21          disclaimed any intent to join those for  
22          partisan reasons. So if not that, if it's not  
23          a partisan interest, what would be the reason  
24          for an irregularly shaped district in North  
25          Florida?

1           **THE COURT:** But doesn't that go back to my  
2 discussions with Mr. Jazil and Mr. Bardos;  
3 doesn't mean that that wasn't there; they are  
4 just not challenging it on that anymore.  
5 Correct?

6           **MR. NORDBY:** I am not sure what you mean.  
7 We are defending, of course, in this map.

8           **THE COURT:** Right. But it could have been  
9 done for political reasons, they are just not  
10 challenging it anymore and, thus, race doesn't  
11 predominant. Correct?

12           I am not saying I agree with it, but it  
13 could have been done -- I am not saying it was,  
14 but it could have been done for a host of other  
15 reasons where race didn't predominate.

16           It could be done for political reasons,  
17 and they are not challenging it, just like the  
18 Secretary didn't challenge the equal protection  
19 on the last cycle.

20           That doesn't mean -- now they are saying  
21 we still get to kind of argue it. Can't they  
22 still argue it here?

23           **MR. NORDBY:** Are you saying -- are the  
24 plaintiffs able to argue that an east-west  
25 district should be imposed for partisan

1 reasons?

2 **THE COURT:** No. I am saying there is  
3 reasons it can be drawn that are not race  
4 dominant.

5 **MR. NORDBY:** Your Honor, I don't think  
6 there are any justifications that the  
7 plaintiffs have put forward for drawing a  
8 nonTier 2 compliant east-west district other  
9 than race. They have not made those arguments  
10 that it should be drawn in that manner other  
11 than for racial reasons.

12 Going back to the last cycle and why  
13 certain arguments may or may not have been  
14 made, you remember, Your Honor, in that  
15 litigation, the Secretary of State and the  
16 legislature were defending the Enacted Map,  
17 which had an equally sprawling north-south  
18 district, so equal protection argument would  
19 have been an odd claim to have been made in  
20 that litigation.

21 Of course, here we have a district that  
22 follows the St. Johns River in northeast  
23 Florida, and the equal protection argument has  
24 really come to the forefront, I mean, comparing  
25 the Enacted Map with a map that attempts to

1 apply with the nondiminishment requirement in  
2 North Florida here.

3 And for that reason, we certainly agree  
4 with the question you asked, that where the  
5 Florida Supreme Court or the U.S. Supreme Court  
6 has resolved the question, this Court is bound  
7 by that. We agree with that.

8 At an earlier hearing on legislative  
9 privilege, I think you asked the appropriate  
10 question and we answered it, that we were  
11 making arguments there for preservation  
12 purposes, seeking to have some precedent  
13 overturned. We're waiting on that still, up in  
14 the Appeals Court.

15 We are not making those arguments here  
16 today though. The arguments we are making here  
17 today have not been previously addressed by the  
18 Florida Supreme Court in last cycle's  
19 redistricting litigation.

20 What we are arguing here is the question  
21 that the Governor presented to the Florida  
22 Supreme Court in his request for an advisory  
23 opinion; a request that the legislature joined  
24 in, by the way. The legislature filed a brief  
25 asking the Court to consider that question to



1 avoid post-enactment litigation, which is where  
2 we are now.

3 Of course, the Court always has the  
4 discretion to not answer the question and  
5 believed it needed a more thorough record than  
6 it had in front of it at that stage. But  
7 that's the question. What the unresolved  
8 question that the Governor posed is the  
9 question here today; it's not been previously  
10 addressed by Florida Supreme Court precedent.

11 And the question is this: Where the only  
12 way to draw a district that satisfies the  
13 nondiminishment requirement would conflict with  
14 the Equal Protection Clause's prohibition  
15 against racial gerrymandering, must the  
16 legislature comply with the nondiminishment  
17 requirement?

18 And we suggest the answer to that question  
19 is no, because of the supremacy laws. So if  
20 the only way to comply with the nondiminishment  
21 requirement is to draw a district that violates  
22 Equal Protection Clause, the superior law,  
23 Tier 0 must prevail. And that's what the  
24 Enacted Map does.

25 The Enacted Map complies with the

1 nondiminishment clause of the Florida  
2 Constitution in every place that it can without  
3 violating the Equal Protection Clause.

4 This challenge has been limited now to  
5 North Florida. So we'll just talk about that  
6 part of the map, and on Tier 2 grounds, and on  
7 every other ground of the Florida Constitution,  
8 North Florida presents no challenges  
9 whatsoever, the plaintiffs have not challenged  
10 anything in that part.

11 **THE COURT:** Again, this gets back and the  
12 same question is, as to step one of this  
13 process, does the enacted district result in  
14 nondiminishment or result in diminishment in  
15 this case -- do you agree that may be, as  
16 applied, violative of equal protection; but do  
17 they get past step one to show facially that  
18 this is in violation of the Florida  
19 Constitutional provision that you can't have  
20 this diminishment?

21 **MR. NORDBY:** I don't think the Senate has  
22 ever disputed that as compared to benchmark  
23 CD-5, the Enacted Map does not have a district  
24 that satisfies the nondiminishment requirement.

25 **THE COURT:** Okay. Is the equal

1 protection -- and this goes back to -- I asked  
2 it 14 different ways because it's worth looking  
3 at -- whose burden is it to show is that it is  
4 impossible to comply with both the Florida  
5 constitutional provision and the Equal  
6 Protection Clause? Whose burden is that to  
7 show?

8 **MR. NORDBY:** We submit it's the  
9 plaintiffs. The plaintiffs have the ultimate  
10 burden in this case to prove their cause of  
11 action and to prove that a remedy is possible.

12 Redistricting litigation is a little  
13 unusual in that sense. They are not seeking  
14 money damages, which is always something that  
15 the Court can award, or a prohibitory  
16 injunction alone, which is always something the  
17 Court can award to prohibit a defendant from  
18 doing something.

19 The plaintiffs here are seeking the  
20 imposition of a remedy, either by the Court or  
21 by the legislature within the confines outlined  
22 by a Court order.

23 **THE COURT:** That's where I am slowly  
24 getting to. Okay. The remedy they are really  
25 asking for is don't use this map.

1           Now to the extent of we'll put some other  
2 map out there, what if the Court's answer is  
3 the remedy you get is don't use this map;  
4 legislature, do it right?

5           So isn't it the legislature's  
6 responsibility to show that it can't be done?  
7 Why is it theirs to show that the legislature  
8 ultimately -- because that's not really the  
9 remedy they are asking for. They are asking  
10 for not this map.

11           And then you know what, there is a process  
12 by which enactment -- you guys, I am not ruling  
13 on whether they are appropriate or not, but  
14 that's the flow path you see anyway in how this  
15 case, if this case were to throw out that map,  
16 to return to it to the legislature anyway.  
17 That's their job, not this Court's job.

18           Ultimately, the Supreme Court, under the  
19 prior precedent, they may have to adopt a map,  
20 whatever. We are not there.

21           Why isn't step one, not this map,  
22 legislature, try it again. And so if the  
23 legislature wants to skip the step of trying  
24 again, why doesn't the legislature got to prove  
25 right here and now that it is impossible?

1           **MR. NORDBY:** Well, a couple of answers to  
2 that.

3           First, as the plaintiffs here, they bear  
4 the burden of proof of proving their cause of  
5 action and proving that there is a remedy that  
6 is available here.

7           **THE COURT:** The remedy is you can't use  
8 this map. Why isn't that available?

9           **MR. NORDBY:** Because not using a map, not  
10 using a map or not having a map is not an  
11 option here.

12           **THE COURT:** Why not? I know it's extreme,  
13 but is there a requirement that Florida is  
14 required to send representatives to the  
15 Congress, or could Florida just sit it out?

16           I know that's extreme, nobody wants that,  
17 but is there a requirement that requires that,  
18 or is the state, under the constitution,  
19 allowed to send them and this is how you do it?

20           **MR. NORDBY:** Florida -- I am not aware of  
21 any cases saying Florida could choose not to  
22 send its delegation to Washington, D.C., to  
23 Congress. If Florida were to have a portion of  
24 the state unrepresented, because their  
25 challenge is limited to North Florida, if there

1           were citizens in North Florida who would be  
2           unrepresented as a result of a judicial  
3           decision, I think that would raise some serious  
4           equal protection challenges.

5           **THE COURT:** Right, and those citizens  
6           could bring an equal protection challenge as to  
7           the provision of the Florida Constitution,  
8           right?

9           **MR. NORDBY:** Well, Your Honor -- so I  
10          mentioned a couple of answers to the question  
11          you had on the burden.

12          The first is I believe the plaintiffs have  
13          the burden, because they are the plaintiffs, of  
14          showing that they have a right and that a  
15          remedy is available to them. They have not  
16          attempted, again at any point in this  
17          litigation, to show that the district that  
18          looks something more like that or that or that,  
19          could be created that would satisfy  
20          nondiminishment.

21          They raise -- they put up a slide earlier  
22          showing that Duval-only version of the district  
23          that was passed as part of the legislative  
24          process early; I don't think there is any  
25          serious question that district would diminish

1 as compared to benchmark CD-5.

2 **THE COURT:** Isn't that theirs to raise?  
3 What if they are okay with that?

4 **MR. NORDBY:** Well, the legislature I don't  
5 think has the ability to enact a district that  
6 would violate either of those two  
7 constitutional provisions.

8 In the event of a conflict, the Federal  
9 Constitution provision has to prevail there.  
10 So we are defending obviously the Enacted Map  
11 and not an alternative that was vetoed or  
12 didn't pass here.

13 **THE COURT:** But we are talking about the  
14 alternatives, because you are saying that they  
15 are required to provide an alternative. So we  
16 do need to talk about under your logic, we have  
17 to talk about an alternative.

18 **MR. NORDBY:** Correct. And they have not  
19 provided an alternative that satisfies both  
20 nondiminishment and equal protection in North  
21 Florida.

22 So the other point I raise on that is to  
23 your question about deciding only that -- the  
24 nondiminishment issue first and then wait for  
25 another day to decide other things, whether

1           it's until the appeals are done or until some  
2           subsequent legislative action.

3           We think it's far more appropriate to  
4           decide everything concurrently here, when it's  
5           squarely presented to Your Honor, than to  
6           sequentially handle these things.

7           The plaintiffs' approach, particularly  
8           their arguments on standing, which we think are  
9           inapplicable for all the reasons in our briefs,  
10          what they would have this Court do is issue a  
11          ruling solely on nondiminishment without  
12          considering the federal constitutional issues,  
13          notwithstanding the oath to protect --  
14          support, protect and defend the constitution of  
15          Florida and the constitution of the United  
16          States that legislators take and that Your  
17          Honor takes.

18          They would to have to decide just the  
19          Florida constitutional issue; find  
20          nondiminishment, not allow for a defense for  
21          that, and then after the legislature enacts a  
22          map that doesn't diminish, then and only then  
23          could a citizen file a new complaint in the  
24          spring of next year raising a racial  
25          gerrymandering claim under a Shaw cause of



1 action.

2 **THE COURT:** Don't we do that all the time  
3 in the law? We tick off three issues, and yep,  
4 this is still hanging out there, but we'll  
5 leave that.

6 Doesn't the U.S. Supreme Court and Florida  
7 Supreme Court say that all the time, we have to  
8 leave that for another day?

9 **MR. NORDBY:** This is not an issue that can  
10 be left for another day. The legislature's  
11 authority and obligations under the Florida  
12 Constitution and the Federal Constitution will  
13 necessarily have to be addressed in any  
14 remedial phase if Your Honor finds for the  
15 plaintiffs; because as Mr. Bardos said, if the  
16 Court addresses only nondiminishment and sends  
17 it back to the legislature without addressing  
18 what the Equal Protection Clause requires --

19 **THE COURT:** But let's talk about the Equal  
20 Protection. So it's not -- I know Mr. Jazil  
21 says we've got a facial problem, but as  
22 applied; as applied to what? It's got to be to  
23 a specific district.

24 If the Court just throws out the map, how  
25 am I addressing what district it's violating of

1 the equal protection, unless one of the  
2 parties -- and that's what we are getting to --  
3 has to show that there is no possible  
4 conceivable map that will do this, that will  
5 satisfy nondiminishment and yet doesn't violate  
6 equal protection.

7 **MR. NORDBY:** So your Honor, I go back to a  
8 couple of things I touched on.

9 I think the population figures in North  
10 Florida illustrate why it's not possible to do  
11 that without going from Jacksonville to  
12 Tallahassee, or from Jacksonville to Orlando.

13 The legislature had a long process, where  
14 it tried pretty hard to satisfy nondiminishment  
15 and equal protection. The House staff and the  
16 Senate staff both came out with proposals that  
17 looked very similar to the benchmark map. And  
18 the plaintiffs also have not submitted any  
19 alternatives that would illustrate how it can  
20 be done, other than through a district that  
21 looks like this.

22 Any district that spans that length of the  
23 state, that joins the downtown population area  
24 in Jacksonville and Tallahassee, would raise  
25 the same sort of equal protection issues that

1 we are talking about here, whether it's  
2 possible to change a couple of the lines to  
3 follow a road instead of a river would not  
4 resolve those sort of equal protection issues  
5 that we are talking about here.

6 A district like that is unexplainable on  
7 any grounds other than race, period. And there  
8 has not been anything in this record -- we'll  
9 certainly cite in our proposed orders. I hope  
10 Your Honor got the exhibits with the  
11 transcripts, and so forth, that's what we would  
12 look at the record here that we have an  
13 obligation to point you to.

14 **THE COURT:** I know, but that gets back  
15 into, and I hear it time and time again from  
16 some of these very defendants, that you can't  
17 determine legislative intent by what some  
18 legislator says on the floor or in a committee,  
19 because I had plaintiff after plaintiff come in  
20 and try to cite to me to the Congressional --  
21 not in this case -- the legislative record and  
22 time and time again, the response,  
23 appropriately so, is I don't know why those 27  
24 out of 40 or 38 out of 40, or whatever  
25 senators, voted a certain way. That's why that

1 one maybe did it.

2 So again, how am I to resolve that?

3 Justice Scalia was pretty pointed when he  
4 talks about looking at Congressional records  
5 and committee hearings and things like that.

6 **MR. NORDBY:** I agree with all of that.  
7 What we are asking you to look at here is not  
8 legislative history in that sense, the intent  
9 of a single member.

10 We are asking you to look at the  
11 legislative process that played out here  
12 through the introduction of bills, the  
13 introduction of amendments. Those are the sort  
14 of things that Justice Scalia said are  
15 appropriately considered.

16 **THE COURT:** Then what do we have between  
17 the veto, which is perfectly all right; what do  
18 we have between the veto of things that looked  
19 like the benchmark and the enacted legislation  
20 that gives us any idea of this process other  
21 than it was, this is the one that will be  
22 signed if you pass it? What do we have?

23 **MR. NORDBY:** So what we have is not  
24 post-veto but pre-veto. The legislative  
25 process that began in October of 2021, through

1 the committee process, through the presentation  
2 of draft proposals to the legislative  
3 committees, all the way through to passage on  
4 the Senate floor of a proposal in January. All  
5 through that process, of course, members could  
6 file amendments, if they believed there was a  
7 different way to do it.

8 The same process happening in parallel on  
9 the House side of the building: Committee  
10 meetings, draft alternatives, introduced or  
11 proposed, amendments voted up or down. The  
12 House came up with a proposal and as always  
13 happens in the legislative process, you need  
14 bicameralism, and presentment and signature.

15 And the bodies came together here, after  
16 the special session, with what we needed at the  
17 end of that process, which is a map that was  
18 agreed to by the House and the Senate and  
19 signed by the Governor.

20 The alternative here in the case of  
21 redistricting is, it's not that legislation  
22 doesn't pass and let's try again next year.  
23 The alternative -- if the political branches  
24 here had not gotten together on a map would  
25 have been Court-drawn map.

1           We had the malapportionment the lawsuit in  
2 federal Court that was filed even before that  
3 special session. So what happened here was the  
4 resolution of a lot of difficult issues, as  
5 always happens in redistricting.

6           Federal standards, state standards,  
7 competing state standards; we cited to Abbot  
8 versus Perez in our papers about the competing  
9 litigation risks that always face legislatures  
10 in the redistricting year.

11           The legislature could enact a map that  
12 would perhaps accomplish nondiminishment, but  
13 it would be opening itself up to a racial  
14 gerrymandering lawsuit; or they could pass a  
15 map that complies with the Equal Protection  
16 Clause, but open themselves up to a  
17 nondiminishment lawsuit.

18           In weighing those considerations, the  
19 legislature ultimately in the Enacted Map  
20 appropriately considered all of the federal  
21 requirements and the state requirements and  
22 particularly which prevail over others.

23           Tier 2 applies, unless Tier 1 requires  
24 otherwise. But Tier 1 doesn't apply if Tier 0  
25 requires otherwise. And that's what the

1 Enacted Map does.

2 Your Honor, in an abundance of caution, I  
3 will make that ore tenus motion to amend our  
4 answer to adopt the equal protection as applied  
5 arguments as raised by the House, unless the  
6 plaintiffs have an objection.

7 **THE COURT:** Plaintiff?

8 **MS. KHANNA:** We do have an objection, Your  
9 Honor.

10 **THE COURT:** With that, Mr. Nordby I will  
11 let you put it in writing. That way it will  
12 give anybody that reviews this the opportunity  
13 to see what you put in writing. It will give  
14 the plaintiff appropriate notice and ability to  
15 respond. So you will need to do that.

16 I am looking at where we are today. I  
17 will let you do that by noon tomorrow. And I  
18 will give the -- and then I will give the  
19 plaintiff until the end of the day on Monday to  
20 respond.

21 **MR. NORDBY:** Thank you.

22 **THE COURT:** With that, Ms. Khanna.

23 **MS. KHANNA:** With the Court's indulgence,  
24 if we can take a quick break --

25 **THE COURT:** Let me see -- and I don't

1 necessarily need the court reporter. This is a  
2 scheduling issue. Let's see one counsel from  
3 each party at sidebar.

4 (Discussion off record.)

5 **THE COURT:** What we are going to do, let's  
6 take a 10-minute recess. And then we are going  
7 to let the plaintiff respond in rebuttal. And  
8 I think we should wrap everything up by lunch.

9 (A recess took place from 12:15 p.m. to  
10 12:30 p.m.)

11 **THE COURT:** Are we ready to proceed? It  
12 looks like Ms. Khanna is ready.

13 All right, with that, back on the record.

14 All right. Ms. Khanna, you may proceed.

15 **MS. KHANNA:** Thank you, Your Honor. Just  
16 a few points I'd like to make on rebuttal.

17 The first question that this Court has  
18 been asking throughout this entire proceeding  
19 is, what are the facts here? And as Your Honor  
20 has pointed out, you have before you our  
21 stipulation of facts that includes paragraph 3  
22 and paragraph 4 that detail the facts relevant  
23 to our diminishment claim. And the facts  
24 relevant to our diminishment claim are spelled  
25 out in black and white. And as the counsel for



1 the defendants have represented today, they are  
2 not in dispute.

3 I believe counsel for the Senate said that  
4 they've never disputed that apparently the  
5 Enacted Map violates the nondiminishment  
6 provision of the Florida Constitution, which  
7 is -- you know, it's taken us some time to get  
8 here, but I believe the Court has in front of  
9 it everything it needs to find on the  
10 diminishment claim that is actually the subject  
11 of this litigation, that is actually the  
12 plaintiffs' claim before this Court.

13 Now, the extent to which the Court chooses  
14 to take judicial notice of the Florida  
15 redistricting website from the state,  
16 defendants and all the data and maps in there,  
17 that is all I think the question for the extent  
18 to which the Court really wants to engage in  
19 the defendants' convoluted affirmative defense  
20 in their attempt to make this case about  
21 something it certainly is not.

22 The district. This has been a huge  
23 question throughout this hearing this morning.  
24 What district are we talking about? The  
25 defendants have kept up the picture of the

1 Benchmark District here and kept pointing to  
2 this as the district, something like it,  
3 something close to it.

4 I mean, it's telling, of course, I think  
5 they all agreed that that's not the district at  
6 issue, that's not for this Court to strike down  
7 or opine on and, of course, that was a district  
8 that was ordered by the Florida Supreme Court.

9 But then there's -- we did hear from the  
10 defendants a lot of things about, well, it's  
11 got to be an east-west district. And why is  
12 that? It's because the legislature  
13 apparently -- we learned during this argument  
14 that the legislature apparently believed there  
15 was no way to comply with the Florida  
16 Constitution and the U.S. Constitution. The  
17 legislature apparently was tangling with this  
18 conflict and this tension that it did not know  
19 how to resolve and it had no choice, but the  
20 legislative record says something very  
21 different, Your Honor.

22 The legislative record shows, as we have  
23 on slide 8 of our presentation, the legislature  
24 passed a plan as -- they called it Plan A,  
25 their primary plan was a plan that was -- CD-5

1 was located in Duval County only, and the chair  
2 of the House Reapportionment Committee for  
3 Congressional Redistricting specifically said  
4 that this is a Black performing district. It  
5 is a reliable Black performing district from  
6 the functional analysis.

7 Now, I don't have today the full record of  
8 what he was relying on or what anybody else was  
9 relying on, but apparently what Mr. Jazil is  
10 choosing to rely on to say otherwise.

11 But it is puzzling, indeed, how the  
12 legislative record can reflect that the  
13 legislature passed a primary plan that  
14 apparently their counsel now says that they  
15 believed all along -- what, was it -- were they  
16 misrepresenting what it did to the voters?  
17 Were they misrepresenting it to each other?  
18 It's entirely unclear.

19 It seems that the counsel for the House  
20 and Senate are now taking the position that is  
21 contrary to the legislature itself and it is --  
22 it is -- we have to be able to take the  
23 legislature at its word at some point, that it  
24 thought it could do something.

25 This idea that they had no choice, what

1 could they possibly do? Well, they could do  
2 what they did. They passed a Plan A, and then  
3 after that they passed a Plan B. So this idea  
4 that the legislature, by the time it got around  
5 to the post-veto era was -- was -- you know,  
6 was essentially choiceless, seems to defy the  
7 entire legislative record up until that point.

8 In that same passage on Plaintiffs'  
9 Exhibit 8, on page 8, where we quote the chair  
10 of the House Redistricting Committee speaking  
11 about the performance of Plan 8019, in that  
12 same transcript, that same chair says that Plan  
13 8015 is, quote, legally compliant under current  
14 law.

15 This Court asked defendants where in the  
16 record will I find this supposed tension that  
17 the legislature did not believe it could comply  
18 with all of the applicable laws? Well, you  
19 have in Plaintiffs' Exhibit 8 the transcript,  
20 page 23, line 16 to 20, the chair of the House  
21 Redistricting Committee saying that Plan 8015  
22 is legally compliant under current law. And  
23 now, his counsel is now saying something else,  
24 apparently they didn't believe it was compliant  
25 under current law.

1           That is really just defies the record  
2 before us.

3           **THE COURT:** Well, Ms. Khanna, why can't  
4 they say, you know what, we've considered the  
5 arguments by the Governor and, you know what,  
6 we were wrong and the Governor was right that  
7 it violates equal protection? Why can't they  
8 make that decision? Because ultimately,  
9 whether it's legal or not is a legal question,  
10 not a political question, that we asked the  
11 legislature to decide political questions. So  
12 why can't they change their mind?

13           **MS. KHANNA:** Certainly they're allowed to  
14 take any litigation strategy they want. I  
15 think it's a -- it's a -- it's a questionable  
16 litigation strategy that undermines the actual  
17 legislative record that they have put forward  
18 to this Court as evidence in this case. But  
19 are they allowed to change their argument,  
20 change their view of the law? Yes, I suppose  
21 so.

22           But I think this -- that pivot point is  
23 exactly why this posture makes no sense.  
24 Because now we are in Court where plaintiffs  
25 have challenged the map actually enacted into

1 law, and the defendants, rather than defend  
2 that map under the law being challenged by,  
3 have challenged -- kind of reversed course to  
4 say, well, if we had done some hypothetical  
5 thing or the thing we actually did do or tried  
6 to do, turns out that would have been a  
7 violation of the law.

8 It is -- in trying to turn this case into  
9 something it's not, we've all kind of lost our  
10 bearings here about who's challenging what.  
11 And sure, can somebody make an argument that --  
12 of the kind that they're advancing now in  
13 violation -- you know, in contradiction to what  
14 their own clients said? I suppose so. But  
15 does it provide this Court any factual basis to  
16 actually find in favor of their affirmative  
17 defense? I do not think so.

18 **THE COURT:** What about the remedy?

19 Mr. Jazil brought up the remedy. If this Court  
20 ultimately cannot -- I mean, yes, this Court --  
21 I can just throw it out, but what if this Court  
22 were to throw it out and there literally is no  
23 way to meet that standard and not violate the  
24 Equal Protection Clause, why is he not right  
25 that the plaintiff loses?

1           **MS. KHANNA:** Well, I mean, that's a huge  
2 if, Your Honor. And as the Court I think has  
3 already pointed out, that the proof behind that  
4 is not anywhere in that packet -- in this  
5 record. Right? That there's no possible way  
6 to get it done, apparently, is their argument  
7 and is there proof?

8           But at the end of the day, Your Honor,  
9 I've litigated a number of redistricting cases.  
10 And when plaintiffs challenge an Enacted Map,  
11 what they are able to ask the Court to do is  
12 enjoin the map. That is all we've asked this  
13 Court to do. That's all I'm able to ask this  
14 Court to do.

15           Now, surely, we all understand that, as a  
16 general matter, there needs to be a map for an  
17 election. But the legal precedent from this  
18 Court, from the Florida Supreme Court, from the  
19 U.S. Supreme Court, has always been that when a  
20 map is enjoined, it goes back to the  
21 legislature to revise or remedy.

22           And if the legislature is either unable or  
23 unwilling to do so, then it falls to the Court  
24 to devise a remedy. And so, we're not trying  
25 to leapfrog over the legislative prerogative

1 here. We are asking what we are only allowed  
2 to ask of this Court, which is to enjoin the  
3 map that is actually enacted into law. And if  
4 the legislature then goes back and determines  
5 that, contrary to the legislative record that  
6 it already had, contrary to the maps that it  
7 already passed, it now believes that it is  
8 incapable of drawing a lawful map, that is a  
9 question for another day. It's not a question  
10 before this Court.

11 **THE COURT:** Why does it raise to  
12 predominate, then? You keep talking about  
13 race, and, you know, the House hit on this very  
14 hard. What are the other considerations? If  
15 this Court were to throw out this map, how do  
16 you get -- how do you get a map without race  
17 predominating?

18 **MS. KHANNA:** I mean, I think we have -- we  
19 have examples from the legislative record of  
20 maps that they believed were compliant with the  
21 law. And that is pretty good evidence that you  
22 can do that when the legislature itself seemed  
23 to believe we can do it.

24 And even if we take the direct evidence  
25 out of it, Your Honor, we have walked through



1 step by step traditional redistricting factors.  
2 You've heard it from defendants' counsel, the  
3 same standard we talked about here before when  
4 it comes to racial predominance, and that is  
5 that the lines are unexplainable on any basis  
6 other than race.

7 Well, every single line in what we looked  
8 at in -- as the -- not even the Benchmark  
9 District, but Plan 8015 CD-5 was very  
10 explainable on basis other than race. And, in  
11 fact, more explainable by reference to  
12 political and natural boundaries than all but  
13 one district in the Enacted Map.

14 So I think the record here of what -- you  
15 know, again, we're talking about some district,  
16 is there a way to draw some district that  
17 doesn't violate the nondiminishment provision  
18 and is still explainable on criteria other than  
19 race, I believe we have shown that in spades.  
20 And I did not hear a single word from  
21 defendants' counsel -- three defendants'  
22 counsel got up and talked about racial  
23 gerrymandering, but I did not hear a single  
24 rebuttal to the evidence we had about the  
25 length of districts in Florida.

1 I believe I heard counsel for the House,  
2 Mr. Bardos, said no other district is quite  
3 like it, when he was talking about, I assume,  
4 CD-5 and the Benchmark Map, CD-5 in Plan 8015.  
5 But we showed that actually in 2002 there was a  
6 district very much like it, in CD- 2 that  
7 spanned the north part of the state. That was  
8 a majority white district. But its  
9 configuration was actually quite similar.

10 We showed that when it comes to county  
11 splits and county configurations, there are  
12 many districts quite like it. We showed that  
13 when it came to the area and the size of the  
14 district, there are many districts not just  
15 like it, but much bigger than the CD-5. We  
16 showed when it comes to city splits, the Plan  
17 CD-5 in 8015 is far more compliant, and we  
18 showed that when it comes to compliance with  
19 geographic and natural boundaries, CD-5 is more  
20 compliant than almost every single district in  
21 the Enacted Map.

22 So there's no district quite like it. I'm  
23 not exactly sure what maps counsel is looking  
24 at, but certainly they were not able to point  
25 this Court to any evidence in the record or any

1 objective metrics that would dispute those --  
2 that evidence, that those statements that we  
3 were able to show about the actual district  
4 lines in the map they actually drew and tried  
5 to enact into law.

6 Now, the question of whose burden it is I  
7 think has also been a huge football in this  
8 case, and I think we've -- I think Your Honor  
9 is clear on our position, which is that, of  
10 course, our burden is to prove diminishment and  
11 our burden here has been satisfied. I think  
12 that has been conceded to.

13 They have raised -- or two out of three of  
14 them have raised an affirmative defense, and it  
15 is black letter law in Florida, under Florida  
16 law, that it is the defendants' burden to prove  
17 their affirmative defenses.

18 Now, they're trying to say, well, racial  
19 gerrymandering is different, and so this case  
20 is different. And they're really trying to  
21 kind of put a lot on the racial gerrymandering  
22 legal standard.

23 But, Your Honor, again, I've litigated a  
24 lot of redistricting cases, and I've litigated  
25 racial gerrymandering cases, and I'm pretty

1           sure I've read every single racial  
2           gerrymandering case to come out of the  
3           U.S. Supreme Court or any Court of Appeals, and  
4           I am not aware of a single case in which a  
5           Court has held that the plaintiffs would bear a  
6           burden to show that race does not predominate  
7           in a number of nebulous and hypothetical maps  
8           that could possibly and hypothetically be  
9           drawn. I've never seen that.

10           And I believe I heard from Mr. Bardos  
11           that -- a new burden, that there's --  
12           apparently plaintiffs would also have the  
13           burden to show that there was some other  
14           predominant purpose.

15           Again, I'm not aware of a single case that  
16           has ever said, well, if it's not race, then  
17           you've got to show what was the predominant  
18           purpose. In fact, the courts have assumed that  
19           where you balance a number of district --  
20           different criteria, there is no predominant  
21           purpose. And I'm certainly not aware of any  
22           case in which private plaintiffs have been told  
23           that apparently they now bear the burden of  
24           satisfying strict scrutiny that is reserved  
25           exclusively for state action.

1           So the defendants' burden argument is  
2 novel, to say the least, and unprecedented.  
3 And I'm really not sure what case law this  
4 Court would have to look to, to find that they  
5 are right on it. It's certainly not in Florida  
6 law, which says that the defendants bear the  
7 burden of affirmative defenses. And it's  
8 certainly not in federal law, which makes it  
9 very clear that a person actually challenging a  
10 district has to establish racial predominance  
11 in that district.

12           The question -- I believe counsel also  
13 raised -- counsel for the Senate raised the  
14 question of a sequential finding. It's just --  
15 this Court should just go ahead and wrap it all  
16 up in this case, that would be the cleanest and  
17 the easiest way to do it.

18           But as Your Honor pointed out, that's  
19 just -- that happens all the time, particularly  
20 in redistricting cases. In fact, the very --  
21 the Florida Constitution itself, which  
22 establishes a kind of facial review process for  
23 state legislative maps, specifically  
24 contemplates a sequential redistricting  
25 process, somebody can -- the court can --

1           **THE COURT:** How many times did this go up  
2 and back last time?

3           **MS. KHANNA:** I was here last time and I  
4 didn't --

5           **THE COURT:** I think most of you were.

6           **MS. KHANNA:** Yeah, we were; we've all been  
7 here.

8           **THE COURT:** Yeah, that's what I thought.  
9 Mr. Jazil is holding up eight fingers, so...

10           **MS. KHANNA:** Yes. We've seen -- we've  
11 seen many, many maps go up and down and up and  
12 down, and it's not unusual. The whole  
13 constitutional system actually contemplates  
14 that. There's a facial review process for  
15 state legislative maps. And then the Court  
16 says, well, okay, we're going to make a facial  
17 ruling, and then you can come back and make an  
18 as-applied ruling.

19           The defendants here cite a case called  
20 *Harris v. Cooper*, a racial gerrymandering case  
21 from the U.S. Supreme Court. *Harris v. Cooper*  
22 has a storied history of going up and down and  
23 up and down and up and down. And after that  
24 district was struck down as a racial  
25 gerrymander, then there was a remedy map, and

1 then that map was challenged as partisan  
2 gerrymandering.

3 **THE COURT:** Isn't Allen v. Milligan --  
4 it's gone up and it -- wasn't that on a  
5 temporary --

6 **MS. KHANNA:** Yes, Your Honor. And I --  
7 and I know a thing about Allen v. Milligan. I  
8 was the lead trial counsel that brought the  
9 Allen v. Milligan case, and I've argued that  
10 case in front of the Supreme Court.

11 And, yes, exactly, it is a sequential  
12 process. And the Courts do not just say, well,  
13 why don't we just, like, opine on potential  
14 remedies, even though they're not actually  
15 before us? It's not -- it's just not that easy  
16 because Courts are in no position to make legal  
17 rulings about laws that are not before it.  
18 It's just not how the system works.

19 And ultimately, Your Honor, the ask the  
20 defendants are making of this Court is really  
21 monumental, and they are asking this Court to  
22 break new ground in any number of ways.

23 They're asking this Court to be the first  
24 Court ever to apply the Gingles' precondition  
25 to a diminishment claim under federal law or

1 under state law. They're asking this Court to  
2 be the first Court ever to find that a -- that  
3 I guess state officials are protected by the  
4 Equal Protection Clause, and that nonresidents,  
5 nonvoters of districts that don't exist have  
6 standing to say -- to cry foul based on racial  
7 classifications.

8 They're asking this Court to be the first  
9 to define that the Fair District Amendments  
10 were apparently unlawful the minute they were  
11 enacted, notwithstanding decades -- over a  
12 decade of case law from the Florida Supreme  
13 Court operating under the premise that the law  
14 is what the law is, interpreting that law,  
15 applying that law; and notwithstanding the fact  
16 that the legislature itself has drafted and  
17 defended scores of districts, state legislative  
18 districts, Congressional districts, under that  
19 nondiminishment provision which apparently now  
20 they say has been poisoned from the start.

21 They are asking the Court, this Court to  
22 be the first to find that the Florida  
23 Constitution --

24 **THE COURT:** Counsel, hold on. Are they  
25 really saying that? Aren't they just saying,



1           hey, with some of these others, we can do it,  
2           we can get there, we're not violating equal  
3           protection and we cannot diminish, but on this  
4           one, we've got a problem? Isn't that -- that's  
5           their argument, isn't it?

6           **MS. KHANNA:** I think it -- I think it's  
7           very unclear -- again, this racial  
8           gerrymandering argument is a -- it is a game of  
9           laser tag a little bit, right? We're trying to  
10          figure out what exactly are we challenging and  
11          who is challenging what. And apparently it's  
12          changing even as the course of this hearing has  
13          gone on.

14          But when I heard -- you know, when the --  
15          when Mr. Bardos said, well, we're not making a  
16          facial challenge, but at the same time the  
17          Florida Constitution's nondiminishment  
18          provision is not a compelling state interest,  
19          it's not even compelling, because it's -- well,  
20          it is compelling sometimes, but it's not  
21          compelling other times.

22          I don't -- that is a conversa -- I do  
23          not -- that doesn't make sense, Your Honor, and  
24          I think ultimately either the Florida  
25          Constitution is something that binds the

1 Florida legislature or it is not. Either it's  
2 something that compels the Florida legislature  
3 or it is not. It is not up to public officials  
4 to pick and choose when they think the Florida  
5 Constitution is, in fact, compelling enough to  
6 comply with.

7 Ultimately, Your Honor --

8 **THE COURT:** Wait, hold on. But if the  
9 Court were to say, okay, race has got to be  
10 taken into account, and if the Court were to  
11 find it's predominating, we're talking about  
12 making a district to preserve racial groups'  
13 ability to choose the candidate of their  
14 choice, then what is the compelling state  
15 interest there?

16 **MS. KHANNA:** I mean, if the Court were to  
17 find -- I mean, if you were to kind of surpass  
18 all those other hurdles of even getting to that  
19 question, right, the Court were to find  
20 standing, find a specific district, and then  
21 find racial predominance in a district that we  
22 were still wondering what that is, and then  
23 say, well, what is the --

24 **THE COURT:** It goes back to that, if it's  
25 even possible. Is it even possible to do it

1 without race predominating?

2 **MS. KHANNA:** Well, certainly the  
3 legislature seemed to think so when it passed  
4 Plan 8019.

5 **THE COURT:** I understand. I'm not --  
6 these are all hypotheticals.

7 **MS. KHANNA:** Right.

8 **THE COURT:** And you've done this long  
9 enough to know why I ask.

10 Then what is the compelling state  
11 interest?

12 **MS. KHANNA:** I mean, the compelling --  
13 the -- it is hardly a controversial statement  
14 to say that complying with the Florida  
15 Constitution is a compelling state interest.

16 Having it be a compelling state interest  
17 does not amount to a get-out-of-jail-free card  
18 as Counsel suggested it was. The U.S.  
19 Supreme Court has in every single case assumed  
20 that the Voting Rights Act is a compelling  
21 state interest and yet still it finds that  
22 districts are racial gerrymanders in violation  
23 of the law.

24 **THE COURT:** Well, that's why it leads me  
25 to, if following the Florida Constitution is

1 not a compelling state interest, doesn't it --  
2 and obviously in order to not diminish, one has  
3 to consider race. I mean, is that just a  
4 backdoor attack on saying nondiminishment  
5 violates equal protection, we ought to throw  
6 the whole thing out, and this Court will be the  
7 first in the country to say that, you know,  
8 even the Voting Rights Act is unconstitutional?  
9 I mean, is that a far stretch?

10 **MS. KHANNA:** I think that is exactly the  
11 implication that the defendants are asking of  
12 this Court. That is the heavy ask that they  
13 are making of this Court, to break that new  
14 ground. And ultimately, they're asking this  
15 Court to say that the consideration of race in  
16 redistricting, whether it's because of the Fair  
17 District Amendments, the Voting Rights Act, or  
18 anything else, is per se unconstitutional.

19 And we've heard talk -- the defendants  
20 talk about the Allen case and, like I said, I  
21 know a couple of things about the Allen case.  
22 And in the Allen case, the State of Alabama  
23 said -- weighed the exact same argument.

24 The consideration of race in redistricting  
25 is per se unlawful under the Equal Protection

1 Clause, and that the constitution demands  
2 race-blind consideration.

3 And when that case was taken away -- we  
4 won that case at the trial court, and then the  
5 Supreme Court took that case up. And while  
6 that case was pending before the U.S.

7 Supreme Court, the Governor of Florida pointed  
8 to the existence of that case.

9 **THE COURT:** Well, I pointed to the  
10 existence of that case back in, what, April. I  
11 said we're going to have some more guidance, so  
12 that's...

13 **MS. KHANNA:** Exactly. But he -- but in  
14 so -- in pointing to it, he also assured that,  
15 oh, the reason they took that case is because  
16 they're about to change the law and say that  
17 any consideration of race in redistricting is a  
18 violation of the constitution. But they said  
19 no such thing; they rejected that argument.  
20 They rejected the very same argument that the  
21 defendants are advancing here.

22 And so ultimately, the defendants are  
23 asking this Court to be the first to say I  
24 guess that the U.S. Supreme Court got it wrong  
25 and to say the opposite of that and to do what

1 the U.S. Supreme Court has refused to do,  
2 despite multiple invitations to do it.

3 And at the end of the day, this Court --  
4 this Court's task is actually not that  
5 monumental, certainly not as monumental as the  
6 defendants would have this Court believe or --  
7 ultimately, this Court is asked to look at the  
8 law, and look at the facts, the facts and the  
9 law when it comes to the plaintiffs' claim and  
10 the actual law, the actual map before this  
11 Court are undisputed and beyond dispute. And  
12 on those facts and law, plaintiffs are entitled  
13 to an injunction against the Enacted Map.

14 Unless the Court has any further  
15 questions...

16 **THE COURT:** Thank you, Ms. Khanna.

17 **MS. KHANNA:** Thank you very much.

18 **THE COURT:** So what I want to do -- what I  
19 want to talk about now, folks, is timing on  
20 proposed orders. You all have worked long and  
21 hard on this case and I appreciate that.  
22 You've come to a lot of agreements that have  
23 helped everybody. It's not hidden my  
24 consternation with some of the agreements and  
25 what that does with our record and, you know, I

1 think I'm not going to speak for the Florida  
2 Supreme Court, obviously, but when they talk  
3 about, you know, full records before them, you  
4 know, often that is the result of weeks of  
5 trial and cross examination and experts and  
6 other experts so that we get to hear all these  
7 facts, not what somebody says in a committee,  
8 not what just, you know, some individual report  
9 is, but it's that robust adversarial process --  
10 we have what we have. It goes back to that  
11 presentment, what the parties have presented.

12 So based on that, what I would like is the  
13 parties to submit written proposed orders in  
14 Word format, that's what I use; sorry if you  
15 use Word Perfect or one of those other  
16 programs. I'm not advocating you buy it,  
17 that's just what I use, and that's what the  
18 taxpayers have paid for me to use, so that's  
19 what I'll use, Word format.

20 But timing, I want ask the parties,  
21 because I will tell you, I blocked two full  
22 weeks for this trial. I did not give that time  
23 back up to the other 900-and-some odd -- well,  
24 I guess you've got to multiply it by at least,  
25 probably, about three or four because I'm

1 civil, it's not one party versus another --  
2 with that number of parties; I didn't give that  
3 back to them to have.

4 So I will be working on this case for that  
5 period of time and putting everything else,  
6 pretty much, on the back burner, other than  
7 emergency motions.

8 But I want to know what realistically is  
9 the quickest you can get it to me, because I  
10 will independently be writing an order as well  
11 and then ultimately I would like to issue a  
12 ruling, because I've read it. You know, I have  
13 notions -- you know, this is that important of  
14 a matter to the people of the State of Florida,  
15 maybe people elsewhere, but what this deals  
16 with, this deals with the right of people to  
17 elect the electors of their choice. This deals  
18 with the right of the legislature to do what  
19 the Federal Constitution has given to them to  
20 do, which is to decide how to district, and go  
21 back -- it goes back to the right of the -- and  
22 recently affirmed by the U.S. Supreme Court --  
23 the right of the state courts to be involved in  
24 that process to ensure that the legislature is  
25 following the law.



1           And so it's important all around and,  
2 ultimately for the people of the State of  
3 Florida to be properly -- whatever that  
4 entails -- represented in the U.S. House of  
5 Representatives.

6           So what is the earliest reasonable, like  
7 on -- you know, don't tell me one thing and ask  
8 for more. That's why most of the time when  
9 attorneys on a regular case, they'll say,  
10 Judge, 15 days. I'm, like, I know attorney  
11 time, I'll give you 30.

12           But I also understand the heavy lift you  
13 guys are doing. And I also understand some of  
14 you are involved, some of you are not; there's  
15 another trial that need not concern this Court,  
16 but that many of you are working on in the near  
17 future with very similar issues, and I don't  
18 want to be, you know, get this done,  
19 compartmentalize, get this gone and then get  
20 that done.

21           So for the parties, how quickly do you  
22 think you can reasonably get that done, knowing  
23 that your clients are going to have to pay for  
24 this?

25           **MS. KHANNA:** So from plaintiffs'

1 perspective, Your Honor, certainly we can get  
2 this done before the end of next week. We  
3 would say even the middle of next week.

4 **MR. JAZIL:** Your Honor, I would suggest  
5 next Friday, a week from tomorrow, spending  
6 some time with Judge Hinkle earlier in the week  
7 and, as you noted, the federal trial starts on  
8 the 25th, so that might be the sweet spot.

9 **THE COURT:** Mr. Bardos?

10 **MR. BARDOS:** Next Friday would be fine  
11 with us, Your Honor.

12 **THE COURT:** Well, I'm not -- I'm not  
13 saying I'm going to give you until Friday,  
14 because Friday I turn into a pumpkin and have  
15 900 -- the latest 913 other cases that I am  
16 going to be working on.

17 Mr. Nordby?

18 **MR. NORDBY:** Friday would certainly work.  
19 We could probably do it, from my schedule, a  
20 day or two earlier, but I would cede to the  
21 Secretary's counsel on this case.

22 **THE COURT:** All I know is that a capable  
23 firm that is more than one -- this is what I'm  
24 going to do, I'm going to give you the end of  
25 day Wednesday. That gives me undivided time on

1 Thursday and Friday. And then my time gets  
2 more divided at that point with other hearings  
3 and other trials.

4 So let's do by the end of -- let me make  
5 sure I've got -- that's the 30th, correct? By  
6 the end of the day. I mean, if you want to do  
7 it at 11:59, that's fine, because if you do it  
8 at 5:00 or you do it at -- you know -- if you  
9 do it at 5:00 or -- as long as the next morning  
10 when I get to work, I can be reading them.

11 I'll probably read them before then. But  
12 you come in -- you know, you don't have to wait  
13 until 11:59. I will read them whenever they  
14 come in, so -- but I appreciate that.

15 All right. With that, and I've already  
16 talked about the other motion from Mr. Nordby.  
17 What other issues do we need to discuss?

18 **MS. KHANNA:** Nothing from plaintiffs, Your  
19 Honor.

20 **MR. JAZIL:** Nothing further from us, Your  
21 Honor.

22 **MR. BARDOS:** Nothing further, Your Honor.

23 **MR. NORDBY:** That's it.

24 **THE COURT:** All right. Well, I appreciate  
25 Counsel, again, a lot of heavy lifting,

1           discovery that, yes, I've seen a little bit of  
2           it in in-camera review, but I don't even want  
3           to imagine the volume that you've dealt with,  
4           and I appreciate everyone's hard work,  
5           interesting legal briefs.

6                     And so with that, the Court will retire  
7           and consider the matter, subject to your  
8           proposed orders.

9                     (Proceedings concluded at 1:00 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA )

COUNTY OF LEON )

I, SANDRA L. NARGIZ, RPR, CM, CRR, CRC, CCR, certify that I was authorized to and did stenographically report the foregoing proceedings, and that the transcript is a true and complete record of my stenographic notes.

DATED on August 28, 2023.

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