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IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D23-2252
L.T. CASE NO. 2022-CA-666

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

v.

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

On Appeal from a Final Order of
the Second Judicial Circuit

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

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STATEMENT OF IDENTITY AND INTEREST

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

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Florida voters enshrined the Fair Districts Amendments ("FDA") into the Florida Constitution, creating state constitutional safeguards for equal representation that are not contained in the U.S. Constitution. *See* Fla. Const. art. III, §§ 20-21. This new language added to the Florida Constitution a prohibition against drawing congressional district boundaries "with the intent or result of denying or abridging the equal opportunity of

racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." *Id.* § 20(a). The Florida Supreme Court has held that these provisions are modelled after Sections 2 and 5 of the federal Voting Rights Act ("VRA"), 52 U.S.C. §§ 10301, 10304, and were designed for the "prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice," *In re S. J. Res. Legis. Apportionment 1176*, 83 So. 3d 597, 619 (Fla. 2012) ("*Apportionment I*").

This case presents a textbook case of diminishment in violation of the Florida Constitution. It is undisputed that in the 2016, 2018, and 2020 congressional elections, Black voters in Congressional District 5 ("CD-5")—the boundaries of which were expressly approved as constitutional by the Florida Supreme Court, *see League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) ("*LMV II*")—were able to elect their candidate of choice.[1] R.8036. It is also undisputed that in 2022, after the Florida Legislature enacted a congressional districting plan ("Enacted Plan")

[1] The CD-5 in place for these congressional elections will be referred to as Benchmark CD-5.

that split Benchmark CD-5 into four congressional districts, Black voters no longer could elect a representative of their choice in any of those four districts. R.8037. As the trial court correctly concluded, the Enacted Plan violates the Florida Constitution under any fair reading of the non-diminishment command.

Appellants make two arguments in their effort to deny equal political opportunity to voters of color in CD-5. They are fundamentally flawed as a matter of state and federal constitutional law and should be rejected.

First, the Secretary urges this Court to jettison the Florida Supreme Court's binding precedent interpreting the FDA. He argues that a non-diminishment claim requires proof of vote dilution, effectively conflating the FDA's non-diminishment provision with its non-dilution provision and treating the non-diminishment guarantee as surplusage. This would hollow out the FDA's two guarantees, reducing them to one. As the Florida Supreme Court has consistently recognized, the FDA's non-dilution and non-diminishment provisions are modelled after Sections 2 and 5 of the VRA, and just as those VRA sections serve different purposes and are governed by different standards, the FDA also

provides two distinct remedies for voters of color. The Secretary's argument that the FDA's non-diminishment provision requires Plaintiffs to satisfy the *Gingles* preconditions (which apply to VRA Section 2 claims and thus to FDA non-dilution claims) is contrary to the text and history of the FDA and binding Florida Supreme Court precedent construing its twin safeguards.

Second, Appellants argue that they cannot comply with the non-diminishment provision in North Florida without violating the Fourteenth Amendment's prohibition on racial gerrymandering. In their view, any map—no matter how it is drawn—designed to remedy the Legislature's destruction of a Black-opportunity district in CD-5 would make race the predominant criterion. But Appellants are attempting to manufacture a constitutional problem where none exists. There is nothing constitutionally suspect about the Florida Legislature or the Florida Supreme Court considering race to comply with the non-diminishment provision. As the U.S. Supreme Court recognized earlier this year in *Allen v. Milligan*, "[t]he contention that mapmakers must be entirely 'blind' to race has no footing" in the law. 143 S. Ct. 1487, 1512 (2023) (plurality opinion). After all, state constitutional remedies to protect the voting strength

of communities of color help realize, not flout, the constitutional guarantee of equality. Thus, striking down state practices that dilute or diminish the voting rights of citizens of color raises no equal protection concern.

ARGUMENT

I. The Non-Diminishment Provision—Modelled After Section 5 of the VRA—Does Not Require Appellees to Establish the *Gingles* Preconditions.

The racial equality provision of the FDA contains "dual constitutional imperatives"—the non-dilution provision and the non-diminishment provision. *Apportionment I*, 83 So. 3d at 619. These requirements track "almost verbatim" the text of Sections 2 and 5 of the federal VRA. *Id.* (quoting *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1280 (11th Cir. 2012)).

This similarity was intentional. As the Florida Supreme Court has recognized, "[c]onsistent with the goals of Sections 2 and 5 of the VRA, Florida's corresponding state provision aims at safeguarding the voting strength of minority groups against both impermissible dilution and retrogression." *Id.* at 620. Indeed, "[b]efore its placement on the ballot and approval by the citizens of Florida, the sponsors of this amendment . . . acknowledged that

Florida's provision tracked the language of Sections 2 and 5 and was perfectly consistent with both the letter and intent of federal law." *Id.* Thus, because the FDA was modelled on Sections 2 and 5 of the VRA, the FDA "imposes two requirements that plainly serve to protect racial and language minority voters in Florida." *Id.* at 619. The Secretary's assertion that the non-diminishment provision requires Plaintiffs to satisfy the test for vote dilution under *Thornburg v. Gingles*, 478 U.S. 30 (1986), is irreconcilable with this Florida Supreme Court precedent and the text and history of the FDA.

A. The non-dilution and non-diminishment provisions—modelled after Section 2 and Section 5 of the VRA—are "dual constitutional imperatives" that protect against distinct harms.

Before the FDA, the Florida Supreme Court had held that the Florida Constitution's requirements for redistricting went no further than the federal constitutional requirements. *See Apportionment I*, 83 So. 3d at 602 (citing *In re Constitutionality of H. J. Res. 1987*, 817 So. 2d 819, 824 (Fla. 2002)). "In 2010, with the passage of the [FDA], the people of Florida increased the instructions to their representatives to provide additional constitutional imperatives for

their elected representatives to follow when drawing the senatorial and representative districts." *Id.* at 603. The twin protections for voters of color, incorporating the VRA's core protections into the Florida Constitution, were integral to the FDA's reform of redistricting in Florida.

"The first imperative, that 'districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process,'" protects against "impermissible vote dilution." *Id.* at 619 (quoting Fla. Const. art. III, § 21(a)).[2] "Florida's second imperative, that 'districts shall not be drawn . . . to diminish [racial or language minorities'] ability to elect representatives of their choice,'" protects against "impermissible retrogression in a minority group's ability to elect a candidate of choice." *Id.* at 619-20 (alteration in original) (quoting Fla. Const. art. III, § 21(a)). In this respect, both

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

fundamental safeguards contained in the VRA are part of the fundamental law of Florida.

Consistent with the text and history of these provisions, the Florida Supreme Court has concluded that each provision provides a distinct protection for minority voters in Florida, and it has therefore imposed different standards of compliance for each provision. The non-dilution provision is governed by the federal Section 2 vote dilution standard, which the Supreme Court established in *Thornburg v. Gingles* and has consistently applied in every vote dilution case it has heard "[f]or the past forty years." *Allen*, 143 S. Ct. at 1502-03; *see id.* at 1504 (collecting cases). Under *Gingles*, plaintiffs must establish that "(1) a minority population is 'sufficiently large and geographically compact to constitute a majority in a single-member district'; (2) the minority population is 'politically cohesive'; and (3) the majority population 'votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Apportionment I*, 83 So. 3d at 622 (quoting *Gingles*, 478 U.S. at 50-51). Once the three preconditions are met, *Gingles* then requires courts to "assess the totality of the circumstances to determine if the Section 2 'effects' test is met—

that is, if minority voters' political power is truly diluted." *Id.* (citing *Johnson v. DeGrandy*, 512 U.S. 997, 1013 (1994)).

The non-diminishment provision, by contrast, prohibits discriminatory redistricting practices—whether dilutive or not—and thus prevents "the Legislature" from "eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625.

The Florida Supreme Court's interpretation of the non-dilution and non-diminishment provisions was "guided by prevailing United States Supreme Court precedent" construing Section 2 and Section 5 of the VRA. *Id.* at 620. And as that Court correctly understood, Section 2 and Section 5 have been consistently read to "differ in structure, purpose, and application." *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion); *see also Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard."); *Reno v. Bossier Parrish Sch. Bd.*, 520 U.S. 471, 477 (1997) ("[Section 2 and Section 5] combat different evils."); H.R. Rep. No. 109-478, at 71 (2006) ("Sections 2 and 5 serve two different purposes under the VRA.").

The text and history of the VRA bolster the Florida Supreme Court's conclusion that the non-dilution and non-diminishment provisions protect against distinct harms to voters of color. The non-dilution provision mirrors Section 2 of the VRA, which prohibits voting standards, practices, or procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A Section 2 violation is "established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

Section 2 has consistently been understood to prohibit vote dilution. When Congress enacted Section 2's current language in 1982, Congress "ma[de] clear that certain practices and procedures that result in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent

protects them from constitutional challenge." *Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991). Congress recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot" and acted to eliminate all "discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97-417, at 6, 28 (1982).

The non-diminishment provision is modelled after Section 5 of the VRA. In relevant part, Section 5 prohibits covered jurisdictions from enacting voting standards, practices, or procedures that "ha[ve] the purpose of or will have the effect of *diminishing* the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 52 U.S.C. § 10304(b) (emphasis added). While the express statutory protection against diminishment was added to the VRA in 2006, the provision is deeply rooted in Section 5's history.

From its enactment, Section 5 has protected against the retrogression of the voting strength of communities of color, working to ensure that state and local officials do not reduce the

voting strength of communities of color through annexation and redistricting. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolution prohibition on casting a ballot."); *Perkins v. Matthews*, 400 U.S. 379, 389 (1971) ("gerrymandering and boundary changes ha[ve] become prime weapons for discriminating against Negro voters"); *Georgia v. United States*, 411 U.S. 526, 535 (1973).

The non-retrogression standard was first articulated in *Beer v. United States*, 425 U.S. 130 (1976). There, the Supreme Court held that Section 5 permits the preclearance of voting procedures that would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. The non-retrogression standard governed subsequent Section 5 cases concerning electoral schemes and redistricting. *See, e.g.*, *City of Lockhart v. United States*, 460 U.S. 125, 133-34 (1983) (applying *Beer*); *City of Rome v. United States*, 446 U.S. 156, 185 (1980) (same).

Thirty years later, after the Supreme Court had narrowed *Beer*'s scope, *see Ashcroft*, 539 U.S. at 480, Congress amended the

VRA to expressly enshrine *Beer*'s non-retrogression standard into Section 5. *See* H.R. Rep. No. 109-478, at 71. This amendment resulted in Section 5's prohibition against diminishment that was in effect when the FDA was enacted. *See* 52 U.S.C. § 10304(b) (limiting the ability of certain jurisdictions from enacting a voting change that "has the purpose of or will have the effect of diminishing the ability" of voters of color "to elect their preferred candidates of choice"). Congress expressly sought to "protect the ability of such citizens to elect their preferred candidates of choice." *Id.* § 10304(d); *see also* H.R. Rep. No. 109-478, at 71 (emphasizing that the "relevant analysis" is "a comparison between the minority community's ability to elect their genuinely preferred candidate before and after a voting change"). The sponsors of the FDA used this same language to write the non-retrogression principle into the Florida Constitution. The U.S. Supreme Court has since affirmed that Section 5 "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice," *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015), the determination of which necessitates a "functional analysis of the electoral behavior within the particular jurisdiction or election district," *id.* at 276

(quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (2011)); *see also Apportionment I*, 83 So. 3d at 625 ("To undertake a retrogression evaluation requires an inquiry into whether a district is likely to perform for minority candidates of choice."). Section 5's text and history underscore that the question of whether a redistricting plan diminishes minority voters' ability to elect a candidate of their choice is grounded in the non-retrogression standard.

Thus, when the FDA's framers chose to protect voters of color against diminishment, *see* Fla. Const. art. III, § 20(a), they understood that diminishment referred to the specific harm of retrogression under Section 5, wholly independent of the prohibition against vote dilution embodied in Section 2 and the non-dilution language in the FDA. The Florida Supreme Court expressly relied on this critical history when it held that the non-dilution and non-diminishment provisions are "dual constitutional imperatives." *Apportionment I*, 83 So. 3d at 619. Any construction that weakens the independent force of these provisions contradicts this essential history and subverts the text of the FDA.

B. The Secretary's efforts to rewrite the FDA are contrary to Florida Supreme Court precedent and the text and history of the FDA.

The history of the FDA—specifically, the fact that its twin protections were modelled on Sections 2 and 5 of the VRA—strongly supports Florida Supreme Court precedent establishing that the non-dilution and non-diminishment provisions of the FDA impose two distinct requirements to protect minority voters in Florida: "prevention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice." *Id.* at 619. The Secretary, however, posits that the text of the FDA makes the non-diminishment provision dependent on a violation of the non-dilution provision. Sec'y Br. 66-67. Pointing to the use of the possessive pronoun "their" in the non-diminishment provision, he argues that because this pronoun refers to the "racial or language minorities" in the non-dilution provision, the non-diminishment provision only protects against retrogression insofar as a racial or language minority group is already protected under the non-dilution provision and the *Gingles* test. *Id.* at 67. The Secretary is wrong.

First, the Secretary's argument contravenes the text and history of the FDA. When the Florida Supreme Court concluded that the FDA "safeguard[ed] the voting strength of minority groups against both impermissible dilution and retrogression," *Apportionment I*, 83 So. 3d at 620, it was because the FDA incorporated both of the VRA's safeguards. A critical factor in the Court's analysis was the history of the FDA, which, as previously explained, establishes that the FDA was purposefully drafted and enacted to embody the VRA's dual protections against vote dilution and retrogression. And as the text and history of the VRA make clear, Section 2 and Section 5 provide distinct and independent remedies for minority voters. The Secretary asks this Court to ignore this foundational history and read the non-diminishment provision to have no independent force. This Court should reject the Secretary's request that it ignore a key state constitutional protection for voters of color. *See id.* at 614 (when interpreting the Florida Constitution, courts must "give[] effect to every clause and every part of it" (internal quotation marks omitted)).

Second, the Secretary's textual argument is squarely foreclosed by Florida Supreme Court precedent. When it first

interpreted the FDA, that Court held that the minority protection provision included two separate clauses that each "impose a restrictive imperative" that must be independently satisfied. *Id.* at 619. Indeed, when summarizing the non-diminishment provision, the Court replaced the possessive pronoun in the provision with the subject to which it refers—"districts shall not be drawn . . . to diminish [racial or language minorities'] ability to elect representatives of their choice," *id.* at 619-20 (alteration in original)—just as the Secretary does, and the Court did not conclude that that construction of the provision made it in any way dependent on the non-dilution provision, *see id.* Instead, the Court correctly ascertained that the FDA creates two independent protections for minority voters.

Third, the Secretary's position misunderstands how the *Gingles* preconditions operate and their relationship to the non-retrogression standard. The Secretary asserts that the *Gingles* factors are used to determine which "racial or language minorities" are protected by the non-dilution provision. Sec'y Br. 67. This is wrong. *Gingles* establishes preconditions necessary to show that vote dilution has occurred. *See Apportionment I*, 83 So. 3d at 622.

The *Gingles* preconditions do *not*, however, define whether a racial or language minority is protected by the non-dilution provision in the first place.

Moreover, the Secretary's emphasis on the relationship between *Gingles* and the non-retrogression standard is misplaced. As the Florida Supreme Court has correctly recognized, some elements of the *Gingles* test and the non-retrogression standard overlap, in particular the showing that a minority group votes cohesively, which relates to the question whether a voting change deprives Black voters of political opportunities they previously enjoyed. *See LMV II*, 179 So. 3d at 286 n.11. This makes sense, as the voting strength of a minority group is relevant to both non-dilution and non-diminishment, and whether a minority group votes together is a necessary factor to assess voting strength. *See Gingles*, 478 U.S. at 56 (describing the relevance of racial bloc voting for Section 2 claims); *Ala. Legis. Black Caucus*, 575 U.S. at 277 (explaining how racially polarized voting operates in Section 5 claims). However, the *Gingles* factors and the standard for non-retrogression diverge precisely because the non-dilution provision and the non-diminishment provision provide for different remedies:

while the non-dilution provision may require an additional district to be drawn, the non-diminishment provision preserves the status quo. The Secretary's position elides this basic principle of non-retrogression.

* * *

The history of the FDA demonstrates that the non-dilution and non-diminishment provisions were modelled after Sections 2 and 5 of the VRA and create two independent safeguards for the voting strength of voters of color. This Court should reject the Secretary's request that this Court gut the important state constitutional protection against non-diminishment.

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

Appellants also argue that the non-diminishment provision cannot be constitutionally applied in this case, asserting that any attempt by the Legislature to remedy a violation of the non-diminishment provision's commands in CD-5 would necessitate a racial gerrymander in violation of the Fourteenth Amendment of the U.S. Constitution. Sec'y Br. 23-24; Legis. Br. 22. The Secretary, on his own, goes even further, arguing that Benchmark CD-5 that was

approved by the Florida Supreme Court in 2015 was itself a racial gerrymander. Sec'y Br. 25. This is wrong. The Fourteenth Amendment does not prohibit race-conscious voting rights protections for voters of color, as the U.S. Supreme Court made clear earlier this year. And while using race as the predominant factor in drawing district lines raises constitutional concerns, Appellants do not come close to establishing that race predominated in the approval of Benchmark CD-5 or that race will necessarily predominate in any remedial district, no matter how a remedial map might be drawn.

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

When redistricting, legislatures must "almost always be aware of racial demographics." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). But "it does not follow that race predominates in the redistricting process." *Id.*; *see also Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."); *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination."); *cf.*

Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545 (2015) (noting that, under the Fourteenth Amendment, "race may be considered in certain circumstances and in a proper fashion"). Indeed, the retrogression inquiry at the heart of Section 5 "obviously demanded consideration of race," *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quotation omitted), and compliance with Section 2 "involves a 'quintessentially race-conscious calculus,'" *Allen*, 143 S. Ct. at 1510 (plurality opinion) (quoting *DeGrandy*, 512 U.S. at 1020). But the VRA is not constitutionally suspect just because it requires the consideration of race, and neither is the FDA.

The U.S. Supreme Court rejected an argument very similar to Appellants' just this year in *Allen v. Milligan*. There, Alabama argued that it could not constitutionally comply with Section 2's long-standing requirements because Section 2's remedy would require Alabama to "take race into account." *Id.* at 1510. The Supreme Court concluded otherwise. In his opinion for a plurality of the Court, Chief Justice Roberts emphasized the difference between race consciousness and racial predominance: "[t]he former is permissible; the latter is usually not." *Id.* Reviewing the

illustrative maps at issue, a plurality of the Court concluded that the consideration of race alongside other factors "such as compactness, contiguity, and population equality" did not pose an equal protection problem. *Id.* at 1511. The Chief Justice underscored that, under *Gingles*, the consideration of race required to draw a majority-minority district as a remedy for a Section 2 violation "is the whole point of the enterprise." *Id.* at 1512; *see also id.* at 1518 (Kavanaugh, J., concurring) ("[T]he effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters so as to prevent the cracking or packing—whether intentional or not—of large and geographically compact minority populations."). And a plurality of the Court expressly rejected the dissent's position that race predominated in the illustrative maps just because they were designed to include two majority-Black districts. *Id.* at 1511 (plurality opinion). Thus, just as compliance with Section 2 raises no constitutional concern, compliance with Florida's non-diminishment provision does not violate the equal protection command.

Equal protection concerns arise in redistricting only when race "*predominates* in the drawing of district lines." *Id.* at 1510 (emphasis added). Under Supreme Court precedent, to prove that a district is a racial gerrymander, a plaintiff must "'show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Ala. Legis. Black Caucus*, 575 U.S. at 266-67 (quoting *Miller*, 515 U.S. at 916). "[T]he 'predominance' question concerns which voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, 'traditional' factors when doing so." *Id.* at 273. As *Allen* stresses, this is a highly-fact specific, contextual inquiry that depends on the totality of the circumstances surrounding the district's creation, the very opposite of Appellants' insistence that race would predominate in every case where a legislature acted to prevent retrogression.

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

In certain cases, "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller*, 515 U.S. at 916; *see also Allen*, 143 S. Ct. at 1510-11 (plurality opinion). Appellants, however, do not even attempt to make this distinction. Instead, they equate any attempt to draw a district that preserves Black Floridians' ability to elect a representative of their choice in North Florida with racial predominance, no matter how the district was created. Legis. Br. 47; Sec'y Br. 30-31, 47-51. This position is irreconcilable with the Fourteenth Amendment, as construed by the Supreme Court. That position might be supported by the *Allen* dissent, but it was certainly not the view of the Court.

First, Appellants assert that the FDA's "tier-based structure compels" racial predominance. Sec'y Br. 28; *see also* Legis. Br. 51. Again, Appellants assume that compliance with the non-diminishment provision necessarily requires racial predominance. But subsection 20(b) does not require that race predominate above all other factors in the drawing of district lines. Subsection 20(b)

provides that districts shall (1) "be as nearly equal in population as is practicable," (2) be "compact," and (3) "utilize existing political and geographical boundaries" unless those standards "conflict[] with" the requirements in subsection (a), including the non-diminishment provision. Fla. Const. art. III, § 20(b). Taking account of non-diminishment, alongside these districting principles, does not make race predominate, just as the requirement to heed the non-dilution command did not make race predominate in *Allen*. The Legislature thus must hew to traditional redistricting principles at the same time that it considers the consequences of its line-drawing choices on voters of color, but there is nothing unconstitutional about that, and the FDA requires nothing more.

Second, Appellants argue that previous Florida Supreme Court decisions mandating that CD-5 be drawn in an East-West configuration make clear that race predominated here. Sec'y Br. 30-31; *see* Legis. Br. 52 (arguing that there was "one—and *only* one—reason for the East-West district's reinstatement: race. Race is all that the East-West district has ever been about"). But this argument misunderstands the Florida Supreme Court's reasoning, and it does not come close to establishing racial predominance.

In 2015, the Florida Supreme Court was considering how to remedy the unconstitutional partisan intent motivating the then–existing CD-5's district lines. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402 (Fla. 2015) ("*LMV I*"). The Legislature pressed for the Court to retain the then North-South configuration of the district, in part because it claimed it was "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* The Court disagreed and adopted the East-West configuration of CD-5 not only because it would preserve the ability of Black Floridians to elect a representative of their choice, but also because, compared to the North-South version, it was "less 'unusual' and 'bizarre,'" *id.* at 406 (quoting *Apportionment I*, 83 So. 3d at 634), had more favorable "numerical compactness scores," *id.*, and because it contained "fewer incorporated city and county splits," *id.* In recognizing that "neither the North-South nor the East-West version of the district is a 'model of compactness,'" the Court observed that this was attributable not only to the FDA, but also to geography. *Id.*; *see also Apportionment I*, 83 So. 3d at 635 ("The Florida Constitution does not mandate . . . that districts within a redistricting plan achieve the highest mathematical

compactness scores.”). Nothing in this thorough analysis, in which a district’s impact on minority voters was properly considered alongside traditional redistricting criteria, constitutes racial predominance.

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

CONCLUSION

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

Respectfully submitted,

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I HEREBY CERTIFY, under Florida Rule of Appellate Procedure 9.045(e), that this Brief complies with the applicable font and word-count requirements. It was prepared in Bookman Old Style 14-point font, and it contains 4,980 words.

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