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

SECRETARY BYRD'S REPLY BRIEF

ASHLEY MOODY
Attorney General

MOHAMMAD O. JAZIL (FBN72556)
GARY V. PERKO (FBN855898)
ED WENGER (FBN85568)
MICHAEL BEATO (FBN1017715)
Holtzman Vogel Baran Torchinsky & Josefiak
119 S. Monroe St. Ste. 500
Tallahassee, FL 32301
mjazil@holtzmanvogel.com

(Additional counsel on next page)

HENRY C. WHITAKER (FBN1031175)
Solicitor General
DANIEL WILLIAM BELL (FBN1008587)
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitors General
DAVID M. COSTELLO (FBN1004952)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
henry.whitaker@myfloridalegal.com

Counsel for Secretary Byrd

BRADLEY R. MCVAY (FBN79034)
JOSEPH S. VAN DE BOGART (FBN84764)
ASHLEY DAVIS (FBN48032)
Florida Department of State
500 S. Bronough St.
Tallahassee, FL 32399
brad.mcvay@dos.myflorida.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

INTRODUCTION

Plaintiffs seek to invalidate Florida's race-neutral map and replace it with one that contains a racial gerrymander in North Florida—a sprawling congressional district that would group together, with laser-like precision, far-flung concentrations of black voters in Leon, Gadsden, and Duval counties. That is the only sort of district that anyone, at any point in this litigation or in the redistricting process, has ever identified that would comply with the rigid, race-based redistricting standards Plaintiffs insist the Florida Constitution embodies. No matter how you tweak it around the edges, any similar configuration would pack "in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries," which "bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 647 (1993).

Plaintiffs ask the Court to ignore that reality by floating an armada of procedural technicalities: burden of proof, abandonment, res judicata, public-official standing, even lack of injury-in-fact. But Plaintiffs have the burden to prove their claims. And the Secretary

may defend Florida's redistricting map from Plaintiffs' bid to taint it with a racial gerrymander.

The Court should reverse.

ARGUMENT

I. Plaintiffs' non-diminishment theory flouts the Equal Protection Clause.

Plaintiffs claim that the Enacted Plan unconstitutionally diminishes black voting strength in North Florida by eliminating any district like Benchmark CD-5. AB21. The parties stipulated below that this claim turns in part on "[w]hether the non-diminishment provision's application to North Florida violates the Equal Protection Clause." R.8027. That issue raises two questions: (1) whether Benchmark CD-5 is an unconstitutional racial gerrymander, IB25–46, and (2) whether any similar east-west configuration drawn during this redistricting cycle would also be an unconstitutional racial gerrymander, IB46–64. If the answer to either question is yes, the Equal Protection Clause forecloses Plaintiffs' claim. IB2–3.

As "the challengers," Plaintiffs bear the burden to assure the Court that the answer to both questions is no. IB52 (quoting *In re Senate Joint Resol. of Legis. Apportionment 1176 (Apportionment I)*, 83

So. 3d 597, 610 (Fla. 2012)). But no matter where the burden lies, Benchmark CD-5 violated the Equal Protection Clause, and any attempt to perpetuate a similar configuration today would too.[1]

A. Benchmark CD-5 was an unconstitutional racial gerrymander, and any similar configuration drawn during this cycle would be too.

The "Equal Protection Clause forbids racial gerrymandering." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (quotations omitted). A racial gerrymander results when race is the "predominant factor" for a district's shape. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Such districts must satisfy strict scrutiny. *Abbott*, 138 S. Ct. at 2314–15.

The east-west configuration of CD-5, reflected in both Benchmark CD-5 and its modern variants, is a textbook unconstitutional racial gerrymander: Race drives its tortured form, and the configuration is not narrowly tailored to a compelling interest.

---

[1] Plaintiffs assert that the trial court "limited its analysis to the facts and exhibits stipulated by the parties" and "took judicial notice of only four additional pieces of evidence." AB12 & n.1. But the parties stipulated that a host of additional, non-controversial, and publicly available evidence was judicially noticeable. R.8034. The court noted several times that it was "tak[ing] judicial notice" of evidence pursuant to the parties' stipulation. *E.g.*, R.12407.

1. Race predominated in drawing Benchmark CD-5 and would predominate in drawing any similar configuration during this cycle.

Race is the predominant factor in districting when "[r]ace was the criterion" that "could not be compromised." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017) (citation omitted). So too when the State "subordinate[s] traditional race-neutral districting principles" to "racial considerations." *Id.* at 187 (citation omitted).

The non-diminishment provision does that on its face. It requires allocating voters to achieve a "racial target," *Cooper v. Harris*, 581 U.S. 285, 299 (2017)—preserving the ability of minorities to elect the candidates of their choice, *see Apportionment I*, 83 So. 3d at 624–27, 640. And its tier-based structure compels the State to achieve that racial target by "subordinat[ing] traditional race-neutral districting principles" (like compactness) "to racial considerations." *Bethune-Hill*, 580 U.S. at 187 (citation omitted); IB28–30. Though it sets no numerical racial quota, AB56–57, it nonetheless sets a rigid racial target in requiring the State to cram just enough minority voters in a district to preserve their voting strength, *see Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276–77 (2015).

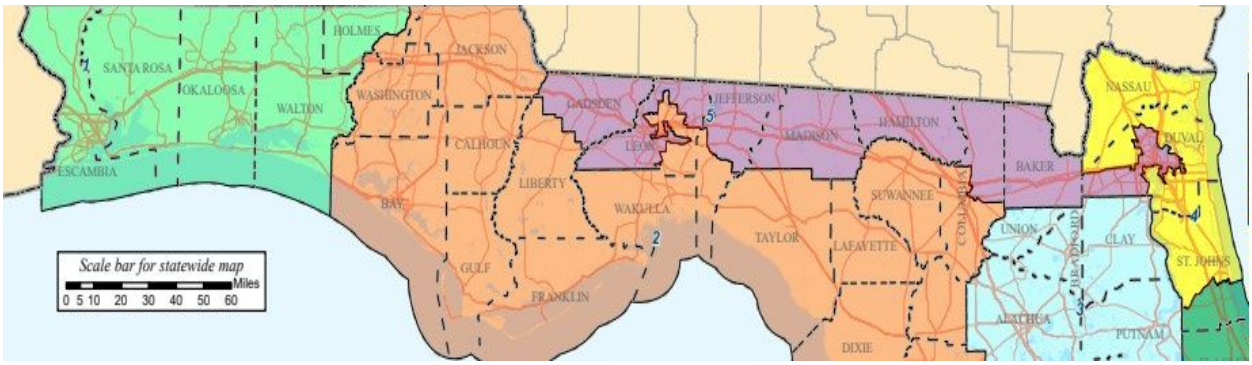
But this Court need not issue a broad ruling about the non-diminishment provision's structural problems. Instead, it need only hold that applying it to North Florida compels the drawing of a racial gerrymander: the east-west configuration reflected in Benchmark CD-5 and successors like Plan 8015's CD-5.

i. Both "circumstantial evidence of a district's shape and demographics" and "direct evidence" of racial intent can establish racial predominance. *Miller*, 515 U.S. at 916. Here, both forms of evidence show that race is the "overriding reason" for drawing the east-west configuration. *Bethune-Hill*, 580 U.S. at 190.

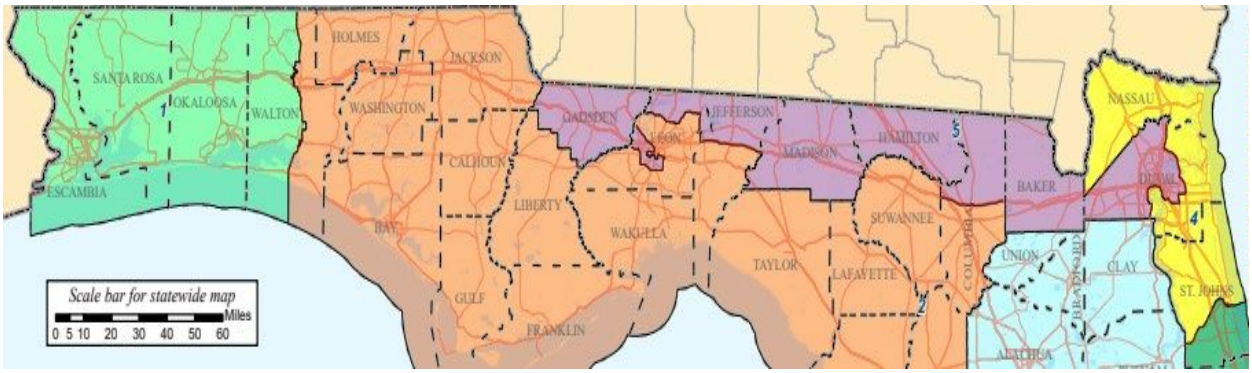
It is not "difficult at all" to show that race predominated when a district "concentrate[s] a dispersed minority population" by "disregarding traditional districting principles." *Shaw I*, 509 U.S. at 646–47. The east-west configuration is a classic example.

(Graphics on next page.)

Benchmark CD-5



Plan 8015's CD-5



Jt.App.4, 28.

Benchmark CD-5 and Plan 8015's CD-5 stretch 200 miles long, taper to just a few miles wide, extend across eight counties, and splinter four of them. Jt.App.4–5, 28–29. The configuration boasts rock-bottom compactness scores—among the lowest of any district in the country. Jt.App.5, 29; R.8657. The demographics of North Florida require it to curl like a hook to grab pockets of black voters in Leon and Gadsden counties, and then to jut hundreds of miles eastward to "unite[]" them with distant black voters in Duval County.

R.344, 351. Racial predominance has been found on far less. *See GRACE, Inc. v. City of Miami*, No. 1:22-cv-24066, 2023 WL 3594310, at *17, 50–57 (S.D. Fla. May 23, 2023).

The non-diminishment provision explains that mangled shape. It commands the State to sacrifice traditional redistricting principles so that black-preferred candidates win as often as they did in the benchmark—i.e., in every election. *Compare* Jt.App.9 (Benchmark CD-5: 14 out of 14 elections), *with* Jt.App.33 (Plan 8015 CD-5: 14 out of 14 elections). Race is thus the "overriding reason" for the east-west configuration's unabashed effort to group together remote concentrations of black voters. *Bethune-Hill*, 580 U.S. at 190.

Direct evidence confirms as much. The Florida Supreme Court adopted the east-west configuration because it was the "only alternative option" that would comply with non-diminishment. *League of Women Voters of Fla. v. Detzner (Apportionment VII)*, 172 So. 3d 363, 403, 406 (Fla. 2015). Legislators felt compelled to perpetuate the district because it would "continu[e] to protect the minority group's ability to elect a candidate of their choice." R.10960. Robert Popper—co-creator of the Polsby-Popper compactness test—testified that the district's abysmal compactness scores show it was drawn "to connect

particular communities" and "create a particular result." R.8659. And J. Alex Kelly—former staff director of the House Redistricting Committee—was unequivocal: The east-west configuration "assigns voters primarily on the basis of race." R.11372; *see also* R.11230.

The racial motive driving that gerrymander is nothing like the race-consciousness approved in *Allen v. Milligan*, 599 U.S. 1 (2023). *See* AB51, 58. That case rejected the argument that applying the threshold preconditions for a vote-dilution claim under Section 2 of the VRA impermissibly employs race, because those preconditions "never require[] adoption of districts that violate traditional redistricting principles." *Allen*, 599 U.S at 30 (cleaned up). Plaintiffs' non-diminishment claim requires just that.

ii. Plaintiffs spill much ink arguing that the Secretary is barred from defending the Enacted Plan from Plaintiffs' bid to inject it with an unconstitutional racial gerrymander. AB31–37. They first contend that the Secretary did not preserve the argument that Benchmark CD-5 is not a valid benchmark. AB31–35. But the Secretary raised that argument in opposing Plaintiffs' summary-judgment motion: "[B]enchmark CD-5 can't serve as a valid benchmark" because it "violates the Equal Protection Clause." R.7090–92.

Plaintiffs zero in on the parties' stipulation of what issues remained for resolution. AB32. But the Secretary's challenge to Benchmark CD-5 falls square within Issue 2: "Whether the non-diminishment provision's application to North Florida violates the Equal Protection Clause." R.8027. Perpetuating an unconstitutional benchmark district in the name of non-diminishment would itself be unconstitutional. A State cannot "immunize from challenge a new racially discriminatory redistricting plan simply [because] it resemble[s] an old racially discriminatory plan." *Allen*, 599 U.S. at 22. And just five days after the parties executed their stipulation, the Secretary advanced that very argument in a trial brief. R.11141, 11151.

Plaintiffs also suggest that the Secretary's counsel at the final hearing "affirmatively disclaim[ed] any challenge to the Benchmark Plan." AB33. But counsel was merely explaining that the Secretary was not asking the court to invalidate the 2016 Plan because that plan was no longer effective. R.12127–28. In that same colloquy, counsel also explained that the preliminary question was whether the 2016 Plan "is a benchmark worth protecting." R.12128. And counsel repeated the point later: To assess Plaintiffs' claim, "[w]e start" with "the fundamental question" of "whether or not the Florida legislature

had an obligation to use CD-5 in the benchmark as something worthy of protection." R.12135–36.

Nor is the Secretary's argument foreclosed by res judicata (also known as claim preclusion). AB35–36. Claim preclusion applies only when the "cause[s] of action" in the first and second suits are "identi[cal]." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004). That means there must be "an identity of the facts essential to the maintenance of [each] action." *Larimore v. State*, 76 So. 3d 1121, 1123 (Fla. 1st DCA 2012); *see also Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594–95 (2020).

Here, the facts underlying Plaintiffs' claim differ from those underlying the claim in *Apportionment VII* that led to the adoption of Benchmark CD-5. In *Apportionment VII*, plaintiffs challenged the 2015 north-south iteration of CD-5 as violating Tier 2's compactness and boundary requirements. *See Apportionment VII*, 172 So. 3d at 402. By contrast, Plaintiffs challenge the 2022 Enacted Plan as violating Tier 1's non-diminishment standard. The claims turn on

"different conduct, involving different [maps], occurring at different times." *Lucky Brand*, 140 S. Ct. at 1595. They are not identical.[2]

Next, Plaintiffs contend that Benchmark CD-5 is a proper benchmark even if it was an unconstitutional racial gerrymander. AB37. But Plaintiffs agree that a benchmark is valid only if it was "legally enforceable." AB38; *DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice*, 76 Fed. Reg. 7470-01, 7470 (Feb. 9, 2011). And Plaintiffs do not dispute that an unconstitutional racial gerrymander is not legally enforceable. *See Abrams v. Johnson*, 521 U.S. 74, 97 (1997). Yet Plaintiffs contend that *this Court* may not make that determination here. AB38–39.

This Court may indeed "find[]" Benchmark CD-5 unconstitutional. *DOJ Guidance*, 76 Fed. Reg. at 7470. Many contexts require courts to make similar determinations. *E.g.*, *United States v. Mendoza-Lopez*, 481 U.S. 828, 834 (1987) (contesting validity of prior deportation order in subsequent criminal proceeding); *Powe v. City of Chicago*, 664 F.2d 639, 648 (7th Cir. 1981) (same for prior warrant

---

[2] Plaintiffs cite cases discussing the administrative-finality doctrine. AB36–37. That doctrine applies only in administrative proceedings. *See Kirschner v. Baldwin*, 988 So. 2d 1138, 1142 (Fla. 5th DCA 2008).

in a wrongful-detention case). Otherwise, the non-diminishment provision would raise serious constitutional questions by "freez[ing] in place the very aspects of a plan" that made it "unconstitutional." *Abrams*, 521 U.S. at 97.

Plaintiffs chide the Secretary for not "identify[ing] which district [he] now believe[s] *should* be the proper benchmark." AB39. But it is Plaintiffs' burden to show diminishment. And the functional-analysis evidence to which the parties stipulated exclusively relates to Benchmark CD-5. R.8027, 8034–37; *see also* Jt.App.4–11. Without that benchmark, Plaintiffs have not met their burden.[3]

Plaintiffs also claim that race could not have predominated in drawing Benchmark CD-5 since "the district's primary purpose" was to remedy a partisan gerrymander. AB64. That conflates the *event* that prompted Benchmark CD-5's creation—a finding of partisan intent—with the *reason* the Florida Supreme Court adopted Benchmark CD-5's configuration: It was the "only alternative option" that

---

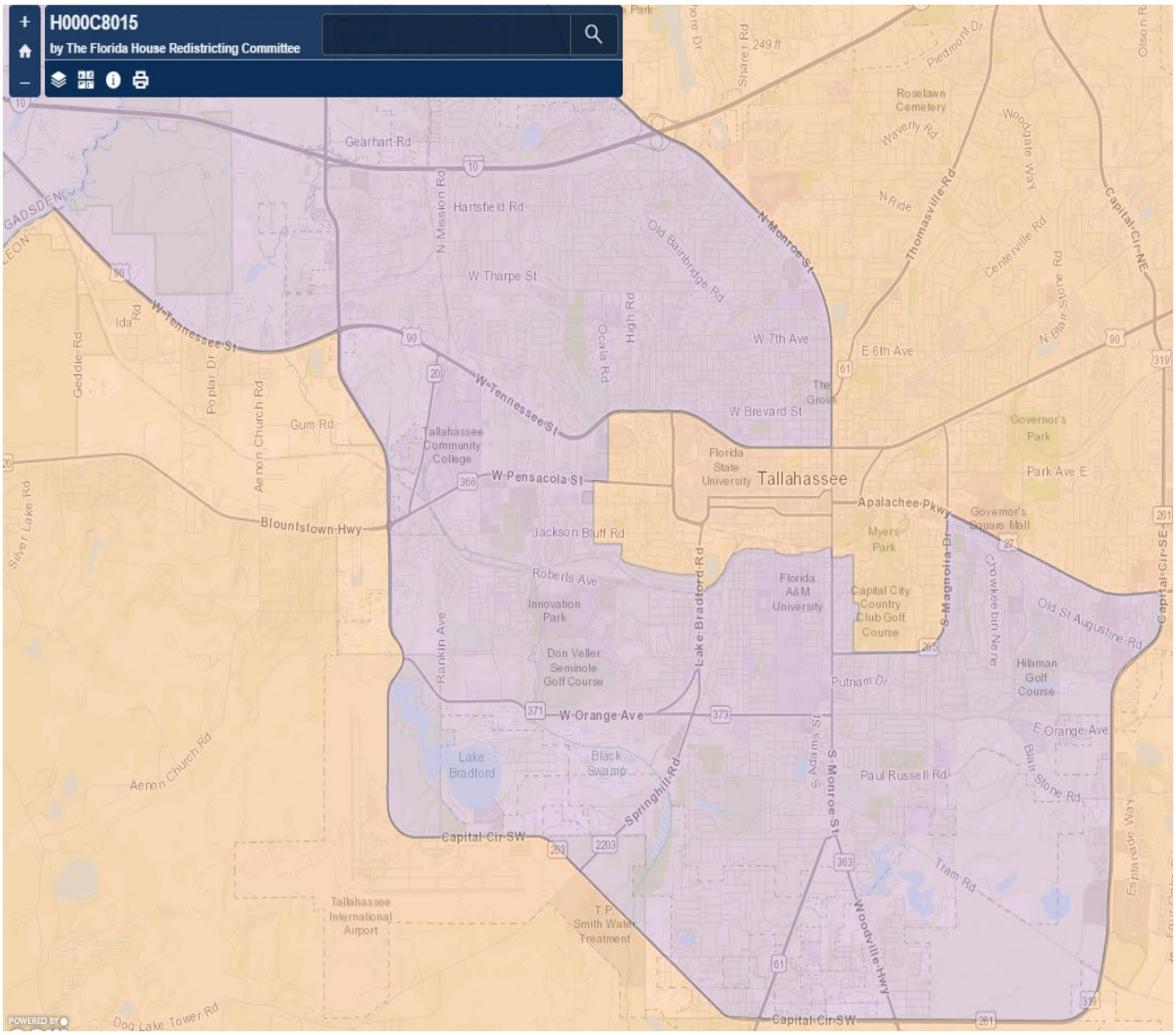
[3] Plaintiffs suggest in passing, apparently based on data from outside the record, that even if the 2016 Plan were invalid, the Enacted Plan still diminishes when compared to Florida's 2002 Plan. AB39. But they cite no functional-analysis evidence in *this* record to support that assertion.

complied with non-diminishment. *Apportionment VII*, 172 So. 3d at 403.

Finally, Plaintiffs assert that the map is immune from challenge because it was drawn by the Florida Supreme Court. AB65. But court-ordered maps can violate the Equal Protection Clause, *see Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022), and the Florida Supreme Court never considered that issue, *see Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020); IB43–44.

iii. Plaintiffs cannot refute that *any* sprawling, misshapen east-west district in North Florida would be a racial gerrymander if drawn today. Plaintiffs tout the updated version of Benchmark CD-5—specifically, Plan 8015's CD-5—as following existing political and geographic boundaries, like roads. AB61–63. But that district still spans eight counties (splitting four of them); still nips and tucks to capture distant black populations in Leon, Gadsden, and Duval; and has even *worse* compactness scores than Benchmark CD-5. Jt.App.4–5, 28–29.

Consider, for instance, how Plan 8105 would carve up the city of Tallahassee. AB61.



The Plan's hook-like shape joins predominately black neighborhoods in the northwest, west, and south areas of Tallahassee with black voters concentrated in Gadsden County. IB14 (illustrating North Florida's black population). To do so, its eastern line swings south from Gadsden County down North Monroe Street; turns west on West Tennessee; and then, once west of the city, turns south, and then east, all to skirt the predominately white Florida State University

campus and downtown areas surrounding the Florida Capitol. Once east of downtown, the line swings south again, then northeast, and then back northwest to Gadsden County.

Those acrobatics are necessary to capture just enough black voters to preserve the "black-performing district" that Benchmark CD-5 represented. The superficial changes to which Plaintiffs point cannot remove the racial motivation that spawned its original configuration. IB50–51 (collecting cases).

Plaintiffs next argue that their preferred east-west district is not as horrible as some other racial gerrymanders, AB66–71—a ringing endorsement indeed. Those cases do not set a floor on what is a racial gerrymander. And though Plaintiffs trumpet that "a three-judge court found that race *did not* predominate" in CD-3 in Florida's 2002 plan, AB69–70, they incredibly omit that the presence of racial predomination was not "challenged" by "any party," and its absence was "accepted by [the court] *on that basis*." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1300–01 n.20 (S.D. Fla. 2002) (emphasis added).

iv. Plaintiffs attempt to foist the burden of proving their case on the Secretary. AB51. But as the Legislature has shown (Leg. IB34–40), States routinely defend enacted maps by arguing that their

configurations were necessary to respect other applicable legal requirements (here, the Equal Protection Clause). When the State does so, the *challengers* must offer an alternative district that complies with both their legal demands and the redistricting principles that the State's map sought to respect. The State need not prove the negative that "*any* district," AB59—of which there may be trillions of permutations, *see Allen*, 599 U.S. at 36—would both satisfy Plaintiffs' legal demands and comply with other legal principles.

Abrams illustrates the point. There, plaintiffs asserted that a court-drawn redistricting map contravened both the VRA and the Georgia Legislature's preference to have at least two majority-black districts. 521 U.S. at 78–79. The Supreme Court rejected the challenge because the plaintiffs had "not demonstrated that it was possible to create a second majority-black district within constitutional bounds." *Id.* at 96. The plaintiffs had tried to meet that burden by pointing to alternative maps that contained two majority-black districts. *Id.* at 86. But the Court rejected those maps because they were racial gerrymanders. *Id.* at 86–90.

So too here. Plaintiffs have the burden. And the only alternative they have advanced—Plan 8015—contains a racial gerrymander.

v. That east-west configuration is the only alternative that would comply with non-diminishment given the demographics of North Florida. After all, 89% of the district's population, R.8034, and most of North Florida's black-voting-age population is concentrated in Gadsden, Leon, and Duval counties, IB13–14. It is therefore impossible, as the Enacted Plan's author J. Alex Kelly put it, to "check" the "box[]" of non-diminishment without drawing the east-west configuration. *See* R.11394; *see also* R.4700–01, 11188–89. Efforts to eliminate that configuration would "scream[] of diminishment." *See* R.11450. Plaintiffs agreed in the temporary-injunction proceedings below: The east-west "configuration of CD-5 is *necessary* to ensure minority voters' continued ability to elect candidates of their choice." R.1095 (emphasis added). So did the Florida Supreme Court. *See League of Women Voters of Fla. v. Detzner (Apportionment VIII)*, 179 So. 3d 258, 271 (Fla. 2015); *Apportionment VII*, 172 So. 3d at 403.

Perhaps most telling, Plaintiffs still have not identified a North Florida district that would both satisfy non-diminishment and not be a monstruous racial gerrymander. If that unicorn existed, Plaintiffs had every incentive to discover it. The closest they come is noting that some legislators thought Plan 8019's CD-5 would satisfy non-

diminishment. AB71–72. But Plaintiffs conspicuously do not endorse that position, because Plan 8019's CD-5 does *not* comply with non-diminishment. IB56 n.13. Worse, that district's "donut-hole" shape and the debates preceding its creation show that it *too* was a racial gerrymander. *E.g.*, Jt.App.20; R.3890–91, 10960, 10981, 10996–1005.

All told, no one—not Plaintiffs, not the Legislature, not the Florida Supreme Court, nor any litigants in the last redistricting cycle—has drawn a valid North Florida district that complies with non-diminishment other than the east-west configuration, despite over a decade of litigation in which North Florida has been the "focal point." *Apportionment VII*, 172 So. 3d at 402. Because that configuration is a racial gerrymander, it must satisfy strict scrutiny.

2. Neither Benchmark CD-5 nor any similar configuration withstands strict scrutiny.

Plaintiffs assert just one compelling interest to meet strict scrutiny: compliance with the non-diminishment provision itself.[4] AB74–83. But the U.S. Supreme Court has never said compliance with even

[4] Plaintiffs do not address the Secretary's point that they must satisfy strict scrutiny because they would have the Florida courts carry out unconstitutional state action. IB58–59.

the federal VRA justifies racial gerrymanders, let alone compliance with a state voting law. IB35–36. The Court has always assumed, but never held, that compliance with the VRA is a "compelling state interest." *Abbott*, 138 S. Ct. at 2315. But that assumption rests on the idea that *Congress* may enforce the Fourteenth and Fifteenth Amendments with "appropriate legislation." U.S. Const. amend. XIV, § 5; *id.*, amend. XV, § 2; *see Bush v. Vera*, 517 U.S. 952, 990–92 (1996) (O'Connor, J., concurring). A State has no similar abrogation powers.

Plaintiffs observe that States may still "impose their own solutions to race-based problems" using their police powers. AB80. But they cite no case holding that the exercise of ordinary police powers can constitute a compelling interest in the federal equal-protection context. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023) (identifying "only two compelling interests that permit resort to race-based government action": "remediating specific, identified instances of past discrimination," and "avoiding imminent and serious risks to human safety in prisons"). Plaintiffs' citations do not adopt that circular logic, which would sanction all manners of state-based discrimination. IB37–38.

Those cases hold only that the state voting protections there did not invariably compel a racial gerrymander. AB81–82.

Plaintiffs respond that complying with non-diminishment is a compelling interest because that provision, like the VRA, was enacted to remedy past racial discrimination. AB77–79, 81–83. Yet they ignore the Secretary's point that the non-diminishment provision is both broader and more permanent than the VRA. IB38–42. And they fail to show that the provision is similarly necessary to combat the *present* effects of *specific* racial discrimination in North Florida. IB39–40 (collecting cases). The most recent "evidence" of discrimination to which Plaintiffs can point is an unresolved *allegation* of discrimination made in 2002. *See* A78–79 (citing *In re Constitutionality of House Joint Resol. 1987*, 817 So. 2d 819, 828 (Fla. 2002)). That "sheer speculation" is woefully insufficient to justify the racial gerrymander Plaintiffs demand. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

B. The Secretary has standing.

Plaintiffs do not engage with the Secretary's substantive standing arguments. They have no response to the Secretary's point that he has injury because he faces the threat of an adverse judgment.

IB60–62. And they still cite no case in which a public official has been barred from raising a constitutional issue to defend a statute that he is "charged with administering" from attack under a constitutional provision that he does not enforce. *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 497 (Fla. 1st DCA 2019) (Bilbrey, J., concurring); IB62–64.

Nor could they. Last cycle, the Florida Supreme Court repeatedly permitted the State to defend its enacted map against claims that it violated Tier-2 constitutional requirements by asserting that the map was necessary to avoid violating Tier-1's non-diminishment requirement and "federal law[s]" like "Section 5 of the VRA." *Apportionment I*, 83 So. 3d at 648, 650, 652, 653.

This case is no different. The Secretary has defended the Enacted Plan from constitutional attack under Tier 1's non-diminishment provision because any alternative would violate a different, federal constitutional provision: the Tier-0 requirement of the federal Equal Protection Clause.

II. Plaintiffs cannot establish a non-diminishment violation in any event.

This Court may avoid a constitutional ruling here: Plaintiffs cannot establish a non-diminishment claim under the standard's ordinary application.

To begin with, Plaintiffs have acknowledged—for the first time on appeal—that the non-diminishment provision is not "trigger[ed]" when it would compel the drawing of a district that is "simply not compact." AB58. That is also true of the model for the non-diminishment provision, Section 5 of the VRA. *See DOJ Guidance*, 76 Fed. Reg. at 7472. Construing Florida's parallel provision similarly would both avoid tension with the federal Equal Protection Clause, *see State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995), and respect Florida's coextensive Equal Protection Clause, *see Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d 1129, 1134 (Fla. 2003); *Fla. Senate v. Forman*, 826 So. 2d 279, 281 (Fla. 2002).

Under that construction, Plaintiffs cannot prove diminishment. An east-west configuration like Benchmark CD-5 is "simply not compact," so the non-diminishment provision is not "trigger[ed]." AB58; *supra* 5–8.

In the same vein, Plaintiffs cannot avoid their burden to show that the black population in Benchmark CD-5 could constitute a majority in a reasonably configured district. IB64–69 (discussing *Thornburg v. Gingles*, 478 U.S. 30 (1986)). That issue is not foreclosed by *Apportionment VII*; the Court was never presented with it. *See Jackson*, 288 So. 3d at 1183. Nor does it matter that *Gingles* has different elements than the test for determining whether a district is an ability-to-elect district, AB22–25—the tests work in tandem. *Gingles* establishes, on the front end, when a minority population should be protected by the non-diminishment standard. The ability-to-elect test then establishes, in subsequent redistricting cycles, whether the district should remain protected.

CONCLUSION

The Court should reverse.

Dated: October 27, 2023

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Henry C. Whitaker
HENRY C. WHITAKER (FBN1031175)
Solicitor General
DANIEL WILLIAM BELL (FBN1008587)
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitors General
DAVID M. COSTELLO (FBN1004952)
Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for Secretary Byrd

MOHAMMAD O. JAZIL (FBN72556)
GARY V. PERKO (FBN855898)
ED WENGER (FBN85568)
MICHAEL BEATO (FBN1017715)

Holtzman Vogel Baran Torchinsky & Josefiak
119 S. Monroe St. Ste. 500
Tallahassee, FL 32301
mjazil@holtzmanvogel.com

BRADLEY R. MCVAY (FBN79034)
JOSEPH S. VAN DE BOGART (FBN84764)
ASHLEY DAVIS (FBN48032)

Florida Department of State
500 S. Bronough St.
Tallahassee, FL 32399
brad.mcvay@dos.myflorida.com

CERTIFICATE OF SERVICE

I certify that on October 27, 2023, a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal, or by email, to the following:

Frederick S. Wermuth
Thomas A. Zehnder
Quinn B. Ritter
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802

Abha Khanna
Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 Seventh Ave., Ste. 2100
Seattle, WA 98101

Christina A. Ford
Joseph N. Posimato
Julie Zuckerbrod
Jyoti Jasrasaria
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW
Ste. 400
Washington, DC 20002

Counsel for Plaintiffs

Mohammad Jazil
Michael Beato
Gary V. Perko
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
119 S Monroe St., Ste. 500
Tallahassee, FL 32301

Bradley R. McVay
Joseph S. Van de Bogart
Ashley Davis
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S Bronough St.
Tallahassee, FL 32399

Taylor A.R. Meehan
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

Counsel for the Florida Secretary of State

Andy Bardos
GRAYROBINSON, P.A.
301 S Bronough St., Ste. 600
Tallahassee, FL 32302

Counsel for the Florida House of Representatives

Daniel E. Nordby
George E. Meros, Jr.
Tara R. Price
SHUTTS & BOWEN LLP
215 S Monroe St., Ste. 804
Tallahassee, FL 32301

Carlos Rey
Kyle Gray
FLORIDA SENATE
404 S Monroe St.
Tallahassee, FL 32399

Counsel for the Florida Senate

/s/ Henry C. Whitaker
Solicitor General

CERTIFICATE OF COMPLIANCE

I certify that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman Old Style font and contains 3,989 words.

/s/ Henry C. Whitaker
Solicitor General