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IN THE SUPREME COURT OF FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA, EQUAL GROUND, FLORIDA RISING TOGETHER, et al., Petitioners, v. CORD BYRD, in his official capacity as Florida Secretary of State, et al., Respondents.	Case No.: SC23-1671 L.T. No.: 1D23-2252 2022-ca-000666

PETITIONERS' INITIAL BRIEF

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INTRODUCTION

The Florida Constitution expressly prohibits redistricting plans that diminish minority voters' ability to elect representatives of their choice. *See* Article III, § 20(a). This Court has repeatedly evaluated claims under this provision using a basic comparative analysis: A diminishment violation occurs when a new redistricting plan eliminates a minority group's voting power as compared to the prior (benchmark) plan. But when tasked with applying this well-established test to the undisputed and stipulated facts of this case, the First DCA disregarded this Court's precedent completely, inventing a new diminishment standard out of whole cloth. This was an error, and it must be reversed.

The First DCA's novel interpretation of the non-diminishment provision defies both precedent and reason. This Court has held that Florida's non-diminishment provision, modeled after Section 5 of the Voting Rights Act which preserves minority communities' *existing* political power, operates independently from the state's non-dilution provision, modeled after Section 2 of the Voting Rights Act which realizes minority communities' *potential* political power. The First DCA's new test for diminishment improperly conflates the two,

grafting vote dilution principles onto the diminishment analysis and resulting in a warped legal rule. This Court should reverse the First DCA both to preserve its own authority to say what the law is and to correct an egregious misreading of Florida's Constitution.

The facts in this case are undisputed. Black voters in North Florida had the ability to elect their candidates of choice under the prior redistricting plan, and the Enacted Plan eliminates that ability. Under this Court's unambiguous legal standard and the stipulated facts, Petitioners proved a textbook violation of the non-diminishment provision. This Court should reverse the opinion below and reinstate the trial court's well-reasoned opinion.

STATEMENT OF THE CASE AND FACTS

I. FACTUAL BACKGROUND

A. This Court resolved the meaning of the Fair Districts Amendments after their adoption.

In 2010, Floridians enshrined the Fair Districts Amendments into the Florida Constitution, establishing new standards for redistricting. The Amendments, incorporated into Article III, Sections 20 and 21 of the Florida Constitution, include "identical standards" for state legislative and congressional redistricting. *In re S. J. Res. of*

Legis. Apportionment 1176, 83 So. 3d 597, 598 n.1 (Fla. 2012) ("*Apportionment I*").

In 2012, this Court "define[d] these new standards for the first time," a duty this Court described as an "extremely weighty responsibility." *Id.* at 599. It did so only after receiving extensive briefing on the meaning of those Amendments and holding oral argument as part of its obligation to "interpret these new constitutional standards." *Id.* at 600, 604; Fla. Const. art. V, § 16 (requiring this Court to affirmatively conduct a "judicial review" of the state's legislative plans).

As part of that judicial review, this Court examined "Florida's minority voting protection provision," which the Florida House and Senate had invoked "as justification for the manner in which they drew specific districts." *Apportionment I,* 83 So. 3d at 621. That constitutional provision states: "[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Fla. Const. art. III, § 20(a), 21(a). In *Apportionment I*, this Court held this provision contains "two requirements," "each of which must be

satisfied": "[P]revention of impermissible vote dilution and prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice." 83 So. 3d at 619 (quotation omitted). As this Court explained, these two provisions were borrowed from two separate provisions of the federal Voting Rights Act (VRA). *See id.* at 619-20 (interpreting the non-dilution provision as "essentially a restatement of Section 2 of the [VRA]" and the non-diminishment provision as a state-level codification of "Section 5 of the VRA"). This was not a controversial holding. As the Court noted, "all parties to this proceeding agree that Florida's constitutional provision now embraces the principles enumerated in Section 2 and 5 of the VRA." *Id.* at 620.

As the Court explained, these "dual constitutional imperatives" serve separate purposes and thus imposed separate requirements. *Id.* at 619. The non-dilution provision addresses claims for a *new* minority opportunity district that could "potentially exist[]." *Id.* at 622. Proving entitlement to that district requires meeting all three "*Gingles*" preconditions, including specifically the first *Gingles* precondition: the existence of a "sufficiently large and geographically compact" minority community that could form a majority of the

voting age population in a new district. *Id.* at 620 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)).

The non-diminishment provision, by contrast, protects *existing* minority opportunity districts. As this Court held, the non-diminishment provision means the "Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625. Diminishment claims require the "the existing plan" to "serve[] as the 'benchmark'" by which minority voting strength is measured as compared to the newly-enacted plan. *Id.* at 624 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997)).

Pursuant to this framework, in *Apportionment I* the Court compared the state's 2012 redistricting plans to the 2002 benchmark plans and concluded the new plans did not result in diminishment or retrogression of minority voting power.[1] *Id.* at 645, 655. The Court made clear, however, that a proper diminishment assessment required mapmakers to perform a "functional analysis" of the

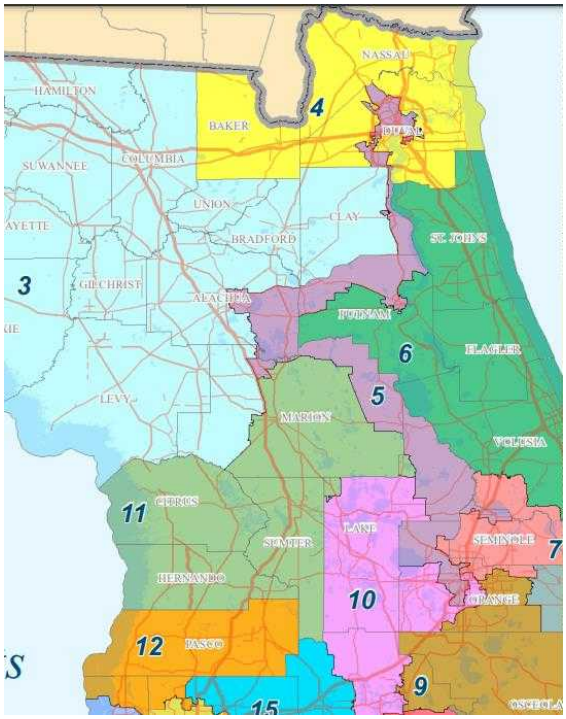
[1] This Court has used the terms "diminishment" and "retrogression" interchangeably. *See Apportionment I*, 83 So. 3d at 625.

minority population's actual voting behavior and political preferences to avoid racial stereotyping and blind adherence to fixed racial percentages, *see id.* at 625-27, which it required before holding certain districts to be constitutionally valid, *see In re S. J. Res. of Legis. Apportionment 2-B*, 89 So. 3d 872, 879 (Fla. 2012) ("*Apportionment II*").

B. This Court carefully considered and approved Benchmark CD-5 in the last redistricting cycle.

Three years after *Apportionment I* and *II*, this Court invalidated the Legislature's 2012-enacted congressional plan as an intentional partisan gerrymander. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371 (Fla. 2015) ("*Apportionment VII*"). One of the invalidated districts was CD-5, shown below. R. 8369.[2]

[2] "R." refers to the trial court record. "A.R." refers to the appellate court record.



After the Legislature attempted to justify this district as necessary to comply with the state's non-diminishment provision, the Court analyzed that provision in *Apportionment VII* to determine whether the district was in fact warranted to avoid diminishment or whether the Legislature had acted with improper partisan intent in drawing the district. 172 So. 3d at 404. In the end, the Court affirmed that a Black-performing district *was* required in light of the state's existing 2002 congressional plan, which afforded Black voters in North Florida the ability to elect their candidate of choice, but held that the Legislature's configuration of CD-5 was not justified because it overpacked Black voters. *Id.* at 404-05.

To remedy the partisan intent in the plan, this Court ordered the new CD-5 (now "Benchmark CD-5") to be drawn in an "East-West" configuration from Tallahassee to Jacksonville across Florida's northern border. *Id.* at 403. During the remedial special session, "[b]oth the Senate and the House . . . adopted the East-West version of District 5" known as Benchmark CD-5 today. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271 (Fla. 2015) ("*Apportionment VIII*"). At the time of its adoption, Benchmark CD-5 had a Black voting age population (BVAP) of 45.12%. *Apportionment VII*, 172 So. 3d at 404. As this Court observed when it ordered this district, Benchmark CD-5 complied with the non-diminishment provision of the Florida Constitution by preserving a historically performing Black district, remedied the partisan violations in the previous plan, and was "more visually and statistically compact" than its predecessor. *Apportionment VIII*, 179 So. 3d at 272; *see also Apportionment VII*, 172 So. 3d at 406 (citing Benchmark CD-5's improved Tier II metrics as compared to "the Legislature's North-South district").

Benchmark CD-5 was in place during the 2016, 2018, and 2020 congressional election cycles. R. 8034. An image of Benchmark CD-

5—"drawn by legislative staff, passed by both the House and Senate," and ordered by this Court, *Apportionment VIII*, 179 So. 3d at 272—is shown below. *See* R. 8041.[3]

C. At the Governor's urging, Florida's new redistricting plan eliminated this historically performing minority district.

At the start of the 2020 redistricting cycle, the Legislature reaffirmed that Benchmark CD-5 still allowed Black voters in North Florida to elect their candidates of choice and proposed new configurations that would retain that ability. R. 8463-8467.[4]

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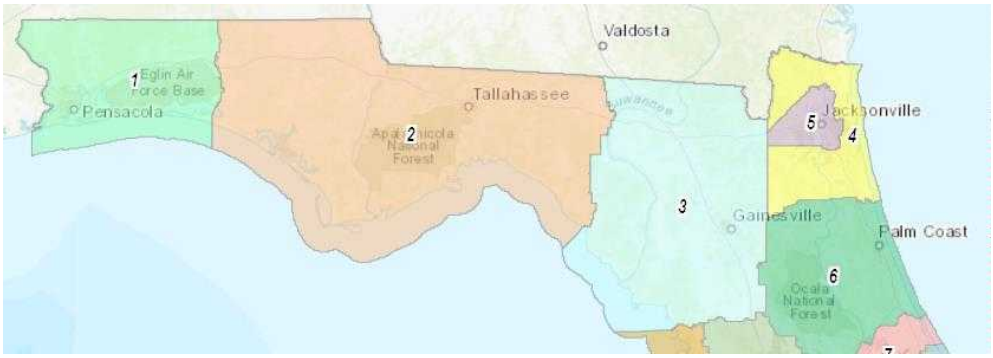
[3] Benchmark CD-5 was not enacted into law by the Legislature itself because the Legislature could not agree how to remedy other invalidated districts. *See Apportionment VIII*, 179 So. 3d at 261. That Benchmark CD-5 became law because of this Court's order, and not an Act of the Legislature, however, is irrelevant to the diminishment analysis.

[4] References to "District 3" in this transcript are references to the Black-protected district in North Florida, which the House re-numbered from CD-5 to CD-3 in certain drafts. *See* R.8467.

Governor DeSantis, however, wanted to eliminate this district and sought this Court's blessing to do so. On February 1, 2022, the Governor submitted a request for an advisory opinion on whether "the Florida Constitution's non-diminishment standard" required a district from Jacksonville to Tallahassee which allowed Black voters to elect the candidates of their choice, "even without a majority." R. 8578-8583. The Governor acknowledged that this Court's precedent "suggest[s] that the answer is 'yes.'" R. 8581. On February 10, 2022, this Court denied the Governor's request, declining to either revisit its precedent or authorize the Governor to eliminate a historically performing district in North Florida. *See Advisory Op. to Governor re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1108 (Fla. 2022).

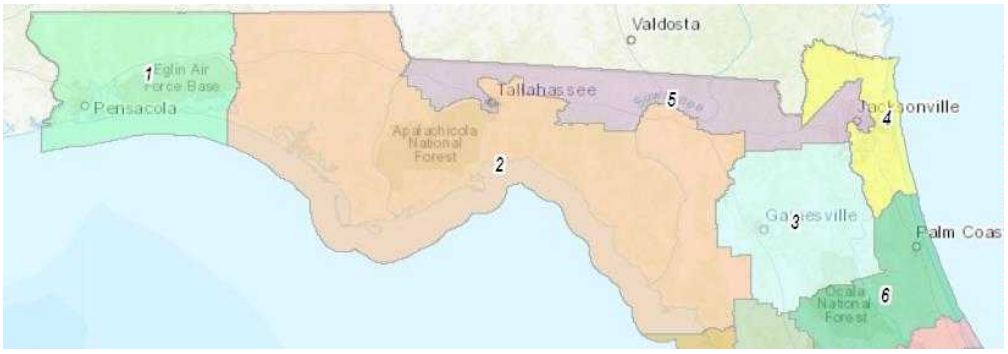
In March 2022, after the Governor threatened to veto any plans retaining a district resembling Benchmark CD-5, the Legislature passed a redistricting plan that contained both a "Primary Map" (Plan 8019) and a "Secondary Map" (Plan 8015) with two different configurations of CD-5, both of which the Legislature maintained would comply with the non-diminishment provision. *See generally* R.

8748-8764. The Primary Map (Plan 8019), shown below, configured CD-5 to include only portions of Duval County. *See* R. 8757.



As the House Redistricting Chair explained, CD-5 in Plan 8019 was "very visually different than the benchmark district" but the Legislature's functional analysis had concluded it was still a "reliable performing district." R. 9056.

The Secondary Map (Plan 8015), also shown below, retained the basic East-West configuration as Benchmark CD-5, while making marked improvements on the district's visual compactness and political subdivision splits as compared to Benchmark CD-5. *See* R. 8749.



After the Governor vetoed both redistricting plans and called a special session, the Legislature adopted the Governor's proposed plan. *See* R. 8050. The Enacted Plan disperses Benchmark CD-5's hundreds of thousands of Black voters between newly-enacted CD-2, CD-3, CD-4, and CD-5. Respondents stipulated that none of these districts are districts in which Black voters can elect their candidates of choice. *See* R. 8036-8037.

II. PROCEDURAL HISTORY

A. Petitioners succeeded on the merits of their diminishment claim in 2022 but could not secure a new district in time for the 2022 elections.

The same day Governor DeSantis signed his map into law, Plaintiffs, now Petitioners, sued Respondents to enjoin the map. *See* R. 2677-2687. Although Petitioners alleged multiple violations of the Florida Constitution, they sought a temporary injunction against the Enacted Plan exclusively on the basis that it resulted in the diminishment of Black voters' ability to elect their candidate of choice based on the elimination of Benchmark CD-5. *See generally* R. 336-361. In May 2022, Judge J. Layne Smith held an evidentiary hearing, heard expert testimony, and concluded Petitioners had "demonstrated the Enacted Plan will result in diminishment" and

ordered a remedial plan for the 2022 elections to restore a Black-performing district in North Florida. *Black Voters Matter Capacity Bldg. Inst.*, No. 2022-ca-000666, 2022 WL 1684950 at *4, *9-10 (Fla. 2d Jud. Cir. Ct. June 17, 2022). The First DCA ultimately vacated that injunction, not on the merits, but because it concluded that Judge Smith erred procedurally in ordering a new redistricting plan in a temporary injunction proceeding. *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070, 1073, 1082-83 (Fla. 1st DCA 2022), *writ denied*, 340 So. 3d 475 (Fla. 2022).

B. Following discovery, the Parties stipulated to facts underlying their diminishment claim.

Over the next year, the Parties exchanged discovery and expert reports, conducted depositions, and filed summary judgment motions. In advance of trial, however, the Parties reached a stipulation to streamline the issues. In exchange for Petitioners' dismissal of their partisan intent and racial intent claims, Respondents stipulated "to the facts relevant to [Petitioners'] diminishment claim," stipulated that Petitioners had standing to challenge diminishment in the Enacted Plan, and withdrew several

affirmative defenses. R. 8026, 8034-8037. In light of the Joint Stipulation, the Parties agreed that trial should be vacated. R. 8058.

Specifically, the Parties stipulated that while Black voters in Benchmark CD-5 "had the ability to elect the candidate of their choice," "[n]one of the Enacted districts in North Florida are districts in which Black voters have the ability to elect their preferred candidates." R. 8036-8037. These facts were compelled by the undisputed demographic and electoral data. *Compare, e.g.*, R. 8035 ("In Florida's eight statewide elections in 2016, 2018, and 2020, the Black preferred candidates won a majority of the vote in Benchmark CD-5 in each election."), *with* R. 8037 ("In the 2016, 2018, and 2020 statewide elections, candidates preferred by Black voters [would have] failed to win a majority of votes in any of the four Enacted CDs that took parts of Benchmark CD-5.").

As the Parties noted, "[u]nder the Enacted Plan in 2022, North Florida did not elect a Black member of Congress for the first time" in over 30 years. R. 8037.

C. The trial court concluded the Enacted Plan violated the Florida Constitution and rejected Respondents' affirmative defenses.

Because the Parties' Stipulation resolved the underlying facts pertaining to the sole outstanding diminishment claim, the trial court heard oral argument on the remaining legal issues in lieu of trial on August 24, 2023. At the hearing, both the Florida House and Senate conceded that the Enacted Plan results in diminishment in violation of the Florida Constitution. A.R. 30-31.

After considering the facts and exhibits stipulated by the Parties, R. 8033-8057, the trial court issued a written order entering judgment for Petitioners on all remaining legal issues. First, applying the non-diminishment standard established in *Apportionment I*, the trial court found that Petitioners had standing to challenge the diminishment in the Enacted Plan and held that "[u]nder the stipulated facts, [Petitioners] have shown that the Enacted Plan results in the diminishment of Black voters' ability to elect their candidate of choice in violation of the Florida Constitution." A.R. 22 n.4, 26. The court further rejected the Secretary's argument that the first *Gingles* precondition applied to the diminishment claims,

explaining that this argument "ha[s] no basis under either federal precedent or Florida Supreme Court precedent." A.R. 31.

Second, the trial court held that Appellants' "racial gerrymandering affirmative defense [] fails at every level, for multiple, independent reasons," including because "there [is] no specific district under which [the trial court] could evaluate whether racial gerrymandering occurred," and because Respondents "lack standing to raise a racial gerrymandering challenge in the first place." A.R. 40. Third, the trial court found that even if Respondents had cleared these hurdles, Respondents did not prove that race would necessarily predominate in the drawing of any district that complies with the Florida Constitution's non-diminishment provision in North Florida. A.R. 48-55. Finally, the trial court concluded:

> Even *if* [Respondents] had standing to bring a racial gerrymandering challenge, and *even if* they could bring that challenge to a district that does not exist, *and even if* the lines of that district were predominantly drawn on the basis of race, [Respondents'] claim would still fail because the drawing of such a district would be narrowly tailored to address a compelling state interest.

A.R. 55-56.

The trial court declared the Enacted Plan unconstitutional; enjoined the Secretary from conducting any elections under the

Enacted Plan; and afforded the Legislature the opportunity to enact a remedial plan in compliance with the Florida Constitution. A.R. 66-67.

D. The First DCA reversed after concluding it was not bound by the Parties' Stipulation or any of this Court's precedent on the non-diminishment provision.

After Respondents noticed an appeal, A.R. 5, the Parties jointly moved for pass-through certification to this Court, A.R. 82, consistent with the Parties' desire to resolve this litigation in time for the 2024 elections, R. 8028. The First DCA, however, rejected the motion and heard Respondents' appeal en banc. A.R. 94.

The First DCA reversed the trial court's order and held that Petitioners failed to prove their diminishment claim because they did not prove a proper benchmark under which they were entitled to protection from diminishment. In reaching this conclusion, the First DCA did not consider itself bound by either the Parties' Joint Stipulation, *see* A.R. 817-819, or this Court's precedent interpreting the non-diminishment provision, *see* A.R. 823-828. The First DCA acknowledged that this Court has—on several occasions—interpreted the non-diminishment provision. But the First DCA did not consider this Court's "broad pronouncements" in these cases to

be "holdings," and, in any event, concluded they had little applicability in this appeal. *See* A.R. 826.

Unmoored from the Parties' Stipulation or this Court's prior opinions, the First DCA invented a new test for diminishment which grafts non-dilution principles onto the non-diminishment analysis and reinterprets the definition of a benchmark by which to measure a diminishment claim. *See* A.R. 838-839. In the First DCA's interpretation of the non-diminishment provision, it was "not enough" to "rel[y] on the mere existence of former CD-5 as a Black performing district as a basis for using it as a benchmark." A.R. 839. The court decided instead that there is no benchmark district without proof of a "naturally occurring, geographically compact community with inherent voting power." A.R. 837; *see also id.* at 839 (holding that plaintiffs alleging diminishment "must demonstrate that the naturally occurring community of which they are a part achieved some cohesive voting power under a legally enforceable district"). Applying its new test to this case, the First DCA faulted the Parties for "stipulating [its newly delineated preconditions] out of existence" and concluded that Petitioners had "failed to prove a proper benchmark or baseline from which to assess an alleged

diminishment in voting power." A.R. 839. The majority opinion did not reach any of the Respondents' remaining affirmative defenses and consequently did not disturb any of the trial court's factual findings rejecting Respondents' racial gerrymandering affirmative defense.

Three judges (Chief Judge Osterhaus and Judges Bilbrey and Kelly) would have applied this Court's existing test for diminishment and, pursuant to that test, found the Enacted Plan resulted in diminishment. *See* A.R. 841, 861-886. The dissent also agreed with the trial court that Respondents did not carry their burden to prove their racial gerrymandering affirmative defense. *See* S.R. 881. As the dissent explained, the court cannot conclude at this stage that a new district would necessarily violate the Equal Protection Clause, in part because the Legislature has not yet drawn the remedial district for consideration, *see* A.R. 883, and because there are two prospective districts (from Plans 8019 and 8015) that "the Legislature already passed" that are in fact likely constitutional under the Equal Protection Clause, *see* A.R. 861.

SUMMARY OF ARGUMENT

Although no party below advanced this argument, the First DCA decided that this Court's prior interpretations of the Fair Districts

Amendments are not binding on Florida's lower courts. That decision is as brazen as it is wrongheaded, and it sharply denies this Court's constitutional authority to say what the law is. That alone is cause to reverse.

Nor is there any justifiable reason to revisit the precedent that the First DCA ignored. This Court's test for diminishment was right from the start: The non-diminishment provision, which expressly tracks the text of Section 5 of the VRA, is focused on a comparative analysis of a minority group's voting power from the old redistricting plan to the new plan. It operates independently from the state's non-dilution provision, and it is well-designed to avoid racial gerrymandering and to respond to present-day conditions. Under that longstanding interpretation of the state's non-diminishment provision, all Parties agree that Florida's enacted congressional plan violates the non-diminishment standard. Indeed, Respondents stipulated to it.

What remains is Respondents' equal protection affirmative defense, an argument as fatally flawed as the First DCA's decision. Respondents have not and cannot prove that complying with the non-diminishment provision violates the Federal Constitution. And even

were this Court to find that the non-diminishment provision raises constitutional concerns, a district that remedies the Enacted Plan's diminishment, such as Exhibit 2 to the Parties' Stipulation, R. 8039, would be narrowly tailored to serve a compelling interest and, therefore, would pass constitutional muster.

This is a straightforward case that calls for a straightforward application of this Court's precedent. There is no dispute that Florida's Enacted Plan diminishes the voting power of Black Floridians in North Florida. There is no dispute that under this Court's prior precedent that diminishment violates the Florida Constitution. And there can be no dispute that under prevailing precedent from this Court and the U.S. Supreme Court, the non-diminishment provision is entirely consistent with the federal constitution. Petitioners respectfully request that that this Court reverse the First DCA and affirm the trial court's judgment striking down Florida's unconstitutional congressional plan.

ARGUMENT

I. The First DCA upended this Court's settled precedent on the non-diminishment standard.

Over the course of a decade and in at least five cases—heard both in the Court's original jurisdiction and in its appellate jurisdiction—this Court established the test for a diminishment violation under the Florida Constitution. In short, that test requires mapmakers to evaluate whether a minority group exercises sufficient political power to elect its candidate of choice in an existing district (the benchmark plan), and, if it does, to preserve that power in the newly-enacted redistricting plan. As the Court has held, this test is explicitly different from the one used to establish vote dilution, even though the two tests share some commonalities.

The First DCA's opinion setting forth a new test for diminishment presumed this Court does not establish precedent when it acts in its original jurisdiction—a fundamentally flawed assumption—and brazenly waved away this Court's application of the non-diminishment provision in the Court's most recent opinions on the constitutionality of Florida's congressional redistricting plan. That approach was lawless.

This Court got it right the first time around: The non-dilution and non-diminishment provisions serve different aims, combat different harms, and have different tests. And as this Court has already explained, the functional analysis required to trigger protection against diminishment works to shield against racial gerrymandering. There is no basis to revisit that decision: This Court's precedent on the non-diminishment provision was not clearly erroneous (indeed, it was correct), and considerable reliance interests weigh strongly in favor of that established precedent—precedent the Legislature relied upon in drawing the state's existing congressional, state house, and state senate districts.

A. This Court's binding precedent already establishes the basis for a diminishment violation.

This Court has already established the test for a diminishment violation in both its original jurisdiction and its appellate jurisdiction. Both control the outcome here.

1. This Court's facial review cases established precedent on the non-diminishment provision.

Under Article III, Section 16 of the Florida Constitution, this Court has mandatory original jurisdiction to review and issue a "declaratory judgment determining the validity of the apportionment"

of the state's legislative districts, the determination of which is "binding upon all citizens of the state." Fla. Const. art III, § 16(c), (d). Given the importance of these proceedings, the Florida Constitution requires that any "adversary interests [be permitted] to present their views" before the Court renders its judgment. *Id.* This Court has employed this process for decades—including well before the adoption of the Fair Districts Amendments—utilizing it to establish important principles of law in redistricting. *See, e.g.*, *In re Apportionment Law*, 414 So. 2d 1040, 1045-1048 (1982) (holding that Senators whose district lines have changed must run for re-election, even if their term has not otherwise expired, an issue the Court explicitly addressed to avoid further litigation over the issue); *In re Constitutionality of H. J. Res. 1987*, 817 So. 2d 819, 830-32 (Fla. 2002) (holding that Florida does not require consideration of "communities of interest" in redistricting).

In *Apportionment I*, the first facial review proceeding after the adoption of the Fair Districts Amendments, this Court considered those Amendments and applied them to determine whether the state's legislative apportionment was valid. 83 So. 3d at 597. The Court interpreted the state's new non-diminishment provision at

length—differentiating it from the non-dilution standard, *id.* at 619-625, requiring mapmakers to conduct a "functional analysis" of a minority group's voting power to measure its voting strength, *id.* at 625-26, and explaining that the "existing plan" serves as the "benchmark" against which diminishment is measured, *id.* at 625; *see also supra* Background I(A).

In reversing the trial court here, the First DCA pushed all of this precedent aside, erroneously concluding the Court's *Apportionment I* and *II* cases did not create binding precedent it was required to follow. A.R. 824-826. This holding appeared out of thin air. It was not raised at oral argument. No party below, at any point in the litigation, had argued this. To the contrary, all parties, including each of the Respondents, had relied on *Apportionment I* extensively and treated it as binding law. *See, e.g.*, A.R. 868-869 n.9 (Bilbrey, dissenting) (identifying Respondents' repeated reliance on *Apportionment I*). Indeed, even Governor DeSantis assumed *Apportionment I* was binding law, as he acknowledged when he asked this Court to revisit its existing precedent on the non-diminishment provision. *See supra* Background I(C).

The First DCA's conclusion that this Court's facial review decisions do not create binding precedent was as unsupported as it is novel. In defense of its holding, the First DCA cited multiple cases standing for the unremarkable principle that lower courts must follow the holdings of appellate courts. *See* A.R. 826. But none of the cases it cited actually stands for the far broader principle that the First DCA ultimately reached: that it is bound only by the principles of law this Court decides in its appellate jurisdiction, not those it decides in its original jurisdiction.

Although this Court does sometimes issue advisory opinions in its original jurisdiction that do not necessarily create binding precedent, *see* Fla. Const. art. V, § 3(b)(10), "in the apportionment context, this Court's judgment is not an advisory opinion." *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So. 3d 198, 207 (Fla. 2013) ("*Apportionment III*"). Notably, even advisory opinions are meant to establish stable law: "[A]lthough our advisory opinions are not strictly binding precedent in the most technical sense, only under *extraordinary* circumstances will we revisit an issue decided in our earlier advisory opinions." *Ray v. Mortham*, 742 So. 2d 1276, 1285 (Fla. 1999). In the end, the First DCA treated this Court's facial

proceedings with even less deference than it would be required to give an advisory opinion, casually acknowledging it could not "dismiss [this Court's pronouncements] out of hand" but affording them no deference nonetheless. A.R. 826.

In remaking this Court's prior diminishment test, the First DCA also grossly overread this Court's acknowledgement in *Apportionment III* that *Apportionment I* was a decision of limited application because it did not preclude "future fact-based challenges" relying on additional or new evidence. *Apportionment III*, 118 So. 3d at 200, 209. But all this means is that the declaration of the plan's facial *validity* is not binding in future fact-based challenges *to that same plan*, not that the basic principles of law established in this Court's facial review proceedings are not binding precedent. Similarly, when this Court said the trial court had "scant precedent to guide it" in last decade's congressional redistricting challenge, it was referring to the as-applied partisan intent claim then before it, a kind of claim it had never heard before. *Apportionment VII*, 172 So. 3d at 370. Nothing in *Apportionment VII* suggested that the principles of law from *Apportionment I* were not binding on it; to the contrary, *Apportionment*

VII cited *Apportionment I* for principles of law nearly one hundred times. *See id.* at 370, 374-75, 378, 387, 394-401.

Apportionment VII is not an outlier in this regard; this Court has regularly treated the principles of law arising from facial review proceedings as settled law. *See generally League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013) ("*Apportionment IV*") (appellate jurisdiction case relying on *Apportionment I* extensively); *Apportionment VIII*, 179 So. 3d 258 (same). Indeed, this Court cited and applied *Apportionment I*'s understanding of the non-diminishment provision as recently as 2022 when it upheld the state's legislative districts in that facial review proceeding. *See In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d 1282, 1289-90 (Fla. 2022) ("*Apportionment IX*").

In the end, adopting the First DCA's approach would demote this Court's power relative to other state supreme courts, which are presumed to create precedent when they act in their original jurisdiction. *See, e.g.*, Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. Chi. L. Rev. 83, 89 (2024) ("A grant of original jurisdiction empowers a supreme court eager for more opportunities to say what the law is.").

This Court should reaffirm what all parties to this litigation believed throughout this redistricting cycle and throughout this litigation: that this Court's facial review proceedings create binding law and that lower courts and mapmakers must follow them.

2. *Apportionment VII* and *VIII* also established precedent on the non-diminishment provision.

Even if this Court determined its facial review cases did not create precedent applicable in future as-applied cases, *Apportionment VII* and *VIII*, both of which the Court heard in its appellate jurisdiction, also established precedent on the non-diminishment provision. While the First DCA was quick to dismiss these opinions because they adjudicated a claim of partisan intent, A.R. 828, it ignored that this Court's extensive discussion and application of the non-diminishment provision in both *Apportionment VII* and *VIII* was necessary to (1) decide the merits of the case and (2) conclude that the remedial plan complied with Florida's non-diminishment standard. *See supra* Background I(B).

In *Apportionment VIII*, this Court described its test for determining retrogression or diminishment: The Legislature is required to preserve an existing minority opportunity district when

there is a benchmark district in which (1) "the minority group votes cohesively," (2) "the minority candidate of choice is likely to prevail in the relevant contested party primary," and (3) "that candidate is likely to prevail in the general election." 179 So. 3d at 286 n.11 (citing *Apportionment I*, 83 So. 3d at 667-68); *see also Apportionment VII*, 172 So. 3d at 404-05 (adopting the U.S. Supreme Court's test for retrogression articulated in *Apportionment I* and determining the existing CD-5 allowed minority voters to elect their candidate of choice). This test is anchored to the minority group's existing political power in the benchmark district. It does not relitigate the "legal enforceability" of the previous district or hinge on the minority group's "natural existence," "geographical compactness," "shared history," or any other attributes the First DCA now requires to prove a minority group is protected from diminishment. A.R. 837-839 (cleaned up).

Although *Apportionment VIII* noted that the "*Gingles* preconditions" were "relevant" to a retrogression analysis, that reference did not purport to graft the full vote dilution test onto diminishment claims. 179 So. 3d at 286 n.11. Instead, Footnote 11 in *Apportionment VIII* simply acknowledges that minority voting

cohesion and racial polarization (the second and third *Gingles* preconditions) are "relevant" to both diminishment and dilution claims, *see id.* (citing *Texas v. United States*, 831 F. Supp. 2d 244, 262-63 (D.D.C. 2011)). It does not go further to suggest *Gingles*' first precondition applies to diminishment claims. The footnote also reiterates that its interpretation of the Florida Constitution's non-diminishment provision is "guided by any jurisprudence interpreting Section 5" of the VRA, *Apportionment VIII*, 179 So. 3d at 286 n.11, *none* of which purports to require evaluation of the first *Gingles* precondition. This is for good reason: *Gingles*' first precondition demonstrates "that minority voters possess the *potential*" to elect their preferred candidates in a *hypothetical* plan, *see Gingles*, 478 U.S. at 30 n.17, a precondition that has no relevance to diminishment claims based on the *actual* ability to elect minority-preferred candidates in an *existing* plan.

Thus, contrary to the First DCA's view, A.R. 827-828, this Court very plainly established the governing test for diminishment claims under the Florida Constitution in *Apportionment VII* and *VIII*, and it is those holdings—and not the First DCA's reimagined legal

standard—that "control" the outcome of Petitioners' diminishment claim under Florida law.

B. There is no basis to disturb settled precedent.

Florida "adheres to the doctrine of stare decisis," which means that this Court pays "due deference to its own past decisions," an approach that "foster[s] stability in the law" and "promote[s] public respect for the law as an objective, impersonal set of principles." *Puryear v. State*, 810 So. 2d 901, 904-05 (Fla. 2002) (citation omitted). In *State v. Poole*, this Court clarified the circumstances under which it would retreat from its prior holdings: only when this Court's interpretation in a prior decision was "clearly erroneous" and there is not a "valid reason" to retain the precedent. 297 So. 3d 487, 507 (Fla. 2020).

A prior decision is clearly erroneous only if the Court has "a definite and firm conviction that this Court's prior interpretation [] is wrong." *CCM Condo. Ass'n, Inc. v. Petri Positive Pest Control, Inc.*, 330 So. 3d 1, 5-6 (Fla. 2021) (refusing to retreat from prior precedent because it was not clearly erroneous). As this Court has explained, "[i]t is no small matter for one Court to conclude that a predecessor Court has clearly erred." *Poole*, 297 So. 3d at 506. "The later Court

must approach precedent presuming that the earlier Court faithfully and competently carried out its duty," and this "searching inquiry" must be "conducted with minds open to the possibility of reasonable differences of opinion" and "'honest disagreement'" in the law. *Id.* at 506 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring)). In other words, an interpretation is clearly erroneous only when it is "an impermissible interpretation of the text." *Gamble*, 139 S. Ct. at 1986 (Thomas, J., concurring). But where a prior interpretation falls within the range of reasonable constructions of the original meaning, stare decisis counsels in favor of adherence to precedent, "even if a later court might have ruled another way as a matter of first impression." *Id.*

Here, there is no reason for this Court to recede from its established test for diminishment. Its prior interpretation was thoroughly considered, well-reasoned, and fully consistent with federal precedent interpreting the VRA analogue of Florida's non-diminishment provision. Florida citizens and lawmakers have also significantly relied upon it in passing this decade's congressional and legislative apportionment plans, all of which are slated to remain in effect until 2032.

1. The Court's interpretation of the non-diminishment provision was correct.

This Court has no reason to unsettle its well-reasoned non-diminishment precedent. First, that precedent has a strong foothold in federal law, which is in line with the Fair Districts Amendments' framers' intent. Second, it includes safeguards against racial gerrymandering.

a. This Court's precedent is consistent with federal precedent interpreting the non-diminishment standard.

This Court did not begin with a blank slate in interpreting the non-diminishment provision; rather, it based its interpretation of the provision on guiding federal law. For good reason. "Before its placement on the ballot and approval by the citizens of Florida, sponsors of this amendment . . . acknowledged that Florida's provision tracked the language of Sections 2 and 5 and was perfectly consistent with both the letter and intent of federal law." *Apportionment I*, 83 So. 3d at 620. And during the last decade, immediately after the non-diminishment provision was first enshrined in the state constitution, both houses of the Florida Legislature and the State's top law enforcement official all "agree[d]

that Florida's constitutional provision now embraces the principles enumerated in Sections 2 and 5 of the VRA." *Id.*

Despite the First DCA's efforts to suggest otherwise, the U.S. Supreme Court has "consistently understood [Section 2 and Section 5] to combat different evils and, accordingly, to impose very different duties upon the States." *Reno*, 520 U.S. at 477; *see also Holder v. Hall*, 512 U.S. 874, 883 (1994) (explaining that Section 2 and Section 5 of the VRA "differ in structure, purpose, and application").

Section 2 vote dilution claims seek the creation of a *new* minority opportunity district. *See, e.g.*, *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *3 (N.D. Ala. Jan. 24, 2022), *aff'd sub nom. Allen v. Milligan*, 599 U.S. 1 (2023). In *Thornburg v. Gingles*, the U.S. Supreme Court identified three "necessary preconditions" or "*Gingles* factors" for a Section 2 vote dilution claim: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. The first *Gingles* precondition requires a showing that the minority group could

constitute at least 50% of the voting-age population in a "reasonably compact" district. *LULAC v. Perry*, 548 U.S. 399, 430-31 (2006); *see also id.* at 433 (explaining that "[t]he first *Gingles* condition refers to the compactness of the minority population" and takes into account "traditional districting principles such as maintaining communities of interest and traditional boundaries" (cleaned up)).

Section 5, by contrast, does not require states to affirmatively create *new* minority districts; it simply protects against backsliding in *existing* districts where a minority group can already elect a candidate of its choice in the benchmark plan. *See Texas*, 831 F. Supp. 2d at 262 (explaining that Section 5 "looks at gains that have already been realized by minority voters [under the benchmark plan] and protects them from future loss"). Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015). Instead, Section 5 requires the state to "maintain a minority's ability to elect a preferred candidate of choice" in any new redistricting plan, which the state should accomplish by conducting "a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 275-76 (citing

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011)).[5]

This Court's interpretation of the non-diminishment provision, as distinct from the non-dilution provision, is thus well-reasoned, grounded in federal precedent, and far from clearly erroneous. And although the First DCA asserted that importing Section 5's legal standard for retrogression "makes no sense in the FDA context" because the Florida Constitution did not import over the entire preclearance regime of the VRA, *see* A.R. 829, that observation misses an essential point: The non-diminishment provision imported Section 5's legal standard and applied it "statewide." *Apportionment I*, 83 So. 3d at 624. Discarding reliance on Section 5's framework as

[5] Federal precedent also makes clear that a court-ordered plan can serve as a valid benchmark. *See, e.g.*, *Texas*, 831 F. Supp. 2d at 255-56 & n.9 (using court-adopted plan as benchmark); *Markham v. Fulton Cnty. Bd. of Registrations & Elections*, No. Civ.A.1:02-CV1111WB, 2002 WL 32587313, at *5-*6 (N.D. Ga. May 29, 2002) (same). "As a general premise, the benchmark plan for purposes of measuring retrogression is the last 'legally enforceable' plan used in the jurisdiction"—regardless of how it was originally put in place. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 644 (D.S.C. 2002), opinion clarified (Apr. 18, 2002) (citing 28 C.F.R. § 51.54(b)(1) and *Holder v. Hall*, 512 U.S. 874, 883-84 (1994)); *see also Apportionment VII*, 172 So. 3d at 404-05 (following this principle and considering the last legally enforceable plan as the benchmark plan).

the First DCA did would discard the well-established retrogression standard developed by federal courts over the last half-century and that Floridians embraced when they voted to hold Florida lawmakers to that same standard.[6]

b. The existing diminishment test guards against racial gerrymandering.

Notwithstanding the First DCA's protests to the contrary, the existing diminishment standard appropriately guards against racial gerrymandering and proportional representation.[7] The non-diminishment provision protects an existing district from diminishment only when it contains a minority community that is presently strong enough to effectively elect a candidate of choice in both a primary and general election and where racial polarization is

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[6] Section 5, of course, remains good law; only Section 4 (the formula for determining which jurisdictions are covered) was struck down by the U.S. Supreme Court. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

[7] Although the First DCA's opinion references proportional representation as a consequence of applying the non-diminishment provision here, it does not explain the basis for its concern. In any event, even if CD-5 were restored as a district in which Black voters could elect their candidates of choice, only three of Florida's twenty-eight congressional districts would be districts in which Black voters can elect the candidate of their choice (CD-5, CD-20, and CD-24), which would amount to far less than proportional representation for Florida's Black population. *See* R. 8054.

currently present. *Apportionment VIII*, 179 So. 3d at 286 n.11. As a result, the non-diminishment test does not freeze minority districts in perpetuity; it requires those districts only if certain present-day conditions are satisfied.

The restrictions built into the non-diminishment test are not hypothetical. In 2022, the Legislature itself concluded that Benchmark CD-10, which was previously considered a Black-performing district protected from diminishment, was no longer protected under the non-diminishment provision due to declining Black voter registration. *See* R. 9121. But the Legislature made no such findings with respect to CD-5. To the contrary, the record shows that the Legislature determined that Benchmark CD-5 (as adopted in 2015) continued to perform for Black-preferred candidates and therefore continued to warrant protection from diminishment. R. 9056-9057, 9071.

Nor does the non-diminishment provision require the State to employ racial targets or quotas. To the contrary, this Court has explicitly rejected the notion that "the minority population percentage in each district . . . is somehow fixed to an absolute number under Florida's minority protection provision," cautioning that such an

approach "would run the risk of permitting the Legislature to engage in racial gerrymandering." *Apportionment I*, 83 So. 3d at 627. The Court reiterated the same several years later. *See Apportionment VII*, 172 So. 3d at 405 (rejecting Legislature's contention that it was required to achieve fixed racial targets for CD-5). Nor is there any evidence the Legislature engaged in this kind of racial targeting here. Indeed, the record shows that the Legislature *decreased* the BVAP of CD-5 from 46.2% in the Benchmark Plan to 43.4% in Plan 8015 and 35.3% in Plan 8019, *see* R. 8043, 8750, 8757, all while improving those districts' compliance with Tier II criteria and maintaining their ability to elect Black voters' candidates of choice, *see infra* at Argument II(B)(2)(c).

Finally, consideration of race in the context of non-diminishment does not raise the same pernicious stereotyping concerns that motivate racial-gerrymandering claims—a racist assumption that members of a minority group "share the same political interests, and will prefer the same candidates at the polls," *Shaw v. Reno*, 509 U.S. 630, 647 (1993)—precisely because non-diminishment plaintiffs must prove that the minority group shares the same political preferences as part of a functional analysis, as

Petitioners did here, and as Respondents stipulated. *See* R. 8035-8037.

2. Reliance interests counsel in favor of the established precedent.

Even if this Court concluded its prior interpretation of the non-diminishment provision was clearly erroneous, it would still need to consider whether there are valid reasons not to recede from that precedent. *See Poole*, 297 So. 3d at 507. The "critical consideration ordinarily will be reliance" on the earlier decision. *Id.* "In evaluating reliance interests, courts consider legitimate expectations of those who have reasonably relied on the precedent." *State v. Maisonet-Maldonado*, 308 So. 3d 63, 69 (Fla. 2020) (citation omitted). Reliance interests are weakest in cases involving "procedural and evidentiary rules," *Poole*, 297 So. 3d at 507, and much stronger when individuals "alter their behavior" in reliance on an earlier decision, *Lawrence v. State*, 308 So. 3d 544, 551 (Fla. 2020); *Maisonet-Maldonado*, 308 So. 3d at 69.

Here, reliance interests weigh strongly in favor of preserving this Court's existing precedent, which Florida lawmakers reasonably and recently relied upon in passing Florida's legislative and congressional

districts in 2022. Indeed, in briefing before this Court just two years ago, the Legislature expressed its belief that the non-diminishment provision did *not* require application of all of the *Gingles* preconditions—an approach it believed "would directly conflict with U.S. Supreme Court precedent and would eliminate the line between vote dilution (section 2) and non-diminishment (section 5)." Brief of the Florida House of Representatives at 27 n.10, *In re J. Res. of Legis. Apportionment*, No. SC22-131 (Feb. 19, 2022); *see id.* at 18-27 (not addressing or applying *Gingles* factors when discussing its compliance with the non-diminishment provision in drawing state legislative districts); *see also* Brief of the Florida Senate Supporting the Validity of the Apportionment at 34-38, *In re J. Res. of Legis. Apportionment*, No. SC22-131 (Feb. 19, 2022) (same).

The Florida Legislature consequently drew thirty state house districts and ten state senate districts based on the non-diminishment precedent this Court set over the course of the last decade—districts this Court recently held complied with the Florida Constitution. *See Apportionment IX*, 334 So. 3d at 1289. The Florida Legislature similarly drew six congressional districts in 2022 utilizing the same standard. *See* R. 8054. Candidates for office relied upon

these districts in making decisions about whether to run for office, and Florida's voters are now represented by dozens of incumbents—both Republicans and Democrats—who were elected as minority voters' candidates of choice in these districts. These reliance interests are significant and provide compelling reasons, not just valid reasons, to adhere to existing precedent.

II. There is no other basis to reverse the trial court's order.

Under this Court's prior precedent and the undisputed facts of this case, the Enacted Plan presents a textbook diminishment violation, as Respondents have stipulated. It even meets the First DCA's new test for diminishment, misguided as it may be. And there is no basis to find that Respondents proved their affirmative defenses. As the trial court found, Respondents lack standing to press those defenses, and they failed to prove that race *must* predominate in any remedial district, a determination that is reviewed for clear error.

A. Petitioners proved a violation of Article III, Section 20(a) of the Florida Constitution.

In addition to ignoring this Court's precedent on the Fair Districts Amendments, the First DCA flouted decades of settled case law on the binding nature of pretrial stipulations. As the House and

Senate already conceded, when the straightforward legal standard for diminishment is applied to the undisputed facts, the elimination of a Black-performing district in North Florida violates the Florida Constitution.

1. The First DCA erred in disregarding the Parties' stipulations.

This Court has long held that "when a case is tried upon stipulated facts[,] the stipulation is binding not only upon the parties but also upon the trial and appellate courts." *Troup v. Bird*, 53 So. 2d 717, 721 (Fla. 1951); *see also Delgado v. AHCA*, 237 So. 3d 432, 436-37 (Fla. 1st DCA 2018) ("wholeheartedly endors[ing]" this "enduring principle" regarding pretrial stipulations).

The First DCA's job was simple. The Parties stipulated to demographic and electoral data demonstrating that voters in Benchmark CD-5 "had the ability to elect the candidate of their choice," but "[n]one of the Enacted districts in North Florida are districts in which Black voters have the ability to elect their preferred candidates." R. 8036-8037. Respondents affirmed these stipulations before both the trial court, A.R. 26-31, and the First DCA, A.R. 177, 252.

The First DCA, however, refused to accept the stipulated facts for what they are: legally binding and undisputed. The court brushed off the stipulation as containing mere "purported facts" and "cold statistical data." *See* A.R. 817-818. But it was not for the First DCA to evaluate the weight and credibility of the evidence. *See Troup*, 53 So. 2d at 721 (when reviewing a case decided on stipulated facts, "no other or different facts will be presumed to exist"). The First DCA further disregarded the stipulation by asserting that the ability of Black voters in Benchmark CD-5 to elect candidates of their choice was a legal question that could not be answered by stipulation. *See* A.R. 901. But as the dissent recognized, "whether a new district diminishes the ability of Black voters to elect a candidate of their choice is based on facts." A.R. 954 (Bilbrey, J., dissenting); *see also Beer v. United States*, 425 U.S. 130, 141 (1976) (characterizing the retrogression inquiry as a determination based on "facts found" by the Attorney General or a district court) (quoting H.R. Rep. No. 94-196, p. 60)). Indeed, evaluating minority voters' ability to elect requires a "functional analysis," which is intensely factual, "requiring consideration not only of the minority population in the districts, or even the minority voting-age population in those districts, but of

political data and how a minority population group has voted in the past." *Apportionment I*, 83 So. 3d at 625. Here, Petitioners' expert performed this data analysis, and Respondents stipulated to those findings below. That should be the end of the story.

The First DCA further erred by "set[ting] out" to reinterpret the non-diminishment standard, even though that issue was waived by the parties' stipulation. *See Delgado*, 237 So. 3d at 437 ("A stipulation that limits the issues to be tried amounts to a binding waiver and elimination of all issues not included.") (internal quotations omitted). In their Joint Stipulation, the Parties identified only four issues to be tried. R. 8027-8028. Although this list included whether the non-diminishment provision applies to North Florida, *id.*, it did not include "[w]hether Black voters could 'elect the candidate of their choice' in former CD-5," A.R. 11. The First DCA thus had no basis to embark on its quest to "determine what it means for a delineated congressional district to have the result of 'diminish[ing]' the ability of a racial minority 'to elect representatives of their choice.'" A.R. 901. According to the Parties' binding Stipulation, the factual basis for evaluating Black voters' ability to elect their candidate of choice is undisputed, and the First DCA's

proper role was "simply to determine whether the trial court properly applied the law to the stipulated facts." *Trumbull Chevrolet Sales Co. v. Seawright*, 134 So. 2d 829, 835 (Fla. 1st DCA 1961).

2. The Enacted Plan violates the Florida Constitution.

Whether under this Court's existing precedent or the First DCA's new legal standard, the Enacted Plan violates Article III, Section 20(a) of the Florida Constitution.

a. The Enacted Plan is a textbook diminishment violation under this Court's existing precedent.

Applying the unambiguous legal standard for diminishment claims to the stipulated and undisputed facts, there is only one conclusion: The Enacted Plan violates Article III, Section 20(a) of the Florida Constitution.

The non-diminishment provision bars the state from adopting redistricting plans "that have the purpose of *or will have the effect of* diminishing the ability of any citizens on account of race or color to elect their preferred candidates of choice." *Apportionment I*, 83 So. 3d at 620 (cleaned up) (emphasis added). This means "the Legislature cannot eliminate majority-minority districts or weaken other

historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625. The non-diminishment standard accordingly calls for a comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is measured." *Id.* at 624. And whether a minority group's voting power has been diminished is determined by a "functional analysis" of "whether a district is likely to perform for minority candidates of choice." *Id.* at 625.

As Respondents agree, each of these elements is satisfied here. Respondents stipulated that Benchmark CD-5 was a district in which Black voters were able to elect their candidate of choice, along with the subsidiary facts that support that conclusion, such as Black voters' political strength in the district. R. 8034-8036. And Respondents stipulated that the Enacted Plan contains no district in North Florida that allows Black voters to elect their candidate of choice, along with the requisite underlying facts. R. 8036-8037. This is the very definition of diminishment: The Enacted Plan "actually diminish[es]" Black voters' ability to elect their preferred candidates by "eliminat[ing]" a "historically performing minority district." *Id.* This

Court should correct the First DCA's mistake and recognize this textbook violation of Article III, Section 20(a).

b. The Enacted Plan violates even the First DCA's standard for diminishment.

Notably, the diminishment here is so stark, it satisfies even the First DCA's novel remaking of the legal standard.

To start, the Black community in Benchmark CD-5 *was* reasonably geographically compact, as this Court previously held. *See Apportionment VII*, 172 So. 3d at 406; *Apportionment VIII*, 179 So. 3d at 272. And the Black community in Benchmark CD-5 *did* achieve "cohesive voting power under a legally enforceable district," as Respondents stipulated. *See* R. 8035 (stipulating to Black voting cohesion in Benchmark CD-5). Indeed, Benchmark CD-5 was not just "legally enforceable," it was literally legally in force in the 2016, 2018, and 2020 elections. R. 8034.

Although it is not clear what it means for a minority community to be "naturally occurring"—all district lines, whether drawn by a Legislature or a court, are artificial to some degree—Benchmark CD-5 incorporates North Florida's longstanding, historically-protected Black community which coalesced to elect a Black member of

Congress for more than 30 years until the Enacted Plan. *See* R. 8037; *see also* A.R. 54-55 (trial court finding a Black district in North Florida "is entirely consistent with the geography, the demographics, and the State's tradition of congressional redistricting in North Florida"). For these reasons, even if this Court were to recede from prior precedent, which it should not, Petitioners still proved a violation of Article III, Section 20(a).

B. Respondents failed to prove their affirmative defenses.

As the trial court held, Respondents failed to prove their affirmative defense that the non-diminishment provision violates the Equal Protection Clause either facially or as-applied here. The First DCA did not address this affirmative defense, and consequently all the trial court's factual findings on this matter, subject to clear error review, remain undisturbed.

Respondents bear the burden of proving their affirmative defense. "An affirmative defense is an assertion of facts or law *by the defendant* . . . and the plaintiff is not bound to prove that the affirmative defense does not exist." *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010) (emphasis added). Furthermore, in the racial gerrymandering context, it is *always* the

party claiming unconstitutional gerrymandering—here, the Respondents—that has the burden to prove that race predominated in the allegedly gerrymandered district. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Respondents failed to carry their burden for multiple, independent reasons. First, Respondents lack standing to press a claim of racial gerrymandering. Second, the Fair Districts Amendments do not require racial gerrymandering, and Respondents cannot prove the trial court clearly erred in determining that race would not predominate in the drawing of Plans 8015 or 8019. And third, even if this Court found race would predominate in any remedial district, it would be constitutionally justified to remedy the diminishment of Black voting power in North Florida.

1. Respondents do not have standing to assert their affirmative defenses.

Respondents lack standing to assert their Equal Protection Clause affirmative defenses under Florida's public official standing doctrine and because they have not suffered a concrete injury.

a. The public official standing doctrine bars Respondents' affirmative defenses.

Under Florida's public official standing doctrine, public officials are jurisdictionally barred from challenging the constitutionality of their legal duties. *See State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681, 683 (Fla. 1922). The judicial branch alone has the power to declare what the law is, including whether the duties imposed by the Florida Constitution are themselves unconstitutional. *See Crossings At Fleming Island Cmt'y Dev. Dist. v. Echeverri*, 991 So. 2d 793, 798-99 (Fla. 2008); *see also Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legis. Info. Servs.*, 7 So. 3d 511, 514-15 (Fla. 2009). This doctrine applies whether a member of the Executive or Legislative branches raises a constitutional challenge to their duties affirmatively, *see Dep't of Revenue of State of Fla. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981), or as an affirmative defense, *see Atl. Coast Line*, 94 So. at 682 (holding that because "the allegation . . . that [a provision] is unconstitutional means that it has been so declared by a court of competent jurisdiction," any affirmative defense alleging as much before such a judicial declaration has been made is not "true" and therefore "no defense").

Respondents' affirmative defense here—that their failure to comply with the Florida Constitution's non-diminishment provision is excused because the provision is itself unconstitutional—is precisely the type of assertion that runs afoul of the public official standing doctrine. There is no question that the Florida Constitution imposes a duty on the Florida House and Senate to redistrict in accordance with Article III, Section 20(a). *See* Art. III, § 20, Fla. Const. (setting "standards for establishing congressional district boundaries" under Article describing "Legislature"). There is no question that the Secretary is charged with the duty of enforcing the state's election laws, including redistricting maps, § 97.012, Fla. Stat. And there is no question that Respondents' unilateral determination that the non-diminishment provision is unconstitutional is not theirs to make.

Florida's state officials do not get to pick and choose which provisions of the constitution they find legally compelling enough to abide by and enforce. Rather, they must adhere to their constitutional duties unless and "until their unconstitutionality or illegality has been judicially established." *Atl. Coast Line R. Co.*, 94 So. at 685; *see also id.* at 683 ("[T]he oath of office 'to obey the

Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined."). Respondents' affirmative defense is therefore "no defense" at all. *Id.* at 682. For this reason alone, Respondents lack standing to assert their affirmative defenses.

b. Respondents lack the personal harm necessary to assert a violation of racial gerrymandering.

Respondents also lack standing to raise their racial gerrymandering affirmative defense because they have not suffered a personal injury. Florida requires a party asserting a violation of law to "demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.'" *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). In the racial gerrymandering context, the U.S. Supreme Court has held that only voters residing in an allegedly racially gerrymandered district have standing to assert such claims because only those "[v]oters . . . suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995).

As government entities sued in their official capacities, Respondents cannot demonstrate that they would suffer "special

representational harms" as voters sorted into a challenged district based on race. *See Hays*, 515 U.S. at 745. For this reason, too, they lack standing to assert their affirmative defenses.

2. Remedying Respondents' violation of the non-diminishment provision does not require race to predominate.

The trial court's conclusion that race does not have to predominate to remedy the diminishment in CD-5 is well supported by U.S. Supreme Court precedent as well as by the trial court's findings that the Legislature itself considered and passed a map that both ensured compliance with the non-diminishment provision and was consistent with traditional redistricting criteria.

a. Respondents bear the burden of establishing the "demanding" showing of racial predominance.

Just as Respondents bear the burden of proving their affirmative defenses, *see Custer*, 62 So. 3d at 1097, it is always the party claiming racial gerrymandering—here, Respondents—that has the burden to prove racial predominance. *See Miller*, 515 U.S. at 916.

The burden of proving racial predominance is a "demanding" one. *Miller,* 515 U.S. at 918, 928 (O'Connor, J., concurring); *see also Shaw,* 509 U.S. at 646 (describing the "difficulty of proof" in proving

racial predominance). To make the requisite showing, Respondents "must prove that the [mapmakers] subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller,* 515 U.S. at 916, by using "an express racial target," *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192 (2017), wholly disregarding "customary and traditional districting practices," *Miller*, 515 U.S. at 928 (O'Connor, J., concurring), or by configuring a district that is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race," *Shaw*, 509 U.S. at 658. Given the "evidentiary difficulty" of proving racial predominance, "courts [must] exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 915-16.

Respondents fail to meet this burden because they conflate racial *consciousness* in redistricting, which is entirely permissible, with racial *predominance*, which triggers strict scrutiny. As the U.S. Supreme Court has explained, redistricting legislatures will "almost always be aware" of race, but such consideration "does not [mean] that race predominates in the redistricting process." *Miller*, 515 U.S. at 916. Just last year, the U.S. Supreme Court reiterated "[t]he line

that [it has] long drawn [] between consciousness and predominance" of race, reaffirming the permissible consideration of race in redistricting. *Allen*, 599 U.S. at 29, 33.

As *Allen* itself explains, a mapmaker's compliance with the VRA or other minority voting protections—here, the Fair Districts Amendments—does not itself show that race predominated in the redistricting process. *See id.* at 29-31 (race did not predominate even though "it was necessary for [mapmaker] to consider race" to meet VRA requirements); *see also Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (the intentional creation of majority-minority districts to comply with the VRA does not trigger strict scrutiny); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 838 (M.D. La. 2022) (finding no racial predominance even though "some level of consideration of race" is "necessary" to comply with the VRA).

b. The Fair Districts Amendments themselves do not require race to predominate in the redistricting process.

Florida's non-diminishment provision does not require race to predominate its redistricting process. As Petitioners explained *supra* Argument I(B)(1)(b), the non-diminishment provision does not require racial quotas or targets, and it does not permit racial stereotyping.

Instead, the test's functional analysis responds to present-day conditions. Only if the minority group is politically strong enough to elect their candidate of choice in a primary and general election and racial polarization is present is the district protected in the first place, and even then, mapmakers are not tied to any particular racial percentage.

Nor does the tiered structure of Article III, Section 20 require racial gerrymandering—an argument that Respondent Secretary pressed below. Although the Fair Districts Amendments require mapmakers to *consider* race under certain circumstances, Article III, Section 20 is no different than the VRA in this regard, against which the U.S. Supreme Court has repeatedly rejected facial attacks on the grounds that race *consciousness* does not amount to racial *predominance*. *See Allen*, 599 U.S. at 30-31 (even though "Section 2 itself demands consideration of race," "such race consciousness does not lead inevitably to impermissible race discrimination" (internal quotation marks and citations omitted)). *See supra* Argument I(B)(1)(b).

Holding that the Fair Districts Amendments require race to *predominate* when they simply require consideration of race would

take this Court of out step with the U.S. Supreme Court's jurisprudence on racial gerrymandering. Although Governor DeSantis openly assumed the U.S. Supreme Court would invalidate all race conscious redistricting in *Allen*, which led him to veto plans that retained the Benchmark CD-5, the Governor's prediction turned out to be wrong. Contrary to his expectations, the U.S. Supreme Court reaffirmed long-standing federal precedent "authoriz[ing] race-based redistricting as a remedy for state districting maps that violate [anti-discrimination laws]." *Allen*, 599 U.S. at 41. In so doing, the Court undermined the very foundation of the Equal Protection Clause theory upon which Respondents' affirmative defenses are based.

c. The trial court did not clearly err in finding that race did not predominate in CD-5 in the Legislature's alternate remedial districts.

As the trial court recognized, because there is no remedial district yet before the court, it would be premature to conclude that there is no district that could satisfy the Equal Protection Clause. A.R. 40-43. Racial gerrymandering is a "district-specific claim," and thus the racial predominance inquiry does not sound in the abstract but rather turns on the configuration of a specific, particular district.

See Ala. Legis. Black Caucus, 575 U.S. at 262-63; *Bethune-Hill*, 580 U.S. at 191.

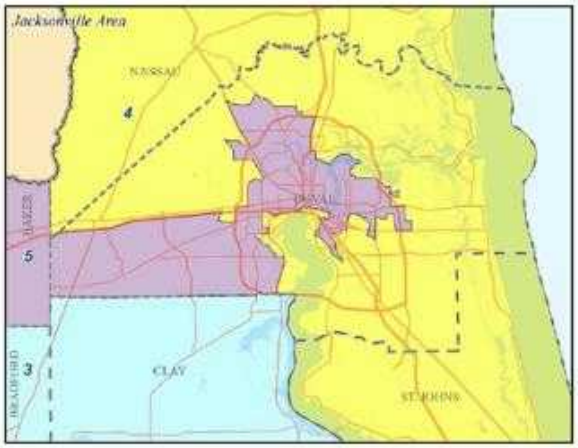
In any event, even if the Court were to consider whether an as-yet hypothetical district violates the U.S. Constitution, the trial court found as a matter of fact that race did not predominate in Plan 8015's version of CD-5, as drawn and passed by the Florida Legislature. A.R. 50-55. The trial court's determination "as to whether racial considerations predominated in drawing district lines" is a factual finding reviewed for clear error. *Cooper v. Harris*, 581 U.S. 285, 293 (2017); *see also Apportionment VIII*, 179 So. 3d at 271.

As the trial court found, race did not predominate in the drawing of CD-5 in Plan 8015, the plan drawn by the Legislature in 2022 to replace Benchmark CD-5. *See* A.R. 49-50. As the trial court found, CD-5 in Plan 8015 "performs just as well—and sometimes better—on several traditional redistricting criteria as other districts in the Enacted Plan." A.R. 52. Specifically, CD-5 in Plan 8015 performs "extraordinarily well on adherence to utilizing 'existing political and geographic boundaries,'" meaning that the district utilized existing city lines, county lines, roadways, waterways, and railways for its boundaries. A.R. 52-53; *see also Apportionment I*, 83

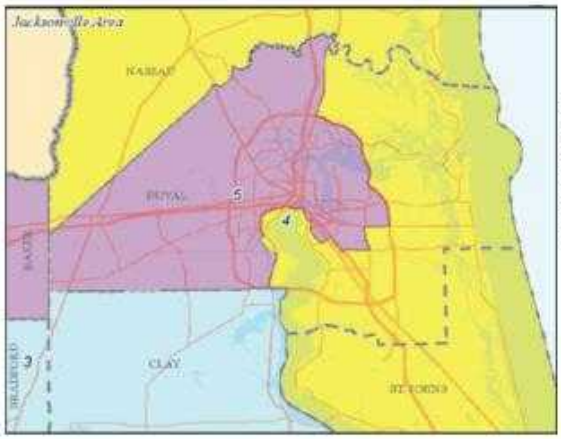
So. 3d at 637 (noting that the "basic purpose of this provision is to keep communities together and sensibly adhere to natural boundaries across the state"). In fact, CD-5 in Plan 8015 performs better on this Tier II criterion *than all but one* district in the Enacted Plan. A.R. 53 (noting this district relies on "non-political or geographic boundaries" "for only 2% of its boundaries," while "the average district in the Enacted Plan" relies on such boundaries 14% of the time).

The trial court also found that CD-5 in Plan 8015 is reasonably compact, particularly as compared to Benchmark CD-5, which had previously been approved by this Court. A.R. 53-55. As the trial court described, "CD-5 in Plan 8015 both decreases the footprint of the district and smooths the boundaries of Benchmark CD-5 even further," A.R. 53, including in Jacksonville, as shown below:

Jacksonville Inset (Benchmark)



Jacksonville Inset (Plan 8015)



Compare R. 8041, *with* R. 8749. And, although the district is long, so was Benchmark CD-5 as approved by this Court, and as the trial court found, "the district's length is largely a factor of North Florida's rural geography and sparse population." A.R. 54. Indeed, Florida's 2002 congressional plan included a district that spanned from Leon County to Duval County well before Benchmark CD-5 ever existed. A.R. 54; R. 11651.

Because the trial court concluded that "CD-5 in Plan 8015 performs reasonably well on objective, non-racial traditional redistricting criteria," A.R. 55, it properly concluded that Respondents failed to establish racial predominance in the district, even if mapmakers were conscious of race while attempting to comply with the non-diminishment provision, A.R. 49. That finding was

consistent with U.S. Supreme Court precedent, which holds that a district's compliance with traditional redistricting criteria "may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 509 U.S. at 647; *see also Allen*, 599 U.S. at 29-30 (finding that race did not predominate where mapmaker considered race but also considered traditional redistricting criteria); *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (requiring party asserting racial gerrymandering to demonstrate "substantial disregard of customary and traditional districting practices").

But even if this Court were to disagree with the trial court's conclusion that race did not predominate in Plan 8015's configuration of CD-5, it would still have no basis to conclude, on this record and at this stage, that there is *no possible district* that could remedy the diminishment in the Enacted Plan and comply with the Equal Protection Clause. As Petitioners noted, in 2022 the Legislature also passed Congressional Plan 8019, which included a Duval County-only district that the Chair of the House Congressional Redistricting Committee affirmed would maintain CD-5 as a Black-performing district. *See supra* Background I(C). As the trial court found, CD-5 in Plan 8019 is "extremely compact, having higher

compactness scores than the average district in the Enacted Plan on all three compactness measures." A.R. 55 n.14. "[A]nd there is also no question it complies with basic traditional redistricting criteria such as equal population, contiguity, or adherence to political and geographic boundaries." A.R. 55 n.14. This Court thus has no basis, on this record, to conclude that Respondents have shown that race would necessarily predominate in *any* district in North Florida that complies with the non-diminishment provision.

3. A district that remedies the diminishment in the Enacted Plan would be narrowly tailored to address a compelling state interest.

Because Respondents did not prove the Fair Districts Amendments require race to predominate in all circumstances, strict scrutiny does not apply. *See Vera*, 517 U.S. at 958-59. But even if this Court held that race would necessarily predominate in *any* district that would remedy the diminishment in the Enacted Plan—a determination this Court cannot make on the record before it—a remedial district would still be justified because it is narrowly tailored to advance a compelling state interest. *Abbott v. Perez*, 585 U.S. 579, 587 (2018).

Compliance with the non-diminishment provision of the Florida Constitution, which this Court has held to be an analogue of Section 5 of the VRA, *see supra* Background I(A), is a compelling state interest. For one, the U.S. Supreme Court has repeatedly—and recently—assumed that compliance with the VRA constitutes a compelling state interest, even in the years after *Shelby County*. *See, e.g.*, *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) ("We have assumed that complying with the VRA is a compelling interest."); *Abbott*, 585 U.S. at 587 (same); *Bethune-Hill*, 580 U.S. at 193 (same). Indeed, in *LULAC v. Perry*, 548 U.S. 399 (2006), *eight* justices announced that they agreed—not just assumed—that compliance with Section 5's non-diminishment provision is a compelling state interest. *See id.* at 518 (Scalia, J., joined by Roberts, C.J., Thomas & Alito, J.J., concurring); *id.* at 475 n.12 (Stevens, J., joined by Breyer, J., concurring); *id.* at 485 n.2 (Souter, J., joined by Ginsburg, J., concurring). Given the substantive similarity between Section 5 of the VRA and the Florida Constitution's non-diminishment provision, *see Apportionment I*, 83 So. 3d at 620-21, compliance with the latter likewise constitutes a compelling state interest.

By voting to adopt new constitutional provisions that mirror the text of the VRA, Floridians expressed their belief that Florida was home to the sort of racial discrimination that justified the VRA in the national context and that a similar civil rights structure was required to stamp it out at home. As a justice of this Court explained, "[t]he people of this great state passed a constitutional amendment seeking to address the errors of the past . . . Floridians voted to add these new redistricting mandates, and they 'could not have spoken louder or with more clarity.'" *Apportionment VIII*, 179 So. 3d at 300-01 (Perry, J., concurring) (cleaned up).

The people were not wrong. Florida has a long and well-documented history of utilizing discriminatory election practices that have inhibited minority voters from exercising their political power. Florida maintained an all-white primary system until it was ruled unconstitutional in 1945 in *Davis v. Cromwell*, 23 So. 2d 85, 87 (Fla. 1945), and only then as a direct consequence of the U.S. Supreme Court's ruling in *Smith v. Allwright*, 321 U.S. 649 (1944). After Florida's effort to reinstate white-only primaries failed, its jurisdictions replaced them—for decades—with at-large election schemes and majority-vote requirements. At-large election systems,

which courts repeatedly found were designed to ensure minority voters could not effectively exercise political power, were especially pervasive in North Florida. *See, e.g.*, *Solomon v. Liberty Cnty., Fla.*, 899 F.2d 1012 (11th Cir. 1990) (en banc); *Bradford Cnty. NAACP v. City of Starke*, 712 F. Supp. 1523 (M.D. Fla. 1989); *Tallahassee Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436 (11th Cir. 1987); *McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037 (5th Cir. 1984); *NAACP v. Gadsden Cnty. Sch. Bd.*, 691 F.2d 978 (11th Cir. 1982).

In 1992, the Northern District of Florida summarized the dire state of electing minorities to office in Florida:

> In the state of Florida, minorities have had very little success in being elected to either the United States Congress or the Florida Legislature. An African-American has not represented Florida in the United States Congress in over a century. In addition, only one Hispanic congressperson serves from Florida. From 1889 until 1968, African-Americans were unable to elect a single representative to the state house. Additionally, African-Americans were unable to elect a representative to the state senate until ten years ago. Until four years ago, no Hispanic state senator had ever been elected in Florida.

DeGrandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). Soon thereafter, then-Chief Justice Shaw remarked on the "substantial inability minorities in Florida have experienced in electing legislators of their choice throughout the past decade."

In re Constitutionality of S. J. Res. 2G, Spec. Apportionment Sess. 1992, 597 So. 2d 276, 292 (Fla. 1992) (C.J. Shaw, dissenting from Court's resolution approving Florida's 1992 Senate districts). The lengths the State has now gone to dismantle the Black-performing CD-5 only emphasize that these issues remain live in Florida.

A district that complies with the non-diminishment provision, including either of the versions of CD-5 in Plans 8015 or 8019, would be narrowly tailored to address this state interest. The "narrow tailoring" standard requires only that a map-drawer have "good reasons to believe" that its use of race in drawing a particular district was necessary to comply with the non-diminishment provision. *Bethune-Hill*, 580 U.S. at 182 (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278). Here, Florida Supreme Court precedent not only provides "good reasons to believe" that a Black-performing district in North Florida is necessary to comply with the non-diminishment provision, it compels that finding. *See Apportionment I*, 83 So. 3d at 625-27 (explaining that the non-diminishment provision prohibits "weaken[ing] . . . historically performing minority districts"); *Apportionment VII*, 172 So. 3d at 403 (affirming that the Florida Constitution requires the Legislature to avoid diminishment of Black

voters' ability to elect their candidate of choice and ordering adoption of Benchmark CD-5).

CONCLUSION

This Court should reverse the First DCA and reinstate the well-reasoned opinion of the trial court. The Court should order the adoption of a remedy, including but not limited to the remedial map set forth in Exhibit 2 of the Parties' Stipulation, which adopts CD-5 in Plan 8015 into the existing Enacted Plan. *See* R. 8039.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2024, a copy of the foregoing was filed via electronic means through the Florida Courts E-Filing portal and was served via electronic mail on the parties registered to receive notifications.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2)(B), the undersigned certifies that this initial brief complies with the word limit and contains 12,780 words.

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