IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Common Cause Florida, FairDistricts Now, Florida State Conference of the National Association for the Advancement of Colored People Branches, Cassandra Brown, Peter Butzin, Charlie Clark, Dorothy Inman-Johnson, Veatrice Holifield Farrell, Brenda Holt, Rosemary McCoy, Leo R. Stoney, Myrna Young, and Nancy Ratzan,

Plaintiffs,

v.

Cord Byrd, in his official capacity as Florida Secretary of State,

Defendant.

Case No. 4:22-cv-109-AW-MAF

PLAINTIFFS' PRE-TRIAL BRIEF

INTRODUCTION

The evidence will show Governor DeSantis went into the 2022 congressional redistricting with one overriding goal: eliminating Florida's Fifth Congressional District ("CD-5" or "Benchmark CD-5"), a district where Black voters could elect their candidate of choice. To achieve that goal, he hijacked the redistricting process in an unprecedented manner, thumbing his nose at the Florida Supreme Court, the Florida Legislature, and the Florida Constitution. Eventually, he forced through his own congressional map, which surgically disassembled Benchmark CD-5. In so doing, the Governor—and, by extension, the Legislature—committed intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments.

As Plaintiffs recount below, the evidence amply establishes each of the "*Arlington Heights* factors" used to evaluate race discrimination claims, including a history of similar discrimination, an acknowledged disparate impact on Black voters, a series of unprecedented deviations from ordinary procedures, and the rejection of less-discriminatory alternatives.

Defendant Secretary of State will surely argue that the Governor was driven not by discriminatory intent, but by a sincerely held belief that an East-West-oriented CD-5 violated the Fourteenth Amendment. But there is overwhelming evidence that this purported explanation was pretextual. His Fourteenth

Amendment argument was conclusory, ignored settled judicial precedent, and lacked the necessary evidentiary record—indeed, key factual underpinnings were demonstrably false. And, in baldly asserting that the Florida Constitution was *itself* unconstitutional in requiring Benchmark CD-5, the Governor contradicted his longstanding position that executive officials "must … faithfully execute the laws on the books," even if they think they are unconstitutional.

But the most compelling indicator of pretext is the Governor's response to the Legislature's proffered "Duval-only" compromise. Seeking to assuage his stated concerns about a 200-mile-long CD-5 joining together supposedly disparate communities, the Legislature passed a map with a reconfigured CD-5 entirely within the Jacksonville city limits. This map solved every single complaint the Governor had leveled at the prior CD-5, while still maintaining a Black opportunity district in North Florida. But the Governor opposed this compromise too, claiming that it did not protect Black voting strength *enough*. Then, betraying that this objection was disingenuous, he forced through his own map that eliminated a Black opportunity district *altogether*.

Only one conclusion can fairly be drawn from these facts. Governor DeSantis was viscerally opposed to any district in North Florida in which Black voters could elect a representative of their choice—no matter how such a district was configured. He vetoed the Legislature's plan, and pushed through his own,

not *in spite of* his plan's adverse impact on Black voting power, but precisely *because of* it. That is unconstitutional.

FACTUAL BACKGROUND

A. Florida's History of Racial Discrimination in Elections

As Plaintiffs' expert, Dr. Kousser, will testify, Florida has a long and sordid history of racial discrimination in elections that continues to the present day. Time and again, Florida's elected officials have adopted discriminatory practices designed to diminish Black voters' political strength—and, at times, to prevent them from voting altogether. Defendant's own historian agrees that Dr. Kousser's factual presentation is correct.

In the aftermath of the Civil War and continuing into the 20th century, the Legislature took aggressive measures—often accompanied by violence—to suppress the Black vote. The passage of the Voting Rights Act in 1965 drove the State to adopt subtler, but no less insidious, means of curbing Black voters' political power. Chief among them was discriminatory apportionment: "cracking" and "packing" Black voters into select districts to reduce their electoral influence.

From 1965 to the present, there have been at least 69 instances where courts or the U.S. Justice Department have found that the state, county, or municipal governments of Florida engaged in voting discrimination, or where such governments settled election lawsuits brought by minority plaintiffs. *See also*

Final Order at 47-50, *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, No. 2022-CA-666, at 7-8 (Fla. 2d Jud. Cir. Ct. Sept. 2, 2023) ("*BVM*") ("Florida's history of voting related discrimination—as told through Florida case law over the years—bears out [the] need [for remedial measures]." (collecting cases)).

B. The Fair Districts Amendment Was Enacted to Put a Stop to This Lengthy History of Discrimination

In 2010, Florida's electorate responded to this pervasive discrimination by amending the state constitution by referendum. Supported by a broad coalition crossing racial and party lines, the Fair Districts Amendments ("FDA") were approved by a supermajority (63%) of Florida voters.

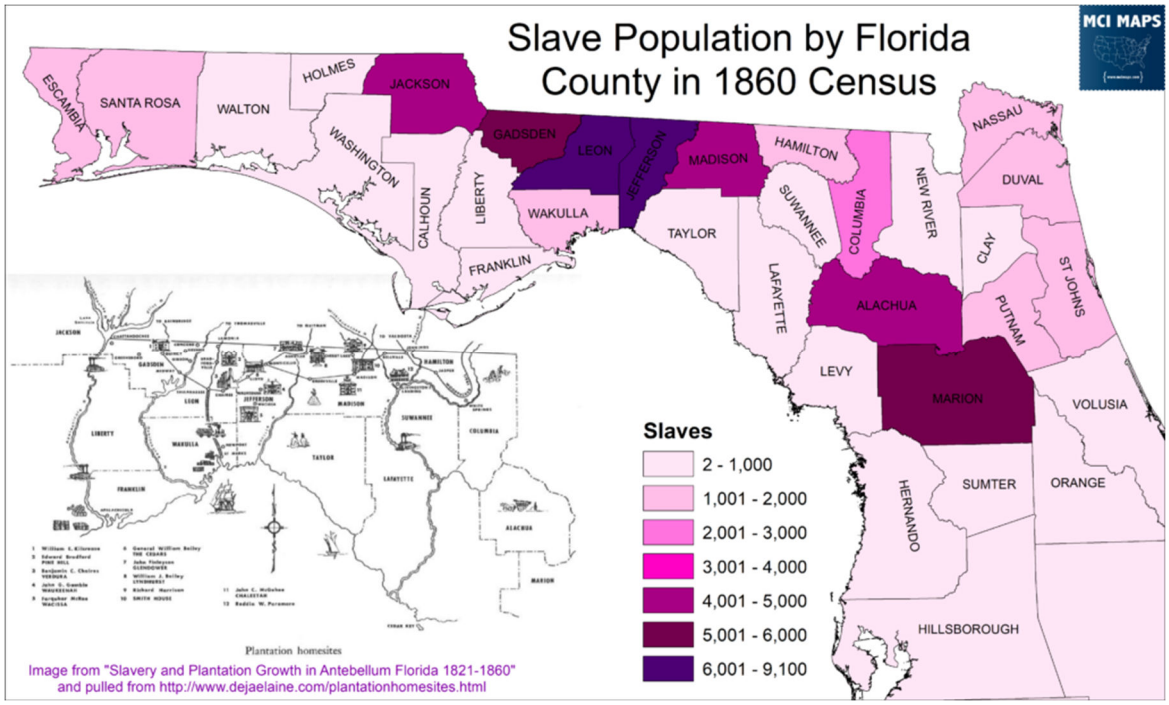
The FDA adds two "tiers" of redistricting rules to Florida's constitution. The "Tier One" rules prevent drawing districts with "the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Fla. Const. art. III, § 20(a). This "non-diminishment" requirement "follow[s] almost verbatim the [analogous] requirement[] embodied in [Section 5 of] the Federal Voting Rights Act." *In re Senate Joint Resolution of Legislative Apportionment 1176* ("*Apportionment I*"), 83 So.3d 597, 619 (Fla. 2012) (citations omitted). The Tier One rules also prohibit political gerrymandering and incumbency protection, and require districts of contiguous territory. Fla. Const.

art. III, § 20(a). The "Tier Two" rules provide that districts shall be "compact" in shape and near-equal in population, and that where feasible, district lines should follow existing political and geographical boundaries. *Id.*, § 20(b). The Tier Two standards are subordinate to the Tier One standards: they do not apply if "compliance ... conflicts with the [Tier One] standards ... or with federal law." *Id.*

Public campaign materials for the FDA showed that a key objective was protecting minority voters from legislative attack. For instance, the amendment's proponents emphasized that the FDA would "make it impossible for legislators to draw districts to diminish the ability of minority voters to elect representatives." *Redistricting amendments on the ballot,* Equality Florida (Jan. 22, 2010), https://www.eqfl.org/breaking-fair-districts-officially-ballot. Press coverage highlighted that the FDA would prevent the cracking and packing that had long diluted Black Floridians' voting strength. *See, e.g.,* Aaron Deslatte, *Gerrymandering Issue Divides Black Caucus*, Orlando Sentinel, July 26, 2009; *Our Opinion, Yes to Amendments 5 and 6*, Tallahassee Democrat, Sept. 26, 2010. Florida NAACP President Adora Obi Nweze argued that success of the anti-FDA campaign would be "a throwback to a very dark time in our history." *Fair Districts Fla. Draws Opposition*, Tallahassee Democrat (Sept. 21, 2010).

C. A Black Opportunity District in Northern Florida

Northern Florida contains the "Slave Belt"—the part of Florida where cotton plantations, and thus, enslaved Black persons, were heavily concentrated before the Civil War. Unsurprisingly, North Florida still contains a high percentage of Black residents.



As a result, even before the FDA, courts and/or the Legislature created a North Florida Black "opportunity district"—*i.e.*, a district that "afford[s] black voters a reasonable opportunity to elect candidates of choice." *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 404 ("*Apportionment VII*") (Fla. 2015).[1]

[1] Opportunity districts are called "crossover" districts when "minority voters make up less than a majority of the voting-age population," but "the minority population … is large enough to elect the candidate of its choice with help from voters who

In particular, a congressional district anchored in Jacksonville elected a Black representative in every election, beginning in 1992.

In 2012, however, the Legislature misused the FDA to pack Black voters from Jacksonville to Orlando into a single district. As a remedy, the Florida Supreme Court required the creation of Benchmark CD-5—a district with an East-West (Jacksonville-Tallahassee) configuration along Florida's northern border—to replace the Legislature's North-South (Jacksonville-Orlando) district. It found that the North-South orientation "overpacked black voters" and thereby "dilut[ed] [their] influence … in surrounding districts." *Apportionment VII* at 402. Based on voter registration and election data, the Court concluded that an East-West CD-5 would afford Black voters a "reasonable opportunity to elect a candidate of [their] choice." *Id.* at 405. And, indeed, that district elected Black voters' preferred candidate in 2016, 2018, and 2020: Al Lawson, a Black candidate.

Benchmark CD-5, as Approved by the Florida Supreme Court.

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are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

In approving Benchmark CD-5, the Court recognized that it was compact enough to satisfy Florida law. *Id.* at 405-06. Moreover, that district's shape was hardly arbitrary. As illustrated by the maps above, its configuration tracks Florida's "Slave Belt" and the Georgia border. That is, the residents of Benchmark CD-5 shared a "lineal connection to the many enslaved people brought to work there during the antebellum period." *Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023). Moreover, in part because of this connection to slavery, the area's residents were on average younger, and had lower educational attainment and lower household incomes, than the median Floridian.

Notably, as part of the 2012 redistricting, Alex Kelly—then a legislative staffer—drew a map with an East-West-oriented district along the Georgia border that mirrored what became Benchmark CD-5. Mr. Kelly will be an important witness in this case because he subsequently became Governor DeSantis' Deputy Chief of Staff, and in that capacity, authored the 2022 Enacted Plan challenged here. Mr. Kelly's experience with the demographics of North Florida, going back at least to 2012, made him well aware that the supposedly "race-neutral" map he drew on behalf of the Governor would crack Benchmark CD-5 into four White districts and disempower Black voters in North Florida.

D. Following the 2020 Census, the Legislature Enacts State Legislative Maps that Comply with the Law

Following the 2020 Census, the Legislature began reapportionment proceedings in late 2021. In Florida, state-level redistricting differs from congressional redistricting in one critical way: the Governor has no veto over state-level maps. Without any hook for the Governor to hijack the process, state-level reapportionment proceeded smoothly and lawfully. Legislative leaders, including Senate Chair Ray Rodrigues and House Redistricting Chair Tom Leek, affirmed their commitment to complying with both the FDA and federal law. (JX 0001-0015, Tr. 15:03-20 (9/20/21 Senate Comm.); JX 0003-0007, Tr. 07:02-14 (9/22/21 House Redistricting Comm.))

On February 3, 2022, the Legislature passed a Joint Resolution establishing state House and Senate districts. The Joint Resolution was subject to mandatory review by the Florida Supreme Court. *See* Fla. Const. art. III, § 16(c). The Legislature's submissions to the Court contained extensive data supporting the state maps' compliance with the FDA's non-diminishment standard, protecting the rights of Black voters, and the Court found that they met that standard, as well as all other applicable requirements. In approving these maps, the Florida Supreme Court again reaffirmed that Florida's Constitution prohibited diminishing minority

voters' ability to elect their candidates of choice. *In re Senate Joint Resolution of Legislative Apportionment 100*, 334 So.3d 1282, 1288 (Fla. 2022).

Although anyone opposing the state maps was permitted to challenge them, for the first time in modern Florida history, no one—including the Governor—did so. *Id.* at 1285. In particular, the Governor did not oppose the maps on the ground that their many Black opportunity districts, which the Legislature had drawn pursuant to the FDA's non-diminishment principle, rendered them suspect under the federal Constitution.

E. Meanwhile, Governor DeSantis Injects Himself into the Federal Redistricting Process and Obsessively Targets CD-5 for Destruction, Ultimately Bending the Legislature to His Will

1. The Legislature Initially Proposes a Compliant Map, Which the Governor Opposes

Things proceeded very differently at the congressional level. From the beginning, the Legislature sought to pass a plan that complied with the FDA by retaining a version of Benchmark CD-5 as a Black opportunity district in Northern Florida. However, on January 16, 2022, the Governor began his campaign against CD-5. He took the unprecedented step of proposing *his own* map and demanding that the Legislature adopt it instead of its own pending plan. (PX 5053 (Map Plan 0079)). The Governor's proposed map ignored the FDA and destroyed Benchmark CD-5, cracking its Black population and dispersing it across four majority-White, North-South districts. (PX 4520 (PC0079 Population Summary Report)).

In an accompanying press statement, the Governor's press secretary expressed the Governor's fundamental opposition to a Black-performing district in North Florida, calling Benchmark CD-5 an "unconstitutional gerrymander that unnaturally connects communities in Jacksonville with communities hours away in Tallahassee and Gadsden Counties." (PX 2209). But, as noted above, there was nothing "unnatural" about this connection: the Governor's claim ignored the many historical and socioeconomic affinities among CD5's "Slave Belt" communities. It ignored that similar-shaped East-West districts had existed in North Florida "well before the East-West CD-5 ever existed." *BVM* at 42. And it ignored the Florida Supreme Court's holding that CD-5 was lawfully drawn.

The Legislature initially stood firm in response to the Governor's intrusion. At a January 19, 2022, press conference, Republican Senator Rodrigues, chair of the Senate Reapportionment Committee, noted that the Senate was a "hundred percent confident" in its pending map, which preserved a North Florida Black opportunity district, and was "prepared to defend that map in court if necessary." (JX 0027-0003, Tr. 03:12-16). A day later, the Senate passed that map.

2. The Governor Seeks an Advisory Opinion from the Florida Supreme Court, But Is Rebuffed

On February 1, 2022, Governor DeSantis sought an unusual "advisory opinion" from the Florida Supreme Court. (JX 0052). He asked whether the FDA

required a "congressional district in northern Florida that stretches [200] miles East to West" "to connect black voters in Jacksonville with black voters in Gadsden and Leon Counties ... so that they may elect candidates of their choice." (JX 0052-0004). The Governor acknowledged that the Court "ha[d] previously suggested that the answer is 'yes'"—mischaracterizing the holding in the *Apportionment* cases as a mere "suggest[ion]." (JX 0052-0004). He also argued that, even if the FDA required such a district, it would violate the Fourteenth Amendment's Equal Protection Clause. (JX 0052-0005).

Nine days later, on Feb. 10, 2022, the Supreme Court rebuffed the Governor's request. *Advisory Opinion to Governor re: Whether Article III, Section 20(a) of the Florida Constitution Requires the Retention of a District in Northern Florida, Etc.*, 333 So.3d 1106, 1108 (Fla. 2022). The Court noted that the Governor's arguments were premature and unsupported. They called for "fact-intensive analysis," but he had provided "no record" to substantiate them. *Id.* "History," the Court observed, "shows that the constitutionality of a final redistricting bill ... will be subject" to "judicial review through subsequent challenges in court." *Id.* As part of those challenges, the parties would develop the sort of "record" necessary to "answer[] the complex federal and state constitutional issues implicated by the Governor's request." *Id.*

The upshot was clear: Benchmark CD-5's shape, standing alone, did not render it unlawful. To have any force, the Governor's attacks required development of detailed evidentiary support and complex legal and factual analysis. But the Governor already had his mind made up. The next day, February 11, 2022, he announced—notwithstanding the Supreme Court's ruling—that he "will not be signing any congressional map that has an unconstitutional gerrymander in it." (PX 2215).

3. The Governor Presses Ahead with His Plan to Destroy CD-5, Ignoring the Florida Supreme Court

On February 14, 2022—four days after the Court had rejected his request—the Governor submitted a second proposed map to the Legislature. (PX 5054 (Map Plan 0094)). Once again, his map purposely destroyed Benchmark CD-5. (PX 4528 (Population Summary Report)). When the Legislature gave no sign that it agreed, the Governor ratcheted up his campaign.

On February 18, the Governor's General Counsel, Ryan Newman, submitted a letter to the Legislature's leadership noting the Governor's purported objections to a congressional district resembling Benchmark CD-5. (JX 0056). Without elaboration or evidence, and ignoring the contrary facts discussed above, Mr. Newman declared that the communities encompassed by the proposed district were "distinct … and not defined by shared interests." (JX 0056-0002). He also made

the unsupported and false assertion that, when "Florida voters approved [the FDA], they did not have before them [a] record of pervasive, flagrant, widespread, or rampant discrimination." (JX 0056-0004).

That same day, Robert Popper, a senior attorney with the group Judicial Watch, testified before the House Reapportionment Committee at the Governor's invitation. He asserted that the proposed district was an unlawful racial gerrymander because race must have predominated in its creation, as evidenced solely by the fact that its shape was not "compact." (JX 0057-0005). Mr. Popper ignored the Florida Supreme Court's holding that Benchmark CD-5 *was* sufficiently compact under Florida law. *Apportionment VII*, 172 So.3d at 405-06. Beyond his reliance on the district's shape, Mr. Popper—like Mr. Newman—offered no analysis of whether considerations beyond race unified the proposed district. (JX 0057). Moreover, Mr. Popper conceded that even if race *did* predominate in the drawing of a district, compliance with the FDA's non-diminishment mandate could provide a compelling state interest to "justify" such a "race-based district." (JX 0057-0005).

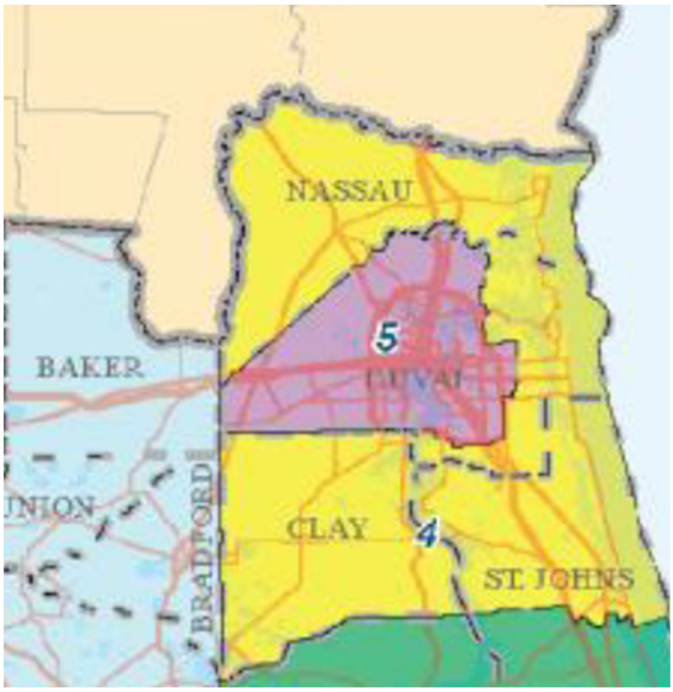
The Legislature—Republicans and Democrats alike—was thoroughly unconvinced by Mr. Popper, publicly casting doubt on his testimony. (JX 0037 (2/18/22 House Redistricting Comm.)). Reapportionment Subcommittee Chair Rep. Tyler Sirois, a Republican, stated: "There's been noise outside of our process

dealing with the congressional map. I would encourage all members to put that noise aside. Those external influences need to stay external, and our personal preferences cannot override our constitutional responsibility to follow the law." (JX 0037-0005, Tr. 05:20-25).

4. The Legislature Takes the Unprecedented Step of Adopting a Preferred Map and a Backup Map

Seeking to placate the Governor while complying with Florida law, the Legislature developed a compromise. It enacted two congressional plans: a primary map, and a backup map in case the primary map was struck down by the courts. Never in the history of Florida redistricting had the Legislature taken such a step—a clear acknowledgment that the Legislature doubted the legality of the Governor's actions.

The Legislature's primary map (Map 8019) addressed *every one* of the Governor's stated concerns about Benchmark CD-5, while maintaining a Black opportunity district in North Florida, as the FDA required. It was no longer a district that "stretche[d] [200] miles East to West" "to connect black voters in Jacksonville with black voters in Gadsden and Leon Counties." (JX 0052-0004). Instead, it was contained *entirely* within Duval County and the city of Jacksonville. (PX 5061).



Map 8019, With a Compact Black-Opportunity District Within Duval County

Even though this Duval-only district had a somewhat lower Black Voting Age Population ("BVAP") than Benchmark CD-5, the Legislature concluded—and the Governor accepted—that it would still have permitted its Black voters to elect their representative of choice. (JX 0038-0026 - 0027, Tr. 26:19-27:08 (2/25/22 House Redistricting Comm.)). The district also followed all traditional redistricting principles. It was plainly compact, crossed no political boundaries, and comprised a natural political constituency, irrespective of skin color. *See Bush v. Vera*, 517 U.S. 952, 959-60 (1996).

The Legislature's backup map (Map 8015) contained an East-West Black opportunity district similar to Benchmark CD-5. However, that district had

improvements over Benchmark CD-5, as measured by traditional redistricting criteria, also intended to address the Governor's stated concerns. (JX 0038-0045, Tr. 45:15-21). *See BVM* at 41 ("CD-5 in Plan 8015 both decreases the footprint of [Benchmark CD-5] and smooths [its] boundaries ... even further").

The Governor dismissed the compromise out of hand. On February 28, while the compromise was under consideration, the Governor said he would "veto [the] maps" under consideration by the Legislature, "[a]nd that is a guarantee. They can take that to the bank." (PX 2107)). On March 4, 2023, the Governor posted on Twitter that he would "veto the plan currently being debated by the House. DOA." (PX 2108). Even though the Duval-only primary map (Map 8019) addressed all the Governor's stated concerns about Benchmark CD-5, the Governor nonetheless maintained—without explanation—that the Legislature's plan included unconstitutional districts and was unacceptable.

The Legislature continued to defend its plan. House Redistricting Chair Tom Leek stated that the two-map plan addressed the "novel legal theory raised by the Governor, while still protecting a minority seat in North Florida." (JX 0038-0024, Tr. 24:08-10). Mr. Leek added that the plan attempted to "continu[e] to protect the minority group's ability to elect a candidate of their choice," as the FDA required. (JX 0038-0024, Tr. 24:20-22). Senate Reapportionment Chairman Ray Rodrigues stated that "based upon what [the House has] done, and a functional

analysis has been performed on those [minority access] seats after they have proposed them, it is clear that we are preserving the opportunity for minority voters, which makes it constitutional." (JX 0040-0008, Tr. 08:11-15).

5. The Governor Vetoes the Legislature's Bill and Issues a Pretextual Veto Statement

On March 29, 2022, Governor DeSantis made good on his veto threat, insisting again that the Legislature's plan contained "unconstitutional racial gerrymanders." (PX 2102). That same day, Mr. Newman issued a memorandum purporting to elaborate on the Governor's position. (JX 0055).

That memo repeated the Governor's argument—deemed conclusory and insufficient by the Florida Supreme Court—that the East-West CD-5 in the Legislature's backup map violated the Fourteenth Amendment because it "assign[ed] voters [to a district] primarily on the basis of race," but was "not narrowly tailored to achieve the compelling interest of protecting the voting rights of a minority community in a reasonably cohesive geographic area." *Id.* at 1, 7. Mr. Newman once again proclaimed this as a self-evident truth, without citing any evidence.

Of course, all of this was largely beside the point, because the map containing this East-West district was explicitly designated as a *backup*. But the Governor found the primary map unacceptable too, even though it was tailored

directly to his stated concerns. Strangely, Mr. Newman's stated reason for this was that the primary map's Duval-only Black opportunity district *did not sufficiently preserve* Black voting strength. As discussed below, that explanation was incoherent—especially because the Governor's own map "solved" that supposed "problem" by eliminating a Black opportunity district in North Florida altogether.

6. The Governor Calls a Special Legislative Session to Push Through His Own Map

After his veto, Governor DeSantis called an abbreviated, three-day special legislative session to commence on April 19, 2022. This was a full six weeks after he had received the Legislature's two-map proposal. The reason for the long delay in calling the special session was apparent. A new map needed to be in place by early May to meet deadlines for the 2022 primary and general elections. In an earlier incarnation of this lawsuit, this Court had set a hearing for May 12-13, 2022, with submissions starting on April 18, 2022—the day before the special session—on whether to impose an interim map for 2022. Dkt No. 76 at 2-3. By postponing a special session until the last minute, the Governor meant to force the Legislature to concede.

The ploy worked. In a memorandum dated April 11, 2022, the Legislative leaders announced that "Legislative reapportionment staff is not drafting or producing a [new] map for introduction during the special session. We are

awaiting a communication from the Governor's Office with a map that he will support." (PX 3040-0002).

On April 13, the Governor submitted his third and final map, which was ultimately enacted into law (the "Enacted Plan"). (PX 7190). It took Benchmark CD-5's Black voters and dispersed them across the newly configured CDs 2, 3, 4, and 5—which are whiter, richer, and more educated than Benchmark CD-5.

The Governor's Third Proposed Map, as Enacted into Law.

In describing the Enacted Plan, the Governor again attacked Benchmark CD-5, stating that "[w]e are not going to have a 200-mile gerrymander that divvies up people based on the color of their skin." (PX 2103). Of course, that argument was a red herring—the primary, Duval-only map had no such district. Rather, its compact CD-5 was entirely within the city limits of Jacksonville.

The Legislature sought an outside opinion on the Governor's constitutional argument about Benchmark CD-5. Daniel E. Nordby, a lawyer working for the Republican Senate leadership, concluded that the Governor's argument was novel and untested at best. (PX 3014). No court "has rendered an opinion on this

specific legal issue," he wrote. The most he could muster was the careful statement that, "in the absence of controlling judicial precedent," the Governor's arguments warrant "careful consideration." (PX 3014-0002-3).

On April 19, 2022, Alex Kelly—then the Governor's Deputy Chief of Staff, and the chief architect of the Enacted Plan—appeared before the Legislature to testify on the Governor's behalf. (JX 0044 (House Congressional Redistricting Subcomm.), JX 0046 (Senate Comm.)). Despite the Governor's insistence that the Enacted Plan was "race-neutral," Mr. Kelly's testimony made clear that it was anything but. As already noted, Mr. Kelly was intimately acquainted with the racial composition of North Florida from his construction of an East-West map in 2012, which had led to Benchmark CD-5 in the first place. Mr. Kelly also acknowledged that he had examined racial demographic data in North Florida before drawing the Governor's map. (JX 0044-0018, Tr. 18:08-19:01 (House); JX 0046-0008, Tr. 08:02-18 (Senate)). He even admitted that he used racial considerations in *drawing actual district lines* in the Enacted Plan—albeit, supposedly not in North Florida. For instance, Mr. Kelly had no qualms about considering race in drawing the Enacted Plan's CD-24, noting that that seat had "historically performed for African American candidates" and "would implicate the Florida Constitution's analysis regarding diminishment, so there was no reason to change that." (Kelly 6/8/23 Depo Tr. 276:02-07). Thus, Mr. Kelly agreed that

there was no constitutional problem with the FDA other than, purportedly, as applied to Benchmark CD-5.

Mr. Newman, too, testified before the House Redistricting Committee on the Governor's behalf. (JX 0044). Like Mr. Kelly, he did not claim that the FDA's non-diminishment standard facially violated the Fourteenth Amendment. Indeed, he acknowledged that there were "other applications" of that non-diminishment standard "that could ... survive strict scrutiny." *Id.* at 67:24-68:02. "One example," he elaborated, "would be if you had a sufficiently compact African American community, right, in a district." *Id.* at 68:03-05. "The issue" that supposedly made Benchmark CD-5 unconstitutional was, he said, "cobbl[ing] together disparate minority communities from across Northern Florida." *Id.* at 68:09-10. As always, Mr. Newman made no factual showing that the relevant communities were "disparate." His testimony likewise demonstrated that there was no facial constitutional problem with the FDA, and that the Duval-only district in the Legislature's primary map was constitutionally unobjectionable.

F. The Enacted Plan Intentionally Diminishes Black Political Power and Representation in Northern Florida

On April 21, 2022, as a result of the Governor's strong-arming, both chambers adopted the Enacted Plan. For the first time in 30 years, Florida's congressional map contained no Black opportunity district in Northern Florida. In

related litigation, the Secretary of State and Legislature have stipulated that "[n]one of the Enacted districts in North Florida are districts in which Black voters have the ability to elect their preferred candidates." *BVM* at 13.

As the Governor intended, in the 2022 election, none of the new districts containing parts of Benchmark CD-5 elected Black voters' candidates of choice. Representative Al Lawson, who is Black, lost his race in the new CD-2 to a White opponent, as did Black candidate LaShonda Holloway in the new CD-4. North Florida failed to elect a Black member of Congress for the first time since 1990.

G. A Florida State Court Finds that the Destruction of CD-5 Violated the FDA and Rejects the Governor's Defenses

On September 2, 2023, the Leon County Circuit Court issued a final judgment against Secretary Cord Byrd and the Florida Legislature, holding that "the Legislature … [had] violated the Florida Constitution by diminishing the ability of Black voters in North Florida to elect representatives of their choice." *BVM* at 2. Accordingly, that court "declare[d] the enacted map unconstitutional and enjoin[ed] [its use] in future congressional elections." *Id.*

The state court rejected the defendants' position "that compliance with the non-diminishment provision of the Florida Constitution would [have] require[d] [them] to implement a racial gerrymander in violation of the U.S. Constitution's Equal Protection Clause." *Id.* at 25, 28. Among other things, the court held that

"even the East-West configuration of CD-5 in Plan 8015 ... complie[d] with traditional redistricting principles to an extent which suggests that race did not predominate in its drawing." *Id.* at 39-43. *A fortiori*, the Legislature's preferred Duval-only configuration was "extremely compact," and there was "no question it complie[d] with basic traditional redistricting criteria" and was not a racial gerrymander. *Id.* at 43 n.14. Finally, the state court held that "*even if*" it were impossible to draw a Black opportunity district in Northern Florida without using race as the predominant consideration, "the drawing of such a district would be narrowly tailored to address [the] compelling state interest" embodied by the FDA's non-diminishment provision. *Id.* at 43-46.

ARGUMENT

Only two issues remain for resolution in this case. As set forth in the Joint Pretrial Report (merging the issues of law and fact), they are:

1. Whether the record and facts developed at trial demonstrate that the Fourteenth and Fifteenth Amendments are violated in this case.

2. Whether Plaintiffs have standing to challenge and remedy the elimination of Benchmark CD-5 in the Enacted Plan.

I. Plaintiffs Have Standing to Bring Their Claims

In this case, the challenge is to the destruction of Benchmark CD-5 and its replacement by Enacted Districts 2, 3, 4 and 5. Therefore, there must be at least one Plaintiff residing in one of those Enacted Districts. *Gill v. Whitford*, 138 S. Ct.

1916, 1929-30 (2018). Defendant has already conceded that there is. Dkt. No. 178 at 2. That grants the Plaintiffs standing and permits Plaintiffs to seek relief based on the destruction of Benchmark CD 5, even if they do not reside in all four of the splintered districts in the Enacted Plan. *Id.* at 4.

There is no reason for the Court to consider standing further. "[W]here at least one plaintiff has standing to maintain the action, there is an Article III case or controversy, and it is unnecessary to address the standing of the other plaintiffs." Dkt. No. 115 at 2. Moreover, if necessary, Plaintiffs will prove that there are two Organizational Plaintiffs with associational standing, by virtue of their members, to challenge all districts under the Enacted Plan.

II. Governing Legal Principles

The Fourteenth Amendment provides that "No State shall ... deny to any person … the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Fifteenth Amendment provides that "[t]he right … to vote shall not be denied or abridged ... by any State on account of race." *Id.*, amend. XV, § 1. Both provisions are violated where a state intentionally acts to diminish the voting power of a racial group in redistricting. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341-42 (1960); *City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980).

Such challenges are governed by a two-step test. First, Plaintiffs must show that the enactment has a discriminatory effect and was enacted, at least in part,

with discriminatory intent. *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021). Importantly, "a plaintiff [need not] prove that the challenged action rested solely on racially discriminatory purposes, ... or even that [discrimination] was the 'dominant' or 'primary' [purpose]." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977). It is enough to "pro[ve] that a discriminatory purpose has been a motivating factor." *Id.* Upon such a showing, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without" the discriminatory motivation. *Greater Birmingham*, 992 F.3d at 1321.

Defendant has previously argued that, in redistricting challenges, "the good faith of the legislature must be presumed." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). All this means, however, is that the plaintiff challenging such a plan has the initial burden to prove that discrimination was a motivating factor—just as in any Equal Protection challenge. "When there is proof that a discriminatory purpose has been a motivating factor in the [challenged] decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265-66.

Defendant has also previously pointed to the Supreme Court's holding that Section 2 of the federal Voting Rights Act does not require the creation of new "crossover" districts—*i.e.*, Black opportunity districts, such as Benchmark CD-5,

that do not have an outright Black majority. *Strickland*, 556 U.S. at 24. However, Plaintiffs sue under the Fourteenth and Fifteenth Amendments, not the VRA. Pursuant to the FDA, Florida has lawfully required crossover districts under specified conditions. When those conditions are met, the Fourteenth and Fifteenth Amendments prevent Florida from intentionally destroying those districts with the goal of reducing Black voters' electoral power. Indeed, foreseeing this very case, the plurality in *Strickland* warned: "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24.

Finally, Defendant may argue that, even if Governor DeSantis acted with discriminatory intent, the Legislature did not. This argument fails. It is only because the Governor vetoed the Legislature's two-map compromise that the Enacted Plan became law. Under the Florida Constitution, the Governor's exercise of his veto power is part of the legislative process. *See* Fla. Const., art. III, § 8 (discussing veto power under article describing the "Legislature").

And even if the Governor were deemed an outsider to the legislative process, a legislative body cannot "avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of [outside parties]." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466

U.S. 429, 433 (1984)). Thus, a plaintiff "need not prove that the [decision-making body] *itself* intended to discriminate on the basis of race," and "[i]t is sufficient … [that] racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker [was] knowingly responsive." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1225-26 (2d Cir. 1987). Applying this principle, the Eleventh Circuit found a Fourteenth Amendment violation where, for instance, racially biased private citizens "put the mayor and the [city] council in a head lock" until they capitulated to those citizens' desires. *Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1008 (11th Cir. 2018); *see also Bonasera v. City of Norcross*, 342 F. App'x 581, 584 (11th Cir. 2009); *Hallmark Developers, Inc. v. Fulton Cnty., Ga.*, 466 F.3d 1276, 1284 (11th Cir. 2006). The same principle makes the Legislature here responsible for bowing to the Governor's wishes.

III. The Governor Targeted Benchmark CD-5 for Destruction at Least in Part on the Basis of Discriminatory Racial Intent

"Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). When evaluating claims of racial discrimination, courts must conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266.

Relevant factors include: "(1) the [disparate] impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to [the law's] passage; (4) procedural and substantive departures [from the norm]; and (5) the contemporary statements and actions of key legislators." *Id.* To this list, the Eleventh Circuit has added: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact; and (8) the availability of less discriminatory alternatives." *Greater Birmingham*, 992 F.3d at 1322. But these factors are "non-exhaustive," *Cooper v. Harris*, 581 U.S. 285, 319 (2017), and courts must always consider "the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976).

A. The Governor Expressly Admitted a Racial Motive

In full context, the Governor's repeated, vehement, and explicit objections to a Black opportunity district in North Florida come extremely close, in themselves, to an admission of racial bias. The Governor made clear that his objections to Benchmark CD-5 focused on race, and in particular, the fact that Benchmark CD-5 enabled "black voters" to "elect candidates of their choice." (JX0052-0004). If they were not an explicit admission, then they are extremely close to that line.

This case, therefore, is easier than most race discrimination cases, where the defendant denies having thought about race at all. The Governor's statements, by themselves, tend to reveal that his true objection to the Legislature's map was, at

least in part, "because of," and not "in spite of," its effect on Black voters. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

B. The Enacted Plan Has a Disparate Impact on Black Voters

By destroying Benchmark CD-5, a Black opportunity district, the Enacted Plan indisputably diminished Black voting power and denied Black voters in North Florida a representative of their choice. Indeed, the state defendants conceded as much in the parallel state court litigation. Joint Stipulation, at 2 § IV(B), *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, No. 2022-CA-666 (Fla. 2d Jud. Cir. Ct. Aug. 11, 2023).

C. The Enacted Plan Continues a Long, Unbroken Chain of Discrimination

Florida has a long history of discriminating against Black citizens in voting and electoral representation—a history that includes racially motivated "packing" and "cracking," like what took place here. Moreover, both parties' historians have noted the heightened racial tension in Florida that exists today. In the immediately preceding redistricting cycle, the Legislature packed Black voters to reduce their voting strength, prompting the Florida Supreme Court to invalidate their plan and creating Benchmark CD-5. This case continues that pattern.

D. The Relevant Sequence of Events Includes Multiple Unprecedented Departures from Procedural and Substantive Norms

So far as we have been able to determine, the events leading up to the Enacted Plan were unprecedented in many respects. Prior to this redistricting cycle, we are aware of no Florida governor who submitted his own congressional map—let alone one he knew would violate the Florida constitution—and crusaded for it like Governor DeSantis. We can identify no Florida governor who ever sought an advisory opinion from the Florida Supreme Court about a pending redistricting plan—and then ignored its advice that such a question was too complex to be answered short of litigation and a full record.

Florida's Legislature had never before passed a redistricting plan that included "primary" and "backup" maps, in anticipation of the "primary" map being invalidated by a court. No Florida governor in memory had ever vetoed his own party's proposed districting plan. Never, to our knowledge, had the Legislature ultimately approved the Governor's plan after widespread acknowledgment that the plan in question would violate the Florida constitution and harm Black voters. Defendant's witnesses could not identify any precedent for these events, either.

In short, almost *everything* about the sequence of events leading to the Enacted Plan was highly irregular—if not totally unprecedented. And along the

way, it is fair to say that the Governor showed no respect for the Florida's Supreme Court, its Legislature, or its constitution.

E. As Confirmed by the Legislative History, the Governor and Legislature Knew that Destroying Benchmark CD-5 Would Harm Black Voters

The Governor and Legislature knew that cracking Benchmark CD-5 across four heavily White districts would dilute Black voting strength. Legislators from Northern Florida and elsewhere protested that the Enacted Plan would violate Florida law by destroying Black voters' ability to elect their candidate of choice and deny a North Florida community with shared interests its own representative. Senator Audrey Gibson made the point with passion:

> [I]t's more than about race. It's also about need [for] folks with health … disparities, … neighborhoods that have been crumbling historically, infrastructure needs, cleaning of Brownsville and communities of color…. [W]ho represents those communities matter[s].

Moreover, she continued, destroying CD-5 would result in "a member [who] doesn't understand in totality that population" and "takes the focus off of some of those who are the neediest." (JX 0046-0140, Tr. 140:02-06).

F. Less Discriminatory Options Were Available

Finally, options less discriminatory than the Enacted Plan were available, but rejected. Unlike the Enacted Plan, both the "primary" and "backup" maps in the Legislature's two-map bill would have retained a Black opportunity district in

North Florida. Even taking at face value the Governor's objections to Benchmark CD-5, there was still an unobjectionable alternative in the Duval-only primary map, which addressed *all* his purported concerns about compliance with traditional redistricting principles.

IV. The Governor's Alternative Justifications for His Actions Are Pretextual and Do Not Dispel the Strong Inference of Discriminatory Intent

The Governor and his surrogates purported to provide non-discriminatory explanations for his opposition to the Legislature's maps. His stated objection to the Legislature's actual map, the Duval-only primary map, was remarkable: it did not *sufficiently* protect Black voters, and therefore had to be replaced by a map that did not protect Black voters *at all*. Tellingly, the Governor largely avoided discussing that map. Instead, he directed his fire principally against the map based on Benchmark CD-5, even though that was the Legislature's second choice, so there was little need to address it at all.

Importantly, Plaintiffs have no burden to show that the Governor's stated objections to these maps were *legally erroneous* (although they are). Plaintiffs need only show that the Governor's purported neutral objections to any Black opportunity district in North Florida were, at least in part, pretextual—*i.e.*, that, *as a factual matter*, they did not provide the sole motivation for his decisions and actions. The evidence supports—indeed, compels—that conclusion.

"[A] plaintiff can show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered reason for the [defendant's] action that a reasonable factfinder could find them unworthy of credence." *Thomas v. Dolgencorp, LLC*, 645 F. App'x 948, 951 (11th Cir. 2016) (citing *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1348 (11th Cir. 2007)). Here, the record is replete with these indicia of pretext. Indeed, far from *refuting* the inference of racially discriminatory intent, the Governor's blatantly pretextual explanations *bolster* that inference. *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) ("The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent."); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (employer's proffer of a pretextual explanation "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination").

A. The Governor's Proffered Reasons for His Objection to an East-West CD-5 Are Unsupported

The Governor's arguments against a Black opportunity district in North Florida were summarized in the veto memo of his General Counsel, Ryan Newman. (JX 0055). Like the Governor's other public statements, the Newman memo focused principally on the "backup," East-West version of CD-5. That

these objections were trained largely on a backup map—and not the Legislature's intended map—is suspect in itself.

As to that backup map, the Governor argued that any East-West district resembling Benchmark CD-5 would violate Fourteenth Amendment racial gerrymandering jurisprudence. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993). In support of this argument, the Governor complained that the proposed CD-5 was not "compact," but rather "stretche[d] approximately 200 miles from East to West," purportedly joining "a minority population in Jacksonville with a separate and distinct minority population" in Tallahassee, with which it had nothing in common but race. (JX 0055-0002, JX 0055-0007). In his view, this meant that race "predominated" over all other factors in the drawing of the proposed East-West district. *Id.* at 4. And this "predominating" use of race was impermissible, in his view, because it was purportedly not narrowly tailored to advance a compelling state interest. *Id.* at 4.

These arguments were so conclusory, so poorly developed, and so flagrantly ignored both contrary authority and contrary facts, as to suggest bad faith. They did not begin to address the complex mix of facts and law that the Florida Supreme Court had found necessary to answer the question. To begin, as the Governor well knew, the Florida Supreme Court had expressly approved Benchmark CD-5 as required by Florida law and consistent with federal law. *See Apportionment VII*,

172 So.3d at 402--06; *League of Women Voters of Fla. v. Detzner*, 179 So.3d 258, 261 (Fla. 2015) ("*Apportionment VIII*"). No court, state or federal, had ever endorsed the Governor's theory that complying with the FDA (or its analogue, Section 5 of the VRA) *itself* constitutes prohibited "racial gerrymandering."

Perhaps hoping that the Florida Supreme Court would change its mind, the Governor requested an unusual advisory opinion. But the court rebuffed him, unanimously concluding that his theory raised complex legal and factual issues and could not be evaluated without a full record. Yet in the Legislature, the Governor did not marshal the necessary complex legal argument or build any semblance of a factual record to support his theory. He just relied on bullying and conclusory assertions. This strongly suggests that the Governor was driven by the result—the elimination of a Black opportunity district—and not the merit of his arguments.

For instance, the Governor simply asserted, without proof, that no "compelling state interest" could justify an East-West CD-5, even if the FDA required such a district. However, the FDA's non-diminishment requirement parallels Section 5 of the VRA, and eight Justices of the U.S. Supreme Court have opined that there *is* a compelling state interest in preventing diminishment under

the VRA.[2] *See LULAC v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., joined by Roberts, C.J., Thomas & Alito, JJ., 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)); *see also BVM* at 45-50 (holding that "[c]ompliance with the Florida Constitution's non-diminishment provision is a compelling state interest"); *Black Voters Matter Capacity Bldg. Inst., Inc. v. Lee*, 2022 WL 1684950 (Fla. 2d Cir. Ct. 2022) (same). A serious, non-pretextual legal argument would have had to grapple with this precedent, but the Governor ignored it entirely.

Moreover, the Governor's assertion that Benchmark CD-5's residents had nothing in common but race was patently untrue. As discussed above, the Black residents of that district shared similar policy concerns and socioeconomic issues, such as education, income level, and housing and employment patterns. (PX 5042-0016). And due to Benchmark CD-5's location in the area known as the "Slave Belt," there is a "lineal connection to 'the many enslaved people brought there to work in the antebellum period.'" *Milligan*, 143 S. Ct. at 1492 (holding that this is one factor that creates a "community of interest" for redistricting purposes). As Senator Gibson noted, the common needs and interests of this community are "more than about race." (JX 0046-0139, Tr. 139:15-20 (4/19/22 Senate Comm.)).

[2] While *Shelby County v. Holder* set aside the VRA's coverage formula in Section 4, it left the non-diminishment command of Section 5 untouched. 570 U.S. 529, 557 (2013) ("We issue no holding on § 5 itself, only on the coverage formula.").

One of the Governor's favorite legal citations makes this point clearly. He relied heavily on a one-sentence sound bite from *Shaw v. Reno*: "A reapportionment plan that includes in one district individuals … [who are] widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." 509 U.S. at 647. But he disregarded *Shaw*'s very next sentence: "It reinforces the perception that members of the same racial group—*regardless of their age, education, economic status, or the community in which they live*—think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* (emphasis added). As this sentence makes clear, factors such as commonality of age, education, economic status or community—all of which are present in Benchmark CD-5, and all of which the Governor ignored—change the equation. The only point of the *Shaw* line of cases is to make "extreme instances of gerrymandering subject to meaningful judicial review"; it is not to invalidate any district where "race … [was] considered in the redistricting process." *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring).

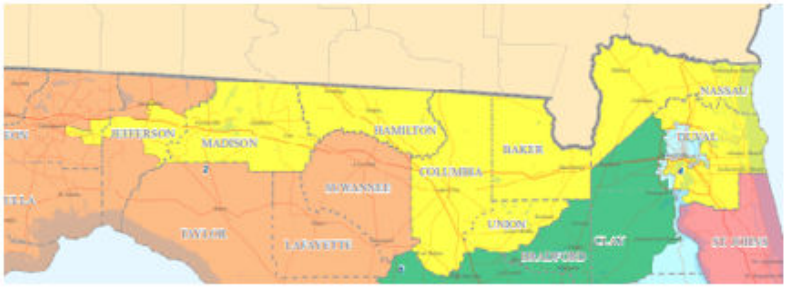
Equally remarkable was the Governor's assertion that, when Floridians adopted the FDA, there was no "record of flagrant, widespread discrimination" against Black voters that could justify remedial action. (JX 0056-0004). As

discussed above, this is demonstrably false. Even Defendant's own history expert in this case agrees that there has been a long and sordid history of discrimination against Florida's Black voters. And far from being long removed from the present day, both experts agree that racial tensions in Florida are high today.

The Governor's professed concerns about "compactness" ring hollow, too. Under the FDA, compactness is a secondary consideration that yields to the goal of preventing diminishment. The Governor's argument essentially made compactness a Tier I consideration. While Benchmark CD-5 may not have been a "model of compactness," it was compact enough to persuade the Florida Supreme Court that it was lawful. *Apportionment VII*, 172 So.3d at 406.

The Governor's complaint that the district was 200 miles long was just rhetoric. As illustrated below, from 2002 to 2012, Florida had a district (CD-2) running along the Georgia border that was about 190 miles long, similar to Benchmark CD-5. And the Enacted Plan, which the Governor pushed through, has a district (CD-26) of similar length.

CD-2 from 2002-2012



Plan 8015

Prior, Non-Black Opportunity Districts in North Florida Had Similar Shapes.

Meanwhile, the Governor ignored the Legislature's conscientious effort to improve Benchmark CD-5. By design, the modified version contained in the Legislature's backup plan was more compact than Benchmark CD-5; more compact than CD-2 in the 2002 plan; and more compact than any alternative district that had been proposed at the time of CD-5's creation. (JX 0038-0045-48, Tr. 45:9-48:9 (2/25/23 House Redistricting Comm.) (Chair Sirois describing how CD-5 in Plan 8015 complied with both Tier I and Tier II, improving compactness and compliance with political and geographic boundaries)); *BVM* at 7-8. By ignoring all this, the Governor treated the Legislature's hard work with disdain—more evidence of pretext.

As the Florida state court recently held, "the East-West configuration of CD-5 in Plan 8015 ... complies with traditional redistricting principles to an extent which suggests that race did not predominate in its drawing." *BVM* at 40-43. "[T]he district's length" can be explained by non-racial reasons, such as "North Florida's rural geography and sparse population," and is "entirely consistent with ... the State's tradition of congressional districting in North Florida." *Id.* at 41-42. The Governor and his surrogates ignored all of this, simply declaring—contrary to both law and fact—that the proposed East-West district was not sufficiently "compact," and therefore, *ipso facto* unconstitutional.

Finally, the Governor's insistence that complying with the FDA would violate the federal Constitution is a reversal of his own position that executive officials *must* enforce the laws, even if they believe them to be unconstitutional. When he was a Congressman, Governor DeSantis lambasted the Obama administration for underenforcing federal laws on that ground. He asserted that, because "ours is a government of laws, not of men," and because "[t]he President is not a king," the Executive "must … faithfully execute the laws on the books" and "cannot amend, suspend, or ignore" them. Testimony of Rep. Ron DeSantis, Serial No. 113-63 (House Hearing), "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws," (Feb. 26, 2014). Indeed, it is well settled under Florida law that "[t]he right to declare an act unconstitutional is purely a judicial

power, and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution." *State ex rel. Atl. Coast Line Ry. Co. v. State Bd. of Equalizers*, 94 So. 681, 682-83 (Fla. 1922); *see BVM* at 32-33. And as Governor, he has aggressively acted against local prosecutors who he asserts have decided on their own what laws to enforce. *See, e.g.*, Tierney Sneed & Steve Contorno, *Judge criticizes DeSantis's firing of Democratic prosecutor but declines to reinstate Andrew Warren*, CNN (Jan. 20, 2023, 4:55 p.m.), https://www.cnn.com/2023/01/20/politics/florida-ron-desantis-democratic-prosecutor-lawsuit/index.html. By unilaterally invoking the FDA's supposed infirmity under the U.S. Constitution as a reason for refusing to enforce it, without a court order supporting his view, the Governor not only reversed his own apparently deeply held position; he also disregarded binding Florida law regarding separation of powers. This is still further evidence that his constitutional arguments were pretextual.

B. The Governor's Proffered Reasons for Rejecting the Duval-only Configuration of CD-5 Are Even Less Credible

As weak as the Governor's objections were to the East-West configuration of CD-5, his objections to the Legislature's primary, Duval-only proposal were utterly incoherent. That compromise addressed *every* objection the Governor had lodged to Benchmark CD-5. The Duval-only CD-5 was highly compact; it was not

200 miles long; it did not cross any political boundaries; and it included only residents of Jacksonville, a natural community of interest. Meanwhile, it still provided Black voters in North Florida with the opportunity to elect a candidate of their choice.

Taking the Governor at his word, he should have welcomed the Duval-only compromise, rather than irately vetoing it. Indeed, Mr. Newman, his General Counsel, testified to the Legislature that a Black opportunity district just like the Duval-only district would have been perfectly constitutional:

> That's not to say that there are[n't] other applications of the Florida Constitution's non-diminishment standard that could be or that could survive strict scrutiny. One example would be if you had a sufficiently compact African American community, right, in a district.

(JX 0044-0067-68, Tr. 67:24-68:12 (4/19/22 House Congressional Redistricting Subcomm.)). Indeed, the Governor raised no objection to a Duval-county state Senate district that looked remarkably like the congressional alternative and that was approved by the Florida Supreme Court as compliant with the FDA.

But acquiescence here would have meant a congressional district in North Florida where Black voters could elect their preferred candidate—something the Governor opposed, no matter how that district was drawn. Thus, he had to create a new legal basis for opposing the Duval-only compromise. The one he settled on was facially preposterous. Through his counsel, Mr. Newman, the Governor

claimed that the Duval-only district violated the FDA because *it did not protect Black voting strength enough*. In so arguing, Mr. Newman relied solely on the fact that the BVAP in Benchmark CD-5 had been 46%, while the BVAP in the proposed Duval-only district was 35%. Supposedly, this 11% decrease in BVAP meant that the Duval-only proposal would have unlawfully "diminished" Black voting strength.

This explanation is baffling on multiple levels. It makes no sense to argue that the Duval-only CD-5 would "diminish" Black voting strength compared to Benchmark CD-5, while simultaneously arguing that Benchmark CD-5 was *itself* unlawful—and thus an invalid baseline for comparison. Moreover, the comparison was utterly meaningless, since the BVAP in one district cannot be compared to that in another without a "functional analysis" to determine, based on the entire population of the district, whether that district would perform for Black voters. Finally, it was nonsensical for the Governor to veto a Duval-only Black opportunity district on the ground that it purportedly diminished Black voting strength, while strong-arming the Legislature into passing his own map, which contained *no Black opportunity district in North Florida at all*.

In fact, as a matter of settled law, the change in BVAP from 46% to 35% did not constitute "diminishment" in violation of the FDA, because functional analyses showed that at either percentage, there would remain one Black opportunity district

in North Florida. Such a plan would not diminish *the number of districts* in which Black voters would retain the ability to elect their candidate of choice. That is the test. As the U.S. Supreme Court has held, "[a] plan leads to impermissible retrogression [*i.e.*, diminishment] when, compared to the plan currently in effect …, the new plan diminishes *the number of districts* in which minority groups can 'elect their preferred candidates of choice'...." *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 260 (2016) (emphasis added). The non-diminishment standard "*does not require maintaining the same population percentages* in majority-minority districts as in the prior plan. Rather, § 5 is satisfied if minority voters *retain the ability to elect their preferred candidates*." *Id.* (emphasis added). The Florida Supreme Court has adopted this exact standard under the FDA's non-diminishment provision:

> [T]he BVAP itself cannot be viewed in a vacuum…. [I]t is the "ability to elect a preferred candidate of choice," not "a particular numerical minority percentage," that is the pertinent point of reference….
>
> [The non-diminishment provision] "does not require maintaining the same population percentages." Instead, … this requirement "is satisfied if minority voters retain the ability to elect their preferred candidates."

Apportionment VII, 172 So.3d at 405 (quoting *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015)).

The Governor's argument, as articulated in Mr. Newman's veto memo, was based on a blatant misreading of a single dictum in *Apportionment I*. There, the Florida Supreme Court had stated that "under [the FDA], a slight change in percentage of [a] minority group's population in a given district does not necessarily have a cognizable effect on [its] ability to elect its preferred candidate of choice." (PX 5087-0005 (citing *Apportionment I* at 625)). Mr. Newman twisted this sentence to mean that a "reduction in the minority population in a given district [that] is more than 'slight'" *would* violate the non-diminishment rule. And he concluded—based on some unspecified metric—that the change at issue was more than "slight," and thus, violated the FDA. (*Id.* at -0006).

This was baseless in every sense. Continuing the pattern of willfully misreading court decisions, the memo ignored the sentence immediately following, which made clear that "a minority group's ability to elect a candidate of choice *depends upon more than just population figures*" and "requires an inquiry into whether [the] district is *likely to perform* for minority candidates of choice." *Apportionment I*, 83 So.3d at 625 (emphasis added). What is more, the Court had emphatically added: "[W]e reject any argument that the minority population percentage in each district … is somehow fixed to an absolute number under [the FDA's] minority protection provision." *Id*. at 627. In all events, whatever meaning the Governor could dredge from this 2012 dictum, his argument runs

headlong into the Florida Supreme Court's explicit holding in *Apportionment VII*, three years later, that the FDA "is satisfied if minority voters retain the ability to elect their preferred candidates," as they would have in the Duval-only district. 172 So.3d at 405.

As noted above, the Legislature conducted the "functional analysis" prescribed by these decisions and determined that the Duval-only CD-5 was likely to perform for Black voters. (PX 0038-0030, Tr. 30:17-23 (2/25/22 House Redistricting Comm.)). The Governor did not dispute this conclusion; he even quoted it in his veto message. Thus, there was no good-faith basis on which the Governor could argue that the Duval-only CD-5 violated the FDA.

In short, the Governor was presented, on a silver platter, with an option that complied with his stated view of the Equal Protection Clause as applied to Benchmark CD-5, while still maintaining a Black opportunity district in North Florida. But, willfully misreading the FDA's non-diminishment standard, he rejected that option as insufficiently protective of Black voters, instead forcing through a map that *eliminated a Black opportunity district in North Florida altogether*. That is "diminishment" under any definition.

Thus, even if the Court were to find that the Governor's stated reasons for opposing an East-West-oriented CD-5 were offered in good faith (and it should not), his stated reasons for opposing the Duval-only alternative do not pass the

straight-face test. They are unequivocally wrong as a matter of both federal and state law—and they make no sense on their face. Not only are they "unworthy of credence," *Thomas*, 645 F. App'x at 951, they cannot possibly have been the sole explanation for his actions. They were simply a pretext for ensuring that no Black opportunity district would exist in North Florida. But for the Governor's discriminatory intrusion in the redistricting process, the Legislature would have enacted a version of either Plan 8015 or 8019, and not the Enacted Plan.

V. The State Court Decision in *BVM* Should Not Delay This Case

The Court has asked the parties "what impact (if any) the recent state-court decision invalidating the challenged map has on this case." In Plaintiffs' view, that decision should have no impact except for the persuasive value of the state court's opinion. It does not moot this case or provide any reason to delay trial.

That concurrent state court proceedings challenge the same plan, on a different basis, "do[es] not detract" from this Court's "obligation" to hear and decide this case, particularly when doing so is vital to ensure a remedy for the 2024 elections. *Covington v. North Carolina*, 2015 WL 13806587 at *1 (M.D.N.C. Nov. 25, 2015) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 590-91 (2013)). Supreme Court precedent "clearly permits the simultaneous operation of [state and federal] procedures to ensure constitutional legislative districts are in place in time for an election." *Brown v. Kentucky*, 2013 WL 3280003, at *2 (E.D.

Ky. June 27, 2013). And relief is still urgently needed. The state court order has been automatically stayed pending appeal, so the Enacted Plan is still in effect. Delaying this case pending the uncertain timeline and outcome of the state appellate process would make it impossible to assure implementation of an unbiased map before the 2024 election.

Timing aside, Plaintiffs agree that affirmance of the state court decision would render moot the *relief* Plaintiffs seek (although it would not moot Plaintiffs' claims for declaratory relief). On the other hand, if the Florida Supreme Court reverses the trial court decision for any reason and leaves the Enacted Plan in place, that reversal would not foreclose Plaintiffs' ability to seek relief in this case, under a separate and independent legal theory.

A. Time Is of the Essence to Secure a Constitutional Map Before the 2024 Election

Delaying this case could prevent Plaintiffs from securing a map that complies with the U.S. Constitution in time for the 2024 election. If Plaintiffs prevail here, the Florida Legislature will be ordered to draw a congressional map free of discriminatory taint during their next session, which runs from January 9 to March 8, 2024. *See Jacksonville Branch of NAACP v. City of Jacksonville*, No. 3:22-CV-493-MMH-LLL, 2022 WL 17751416, at *11 (M.D. Fla. Dec. 19, 2022) ("When a federal court concludes that a … districting plan violates the

Constitution, the appropriate [legislative] redistricting body should have the first opportunity to enact a plan remedying the constitutional violation."), *appeal dismissed*, No. 22-14260-HH, 2023 WL 4161697 (11th Cir. June 6, 2023).

A compliant remedial map must be in place with sufficient time for the Supervisors of Elections for each Florida county to implement it for the 2024 congressional primaries, scheduled for August 20, 2024. Working backwards, that requires an enforceable order from this Court by the end of this year. Any new maps for the 2024 elections must be finalized by Spring 2024, before the end of the next legislative session. That would permit sufficient lead time for this Court to act, if necessary, and for the scheduling of August primaries and the November election. *See* Dkt No. 67-1; Dkt. No. 67-2.

This Court recognized the need for exigency in the prior iteration of this lawsuit—when the state map failed to comply with the one-person-one-vote principle—and scheduled proceedings in this Court for May 12-13, 2022. *Common Cause v. Lee*, 4:22-cv-109-AW-MAF, Dkt No. 76 at 2-3. The parties to the state-court proceeding recognize the same need for exigency: their Joint Stipulation requires the parties to seek expedited appellate review "to allow the Florida Legislature to take up any remedial map, if necessary, during the 2024 legislative session beginning on January 9, 2024 for enactment no later than April 1, 2024." Joint Stipulation, *BVM*, at 3 § VI(D). Meanwhile, there is no assurance

that there will be a timely final decision in the *BVM* case. Just yesterday, Florida's intermediate court denied the parties' joint motion to allow the appeal to go directly to the Florida Supreme Court, meaning there now will be two levels of state-court appellate review—and potentially, U.S. Supreme Court review after that. *See* 28 U.S.C. § 1257(a).

Time is also of the essence to ensure that the *Purcell* principle does not block Plaintiffs from relief. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). Under that principle, "federal district courts ordinarily should not enjoin state election laws in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). In recent cases, courts have applied this rule to elections approximately four months away. *Id.* at 888 (Kagan, J., dissenting); *League of Women Voters of Fla. v. Fla. Sec'y of State*, 32 F.4th 1363, 1372 (11th Cir. 2022) (staying injunction where "voting in the next statewide [primary] election was set to begin in *less* than four months") (emphasis in original).

B. Plaintiffs' Claim for Relief Will Not Be Mooted Even If the Florida Supreme Court Reverses the *BVM* Decision

The *BVM* case relies entirely on state-law theories of liability and on largely different facts from this case. Plaintiffs' Fourteenth and Fifteenth Amendment liability claims will remain exactly the same no matter what happens to that case

on appeal. *See* Dkt. No. 115 at 15 (denying motion to stay and noting "different legal principles[] will govern the two cases and the resolution of one may not have much (*or any*) effect on the other"). Again, Plaintiffs agree that an affirmance in *BVM* would render unnecessary the *relief* Plaintiffs seek here. But for reasons of exigency, this Court should not wait to see if that is the outcome. If the Florida Supreme Court were to reverse the state court decision for any reason, Plaintiffs' claims for relief would not be mooted.

1. Even If the Florida Supreme Court Accepts the State's As-Applied Argument, the FDA Will Require Creation of a Black Opportunity District in North Florida

Assuming the *BVM* judgment is reversed on appeal, it would likely be on the narrow ground that the FDA cannot constitutionally be *applied* to require an East-West Black opportunity district in Northern Florida with a configuration similar to Benchmark CD-5. During the redistricting process, the Governor and his surrogates advanced an as-applied challenge to Benchmark CD-5, but nothing more. They conceded that the FDA's non-diminishment requirement could constitutionally require the creation of Black opportunity districts, as long as they were compact. Indeed, the Enacted Plan contains just such a district, CD-24, albeit not in North Florida.

The proceedings in *BVM* were also focused on this as-applied objection. Both the House and Senate agreed that their Equal Protection challenge was

limited to Benchmark CD-5 or a substantially similar district.[3] As the State court observed: "the Florida House and Florida Senate bring this affirmative defense as an *as-applied* challenge only to North Florida." *BVM* at 25 (emphasis added). And while the Secretary briefly proposed a facial challenge to the FDA, he abandoned it: "While the Secretary reserved the affirmative defense that the Fair Districts Amendments are facially unconstitutional as part of the Parties' Stipulation, the Secretary did not pursue that argument in briefing or argument before the Court, focusing only on the affirmative defense *as it applied* to North Florida." *Id*. (emphasis added). The *BVM* decision therefore focused on rejecting Defendants' as-applied challenge to an East-West district resembling Benchmark CD-5. *Id*. at 50-51. If the Florida Supreme Court reverses, it is most likely to reverse on that ground, leaving intact the many legislative and congressional minority opportunity districts in the State drawn under the FDA.

In that event, the FDA's non-diminishment provision would not be invalidated and would still require the creation of a Black opportunity district in North Florida following traditional redistricting principles. As discussed above, it

[3] Dkt. No. 189, *BVM v. Byrd*, August 24, 2023 Oral Arg. at 117:7-12 ("[O]ur focus in this litigation, speaking for the House, has been the as-applied challenge"); 118:16-18 (House Counsel: "[W]e are not challenging the facial validity [of the FDA]. We are accepting that for the purposes of this argument."); 155:9-12 ("[T]he Senate is asserting this as an as-applied argument[] because it may be possible to comply with [both] nondimishment and equal protection elsewhere").

is possible to draw such a district. The Duval-only compromise that the Legislature has already approved in Map 8019 is one example. Thus, even if the *BVM* decision ends up being reversed on appeal on the most-likely ground (and, to be clear, it should not be reversed at all), this Court could still grant Plaintiffs the relief they seek: a new map free of the taint of racial discrimination.

2. Even Facial Invalidation of the FDA Would Not Preclude Plaintiffs' Desired Relief

Even if the Florida Supreme Court invalidated the FDA in whole, such an action would also not be fatal to Plaintiffs' federal claims. If the Enacted Plan is the product of racial discrimination in violation of the U.S. Constitution, the Legislature is obligated to enact a new plan free of that taint. And that is so whether or not the FDA would *require* the remedial map to contain a Black opportunity district in North Florida.

Moreover, even if the FDA were no longer in effect, there is reason to believe that, freed of the Governor's unconstitutional pressure, the Legislature would find the Duval-only plan an attractive choice. It is what scholars have called a "natural crossover district"—one that exists in a compact preexisting political jurisdiction, where residents share common interests, and has a substantial Black

population. Florida has a history of occasionally creating such crossover districts in response to political pressures long before the FDA was enacted.[4]

With a remand from this Court ordering a map free of bias, the Black voters disenfranchised by the Enacted Plan would be motivated to lobby for that outcome. Even without the FDA, Black voters in North Florida should have the opportunity, through the political process, to "pull, haul, and trade to find common political ground" and achieve a district in which they may elect candidates of their choice. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Thus, the relief Plaintiffs seek here will not be foreclosed even if the Florida Supreme Court were to facially invalidate the FDA's non-diminishment requirement.

CONCLUSION

The Court should invalidate the Enacted Plan under the Fourteenth and Fifteenth Amendments.

Dated: September 19, 2023

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[4] *See, e.g.*, *In re Senate Joint Resol. 2G, Special Apportionment Session 1992*, 597 So.2d 276, 284 (Fla. 1992) (noting that in "2 of the House districts the black voter registration is approximately 45%, and in 1 of the Senate districts the black voter registration is 46.4%," but the districts were nevertheless "effective" at electing minority voters' candidates of choice), *amended sub nom. In re Constitutionality of Senate Joint Resol. 2G, Special Apportionment Session 1992*, 601 So.2d 543 (Fla. 1992); *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So.3d 597, 646 (Fla. 2012) (noting that, prior to 2012 redistricting, there had been one Black crossover district and three Hispanic crossover districts in place).

Respectfully submitted,

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LOCAL RULE CERTIFICATION

I hereby certify that this memorandum contains 11,909 words excluding the case style and certifications.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2023, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

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