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

<u>THE SECRETARY'S TRIAL BRIEF</u>

Defendant Secretary Byrd provides this Court with his trial brief. For the reasons expressed below, this Court should enter judgment for the Secretary.

Dated: September 19, 2023

Respectfully submitted,

Bradley R. McVay (FBN 79034)
Deputy Secretary of State
Joseph S. Van de Bogart (FBN 84764)
General Counsel
Ashley Davis (FBN 48032)
Chief Deputy General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough Street
Tallahassee, Florida 32399
Brad.mcvay@dos.myflorida.com
Joseph.vandebogart@dos.myflorida.com
Ashley.davis@dos.myflorida.com
Telephone: (850) 245-6536

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)
Gary V. Perko (FBN 855898)
Michael Beato (FBN 1017715)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK
119 S. Monroe Street, Suite 500
Tallahassee, Florida 32301
mjazil@holtzmanvogel.com
gperko@holtzmanvogel.com
mbeato@holtzmanvogel.com
Telephone: (850) 274-1690

Jason Torchinsky (Va. BN 478481) (D.C. BN 976033)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK
2300 N Street NW, Suite 643A
Washington, D.C. 20037
jtorchinsky@holtzmanvogel.com
Telephone: (202) 737-8808

Taylor A.R. Meehan (IL BN 6343481)
(Va. BN 97358)
Cameron T. Norris (TN BN 33467) (Va. BN 91624)*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
taylor@consovoymccarthy.com
cam@consovoymccarthy.com
Telephone: (703) 243-9423

Counsel for Secretary Byrd

*Admitted *Pro hac vice*

CERTIFICATE OF SERVICE

I certify that on September 19, 2023, this document was filed on CM/ECF, which provides a copy of this document to counsel of record.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

Introduction

The race-neutral Enacted Map is just that—a race-neutral congressional district map. Presented by J. Alex Kelly, debated and adopted by the Florida House of Representatives and Florida Senate, and approved by Governor DeSantis in April 2022, the map prioritizes compactness and respect for political and geographic boundaries. Jagged lines and wonky edges in the Benchmark Map gave way to neat shapes and smooth borders in the current one.

Yet Plaintiffs find fault with the Enacted Map. Specifically, they complain that the map should have included a racially gerrymandered district in North Florida, one that stretches 200 miles from Duval County in the east to Leon and Gadsden Counties in the west, all to capture dispersed black communities in the northern part of the State. This district, Plaintiffs assert, should mirror "Benchmark CD-5," a district drawn by the Florida Supreme Court in the previous redistricting cycle for race-based reasons. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402-06 (Fla. 2015). Because the Enacted Map doesn't have this kind of race-based gerrymander in North Florida, Plaintiffs claim that the Enacted Map is the product of intentional discrimination and thus violates the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment.

The Equal Protection Clause and the Fifteenth Amendment require no such thing. Plaintiffs can't flip the Civil War Amendments on their head; the amendments were enacted to prevent state-based racial discrimination, not mandate it. *See Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2161 (2023) (quoting

Palmore v. Sidoti, 466 U.S. 429, 432 (1984)). Nor can Plaintiffs prove under *Arlington Heights* that the Enacted Map has a discriminatory impact and was enacted with a discriminatory intent. What's more, Plaintiffs don't have standing to obtain their requested relief—the reimposition of Benchmark CD-5 in North Florida.

For these reasons, this Court should reject Plaintiffs' arguments and deny their requested relief. The Court should enter judgment for the Secretary.

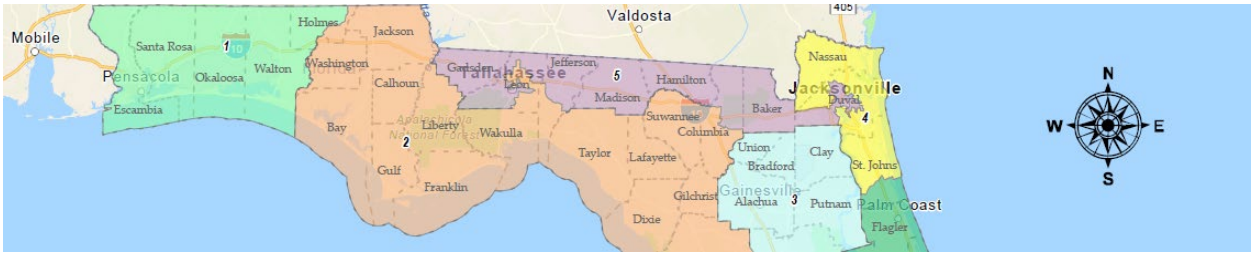
Argument

I. Plaintiffs Lack Standing.

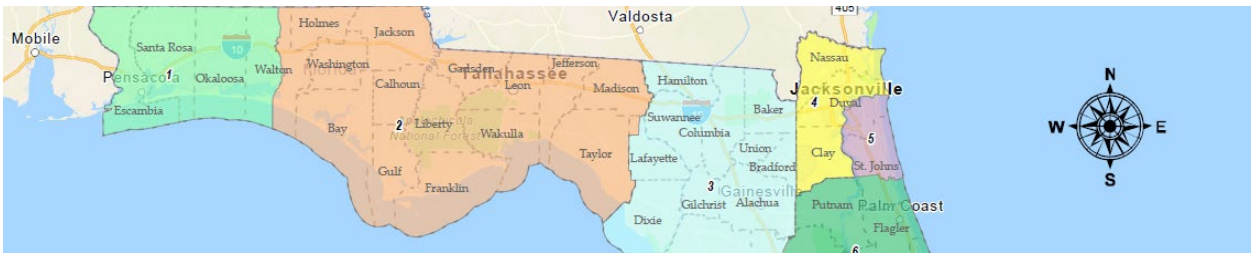
Plaintiffs intend to call five witnesses at trial to establish standing: two organizational witnesses and three individual witnesses. Doc.192-1. Ms. Slater, from the Florida NAACP, and Ms. McClenaghan, from Common Cause Florida, were never disclosed and should be excluded from testifying, as the Secretary explains in his motion to exclude. Doc.192.

That leaves the three individual witnesses (Ms. Inman-Johnson, Mr. Clark, and Ms. Holt); all three reside in Enacted Map CD-2. As a remedy to their purported racial-discrimination claim, however, these three individual witnesses (and Plaintiffs generally) seek the reimposition of a district like Benchmark CD-5, a 200-mile district that links black communities in Duval County and Leon and Gadsden Counties. Imposing that district in North Florida would directly affect the configurations of Enacted Map CD-1, CD-2, CD-3, CD-4, CD-5, and CD-6. The problem is that Plaintiffs lack standing to seek that remedy.

Benchmark Map (DX91)



Enacted Map (DX93)



Standing is an irreducible constitutional minimum. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must prove that he has suffered an injury in fact, that the injury is fairly traceable to the defendant's actions, and that the injury is likely to be redressed by a favorable court decision. *City of S. Miami v. Gov. of Fla.*, 65 F.4th 631, 636 (11th Cir. 2023). In particular, he must "demonstrate standing" "for each form of relief" sought, *Davis v. FEC*, 554 U.S. 724, 734 (2008), with the relief being "limited to the inadequacy that produced [his] injury in fact," *Lewis v. Casey*, 518 U.S. 343, 357 (1996). *See also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

The Supreme Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), provides the more specific standing rules for redistricting cases. Under *Gill*, an individual plaintiff doesn't have standing to challenge a district map as a whole. *Id.* at 1929-31. Instead, he only has standing to challenge the district in which he resides. *Id.* That's because his

injury "is district specific." *Id.* at 1930. After all, he "votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent" the plaintiff has been harmed. *Id.* In other words, a plaintiff's possible injury "results from the boundaries of the particular district in which he resides," and his standing is "limited to the inadequacy" concerning his district. *Id.* Anything other than a district-specific injury is a "generalized grievance," which doesn't confer standing. *Id.*

As such, a plaintiff's remedy is limited to "the revision of the boundaries of" his "own district." *Id.*; *see also Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015). Implicit is that the remedy adheres to traditional districting criteria, making reasonable and necessary boundary revisions to the affected district—not wholesale changes to the district map. Wholesale changes would raise serious issues about the remedial district itself; it would make no sense to fix an ill-shaped district drawn in bad faith with an ill-shaped district drawn in good faith. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Traditional districting criteria still need to be respected.[1]

Again, the testifying Individual Plaintiffs only reside in Enacted Map CD-2, and they want to impose a district like Benchmark CD-5, which would make *major* changes

[1] That respect makes sense. Applying traditional districting criteria respects and preserves, to the extent reasonably possible, the legitimate policy choices made, and boundary lines set, by legislatures in unchallenged portions of a congressional district map. It provides the federal judiciary with objective, neutral criteria that minimize the need for judges to make policy-laden judgment calls. And it reduces the possibility that a remedial district will be worse than the challenged district.

to Enacted Map CD-1, CD-2, CD-3, CD-4, CD-5, and CD-6—the whole North Florida portion of the Enacted Map. That runs into *Gill* problems: just as an individual voter in one part of a district map can't sue to invalidate the whole map, an Individual Plaintiff in one discrete part of North Florida can't sue to invalidate one-third of the Enacted Map. More plaintiffs in more North Florida districts are needed to seek a remedial district that spans 200 miles in a manner that violates traditional districting criteria. The bigger the remedy sought, the more demanding the standing. *See generally City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983).

Plaintiffs' standing theory also highlights the problems in their central merits argument: mandating a new 200-mile district in North Florida solely to connect far-flung black communities creates, rather than remedies, Equal Protection Clause and Fifteenth Amendment problems.

II. The Enacted Map Is Constitutional.

Even if Plaintiffs have standing, the Enacted Map is constitutional—both in its entirety and as to the North Florida configuration. None of the *Arlington Heights* factors demonstrate invidious discriminatory intent. And *Bartlett v. Strickland*, 556 U.S. 1 (2009), doesn't require a different result.

A. More specifically, Plaintiffs bear "the burden of proving both discriminatory impact and discriminatory intent" for their claims under the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment. *League of Women Voters of Fla, Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 940 (11th Cir. 2023) ("*LWVFL*"). Proving

discriminatory intent requires Plaintiffs to show that the law being challenged was passed "because of," and not merely "in spite of," its unconstitutional effects. *Pers. Adm'r of Mass. v. Feeney*, 422 U.S. 256, 279 (1979). Absent direct evidence of discriminatory intent, circumstantial evidence can be collected by considering the impact of the law, historical background, legislative history, departures from usual procedure, statements from key legislators, foreseeability and knowledge of the law's impact, and availability of less discriminatory alternatives. *See Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1321-22 (11th Cir. 2021) ("*GBM*"). Should Plaintiffs carry their burden, the burden would shift to the Secretary to prove that, absent discriminatory motives, the Enacted Map would have been passed. *Id.*

Here, Plaintiffs fail to carry their burden. And even if they carried it, the Enacted Map would have been passed by the Florida Legislature and signed into law by the Governor.

Presumption of Good Faith. From the jump, this Court must apply the presumption of good faith. *LWVFL*, 66 F.4th at 923; *GBM*, 992 F.3d at 1325. It's a mandatory presumption. *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (The "good faith of [the] state legislature *must* be presumed." (emphasis added)); *see also League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (stay panel) (discussing presumption of good faith); *NAACP v. City of Jacksonville*, 2023 WL 119425, at *11-24 (11th Cir. Jan. 6, 2023) (stay panel) (Newsom, J., dissenting) (same).

That presumption means that the parties don't start out with scales in equipoise. That makes sense: at the end of the day, redistricting is a "complex" and "most difficult" endeavor, where tradeoffs, policy judgments, and compromises are part of the process. *Miller*, 515 U.S. at 915-16. Elected officials should be presumed to be acting in public confidence for constitutional results. To overcome that presumption of deference, "only the clearest proof will suffice." *Smith v. Doe*, 538 U.S. 84, 92 (2003); *see also United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (demanding clear evidence to overcome presumption of regularity). Indeed, the U.S. Supreme Court has reversed discriminatory intent findings in the redistricting context even when they were supported by "a modicum of evidence." *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

Here, Plaintiffs nowhere approach the evidence needed to overcome the presumption of legislative good faith.

Direct Evidence. There's a complete lack of direct evidence of discriminatory intent in passing the Enacted Map. In fact, the Governor and Florida Legislature went to great lengths in explaining how they weren't motivated by discriminatory intent and that the Enacted Map didn't even consider race in forming district lines. *E.g.*, JX52/DX1 (Governor's advisory opinion request), JX53/DX2 (Governor's advisory opinion brief), JX54/DX3 (Governor's veto message), JX55/DX4 (Governor's veto memorandum), JX56/DX5 (General Counsel Newman's redistricting memorandum). Nor does the Enacted Map legislation contain any express references to race. Ch. 2022-265, Laws of Fla.

Impact. Discriminatory "impact alone is not determinative." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Even so, Plaintiffs may argue that under the Benchmark Map, North Florida had a district where black voters could elect candidates of their choice, and that under the Enacted Map, black voters can no longer elect candidates of their choice. This argument, however, misses the mark.

Dr. Owens will testify that Plaintiffs' analysis and conclusion aren't that simple; Plaintiffs fail to grasp how partisanship and candidate quality affect elections. And Dr. Johnson will testify that Plaintiffs' remedy—a district like Benchmark CD-5—amounts to a race-based gerrymander.

Stepping back, Plaintiffs also lose sight that minority candidates faired very well under the Enacted Map. As Dr. Owens will explain at trial, four black congressmembers were elected under the Enacted Map: Representatives Frost (CD-10), Donalds (CD-19), Cherfilus-McCormick (CD-20), and Wilson (CD-24). Dr. Owens will also testify that this is one more black congressmember than in 1992, even though the State's black population has remained nearly constant as a percentage of the total State population. In addition, the current number of black congressmembers in the Florida delegation (14%) roughly matches the percentage of black Floridians (17%) as a percentage of the population. *See* Quick Facts, Florida, U.S. Census Bur., https://www.census.gov/quickfacts/fact/table/FL/PST045222 (last visited Sept. 12, 2023); *see also* Fed. R. Evid. 201 (taking judicial notice).

Historical Background. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). Florida now isn't what it was in 1865 or 1965. So "it cannot be that" Florida's "history bans its legislature from ever enacting otherwise constitutional laws about" redistricting. *GBM*, 992 F.3d at 1325.

In addition, the evidence will show that, even in 1965, Florida was not the same as other Deep South states. Unlike Alabama, Georgia, Mississippi, South Carolina, and Virginia, Florida was never under statewide § 5 Voting Rights Act preclearance. Only five Florida counties were (later) put under preclearance, none of which were in North Florida: Collier, Hardee, Hendry, Hillsborough, and Monroe Counties.

Dr. Kousser, Plaintiffs' expert, might testify about Florida's racial history "after the Civil War" and "into the twentieth century." *LWVFL*, 66 F.4th at 922-23. But that would be error. *Id.* The historical background *Arlington Heights* factor doesn't provide "an unlimited look-back to past discrimination." *GBM*, 992 F.3d at 1325. And Dr. Barreto, Plaintiffs' other expert, might reference racial and socioeconomic disparities between races. But that, too, shouldn't be considered on this factor. *LWVFL*, 66 F.4th at 922-23.

Legislative History. The Enacted Map's legislative history is uncontested. Doc.187 at 5-7, ¶¶ 9-16 (joint status report). Starting in February 2022, Governor DeSantis asked the Florida Supreme Court to issue an advisory opinion about how state-constitutional-redistricting standards applied to congressional redistricting in

North Florida. *Advisory Opinion to the Gov.*, 333 So. 3d 1106, 1107 (Fla. 2022). The court declined to issue an opinion.

A month later, on March 4, 2022, the Florida Legislature passed CS/SB 102, a bill that contained a primary map (Plan 8019) and a secondary map (Plan 8015). The primary map didn't contain a district like Benchmark CD-5 in North Florida, while the secondary map did. If a court held the primary map invalid, the secondary map would go into effect. Doc.187 at 6, ¶ 11.

Later that month, the Governor vetoed that bill, issued a memorandum that explained his views on the bill's constitutionality, and called an April 19 to 22 special legislative session to address congressional redistricting. Doc.187 at 6-7, ¶ 12. The Governor's memorandum bears emphasis: he forcefully argued that race-based redistricting is antithetical to the Equal Protection Clause's race-neutrality dictates. JX54/DX3 (Governor's veto message), JX55/DX4 (Governor's veto memorandum). That very well could have changed minds in the Florida Legislature.

It was also imperative that the Florida Legislature and Governor agree on a congressional district map; two impasse cases were pending—*Arteaga v. Lee*, No. 2022 CA 398 (Fla. 2d Cir. Ct.), in state court, and this case in federal court, Doc.1. If the impasse continued, a court would have imposed a congressional district map. As Senator Rodriguez stated during the special legislative session, "the choice before us is: do we pass a map that fulfills our constitutional responsibility, or do we declare an impasse and leave it up to the courts for them to draw our map again?" JX47/DX37

58:22-59:3 (legislative transcript); *see also* JX44/DX34 9:1-5 (legislative transcript) (Rep. Leek: "The only abdication of responsibility would be if we threw our hands up and sent an impasse to the court, allowing them or third parties, all of whom are unelected, to draw our maps.").

The Florida Legislature and Governor, of course, didn't declare an impasse. Instead, during the special session, J. Alex Kelly, the Governor's then-deputy chief of staff, proposed what became the Enacted Map and explained his map-drawing process to the Florida Legislature during the special session. Doc.191-1, 191-2 (transcripts of Mr. Kelly's testimony to the Florida Legislature). As Mr. Kelly will recount at trial, he focused his attention on creating compact districts that respected political and geographic boundaries. The focus paid off: the Enacted Map passed the "interocular test" and performed better on traditional districting criteria than did the Florida Legislature's vetoed primary map. JX58/DX7 (Mr. Kelly's PowerPoint presentation to the Florida Legislature). And Mr. Kelly didn't consider race when drawing lines. *See GBM*, 992 F.3d at 1323-24 (non-race-based reasons for governmental action is evidence that the action "does not have discriminatory intent"). Race was considered only on the backend, for legal compliance purposes, like complying with § 2 of the Voting Rights Act.

On the third day of the special session, the Florida Legislature passed the Enacted Map. *See GBM*, 992 F.3d at 1326-27 (party-line votes generally aren't suspect); *LWVFL*, 66 F.4th at 924-25, 931 (same). The next day, the Governor signed it into

law. *See* SB 2-C: Establishing the Congressional Districts of the State, Fla. Sen., https://www.flsenate.gov/Session/Bill/2022C/2C/ByCategory (last visited Sept. 15, 2023).

Nothing about that process suggests racial animus—it merely exemplifies the commonsense fact that "[r]edistricting is never easy," and it often engenders back-and-forth and compromise. *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018).

Procedural & Substantive Departures. Procedural deficiencies and substantive departures from ordinary lawmaking could evidence discriminatory intent. *Arlington Heights*, 429 U.S. at 267-69. Following normal lawmaking procedures doesn't. *See Hall v. Holder*, 117 F.3d 1222, 1230 (11th Cir. 1997) ("Appellants also point to no procedural departures from the ordinary policy-making process in the decision to maintain the system; that is, they do not argue that the referendum was somehow deficient.").

In this instance, the political branches played squarely within state-constitutional hash marks. The Florida House and Florida Senate considered redistricting legislation and passed redistricting legislation, including the Enacted Map. Fla. Const. art. III, §§ 6-7. The Governor can propose legislation. Fla. Const. art. IV, § 1(e). The Governor vetoed CS/SB 102, which he is allowed to do, and later approved the Enacted Map, which he is also allowed to do. Fla. Const. art. III, § 8. The Governor can seek advisory opinions from the Florida Supreme Court—especially when it comes to important duties like passing a congressional district map. Fla. Const. art. IV, § 1(c); *Advisory*

Opinion to the Gov., 333 So. 3d at 1108 (stating that the Governor raised "importan[t]" "issues"). And he can call special legislative sessions. Fla. Const. art. III, § 3(c). Following constitutional requirements doesn't establish discriminatory intent. It only shows that the rules were followed.

The evidence will further show that Florida's congressional redistricting process wasn't a nationwide anomaly. On multiple occasions, as Dr. Owens will testify, governors across the country, both Democrats and Republicans, exercised their prerogative to veto legislation establishing congressional districts. In fact, in New Hampshire, the Republican governor vetoed the Republican legislature's redistricting map.

And to the extent that Plaintiffs argue that the Enacted Map violates Article III, § 20(a) of the Florida Constitution (the subject of the state redistricting case), that issue is still live and will be resolved by Florida's courts—not this federal court.

Contemporary Statements of Key Legislators. It's hard to pin down the legislative intent of a "multimember body." *LWVFL*, 66 F.4th at 925; *see also GBM*, 992 F.3d at 1324. One legislator—even the sponsor of legislation—doesn't speak for all legislators. *LWVFL*, 66 F.4th at 932. And certainly, the Governor can't speak for two chambers of a different branch of government. Plaintiffs may try to solicit testimony from Democratic legislators and lobbying groups, but statements by bill opponents "are not reliable evidence of legislative intent." *LWVFL*, 66 F.4th at 940.

Plaintiffs may also try to dig up statements from Republican legislators that opposed the Governor's redistricting actions before they supported his redistricting actions. But politicians are entitled to change their minds and compromise. It's valid that legislators were persuaded by the Governor's veto memorandum, and it's valid for legislators to want to "bring" the then-pending impasse "litigation" "to an end as expeditiously as possible" by adopting the Enacted Map. *Abbott*, 138 S. Ct. at 2327. None of that evidences discriminatory intent.

Foreseeability & Knowledge of Disparate Impact. When it comes to foreseeability and knowledge of disparate impacts, redistricting cases are different than most other pieces of legislation. Unlike when a legislature deals with election-reform packages, for example, *LWVFL*, 66 F.4th at 938, "[r]edistricting legislatures will" "almost always be aware of racial demographics," *Miller*, 515 U.S. at 916. But that doesn't mean that "race predominates in the redistricting process." *Id.* As Mr. Kelly will testify, he didn't draw lines based on race. Race was only a consideration on the backend, for legal compliance purposes, such as the need to comply with § 2 of the Voting Rights Act.

Availability of Less Discriminatory Alternatives. Approving alternative maps wasn't an option, either. The Florida Legislature considered two North Florida configurations that differed from the Enacted Map: a configuration like Benchmark CD-5 and a configuration like CS/SB 102's primary map (Plan 8019).

Plan 8019 (DX98)

But both configurations had problems of their own. The Benchmark CD-5 configuration was a pure racial gerrymander, as the evidence will show, and careens into unconstitutional racial gerrymandering issues under the Equal Protection Clause. *See, e.g.*, JX55/DX4 (Governor's veto memorandum, explaining the constitutional issues). The Plan 8019 configuration raised similar federal constitutional concerns, as well as non-diminishment issues under Article III, § 20(a). *See* JX38/DX30 63:16-65:7 (legislative transcript) (legislator observing that proposed Duval County district would not guarantee elections for black-preferred candidates with those candidates losing in "one-third" of "test elections"); DX98 at 3 (Plan 8019 legislative packet, with functional analysis).

In the end, the fact that the Florida Legislature "did not" adopt "the alternative options that Plaintiffs would have preferred is not evidence of discriminatory intent." *LWVFL*, 66 F.4th at 940. It's merely evidence of failed legislation.

The Enacted Map Would Have Been Passed Regardless. Assuming for the sake of argument that Plaintiffs can carry their burden (which they can't), the Secretary can establish that, absent an alleged racial motivation, the Enacted Map would have

been passed. *GBM*, 992 F.3d at 1321. It's easy to see why. Again, with two pending impasse cases, the Florida Legislature and the Governor needed to coalesce around one map. The Enacted Map fit that bill, especially, as Mr. Kelly will testify, considering that it contained compact districts that respected traditional districting criteria.

* * *

At a more fundamental level, Plaintiffs' central ask is this: impose a district in the Enacted Map that looks like Benchmark CD-5. The Governor has already briefed—in his and his general counsel's redistricting memoranda, for example, JX55/DX4, JX56/DX5—how that would amount to racial gerrymandering in North Florida and would violate the Equal Protection Clause. The Secretary incorporates and adopts the Governor's reasoning here: race inherently predominates in that kind of district's creation, and a compelling governmental interest and narrow tailoring wouldn't be met. (The Secretary also briefed this issue extensively in the state court redistricting case.)

Carrying over that kind of district to the Enacted Map would perpetuate Benchmark CD-5's race-based gerrymander. Retaining the core of an unconstitutional district is unconstitutional. Recent federal cases confirm that. Just this past term, the U.S. Supreme Court rejected Alabama's core-retention argument in *Allen v. Milligan*: a state can't "immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." 143 S. Ct. 1487, 1505 (2023). And before *Allen*, in *NAACP v. City of Jacksonville*, Jacksonville redrew its city council and school board district lines, which largely mirrored the lines drawn in

previous redistricting cycles. 635 F. Supp. 3d 1229, 1247-71 (M.D. Fla. 2022). Many of the previous lines, however, were drawn with racial motivations. *Id.* In defending against an equal-protection challenge, Jacksonville made a core-retention argument. Like Alabama in *Allen*, the district court rejected that argument: the cores of the challenged districts were drawn for racial reasons in the first place, and by largely retaining those cores, the enacting city council continued that race-based line drawing and perpetuated the racial gerrymander. *Id.* at 1282-96. So too here. Plaintiffs want to retain Benchmark CD-5's core, but in doing so, they would perpetuate a racial gerrymander. That's inappropriate.

B. *Bartlett v. Strickland* doesn't counsel a different result. As they did in their complaint, Plaintiffs may rely on the following language from the case: "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; *see also* Doc.97 ¶¶ 2, 77. The problems with relying on this quote alone are threefold.

First, it's *dicta* from Justice Kennedy's plurality opinion, which Chief Justice Roberts and Justice Alito joined. The plurality opinion's "holding recognizes only that there is no support for the claim that § 2 [of the Voting Rights Act] can require the creation of crossover districts in the first instance." 566 U.S. at 24. Nothing more.

Second, the quote is taken out of context. The Court said that "States that wish to draw crossover districts are free to do so where no other prohibition exists." *Id.* Nothing

in *Bartlett* suspends the Equal Protection Clause and gives the State of Florida carte blanche to draw districts that brazenly violate traditional districting criteria and purposely sort voters on the basis of their race.

Third, intent still matters. *Bartlett*'s statement stands for the unremarkable premise that if a State draws or eliminates a district *for the purpose of discriminating* against a minority group, that would raise serious constitutional problems. *See* 556 U.S. at 24 (citing both *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481-82 (1997), and the United States's amicus brief, which both touch on that uncontroversial point). But as established above, the State did exactly the opposite here—it engaged in race-blind districting. *Bartlett* does not forbid the State from refusing to discriminate on the basis of race.

III. The State Redistricting Case Impacts This Case.

The state redistricting case is currently winding its way up the state appellate system. That case has some impact on this case. After all, if the state courts agree with the state plaintiffs (finding the North Florida configuration of the Enacted Map unconstitutional under the state constitution), and if North Florida is reconfigured by the Florida Legislature or state courts, then Plaintiffs' case is moot. If the state courts uphold the Enacted Map, then this Court's work will go forward on the federal claims at issue here. The Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25, 34 (1993), suggests that allowing the state court process to run its course to finality is prudent.

Conclusion

For these reasons, this Court should enter judgment for the Secretary.

Dated: September 19, 2023

Respectfully submitted,

Bradley R. McVay (FBN 79034)
Deputy Secretary of State
Joseph S. Van de Bogart (FBN 84764)
General Counsel
Ashley Davis (FBN 48032)
Chief Deputy General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough Street
Tallahassee, Florida 32399
Brad.mcvay@dos.myflorida.com
Joseph.vandebogart@dos.myflorida.com
Ashley.davis@dos.myflorida.com
Telephone: (850) 245-6536

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)
Gary V. Perko (FBN 855898)
Michael Beato (FBN 1017715)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK
119 S. Monroe Street, Suite 500
Tallahassee, Florida 32301
mjazil@holtzmanvogel.com
gperko@holtzmanvogel.com
mbeato@holtzmanvogel.com
Telephone: (850) 274-1690

Jason Torchinsky (Va. BN 478481) (D.C. BN 976033)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK
2300 N Street NW, Suite 643A
Washington, D.C. 20037
jtorchinsky@holtzmanvogel.com
Telephone: (202) 737-8808

Taylor A.R. Meehan (IL BN 6343481)
(Va. BN 97358)
Cameron T. Norris (TN BN 33467) (Va. BN 91624)*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
taylor@consovoymccarthy.com
cam@consovoymccarthy.com
Telephone: (703) 243-9423

Counsel for Secretary Byrd

*Admitted *Pro hac vice*

LOCAL RULES CERTIFICATION

I certify that this brief complies with this Court's word count, spacing, and formatting requirements.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I certify that on September 19, 2023, this document was filed on CM/ECF, which provides a copy of this document to counsel of record.

/s/ Mohammad O. Jazil
Mohammad O. Jazil