IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., EQUAL GROUND EDUCATION FUND, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA EDUCATION FUND, INC., FLORIDA RISING TOGETHER, PASTOR REGINALD GUNDY, SYLVIA YOUNG, PHYLLIS WILEY, ANDREA HERSHORIN, ANAYDIA CONNOLLY, LEELA FUENTES, BRANDON P. NELSON, KAITLYN YARROWS, CYNTHIA LIPPERT, KISHA LINEBAUGH, NINA WOLFSON, BEATRIZ ALONZO, GONZALO ALFREDO PEDROSO, AND MARVIN HUDSON,

Plaintiffs,

v.

CORD BYRD, in his official capacity as Florida Secretary of State, the FLORIDA SENATE, and the FLORIDA HOUSE OF REPRESENTATIVES,

Defendants.
_____/

Case No. 2022-CA-666

FINAL ORDER AFTER HEARING AND FINAL JUDGMENT

THIS CAUSE having come before the Court for Final Hearing on Plaintiffs' Amended Complaint for Injunction and Declaratory Relief. The Court has carefully considered the Amended

Complaint, the Answers and Affirmative Defenses of the Parties, the Joint Stipulation to Narrow Issues for Resolution, the arguments of the parties at a hearing held August 24, 2023, and being otherwise duly advised, the Court hereby finds:

Summary

This case is about whether the Legislature, in enacting its most recent congressional redistricting plan, violated the Florida Constitution by diminishing the ability of Black voters in North Florida to elect representatives of their choice. It is also about whether that provision of the Florida Constitution violates the 14th Amendment to the U.S. Constitution. In short, the answers are yes and no, respectively. For those reasons, this Court will declare the enacted map unconstitutional and enjoin the Secretary of State from using that map in future congressional elections. This Court will return the matter to the Legislature to enact a new map which complies with the Florida Constitution.

Background and Procedural History

The Plaintiffs in this case are U.S. citizen voters who reside in Florida and the affected districts as well as 501(c)(3) organizations who strive to increase voter participation

throughout the State. The Defendants are the Florida Secretary of State, the Florida Senate, and the Florida House of Representatives.

In Florida, Congressional districts are apportioned after the decennial census. The Florida Legislature is required under the U.S. and Florida Constitutions to apportion the state into congressional districts. U.S. Const. art. I, § 4, cl. 1; Art. III, § 20, Fla. Const. Like other laws in Florida, once the respective chambers pass an apportionment bill, that bill proceeds to the Governor of Florida for signature or veto. Art. III, § 8, Fla. Const. Once an apportionment bill is signed, the Secretary of State is then required to implement the districts in conducting Congressional elections. § 97.012, Fla. Stat. Ann.

At issue in this case is the current Congressional Districting Map know as Senate Bill 2-C (Laws of Fla. Ch. 2022-265). Plaintiffs contend that the enacted map violates Article III, Section 20 of the Florida Constitution ("Fair Districts Amendment").

I. The Fair Districts Amendments

Before the 2010 redistricting cycle, Floridians voted to enshrine the Fair Districts Amendments in the Florida

Constitution. The Amendments established new standards to constrain the Legislature's exercise of its congressional reapportionment power. Pursuant to those Amendments,

> In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or *to diminish their ability to elect representatives of their choice*; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection 1(a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (c) The order in which the standards within subsections 1(a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

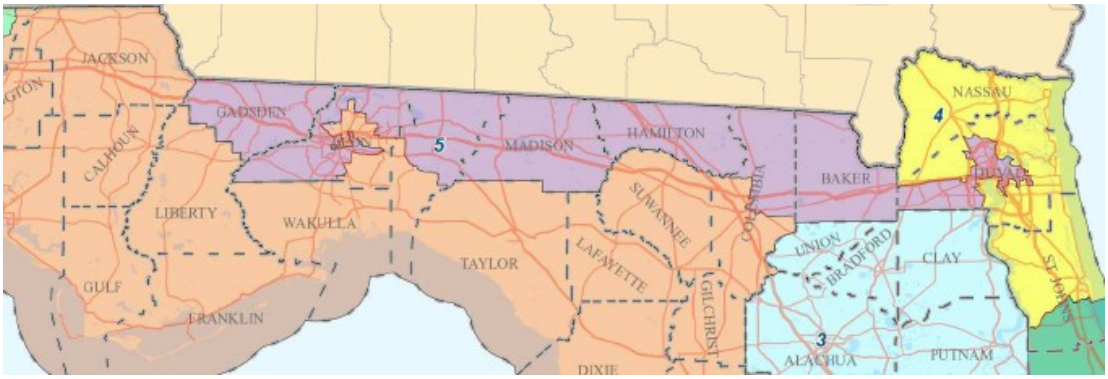
Art. III, sect. 20, Fla. Const. (emphasis added). The Florida Supreme Court has recognized that this provision contains two separate requirements, borrowed from the Federal Voting Rights Act: a non-dilution requirement and a non-diminishment requirement. See *In re S. J. Res. of Legis. Apportionment 1176* ("*Apportionment I*"), 83 So. 3d 597, 619 (Fla. 2012).

II. Benchmark CD-5

In 2015, the Florida Supreme Court invalidated the Legislature's 2012 congressional redistricting plan under Article III, Section 20 of the Florida Constitution after finding that partisan intent tainted the entire redistricting process. *See League of Women Voters of Fla. v. Detzner* ("*LWV I*"), 172 So. 3d 363 (Fla. 2015). In *LWV I*, the Court ordered the new CD-5 (now commonly known as "Benchmark CD-5") to be drawn in an East-West configuration across Florida's northern border. *Id.* at 403. At the time of its adoption, Benchmark CD-5 had a Black voting age population (BVAP) of 45.12%. *Id.* at 404. In approving Benchmark CD-5 at the final remedial stage of the litigation, the Florida Supreme Court specifically found that this configuration would preserve a historically performing Black district. *See League of Women Voters of Fla. v. Detzner* ("*LWV II*"), 179 So. 3d 258, 272 (Fla. 2015) (explaining that "the ability of black voters to elect a candidate of their choice is not diminished" in Benchmark CD-5).

The Benchmark Plan was in place during the 2016, 2018, and 2020 congressional election cycles. Benchmark CD-5, as

approved by the Florida Supreme Court, is shown below. *See* Stip. Ex. 3.



III. The 2020 Redistricting Cycle and Enacted Plan

During the 2020 redistricting cycle, the Legislature reaffirmed the Florida Supreme Court's determination that Benchmark CD-5 performs for Black voters in North Florida and is therefore protected under Florida's non-diminishment standard. On February 1, 2022, however, Governor DeSantis sought the Florida Supreme Court's opinion on whether the "the Florida Constitution's non-diminishment standard" required a district from Tallahassee to Jacksonville which allowed Black voters to elect the candidates of their choice, "even without a majority." Pls.' Br. Ex. 4 at 4.[1] The Governor's Advisory Request

[1] Pls.' Br. Ex. 4 is the Governor's Advisory Request to the Florida Supreme Court. The Parties agreed that this Court may take judicial notice of this document, *see* Stip. Ex. 1 ¶ 2, and this Court so takes judicial notice of the exhibit under Fla. Stat. § 90.202(5) and (12).

acknowledged that existing precedent from the Florida Supreme Court "suggest[s] that the answer is 'yes.'" *Id.* at 4. The Governor's Advisory Request nonetheless asked the Florida Supreme Court to clarify "what the non-diminishment standard does require," both generally and as applied to CD-5 in North Florida. *Id.* at 5. On February 10, 2022, the Florida Supreme Court declined the Governor's request to issue an advisory opinion providing new guidance either on the non-diminishment standard generally or on CD-5 specifically. *See Advisory Op. to Governor re Whether Article III, Section 20(a) of Fla. Const. Requires Retention of a Dist. in N. Fla.*, 333 So. 3d 1106, 1108 (Fla. 2022).

In March 2022, in response to the Governor's continued skepticism regarding the shape of CD-5, the Legislature passed a redistricting plan that contained both a "Primary Map" (Plan 8019) and a "Secondary Map" (Plan 8015) with two different configurations of CD-5. *See generally* Pls.' Br. Ex. 6.[2] The Primary Map (Plan 8019) configured CD-5 to include only portions of Duval County. *See* Pls.' Br. Ex 6. at 10. The Secondary Map (Plan 8015)

[2] Pls.' Br. Ex. 6 is the Summary of CS/SB 102 (Establishing Congressional Districts of the State), as prepared by the Committee on Reapportionment. The Parties agreed that this Court may take judicial notice of redistricting committee materials from the 2022 regular session, *see* Stip. Ex. 1 ¶ 2, and this Court so takes judicial notice of the exhibit under Fla. Stat. § 90.202(5) and (12).

retained the basic East-West configuration of CD-5, while improving the district's performance on many Tier II criteria as compared to Benchmark CD-5. *See* Pls.' Br. Ex. 6 at 2.

After the Governor vetoed both redistricting plans and called a special session, the Legislature passed a redistricting plan submitted by the Governor's Office, which is shown below ("Enacted Plan"). *See* Stip. Ex. 4.

IV. The Parties and the Joint Stipulation

After passage of the Enacted Plan, Plaintiffs—Black Voters Matter Capacity Building Institute, Inc., the League of Women Voters of Florida, Inc., the League of Women Voters of Florida Education Fund, Inc., Equal Ground Education Fund, Florida Rising Together, and individual Florida voters, including several Black voters who resided in Benchmark CD-5—sued Defendants Cord Byrd, in his official capacity as Secretary of State, the Florida House of Representatives, and the Florida Senate, Compl. ¶¶ 11–

32, alleging that the Enacted Plan violates the Florida Constitution.[3]

Count I in Plaintiffs' Complaint alleges that the Enacted Plan violates the non-diminishment standard of Article III, Section 20(a) of the Florida Constitution because it resulted in the diminishment of Black voters' ability to elect their candidate of choice. Plaintiffs' Complaint also alleged the Enacted Plan was drawn with improper discriminatory and partisan intent in violation of the Florida Constitution. *See id.* at Count II–III. Plaintiffs' Complaint asks this Court to declare that the Enacted Plan violates the Florida Constitution and to enjoin Defendant Byrd from conducting elections for the U.S. House of Representatives under the Enacted Plan.

In advance of a non-jury trial on the merits, the Parties reached a stipulation to streamline the issues for the Court's consideration by limiting the case to Plaintiffs' diminishment claim in North Florida and by stipulating to the facts relevant to proving diminishment under the Florida Constitution. *See* Stip. Ex. 1. The Parties agreed that, considering these stipulated facts, "no

[3] "Compl." refers to the Plaintiffs' amended complaint, which was accepted for filing by this Court on February 7, 2023.

material factual issues remain in dispute regarding Plaintiffs' diminishment claim and the Court may rule on that claim as a matter of law." *See* Stip. § III.C. Finally, Defendants also stipulated that Plaintiffs had standing to challenge the alleged diminishment in the Enacted Plan in North Florida[4] and withdrew several of their affirmative defenses. *See* Stip. §§ II–III.

In light of this joint stipulation, the Parties agreed that trial should be vacated. Accordingly, this Court is limited to considering the following stipulated facts, found at Ex. 1 of the Parties' Stipulation, unless it finds that other facts are judicially noticeable and should be judicially noticed.

Specifically, the Parties stipulated, and this Court so finds, that the Benchmark CD-5 has the following characteristics:

a. Voting Age Population (based on 2020 Census): 46.2% Black, 40.2% White, and 9.1% Hispanic.

b. Population Breakdown by County (based on 2020 Census): 60.5% in Duval, 22.2% in Leon, 5.9% in Gadsden, 3.8% in Baker, 2.4% in Madison, 1.9% in Hamilton, 1.8% in Jefferson, and 1.6% in Columbia.

c. Of the 128,235 people who voted in either the Democratic or Republican primary in the district in 2020, 94,780 (73.9%)

[4] The Court will note its finding of standing is a mixed question of fact and law. To the extent the Parties stipulated to standing, this Court finds as fact the predicate voter status, residency, injury, and (where applicable) associational standing to confer standing.

voted in the Democratic Primary and 33,455 (22.1%) voted in the Republican Primary.

d. For the 2020 General Election, Black voters comprised 46.1% of all registered voters in the district.

e. For the 2020 General Election, Black voters comprised 68.6% of all registered Democrats in the district.

f. Black voters accounted for approximately 70% of votes cast in Benchmark CD-5 in the 2020 Democratic Primary; approximately 70% of votes cast in Benchmark CD-5 in the 2018 Democratic Primary; and approximately 67% of votes cast in Benchmark CD-5 in the 2016 Democratic Primary.

g. Black voters were politically cohesive in elections in the district because, in the 2016, 2018, and 2020 general elections, approximately 89% of Black voters in the district voted for Democratic candidates.

h. White voters were politically cohesive in elections in the district because, in the 2016, 2018, and 2020 general elections, approximately two-thirds of White voters in the district voted for candidates opposed to the candidates preferred by Black voters.

i. In the 2016, 2018, and 2020 general elections, voting was racially polarized in the district.

j. A Black candidate (Al Lawson) won each of the U.S. House elections held in the district.

k. Al Lawson was the candidate of choice for Black voters in the district.

l. Al Lawson was not the candidate of choice for White voters in the district.

m. Al Lawson won 65% of the general election vote in 2020, 67% of the general election vote in 2018, and 64% of the general election vote in 2016.

n. In Florida's eight statewide elections in 2016, 2018, and 2020, the Black preferred candidates won a majority of the vote in Benchmark CD-5 in each election.

o. Black voters had the ability to elect the candidate of their choice in the district.

See Stip. Ex. 1 ¶¶ 3(a)–(o).

Similarly, the Parties stipulated, and this Court so finds, that the Enacted Plan has the following characteristics:

a. Enacted CD-4 is the district with the highest percentage of population that comes from Benchmark CD-5.

b. Under the Enacted Plan, 45.2% of the population of Benchmark CD-5 resides in Enacted CD-4.

c. The remaining 54.8% of the population of Benchmark CD-5 is divided across Enacted CD-2, Enacted CD-3, and Enacted CD-5.

d. The Black VAP of Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5 is 23.1%, 15.9%, 31.7%, and 12.8%, respectively.

e. Most registered voters in each of Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5 are White.

f. White voters cast most of the votes cast in the 2016, 2018, and 2020 general elections in each of Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5.

g. More than three-quarters of Black voters in each of Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5 voted for the Democratic candidate in 2022.

h. More than 70% of White voters in each of Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5 voted for the Republican candidate in 2022.

i. White voters cast most of the votes cast in the 2016, 2018, and 2020 primary elections in each of Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5.

j. Representative Al Lawson, who is Black and represented Benchmark CD-5, ran for re-election in Enacted CD-2, and won 40.2% of the 2022 general election vote, but lost to Representative Neal Dunn, who is White.

k. LaShonda Holloway, who is Black, ran for election in Enacted CD-4, and won 39.5% of the 2022 general election vote, but lost to Aaron Bean, who is White.

l. Under the Enacted Plan in 2022, North Florida did not elect a Black member of Congress for the first time since 1990.

m. In the 2016, 2018, and 2020 statewide elections, candidates preferred by Black voters failed to win a majority of votes in any of the four Enacted CDs that took parts of Benchmark CD-5.

n. In Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5, the White-preferred candidates won the majority of votes cast in the 2016, 2018, and 2020 statewide elections.

o. None of the Enacted districts in North Florida are districts in which Black voters have the ability to elect their preferred candidates.

See Stip. Ex. 1 ¶¶ 4(a)–(o).

The Parties' Stipulation also identified several outstanding legal issues, including whether the preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986) apply to the non-diminishment provision, whether Defendants have proved their remaining affirmative defenses (that is, whether the non-diminishment provision violates the Equal Protection Clause to the U.S. Constitution either facially or as applied to North Florida), and whether the public official standing doctrine bars the Defendants' affirmative defenses. *See* Stip. § IV.A. The Court heard argument from counsel on these issues on August 24, 2023.

V. Jurisdiction of the Court

This Court has Jurisdiction pursuant to Chap. 26.012, Fla. Stat., Art. V. sect. 5(b), Fla. Const. *See also Moore v Harper*, 143 S.Ct. 2065 (June 27, 2023).

Analysis

I. Plaintiffs have proved a violation of Article III, Section 20 of the Florida Constitution.

Under the stipulated facts, Plaintiffs have shown that the Enacted Plan results in the diminishment of Black voters' ability to elect their candidate of choice in violation of the Florida Constitution. At the hearing on the parties' outstanding legal

issues, Defendants Florida House and Florida Senate conceded as much. Although the Secretary has not conceded diminishment as a matter of law—instead asking this Court to find that the preconditions from *Thornburg v. Gingles*, 478 U.S. 30 (1986) should apply to diminishment claims—this Court finds that the Secretary's arguments on this matter are inconsistent with Florida Supreme Court precedent and consequently rejects them.

As the Florida Supreme Court has explained, the non-diminishment standard proscribes redistricting plans "that have the purpose of *or will have the effect of* diminishing the ability of any citizens on account of race or color to elect their preferred candidates of choice." *Apportionment I*, 83 So. 3d at 620 (cleaned up) (emphasis added). Under the non-diminishment standard, "the Legislature cannot eliminate majority-minority districts *or weaken other historically performing minority districts* where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625. (emphasis added) The non-diminishment standard accordingly calls for a comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is

measured." *Id.* at 624. And whether a minority group's voting power has been diminished is determined by a "functional analysis" of "whether a district is likely to perform for minority candidates of choice." *Id.* at 625. A functional analysis should include consideration of data such as a district's voting age population, voter registration information, and election results. *Id.* at 627.

In determining whether a previously-existing district "performs" for the minority group's candidate of choice—and is therefore protected from diminishment in the new map—a court must consider (1) "whether the minority group votes cohesively," (2) "whether the minority candidate of choice is likely to prevail in the relevant contested party primary," and (3) "whether that candidate is likely to prevail in the general election." *LWV II,* 179 So. 3d at 287 n.11.

In the Parties' Stipulation, all Defendants conceded that Black voters had the ability to elect their candidate of choice in Benchmark CD-5. *See* Stip. Ex. 1 ¶ 3(o). Applying the three-part test from *LWV II* to the Parties' Stipulated Facts, the Court also independently confirms that the Parties' Stipulation supports this

conclusion. Specifically, Black voters were politically cohesive in Benchmark CD-5, *see* Stip. Ex. 1 ¶ 3(g); Black voters exercised sufficient control over the primary election in Benchmark CD-5 such that their candidate of choice (in this case, former Representative Al Lawson) was likely to prevail (and did prevail) in the primary election, *see* Stip. Ex. 1 ¶¶ 3 (c), (e), (f), (k); and Black voters' candidate of choice was likely to prevail (and did prevail) in the general election in Benchmark CD-5, *see* Stip. Ex. 1 ¶¶ 3 (d), (j)–(n).[5]

In the Parties' Stipulation, all Defendants also conceded that under the Enacted Plan there are no longer any districts in North Florida in which Black voters have the ability to elect their preferred candidates. *See* Stip. Ex. 1 ¶ 4(o). The Court also finds that the Parties' Stipulated Facts support this conclusion. Specifically, under the Enacted Plan, all of the districts that replaced Benchmark CD-5 (Enacted CD-2, CD-3, CD-4, and CD-5) are majority white in voter registration, that white voters cast the majority of votes in both primary and general elections in all of

[5] While racial polarization is not explicitly part of the three-part test identified in *LWV II*, the Parties' Stipulation also recognizes that voting is racially polarized in Benchmark CD-5, *see* Stip. Ex. 1 ¶ 3(i), which the Florida Supreme Court has indicated is relevant to the non-diminishment test. *See LWV II*, 179 So. 3d at 286.

those districts, and that candidates preferred by Black voters failed to win a majority of votes in all of those districts. *See* Stip. Ex. 1 ¶¶ 4(a)–(n).

In sum, Plaintiffs have shown that (1) the Benchmark district (in this case, Benchmark CD-5) allowed Black voters the ability to elect the candidate of their choice, and (2) the Enacted Plan weakens (or in this case, actually eliminates) Black voters' ability to elect the candidate of their choice. Under the standard set out by the Florida Supreme Court in *Apportionment I*, Plaintiffs have proven their diminishment claim.

At the hearing on the outstanding legal issues before the court on August 24, 2023, Defendant Florida Senate conceded the Enacted Plan results in diminishment in violation of the Florida Constitution. *See* Aug. 24, 2023 Hrg. Tr. at 162:21–24 (Senate counsel, Mr. Nordby, conceding, "I don't think the Senate has ever disputed that as compared to Benchmark CD-5, the Enacted Map does not have a district that satisfies the nondiminishment requirement.") Defendant Florida House conceded the same. *See id*. at 88:17–22 (Court asking Florida House counsel, Mr. Bardos, "Is there any concession that [Plaintiffs] make out their primary

case based on the facts before this Court?" and Mr. Bardos acknowledging, "Yeah, there is no district in North Florida that performs for minority voters in the Enacted Map.")

Unlike Defendants Florida House and Florida Senate, Defendant Secretary has argued that, despite the Parties' Stipulated Facts and the existing caselaw, Plaintiffs have not shown a diminishment violation because they have not satisfied the preconditions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), which the Secretary argues should apply to diminishment claims. As the Court explains below, the Secretary's arguments have no basis under either federal precedent or Florida Supreme Court precedent.

The Secretary's interpretation of the relevant legal standard erroneously conflates Florida's *non-diminishment* provision with Florida's *non-dilution* provision. The Florida Constitution imposes two distinct imperatives for the protection of minority voting rights in redistricting. First, it prohibits districts drawn "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process." Art. III, § 20(a), Fla. Const. (non-dilution standard).

Second, and as previously discussed, it prohibits districts drawn with the intent or result of "diminish[ing] [minorities'] ability to elect representatives of their choice." *Id*. (non-diminishment standard). As the Secretary himself has correctly acknowledged, Florida's non-dilution standard reflects Section 2 of the Voting Rights Act, while the non-diminishment provision reflects Section 5 of the Voting Rights Act (VRA). *See Apportionment I*, 83 So. 3d at 619–20. Because the Fair Districts Amendments' minority voting protections "follow almost verbatim the requirements embodied in the Federal Voting Rights Act," *id.* at 619, Florida courts' "interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent," *id.* at 620.

Section 2 of the VRA (non-dilution) requires the creation of a *new* minority district under certain conditions; a successful claim "requires a showing that a minority group was denied a majority-minority district that, but for the purported dilution, could have potentially existed." *Id.* at 622. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court identified three "necessary preconditions" ("*Gingles* preconditions") for a Section 2 vote

dilution claim: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Id.* at 50–51. As relevant here, the first *Gingles* precondition requires the minority group to constitute at least 50% of the voting age population of a potential new district. *See Bartlett v. Strickland*, 556 U.S. 1, 18–20 (2009).

Section 5 of the VRA (non-diminishment), by contrast, simply protects against backsliding in *existing* districts where a minority group has had the ability to elect a candidate of their choice. *See Apportionment I*, 83 So. 3d at 619–20. Thus, Section 5's non-diminishment standard "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015). Instead, it requires the state to "maintain a minority's ability to elect a preferred candidate of choice" in any new redistricting plan, which the state should accomplish by conducting "a functional analysis of the electoral behavior within

the particular jurisdiction or election district." *Id.* at 275–76 (citing Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011)).

Like the federal test for diminishment, the Florida Supreme Court's test for diminishment similarly does not require any specific minority voting percentage, but instead asks (1) "whether the minority group votes cohesively," (2) "whether the minority candidate of choice is likely to prevail in the relevant contested party primary," and (3) "whether that candidate is likely to prevail in the general election" in the benchmark district. *LWV II*, 179 So. 3d at 287 n.11. This three-part test for non-diminishment is plainly different from the three-part test required for vote dilution under *Thornburg v. Gingles*, and for good reason: non-dilution and non-diminishment are different requirements, seeking to guard against different harms. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 477 (1997) (explaining, "we have consistently understood [Section 2 and Section 5] to combat different evils and, accordingly, to impose very different duties upon the States"); *see also Holder v. Hall*, 512 U.S. 874, 883 (1994)

(explaining that Section 2 and Section 5 of the VRA "differ in structure, purpose, and application").

The Secretary's argument that Plaintiffs must satisfy the preconditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986) to trigger the application of the non-diminishment standard is not supported by the caselaw. First,

> "[i]n its 2006 reauthorization, Congress amended Section 5 [of the Voting Rights Act] to add the express prohibition against 'diminishing the ability' of minorities 'to elect their preferred candidate'…This amended language mirrors the language of Florida's provision."

Apportionment I, 83 So.3d at 624. The Florida Supreme Court was aware of both *Gingles* and the Amended Section 5 of the Voting Rights Act when it noted that *Gingles* informs the Court but did not require a majority-minority district in finding a non-diminishment claim. *See LWV II*, 179 So.3d at 287 n. 11. Similarly, just last year the Florida Supreme Court reiterated that the majority-minority prong of *Gingles* was not required when it found in its unanimous opinion that

> "[t]he non-diminishment protection afforded by article III, section 21(a)[6] means that 'the Legislature cannot eliminate majority-minority ***or weaken other***

[6] The Court will note that section 21 mirrors article III, section 20 but applies to Legislature redistricting only.

> ***historically performing minority districts*** where doing so would actually diminish a minority group's ability to elect its preferred candidates.' *Apportionment I*, 83 So.3d at 625; *see also Bethune-Hill v. Va. State Bd. of Elections,* [580] U.S. [178, 195-96], 137 S. Ct. 788, 802, 197 L.Ed.2d 85 (2017)."

In re Senate Joint Resolution of Legislative Apportionment 100, 334 So. 3d 1282, 1289 (Fla. 2022) (Canady, C.J., recused) (emphasis added). In that same opinion, the Florida Supreme Court notes

> "of the five identified performing Black voter districts, one is majority minority in both the benchmark and 2022 Senate plans. The record further shows that four of the five identified performing Hispanic voter districts in the benchmark plan are majority minority, while all five of the identified performing Hispanic voter districts in the 2022 Senate plan are majority minority."

Id. at 1289-90. It stands to reason that the Florida Supreme Court would not comment on identified performing districts and majority minority districts if the latter (majority minority) were a requirement to have the former (identified performing districts).

In light of this precedent and prior applications of the non-diminishment provision, the Court rejects the Secretary's argument that the non-diminishment test requires imposing the *Gingles* preconditions for diminishment claims. Under the non-

diminishment test previously established by the Florida Supreme Court, Plaintiffs have established that there is no Black-performing district where there previously was, *see* Stip. § IV.B, which is sufficient to prove their diminishment claim. The Court thus finds that Plaintiffs have established a violation of Article III, Section 20(a) of the Florida Constitution.

II. Defendants have not proven their racial gerrymandering affirmative defense.

Under the Parties' Stipulation, Defendants have retained only a single affirmative defense: that compliance with the non-diminishment provision of the Florida Constitution would require Defendants to implement a racial gerrymander in violation of the U.S. Constitution's Equal Protection Clause. The Florida House and Florida Senate bring this affirmative defense as an as-applied challenge only to North Florida.

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. Perhaps such apparent abandonment is due to the recent release of the

U.S. Supreme Court's decision in *Allen v. Milligan*, 143 S. Ct. 1487 (2023). In *Allen*, the U.S. Supreme Court rejected Alabama's "race-neutral benchmark" theory. *Id.* at 1507. The Secretary can point to no case finding the non-diminishment language of the Fair Districts Amendment, nor the comparable Section 5 language of the Voting Rights Act, to violate the Equal Protection provision of the 14th Amendment. Similarly, although it was in the context of an Elections Clause case, the United States Court of Appeals for the Eleventh Circuit

> [had] little difficulty in concluding that the factors enumerated in Amendment Six [(the enacting Amendment for the Fair Districts Amendment)] have been for many years commonly considered by legislative bodies in congressional redistricting and long accepted by the courts as being lawful and consistent with the powers delegated to the state legislatures by the United States Constitution.

Brown v. Sec'y of State of Florida, 668 F.3d 1271, 1272-73 (11th Cir. 2012). The Court went on to note,

> Moreover, it must surely be appropriate for a state legislature to take into account the effect that its new districts will have on racial and language minorities. The federal Voting Rights Act prohibits voting practices that deny or abridge the right of any citizen to vote on account of membership in a racial or language minority group. 42 U.S.C. § 1973(a). To argue that Florida may not consider a factor that it is otherwise obliged to

> consider under the Supremacy Clause has no persuasive force. Again, it is irrelevant that only five Florida counties are subject to the Voting Right Act's preclearance requirement...More generally, if the appellants' argument were correct, then no state would be allowed to consider the effect of its congressional districts on minorities, even if the entire state were subject to Section 5 preclearance.[7]

Id. at 1283.

As a threshold matter, the proponents of the affirmative defense, Defendants, have the burden of proving their defense. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096-97 (Fla. 2010) (citing *Hough v. Menses*, 95 So. 2d 410, 412 (Fla. 1957)). This is because "[a]n affirmative defense is an assertion of facts or law by the defendant ... and the plaintiff is not bound to prove that the affirmative defense does not exist." *Id.* This remains true in the racial gerrymandering context, where those challenging a district as a racial gerrymander, in this case the Defendants, have the burden of proving unconstitutional racial gerrymandering. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

[7] Of note, Amendment Six was precleared under Section 5 of the Voting Rights Act, and that preclearance was sent to Andy Bardos (current attorney for Defendant House of Representatives and then-Special Counsel to the President of the Florida Senate). *Id.* at 1273 fn. 2.

The Court finds that Defendants have not satisfied their burden in this case. Not only is there no specific district under which this Court could evaluate whether racial gerrymandering occurred, but Defendants also lack standing to raise a racial gerrymandering challenge in the first place. Even if this Court were to assume which district were at issue, Defendants have not proved that race predominated in the drawing of the district. Finally, even if race did predominate, Defendants have not shown that the district would fail under strict scrutiny. Defendants' racial gerrymandering affirmative defense thus fails at every level, for multiple, independent reasons.

A. The Court cannot evaluate a racial gerrymandering claim where Defendants have not identified a specific electoral district.

The U.S. Supreme Court has made clear that "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 191 (2017); *see also Ala. Legis. Black Caucus*, 575 U.S. at 262–63 ("We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the

drawing of the boundaries of *one or more specific electoral districts*." (emphasis added) (citations omitted)). This precedent forecloses Defendants' affirmative defenses, which aim to establish that *any* district—not a "specific electoral district"—in North Florida that complies with the non-diminishment provision would be a racial gerrymander.[8]

Defendants cannot cure this error by identifying Benchmark CD-5 as the district purportedly at issue. *See* Aug. 24, 2023 Hrg. Tr. at 45:16–24 (the Secretary's counsel, Mr. Jazil, arguing, "I would suggest that in drawing this Congressional district, Benchmark CD-5 … they're race predominant."); *see id.* at 98:24–99:1 (House counsel, Mr. Bardos, stating, "[I]t logically follows that [the Benchmark] district as well would have been a racial gerrymander"). Benchmark CD-5 was adopted by the Florida Supreme Court last decade and has since been replaced. *See*

[8] *See* Aug. 24, 2023 Hrg. Tr. at 81:8–14 (the Secretary's counsel, Mr. Jazil, arguing, "[T]here's no conceivable way to draw a district in North Florida where race doesn't predominant"); *id.* at 136:23–137:2 (House counsel, Mr. Bardos, conceding, "And so the challenge is not to that specific district, but the challenge is to the district that would be a nondiminishing alternative, which is the same basic configuration."); *id.* at 170:22–171:13 (Senate counsel, Mr. Nordby, arguing, "Any district that spans that length of the state, that joins the downtown population area in Jacksonville and Tallahassee, would raise the same sort of equal protection issues that we are talking about here, whether it's possible to change a couple of the lines to follow a road instead of a river would not resolve those sort of equal protection issues that we are talking about here. A district like that is unexplainable on any grounds other than race, period.")

LWV II, 179 So. 3d at 272–73; Fla. Stat. Ann. § 8.0002; (Laws of Fla. Ch. 2022-265) (establishing Enacted Plan as effective upon becoming law); *see also* Aug. 24, 2023 Hrg. Tr. at 97:16–22 (House counsel, Mr. Bardos, conceding that although the Court need not "directly" address whether "the Florida Supreme Court's district was contrary to the Equal Protection Clause" because the Benchmark district "is not the law anymore," acknowledging it "would be a fair inference" that the Benchmark district violated the U.S. Constitution). This Court will not second-guess the Florida Supreme Court[9]. Nor will it evaluate the constitutionality of a district that is no longer in effect as doing so "would unnecessarily embroil this court in extended mini-trials over the moot issue of whether [the Benchmark district] is constitutionally infirm…" *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 644–45 (D.S.C. 2002).

Furthermore, Defendants have not proved that any remedial district that complies with the non-diminishment provision in

[9] Even if this Court were to second-guess the Florida Supreme Court's adoption of Benchmark CD-5, Justice Polston noted that in adopting Benchmark CD-5, the Florida Supreme Court "adopts a remedial plan drawn entirely by Democratic operatives. The Coalition Plaintiffs even stated in oral argument…that, if the remedial plan had been drawn by the Democratic National Committee itself, the outcome would be the same." *LWV II*, 179 So. 3d at 305 (Polston, J., dissenting). Such circumstances could show politics, not race, predominated. The Court will note that partisan gerrymandering is no longer at issue in this case.

North Florida will necessarily bear resemblance to Benchmark CD-5. To the contrary, in 2022 the Legislature proposed and passed Congressional Plan 8019, which included a Duval County-only district that the Chair of the House Congressional Redistricting Committee described as "very visually different than the benchmark district" but "still a protected black-performing district." Pls.' Br. Ex. 8 at 30:17–23.[10]

Because Defendants failed to identify a specific and *existing* electoral district that is allegedly a racial gerrymander, the Court finds that Defendants' affirmative defenses must fail.

B. Defendants do not have standing to assert an Equal Protection violation.

Defendants' affirmative defenses separately fail because no Defendant has standing to raise an Equal Protection violation. This is true both because Defendants' affirmative defense is barred under the public official standing doctrine and because Defendants have not shown they have suffered the personal harm required to obtain relief for a racial gerrymandering claim.

[10] Pls' Br. Ex. 8 is a transcript of the House Redistricting Committee meeting from February 25, 2022. The Parties agreed that this Court may take judicial notice of transcripts of committee meetings, *see* Stip. Ex. 1 ¶ 2, and this Court so takes judicial notice of the exhibit under Fla. Stat. § 90.202(5) and (12).

1. The public official standing doctrine bars Defendants' affirmative defense.

Under Florida's public official standing doctrine, it is well established that public officials are jurisdictionally barred from challenging the constitutionality of their legal duties in court. *See State ex rel. Atl. Coast Line R.R. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922). The judicial branch alone has the power to declare what the law is, including whether the Florida Constitution's provisions are themselves unconstitutional. *See Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n, Inc.*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019); *see also Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legis. Info. Servs.*, 7 So. 3d 511, 514 (Fla. 2009) ("[N]o branch may encroach upon the powers of another.") As such, public officials from the other branches of government cannot raise the unconstitutionality of their legal duties either affirmatively, *see Dep't of Revenue of State of Fla. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981) ("Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion"), or as an affirmative defense, *see Atl. Coast Line*, 94 So. at 682 (holding

that because "the allegation … that [a provision] is unconstitutional means that it has been so declared by a court of competent jurisdiction," any allegation of unconstitutionality before such a judicial declaration has been made is not "true" and therefore "no defense"); *see also id.* at 683 ("[T]he oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined.")

This Court has already held that the public official standing doctrine applies to the Secretary's standing to challenge the constitutionality of the non-diminishment provision. *See* Order on Pltf.'s Mot. to Strike Affirmative Defenses. However, because Plaintiffs originally raised the doctrine in a motion to strike that the Court denied as untimely, *see id.*, the Secretary has continued to advance his affirmative defenses. Plaintiffs promptly raised their arguments under the public official standing doctrine again, this time in a motion for judgment on the pleadings that is not time-barred. Fla. R. Civ. P. 1.140(c) & 1.140(h)(2). Having considered the Parties' briefing on the matter, this Court **GRANTS** Plaintiffs' motion for judgment on the pleadings as to the affirmative defense and reiterates its holding that the public

official standing doctrine applies to the Secretary's affirmative defenses under the U.S. Constitution.

The Court further holds that the doctrine bars the Florida House and Florida Senate from raising their affirmative defense as well.[11] There is no question that the Florida Constitution imposes a duty on the Florida House and Senate to redistrict in accordance with Article III, Section 20(a). And until a *court* holds that Article III, Section 20(a) is unconstitutional, *none* of the Defendants have standing to challenge those duties in court, and this Court lacks jurisdiction to consider Defendants' affirmative defenses. *See Dep't of Transp. v. Miami-Dade Cnty. Expressway Auth.*, 316 So. 3d 388, 389 (Fla. 1st DCA 2021) (holding that the "trial court lacked subject-matter jurisdiction … because [party] lacked standing under the public official standing doctrine"), *reh'g denied* (May 17, 2021), *review dismissed sub nom. Miami-Dade Cnty. Expressway Auth. v. Dep't of Transp.*, No. SC21-841, 2021 WL 3783383 (Fla. Aug. 26, 2021).

[11] Although this Court held differently in an oral ruling on June 5, 2023, that holding was not dispositive of the motion to strike at issue, and in any event, "[a] trial court may sua sponte reconsider and amend or vacate its interlocutory orders prior to final judgment." *Seigler v. Bell*, 148 So. 3d 473, 479 (Fla. 5th DCA 2014) (citing *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998)).

2. Defendants do not suffer the personal harm necessary to raise a racial gerrymandering claim.

Defendants also lack standing to raise their affirmative defense because they have failed to show that they have personally suffered an injury. Florida's standing framework requires the party asserting a violation of law to "demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.'" *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (citing *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)). Florida courts rely on federal court decisions to interpret the injury-in-fact requirement. *See Pet Supermarket, Inc. v. Eldridge*, 360 So. 3d 1201, 1205–06 (Fla. 3d DCA 2023).

The U.S. Supreme Court has held that only voters who reside in an allegedly racially gerrymandered district can demonstrate standing because only "[v]oters in such districts may suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995). A voter "who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does

not approve.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018) (quoting *Hays*, 515 U.S. at 745); *see also Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("[W]e recognized [in *Hays*] that a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district, but that a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification.")

But Defendants—government entities sued in their official capacities—do not and cannot demonstrate that they would suffer "special representational harms" as voters sorted into a challenged district based on race. *See Hays*, 515 U.S. at 745. They are thus incapable of asserting anything other than a generalized grievance insufficient to confer standing. *See Gill*, 138 S. Ct. at 1921. For this reason, too, Defendants lack standing to assert their affirmative defenses.

C. Defendants have not proved race would necessarily predominate in the drawing of any district in North Florida.

Even if Defendants were challenging a specific district and had standing to do so, to succeed on their affirmative defenses

under the Equal Protection Clause, they would need to establish that race predominated in the drawing of the challenged district's lines. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that the burden to establish racial predominance lies with the party claiming unconstitutional racial gerrymandering). "The determination that a particular district is the product of a racial gerrymander is a fact-intensive inquiry." *McConnell*, 201 F. Supp. 2d at 644. Defendants, therefore, must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. The U.S. Supreme Court has admonished that "courts [must] exercise extraordinary caution in adjudicating" racial gerrymandering claims given the critical "distinction between being aware of racial considerations and being motivated by them" and the "evidentiary difficulty" of proving such a claim. *Id.*

As detailed below, Defendants have not met their burden.

1. Defendants did not show direct evidence of racial predominance.

Defendants have presented no direct evidence that race predominated in the drawing of any district in North Florida. Although they have shown that the Supreme Court (in ordering Benchmark CD-5) and the Legislature (in drawing congressional plans during the 2022 session, including vetoed Plan 8015 and Plan 8019) *considered* race in attempting to comply with Article III, Section 20(a), such consideration does not trigger strict scrutiny. The U.S. Supreme Court "never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Shaw*, 509 U.S. at 642. "Redistricting legislatures will … almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller*, 515 U.S. at 916 (citations omitted); *see also Shaw*, 509 U.S. at 646. Indeed, just recently, the U.S. Supreme Court rejected the state's "contention that mapmakers must be entirely 'blind' to race" when drawing districts to comply with the Voting Rights Act, *Allen*, 143 S. Ct. at 1512 (plurality opinion), and reaffirmed "[t]he line that we have long drawn [] between consciousness and predominance" of race, *id.*

2. Defendants did not show circumstantial evidence of racial predominance.

Defendants have not advanced circumstantial evidence of racial predominance. As the U.S. Supreme Court has held, a district's compliance with traditional redistricting criteria indicates that race did not predominate in the drawing of a district and "may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 509 U.S. at 647; *see also Allen*, 143 S. Ct. at 1510–11 (plurality opinion) (finding that race did not predominate where mapmaker considered race but also considered traditional redistricting criteria); *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (requiring party asserting racial gerrymandering claim to demonstrate "substantial disregard of customary and traditional districting practices"). Examples of traditional redistricting principles include "[use of] natural geographic boundaries, contiguity, compactness, and conformity to political subdivisions." *Bush v. Vera*, 517 U.S. 952, 959–60 (1996).

Although Defendants' affirmative defense fails to target a specific existing district, *see supra* at II(A), the Court finds that even the East-West configuration of CD-5 in Plan 8015, which the

Parties have contemplated as a possible remedy in this litigation, *see* Stip. § VII & Stip. Ex. 2, complies with traditional redistricting principles to an extent which suggests that race did not predominate in its drawing. In fact, CD-5 in Plan 8015 performs just as well—and sometimes better—on several traditional redistricting criteria as other districts in the Enacted Plan.[12]

Equal Population. CD-5 in Plan 8015 unquestionably satisfies equal population. *See* Pls.' Br. Ex. 6 at 3 (showing 0.00% population deviation).

Contiguity. Contiguity captures the extent to which all parts of a district are connected, rather than meeting only at a common corner or right angle. *See Apportionment I*, 83 So. 3d at 628. CD-5 in Plan 8015 satisfies Florida's contiguity requirement. *See* Fla. Const. art. III, § 20 (a).

Adherence to Political and Geographic Boundaries. CD-5 in Plan 8015 performs extraordinarily well on adherence to utilizing "existing political and geographic boundaries." Fla. Const. art. III, § 20 (b). Florida measures this adherance by calculating which of the district's boundaries are bounded by a city, county,

[12] The Court limits its analysis here to the facts and exhibits already stipulated by the parties and by the limited pieces of evidence over which the Court takes judicial notice.

roadway, waterway, or railway. *See Apportionment I*, 83 So. 3d at 638. The purpose of this requirement is to "prevent[] improper intent" by allowing mapmakers to "pick-and-choose" their boundaries. *Id.* CD-5 in Plan 8015 relies on "non-political or geographic boundaries" for only 2% of its boundaries, which is better than all but one district in the Enacted Plan. *See* Pls.' Br. Ex. 6 at 3. The average district in the Enacted Plan relies on "non-political or geographic boundaries" for 14% of its boundaries. *See* Stip. Ex. 4 at 2.

Compactness. Florida's compactness standard "refers to the shape of the district" to "ensure that districts are logically drawn and that bizarrely shaped districts are avoided." *Apportionment I*, 83 So. 3d at 636. The Florida Supreme Court has repeatedly emphasized that the "Florida Constitution does not mandate…that districts…achieve the highest mathematical compactness scores." *Id.* at 635. Indeed, the Florida Supreme Court approved Benchmark CD-5's compactness when it adopted the district. *LWV I*, 172 So. 3d at 406. CD-5 in Plan 8015 both decreases the footprint of the district and smooths the boundaries of Benchmark CD-5 even further, as confirmed by a visual

inspection of the two districts below. *Compare* Stip. Ex. 3 at 1 with Pls.' Br. Ex. 6 at 2. There is nothing bizarrely shaped about the district, and certainly nothing more bizarre than what was already approved by the Florida Supreme Court.

Benchmark

Plan 8015

Relatedly, the Court finds that the district's length is largely a factor of North Florida's rural geography and sparse population. Indeed, well before the East-West CD-5 ever existed, Florida's congressional plan from 2002 to 2012 included a district that spanned from Leon County to Duval County. *See* Pls.' Resp. Br.

Ex. 1.[13] The length of Plan 8015's CD-5 is entirely consistent with the geography, the demographics, and the State's tradition of congressional districting in North Florida.

The Court's review of the district thus reveals that CD-5 in Plan 8015 performs reasonably well on objective, non-racial traditional redistricting criteria. It certainly does not demonstrate, as would be Defendants' burden, that race *predominated* in the drawing of the district at the expense of traditional redistricting criteria.[14]

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

Even *if* Defendants had standing to bring a racial gerrymandering challenge, and *even if* they could bring that challenge to a district that does not exist, *and even if* the lines of that district were predominantly drawn on the basis of race,

[13] Pls.' Resp. Br. Ex. 1 shows Florida's Congressional Districts from 2002–2012. The Parties agreed that this Court may take judicial notice of "Florida's prior congressional plans," Stip. Ex. 1 ¶ 2, and this Court so takes judicial notice of the exhibit under Fla. Stat. § 90.202(5) and (12).

[14] While the Parties' briefing and argument largely concerned CD-5 in Plan 8015, the Court also notes that CD-5 in Plan 8019 would comply with traditional redistricting criteria as well. That district, which is located singularly in Duval County, is extremely compact, having higher compactness scores than the average district in the Enacted Plan on all three compactness measures. *See* Pls.' Br. Ex. 6 at 11 and Stip. Ex. 4 at 2. There is also no question it complies with basic traditional redistricting criteria such as equal population, contiguity, or adherence to political and geographic boundaries.

Defendants' claim would still fail because the drawing of such a district would be narrowly tailored to address a compelling state interest. This Court also rejects the argument that Plaintiffs, as private actors, have the burden to show that strict scrutiny would be satisfied here.

1. Plaintiffs are not state actors and therefore fall outside the ambit of strict scrutiny.

Plaintiffs have no burden to show a future remedial district would satisfy strict scrutiny. A state may not allow race to predominate in the drawing of a district unless the district is narrowly tailored to a compelling state interest. *Bethune-Hill*, 580 U.S. at 193. But private citizens engaged in *proposing* rather than *enacting* redistricting plans are not required to meet that burden. The Fourteenth Amendment only applies to state action, and therefore private citizens and organizations, like Plaintiffs, fall outside its ambit. *See The Fla. High Sch. Activities Ass'n, Inc. v. Thomas By & Through Thomas*, 434 So. 2d 306, 308 (Fla. 1983) (explaining that "strict scrutiny … imposes a heavy burden of justification *upon the state* and should be applied only to those actions *by the state* which abridge some fundamental right or

affect adversely some suspect class of persons" (emphases added)). Plaintiffs have no obligation in this challenge to show that a future hypothetical remedial district satisfies a test only applicable to state and federal governments.

2. Compliance with the Florida Constitution's non-diminishment provision is a compelling state interest.

Regardless of who would bear the burden of strict scrutiny, that burden would be satisfied with respect to a North Florida district that complies with the non-diminishment provision, including either of the versions of CD-5 in Plan 8015 or 8019.

Compliance with the non-diminishment provision of the Florida's Constitution is itself a compelling state interest. Florida's non-diminishment provision "follow[s] almost verbatim the requirements embodied in the [federal] Voting Rights Act," *Apportionment I*, 83 So. 3d at 619 (citation omitted and second alteration in original), and the United States Supreme Court has repeatedly (and recently) assumed that compliance with the Voting Rights Act constitutes a compelling state interest to justify race-based redistricting. *See, e.g.*, *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) ("We have assumed that

complying with the VRA is a compelling interest."); *Abbott*, 138 S. Ct. at 2315. Indeed, in *LULAC v. Perry*, *eight* justices did not just assume, but reached consensus that compliance with Section 5 is a compelling state interest. 548 U.S. 399, 518 (2006) (Scalia, J., joined by Roberts, C.J., Thomas & Alito, J.J., concurring) ("I would hold that compliance with § 5 of the Voting Rights Act can be [a compelling state] interest."); *id.* at 475 n.12 (Stevens, J., joined by Breyer, J., concurring) (agreeing that complying with Section 5 would be a compelling state interest); *id.* at 485 n.2 (Souter, J., joined by Ginsburg, J., concurring) (same). Guided by the U.S. Supreme Court's decisions, this Court finds that compliance with the non-diminishment provision of the Florida Constitution is also a compelling state interest for the purposes of the Fourteenth Amendment.

Defendants attempt to avoid this precedent by distinguishing the non-diminishment provision (an initiated constitutional amendment) from the VRA (a legislatively enacted federal statute) based on the manner of their passage. But the absence of legislative findings here does not leave the Court unmoored. Florida courts "adhere to the 'supremacy-of-text

principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" *See Advisory Op. re Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts 56* (2012)). In context, the plain meaning of the Fair Districts Amendments is clear: "The people of this great state passed a constitutional amendment seeking to address the errors of the past." *LWV II*, 179 So. 3d at 300–01 (Perry, J., concurring) (cleaned up). By voting to adopt new constitutional provisions that mirror the text of the VRA, Floridians expressed their belief that Florida was home to the sort of the racial discrimination that justified and required the VRA in the national context and that a similar civil rights structure was required to stamp it out at home. *See Advisory Op. re Implementation of Amendment 4*, 288 So. 3d at 1078.

Florida's history of voting related discrimination—as told through Florida case law over the years—bears out this need. In 1992, a three-judge court for the Northern District of Florida,

documenting the state's history of discrimination against minority voters, explained that:

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

DeGrandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). That same year, the Florida Supreme Court's then-Chief Justice Shaw remarked on the "substantial inability minorities in Florida have experienced in electing legislators of their choice throughout the past decade." *In re Constitutionality of S. J. Res.. 2G, Spec. Apportionment Sess. 1992*, 597 So. 2d 276, 292 (Fla. 1992) (Shaw, C.J., dissenting from Court's resolution approving Florida's 1992 Senate districts). These courts were summarizing decades of judicial decisions striking down state efforts to diminish voting power in Florida, including efforts specifically targeting Black voters in North Florida. *See, e.g.*, *Davis v.*

Cromwell, 156 Fla. 181, 184 (Fla. 1945) (en banc) (striking down Florida's use of white-only primaries); *Solomon v. Liberty Cnty., Fla.*, 899 F.2d 1012 (11th Cir. 1990), *cert. denied*, 498 U.S. 1023 (1991) (striking down at-large voting system designed to diminish minority voting power); *Bradford Cnty. NAACP v. City of Starke*, 712 F. Supp. 1523 (M.D. Fla. Feb 27, 1989, Jacksonville Division) (same); *Tallahassee Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436 (11th Cir. 1987), *cert. denied*, 488 U.S. 960 (1988) (same); *McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037 (5th Cir. 1984) (same); *NAACP v. Gadsden Cnty. Sch. Bd.*, 691 F.2d 978 (11th Cir. 1982) (same).

Defendants' narrow focus on an absent legislative record misses what is plain from the Amendments' text and its context.[15] *See Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018) (explaining that on a facial review only the text of the law is relevant). Florida has been a state home to discrimination in voting and the people of this state

[15] Defendants' focus on a legislative record also proves too much. If a legislative record were always required to justify remedial statutes, popularly enacted measures, which by their nature lack such records, would always violate the constitution. *See* Fla. Const. Article XI, Section 3. The Court finds no reason, and the Defendants have failed to provide one, to interpret the Fourteenth Amendment, adopted to advance racial equality, to render constitutionally suspect popular efforts to protect it.

demanded a Florida analogue to the VRA to finally rid the state of its presence. The Court therefore finds that the non-diminishment provision of the Florida Constitution is justified by a compelling state interest in rooting out persistent discrimination in the state and that compliance with the provision itself is a compelling state interest.[16]

3. A Black-performing district in North Florida is narrowly tailored to justify the compelling interest in the non-diminishment provision.

The narrow tailoring inquiry underscores the bizarre posture in which Defendants' arguments place the Court.[17] Defendants' strict scrutiny argument depends on a hypothetical district in North Florida whose metes and bounds are currently undetermined. This hypothetical alone is sufficient to reject the Defendants' arguments. Nevertheless, for the purpose of this inquiry, the Court will assume that it is being asked to determine

[16] Defendants' argument, moreover, that civil rights statutes imposed by Florida are less meaningful than those imposed by the federal government is squarely rejected by the U.S. Supreme Court's repeated admonition that its "established practice, rooted in federalism" that "States [have] wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 120 S. Ct. 746, 757 (2000). Defendants' efforts here to ignore and undermine their own constitutional provisions only underscores the importance that states retain the ability to adopt measures necessary to protect minority voters.

[17] The Florida House and Florida Senate do not argue that CD-5 would fail the narrow tailoring inquiry. *See* Legis. Defs.' Br. at 12–15; *see also* Aug. 24, 2023 Hrg. Tr. at 88:8–12.

whether Plan 8015's CD-5 is narrowly tailored to address the compelling interest in complying with the non-diminishment provision. The Court concludes that it is.

A race-based remedy is narrowly tailored where there is a "good reason[] to believe" that a legislature's use of race was necessary to comply with existing law. *See Abbott*, 138 S. Ct. at 2332 (holding that the legislature had "good reasons" because plaintiff groups had argued that it was mandated by the Voting Rights Act and a court had previously approved it). The limited legislative record before the Court reveals that the Legislature properly conducted a functional analysis on Benchmark CD-5, *see* Stip. Ex. 3 at 5–8, as has been required by the Florida Supreme Court to determine whether a district merits protection under the Florida Constitution's non-diminishment provision, *see Apportionment I*, 83 So. 3d at 656–57. The record also reveals that the Legislature believed that Benchmark CD-5 was a protected district and that CD-5 in Plan 8015 would ensure Black voters' ability to elect their candidate of choice was not diminished. *See, e.g.*, Pls.' Br. Ex. 8 at 24:20–22 (Chair Leek noting the Committee's aim "to protect the minority group's

ability to elect a candidate of their choice"); *id.* at 45:9–48:9 (Chair Sirois describing how CD-5 in Plan 8015 was drawn to comply with both Tier I and Tier II metrics); *id.* at 23:16–20 (House Redistricting Chair explaining the Legislature believes CD-5 in Plan 8015 to be "legally compliant under current law"). The Legislature thus "had good reasons to believe that" Plan 8015's configuration of CD-5 "was necessary … to avoid diminishing the ability of black voters to elect their preferred candidates." *Bethune-Hill*, 580 U.S. at 182; *see also id.* at 193–94 (crediting legislature's functional analysis to find narrow tailoring).

The Secretary's arguments on narrow tailoring distort how the non-diminishment provision works. The Secretary's argument is wrong to characterize the non-diminishment provision as having no geographic or temporal limits. *See* Sec'y's Br. at 19. The functional analysis required by the Florida Supreme Court anchors the non-diminishment provision's application only to those geographic areas where minority groups are populous enough and politically cohesively enough to elect their candidates of choice; and the reevaluation of districts every decade allows for change over time.

The Secretary's argument is also wrong that the "good reasons" test for narrow tailoring does not apply to this case because there is no VRA claim at issue. The fact that this is not a VRA case is of no moment: The "good reasons" test is part of the *racial gerrymandering* analysis that Defendants themselves seek to inject into this case. *See Ala. Legis. Black Caucus*, 575 U.S. at 278 ("[L]egislators 'may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for [VRA] compliance.'" (citations omitted)); *see also Cooper v. Harris*, 581 U.S. 285, 293 (2017) ("[T]he State must establish that it had 'good reasons' to think that it would transgress the [VRA] if it did *not* draw race-based district lines.") Defendants cannot assert a racial gerrymandering defense under federal law and then cherry-pick which elements of the racial gerrymandering inquiry apply.

Conclusion

The Florida Supreme Court has made clear that "[i]t is this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a

redistricting plan that does not comply with those standards constitutionally invalid." *Apportionment I*, 83 So. 3d at 607. *See also Moore,* 143 S. Ct. at 2089 ("State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause.") By dismantling a congressional district that enabled Black voters to elect their candidates of choice under the previous plan, the Enacted Plan violates Article III, Section 20(a) of the Florida Constitution.

Therefore, it is **ORDERED AND ADJUDGED:**

a. This Court **GRANTS** Plaintiffs' motion for judgment on the pleadings as to the affirmative defense and reiterates its holding that the public official standing doctrine applies to the Secretary's affirmative defenses under the U.S. Constitution.

b. The Enacted Plan is **DECLARED** an unconstitutional violation of the Florida Constitution, Article III, Section 20.

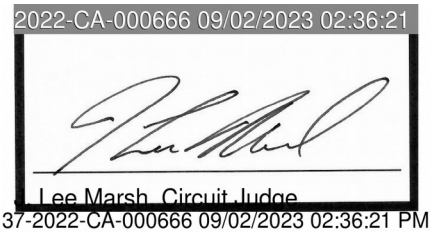
c. Defendant Cord Byrd, in his official capacity of Secretary of State, his agents, officers, employees,

successors, and all persons acting in concert with him are **ENJOINED** from implementing, enforcing, or giving any effect to the Enacted Plan or conducting any elections for the U.S. House of Representatives using the Enacted Plan.

d. The matter of congressional redistricting is **RETURNED** to Defendants House of Representative and Senate to enact a remedial map in compliance with Article III, Section 20 of the Florida Constitution.

e. Jurisdiction is reserved to consider any pending or post-judgment motions, and to enter such further orders as may be necessary to effectuate this judgment or to otherwise fashion an appropriate equitable remedy.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this Saturday, September 2, 2023.



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J. LEE MARSH
CIRCUIT JUDGE

Copies furnished to:
All Counsel of Record